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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARQUISE D. FRANKLIN,

APPELLANT

APPELLATE CASE NO. 2024-001277

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by failing to direct verdicts of acquittal where the State's circumstantial case merely raised a suspicion of guilt, since there was no substantial circumstantial evidence of guilt?

2.

Whether the court erred by permitting a lay witness to testify that Appellant left the scene travelling at speeds of up to 105 miles per hour according to a GPS tracker, where the witness did not know how the tracker determined speed,

A. Since the witness lacked personal knowledge of what speed Appellant was driving?

B. Since the evidence was improper lay opinion testimony when the circumstances required expert testimony?

C. Since Appellant was denied the opportunity for confrontation and cross-examination regarding this evidence?

3.

Whether the court erred by admitting jail phone call recordings from Ohio, where the State failed to comply with § 19-5-520 and failed to call the custodian of records, since the recordings were not authenticated?

STATEMENT OF THE CASE

On July 18, 2024, a Williamsburg County Grand Jury indicted Marquise Franklin, Appellant, for two counts of murder, possession of a weapon during the commission of a violent crime, and possession of a firearm by a person convicted of a violent felony. R. 298 – 299. On or about June 26, 2024, the State served notice of intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45, the recidivist statute. R. 282, l. 18 – 283, l. 18. Appellant was tried before the Honorable R. Ferrell Cothran and a jury, from July 22 – 25, 2024. Debbie Butcher represented Appellant. Ella Alston and Chip Benny prosecuted the case. R. 1.

The charge of possession of a firearm by a person convicted of a violent felony was not submitted to the jury based on a lack of evidence. R. 236, l. 25 – 237, l. 4. Appellant was found guilty of the murder of Quadree Wilson. He was found not guilty of the murder of Tysie Wilson. He was found guilty of possession of a weapon during the commission of a violent crime. R. 280, l. 23 – 281, l. 7. Appellant was sentenced to serve concurrent terms of imprisonment of life for murder and five years for possession of a weapon during the commission of a violent crime. R. 283, ll. 19-23.

This appeal follows.

ARGUMENT

1.

The court erred by failing to direct verdicts of acquittal where the State's circumstantial case merely raised a suspicion of guilt, since there was no substantial circumstantial evidence of guilt.

i. Standard of review

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." *Id.* at 139, 708 S.E.2d at 777. If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013).

ii. Relevant facts: The State relied on circumstantial evidence including motive and flight.

On the evening of October 3, 2020, Quadree Wilson (Decedent) was shot and killed in the parking lot of the Lanue Floyd Village apartments (apartment complex) in Kingstree. R. 32, l. 4 – 33, l. 5; R. 27, l. 17 – 29, l. 5; State's Exhibit #1; R. 206, l. 18 – 207, l. 14; R. 298 – 299. People were gathered there for the "setting up" of a memorial service. "It was really packed. There was a lot of people there." R. 48, l. 17 – 49, l. 14. However, no one testified who saw the shooting, and no one identified Appellant as the shooter. The State's case against Appellant was entirely circumstantial.

The State presented evidence of animosity between Appellant and Decedent. Decedent's girlfriend, Raneisha Conyers (Conyers), testified Appellant and Decedent "were beefing back in high school." R. 185, l. 6 – 186, l. 14. Conyers claimed that on September 19, 2020, she was outside a club in Salters and Appellant slapped her and told her: "Quadree is next." Conyers lived in Greeleyville and she claimed when she left the club and went home, Appellant was outside in her yard, "jumping up and down," and telling Decedent to come outside. R. 186, l. 24 – 189, l. 9. Nothing further happened.

On October 3, 2020, Appellant was at the apartment complex with a girl he had been seeing, Tykia Carson (Carson). Appellant took Carson by a friend's house so Carson and her friend could go to a concert. However, the friend was not ready, so Appellant and Carson drove to the apartment complex for the "setting up" to pass some time. Carson stated Appellant drove the car, and he hugged people when he got there. R. 39, l. 7 – 40, l. 6; R. 41, ll. 9-17; R. 45, l. 13 – 47, l. 3. Carson testified Appellant did not give Carson a bad "vibe, like he was mad or going to do anything. Like, he was normal." Carson, who remained in the car on her phone, heard shots and ducked. Appellant got back in the car and had blood on his neck. He told Carson he had been grazed by a bullet. Carson never saw Appellant with a gun. R. 42, l. 19 – 43, l. 19; R. 44, ll. 6-12; R. 46, ll. 9-10.

Zya Rose (Rose), who was in the parking lot, heard a few shots go off. Rose stated there was no altercation or "fussing" before the shots went off. R. 56, ll. 8-13; R. 49. l. 25 – 51, l. 6. Rose identified the car Appellant and Carson were in as the car that almost hit her when it drove off. R. 53, l. 9 – 54, l. 4. A witness at the scene told law enforcement the shooter was wearing a black hoodie. Law enforcement was not able to identify the shooter in the black hoodie. Appellant was not wearing a black hoodie. R. 163, l. 15 – 164, l. 23.

Appellant was tried for one count of murder in the death of Quadree Wilson, who died of eight gunshot wounds, and a second count of murder in the death of Tysie Wilson, who died of a single gunshot wound. R. 197, ll. 9-14; R. 172, l. 6 – 173, l. 3. The State's theory of the case was that Appellant shot at Quadree Wilson, and Tysie Wilson, who was nearby, was struck by an errant shot. The defense argued the State did not prove Appellant shot anyone, and Quadree could have fired the shot that killed Tysie. R. 52, ll. 7-14; R. 22, l. 16 – 23, l. 11; R. 256, l. 15 – 257, l. 2; R. 260, l 8 – 261, l. 3. The jury found Appellant guilty of the murder of Quadree Wilson, but it found him not guilty of the murder of Tysie Wilson. R. 280, l. 23 – 281, l. 4.

Law enforcement found a gun near Decedent's body. R. 38, ll. 1-5; R. 118, ll. 14-17. There were also shell casings at the scene. R. 36, ll. 4-19. Projectiles were recovered from Decedent's body and Tysie Wilson's body during their autopsies. R. 173, l. 9 – 174, l. 10; R. 203, l. 19 – 206, l. 2. Expert testimony established that two guns were fired at the scene. The gun that was found near Decedent's body did not fire the bullet that was recovered from his body, but it might have fired the bullet that killed Tysie Wilson. R. 114, l. 20 – 124, l. 25; R. 119, ll. 5-7.

Originally, Appellant was going to pick Carson up from the concert when it was over, but he did not. Instead, after leaving the apartment complex, Appellant got a ride from Carson to Greeleyville. R. 46, ll. 19-20; R. 42, l. 19 – 43, l. 14. Appellant was wearing an ankle monitor with "GPS" tracking, which was removed after he got to Greeleyville. As will be discussed further in Issues 2A – C, Daniel Lake, a former agent from the South Carolina Department of Probation, Parole and Pardon Services, testified the ankle monitor showed Appellant was at the scene of the crime, and left travelling at speeds of up to 105 miles per hour. R. 224, ll. 9-15; R. 227, l. 15 – 229, l. 13.

Appellant was subsequently arrested in Ohio. R. 131, ll. 5-12. As will be discussed further in Issue 3, the State introduced what it purported were Appellant's statements as captured on jail phone recordings from a detention center in Cuyahoga County, Ohio. The statements were as follows.

- "I ain't knew this was gonna happen but now that I think bruh this junk happened, like, it was meant for this junk, like, it wasn't no way around this." State's Exhibit #77.
- "I don't, I don't want you like, I don't know man. I feel like its my fault if people hate you, well I know it is, bruh, every time I think about it bruh it wasn't gonna be no way around this shit bruh. It was not gonna be no way around the shit cause if I woulda dropped you off at [unintelligible] house, I was really going to go see my brother then I was going out there anyway, you feel what I'm saying, so this shit would have happened regardless girl, but it was meant for this shit to happen because there wasn't no way around this shit bruh." State's Exhibit #80.
- "Boy came through and ransack this shit. They said they seen on my ankle monitor that I been there for thirteen minutes. Cause like when I dropped myself off, I ain't even stay there long. Cause I went to go see my mama. And like I wasn't gonna do the shit bruh, I was not gonna cut my ankle monitor off bruh, but soon as I seen my mama bruh like she just starts . . . fuck's going on like them boys, them boys already knew what the fuck's going on before I even got to the [unintelligible]. Cause my sister Danielle was calling me when I was on the way, that's who I was on the phone . . . So that shit's really frustrating me out and godammit I got to my mama and shit, she was spazzing on me all type of shit, crying and shit. I was just like, fuck it bruh, I got in my car and I left . . . I left, I got on the four-wheeler and I left, I went to my mama and she started talking crazy

so I went straight to my house, got in my car, and I just dipped, bruh, like." State's Exhibit #79.

- "Cause I was with [unintelligible] like I was asleep but then when I heard you yell I was like, man, let me just go ahead and get up. You know, my plan was to goddamn whenever them boys come I was just gonna go on in one of them empty rooms. But shit, I couldn't even make it, boy. Bruh, I coulda beat them boys if I wasn't sleeping I coulda beat them boys, I coulda go right in one of them other apartments and just chill. I coulda really hid in one of them motherfucking cabinets or something cause they ain't really did shit, they just walked in that motherfucker. Saying shit, them boys ain't really did shit. I coulda got away, if I was up bruh I coulda got away, but . . . And that's what I know they ain't got no evidence to go to trial, so they gonna try to get somebody to testify or whatever, bruh, you feel me so, that's most likely what they gonna try to do to you, get you to motherfucking come and tell something and if you don't tell nothing they gonna try to hit you with, oh, well you hiding a fugitive and this, that, and the third; this, that, and the third . . . Man, I been telling y'all boy, ever since I first told y'all that girl said I was in Cleveland, bro, I been know they was looking for me, that's why they, bro they started setting up roadblocks and shit, remember you talking about said damn there's a ass of police and shit. I ain't wanted to say the shit to scare you up but I already knew what the fuck." State's Exhibit #76.
- "If I woulda got up and go and went to McDonald's like I was posed to that morning, bruh, I probably woulda met them bitches in the fucking parking lot or something like that. It wasn't. If I woulda jumped out the window and tried to run they couldn't shoot me though. And they ain't have no, cause they ain't even look for no gun, they ain't

found no gun, nothing like that boy. If I'da jump out that window; had it, I thought they had it cause when dude put me in handcuffs, that little short white dude, he was walking in the house and he was meeting somebody who was coming out, he was like: 'yeah, that right there seal the deal right there.' So I don't, I thought he was talking about the gun but he musta been talking about me, cause like: 'yep, that'll seal the deal right there.' I swear to god, so I'm thinking he, they found the phone." State's Exhibit #78.

No context was provided for the jury regarding the subject of these conversations. The lead investigator admitted she never talked to the person on the other end of the phone calls "to get the context of what was being said." R. 126, ll. 15-17; R. 167, ll. 5-16.

Defense counsel moved for a directed verdict, arguing:

> They have been unable to show that my guy had a gun, was the shooter. The evidence actually indicated someone else was the shooter, an eyewitness. They are unable to have any gun that my client could have possessed Your Honor. They do show that he left after he, himself, was grazed by a bullet, and left like so many other people did. He did cut his ankle monitor off. He did go to Ohio, and I think that is reasonable suspicion. I don't believe that without anything else that would even meet the probable cause standard, Your Honor. The Statements he made, we don't even know what they mean. The investigator even admitted she didn't know what they meant[.]

R. 230, l. 24 – 231, l. 19. Defense counsel argued there was no "substantial circumstantial evidence." R. 234, ll. 8-10.

The court found that although there was no direct evidence, the State had presented a "a genuine issue of material fact based on circumstantial evidence in this case." R. 234, ll. 13-20. The court cited to evidence that Appellant was present at the scene of the crime, he left the scene "at a high rate of speed . . . He cut his ankle monitor off. He made statements on the telephone

conversations about—that the police didn't find his gun, as well as it was intended to happen." R. 234, l. 23 – 235, l. 7.

iii. Discussion: The court should have directed verdicts of acquittal since the circumstantial evidence merely raised a suspicion of guilt.

Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). An accused is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged. *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Denial of a directed verdict motion is only proper where viewing the evidence in the light most favorable to the State, the evidence could induce a reasonable juror to find the defendant guilty. *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016). "In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013) (citing *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)).

The trial court should grant the motion for a directed verdict "where the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *State v. Pearson*, 415 S.C. at 469–70, 783 S.E.2d at 805 (cleaned up).

"It is the trial court's duty to submit the case to the jury where the evidence is circumstantial, if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *State v. Childs*, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989). "This Court has repeatedly affirmed the principle

that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "[I]n ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). Flight evidence alone is not substantial circumstantial evidence of a defendant's guilt. *State v. Odems*, 395 S.C. at 588-89, 720 S.E.2d at 51-52.

In this case, the evidence merely raised a suspicion of guilt. Appellant's jail phone remarks were that he fled because his mother was "spazzing" and crying" so he "just dipped." This did not go to guilt. It was undisputed Appellant had been shot. The State did not prove that Appellant's statements on the jail phone that he could have hidden from law enforcement were connected with this case. The State did not connect Appellant's remarks about a "gun" to this case. There was no showing what Appellant was talking about when he said "this shit would have happened regardless." No one testified what Appellant was talking about in those conversations. No one identified Appellant as a, or the, shooter. However, an eyewitness at the scene stated the shooter was wearing a black hoodie. It was undisputed Appellant was not wearing a black hoodie. The murder weapon was never recovered.

"Circumstantial evidence that is not substantial is insufficient to go to a jury." *State v. Odems*, 395 S.C. at 592, 720 S.E.2d at 53. When viewed in the light most favorable to the State, the evidence did not reasonably tend to prove Appellant's guilt. The court should have directed verdicts of acquittal. *E.g.*, *State v. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127.

2.

The court erred by permitting a lay witness to testify that Appellant left the scene travelling at speeds of up to 105 miles per hour according to a GPS tracker, where the witness did not know how the tracker determined speed,

A. Since the witness lacked personal knowledge of what speed Appellant was driving.

i. 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).

ii. Relevant facts: Mr. Lake testified a GPS tracker showed Appellant left the scene of the crime driving at speeds of up to 105 m.p.h., but Lake did not know how the tracker determined speed. The court ruled Lake did not need to be an expert, he was not maintaining the speeds were accurate, and he could testify to what he observed via the tracking device.[1]

The State intended to offer the testimony of Daniel Lake (Lake), regarding Appellant's whereabouts and movements during and after the crime. Defense counsel moved to proffer the testimony, and it was proffered. R. 212, l. 25 – 213, l. 8. During the proffer, Lake testified he was a former agent with the South Carolina Department of Probation, Parole and Pardon Services (the Department). His "last position was the agent in charge of the Division of Intelligence Tracking and Communications." Lake stated the Department monitored "events that

[1] The following facts are relevant to Issues 2A, 2B, and 2C. Appellant hereby incorporates these facts into his discussion of Issues 2B and 2C.

occurred regarding the people wearing GPS monitors." He stated that Appellant was being monitored by the Department on October 3, 2020. R. 213, l. 14 – 214, l. 16.

Lake stated he generated a report regarding Appellant's monitoring that showed he tampered with the monitor by removing it, and he noted that an agent recovered the device from its final location in Greeleyville. R. 216, l. 4 – 217, l. 24. According to Lake, Appellant was in the vicinity of "Wilson Buoy" at 7:43 – 7:45 p.m., and then left the area, travelling on "Highway 37, M.L.K. Junior Avenue, and 521 at a high rate of speed." According to Lake's report, Appellant was travelling: "On 377 M.L.K. Junior, 72 miles an hour, 73 miles an hour, and 76 miles an hour, respectively." "And then on the Highway 521: 95 miles an hour, 96 miles an hour, 98 miles an hour, and 105 miles an hour, respectively." R. 217, ll. 2-17.

Lake had some knowledge about the operation of the GPS technology utilized by the Department. For instance, he knew the monitors were "designed to try to get a GPS point every minute of the day," and that the GPS points were delivered to a server four times an hour. R. 214, ll. 16-25. Defense counsel asked Lake if he knew the age of the monitor, the amount of charge on the battery that night, what the weather was like that night, and how much foliage coverage there was in the area: things that could affect the accuracy of the device. Lake said he had "no idea," although he admitted that "many things can affect the accuracy[.]" R. 218, ll. 6-19.

When addressing the accuracy of the device in pinpointing a person's *location*, Lake stated he thought the owner of the GPS equipment was called Behavioral Interventions and "[t]hey have about 12 satellites that can see the monitor, and then you need at least three satellite points to get a dot on this report to see the device. So, for example, when he was at Buie Drive location, eight satellites saw the device. The greater the amount of the satellites that see the

device, the more accurate the device is." R. 218, l. 23 – 219, l. 6. Lake stated his report was "a screen shot from the software that monitors the device." R. 219, ll. 12-21.

Defense counsel asked Lake how the software "generates the miles per hour," and whether the "accuracy" could be "off." Lake answered: "You are asking me a technical question that I'm not exactly sure. I can't answer." Lake affirmed he did not know how the system generated a miles per hour finding. R. 219, l. 22 – 220, l. 7.

Defense counsel did not object to Lake testifying about Appellant's location based on the GPS monitor. However, counsel moved that Lake be prohibited from testifying regarding speed. "I do not believe that he had the knowledge or demonstrated any knowledge of how that device was able to transmit what sped he was traveling or any of that." "[S]ince he was not able to have the knowledge of how that data was transmitted to generate a miles-per-hour speed, I do not believe they should come in, Your Honor. I cannot cross examine him on that." R. 221, l. 17 – 222, l. 11.

The court ruled as follows.

> [T]he issue is whether he's an expert and qualified as an expert. Nobody tried to qualify him as an expert in this, but . . . he's testifying as to what his tracking device shows and what his speed shows. It is just like a patrolman testifying about his radar and how fast he's clocking somebody. Just because I can run a radar and clock speed, he's not an expert in how the radar works and how it's put together. He's not testifying to that . . . so I think the evidence is admissible. **You can argue to the jury the weight of the evidence**, whether it is accurate or not. And so—**he didn't testify that it is accurate. He's just testifying as to what he is observing as he is tracking it**, **just like a patrolman running a radar . . . you can always argue that the machine could be wrong**, you know, not necessarily correct. **I don't think he has to be an expert to testify.** He's not trying to explain how it works. To explain how it works, he may need to be qualified as an expert, how the machine is put together.

> He is testifying that he's tracking somebody. This is what the tracking showed, just like Google Maps of you tracking one of your family members. You don't have to be an expert on how Google works to do the tracking, and the jury can take it and give it whatever weight it is deemed, and you can argue that, but I think it is admissible.

R. 222, l. 12 – 223, l. 16 (emphasis added).

Lake was thus permitted to testify before the jury, not merely about Appellant's location, but that Appellant was travelling on Highway 77: "72 miles an hour, 73 miles, 76 miles an hour, respectively. From there, on Highway 521: 95 miles an hour, 96 miles an hour, 98, and 105 miles an hour, respectively." R. 229, ll. 7-13.

iii. Discussion: The testimony was inadmissible under Rule 602, SCRE, which requires a witness to have personal knowledge of a matter before he may testify to it.

"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. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Rule 602, SCRE. *See also State v. Douglas*, 380 S.C. 499, 502–03, 671 S.E.2d 606, 608 (2009) (witness "testified only as to her *personal* observations and experiences") (emphasis added); *State v. Frazier*, 357 S.C. 161, 167, 592 S.E.2d 621, 624 (2004) (Rule 602, SCRE precluded admission of testimony that was "too speculative").

A "witness's personal knowledge cannot remove testimony requiring scientific, technical, or specialized knowledge from the scope of Rule 702." *State v. Gibbs*, 438 S.C. 542, 550, 885 S.E.2d 378, 382 (2023). *See also State v. Tennant*, 394 S.C. 5, 12, 714 S.E.2d 297, 300 (2011) (testimony properly excluded where witness could offer no scientific, technical, or other specialized knowledge that would assist jury in deciding issue of consent and because she had no personal knowledge regarding consent).

Defense counsel correctly argued Lake lacked the knowledge to say what speeds Appellant was driving. Lake had no personal knowledge of how fast Appellant was driving. He was not in the car with Appellant. Unlike the judge's radar/patrolman example, Lake was not on the side of the road looking at Appellant's car while pointing his radar gun at it. The testimony that Appellant was driving at speeds of 72, 73, 76, 95, 96, 98, and 105 miles an hour was not based on his personal observation of Appellant's speed. Nor did Lake personally know how the machine purported to determine Appellant's speed. The judge's ruling that Lake could testify because he was observing what the machine reported was not in keeping with Rule 602's personal knowledge requirement. The testimony should have been excluded pursuant to Rule 602.

2.

The court erred by permitting a lay witness to testify that Appellant left the scene travelling at speeds of up to 105 miles per hour according to a GPS tracker, where the witness did not know how the tracker determined speed,

B. Since the testimony was improper lay opinion testimony on a matter that required expert testimony.

i. 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).

ii. Discussion: A lay witness may offer an opinion which is based upon his own perception and does not require specialized knowledge. Lake's testimony was inadmissible as it was not based on his own perception, and it required specialized knowledge.

Rule 701, SCRE governs the admissibility of opinion testimony by lay witnesses. It provides that where a "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." "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—not the general or background experience of the witness." *State v. Gibbs*, 438 S.C. 542, 548–49,

885 S.E.2d 378, 381 (2023). *Cf. State v. Bottoms*, 260 S.C. 187, 196, 195 S.E.2d 116, 119-20 (1973) (lay opinion must be based on the witness's own observations and not upon the statements of another). "Lay opinion evidence that strays too far from the anchor of observed, concrete facts is nothing more than speculation." D. Garrison Hill, *Lay Witness Opinions*, S.C. Law., September 2007, at 34, 38.

In contrast, Rule 702, SCRE governs the admissibility of opinion testimony by expert witnesses. It provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge[.]" *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010).

"The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required." *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). "Deciding what is within the knowledge of a lay jury and what requires expert testimony depends on the particular facts of the case, including the complexity and technical nature of the evidence to be presented and the trial judge's understanding of a lay person's knowledge." *Id.*

The trial court must make three key preliminary findings fundamental to Rule 702 before the jury may consider expert testimony. "First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to

qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Watson v. Ford Motor Co.*, 389 S.C. at 446, 699 S.E.2d at 175.

"[T]he trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law. Once the trial court makes a ruling that the particular evidence is admissible, then it is exclusively within the jury's province to decide how much weight the evidence deserves." *Watson v. Ford Motor Co.*, 389 S.C. at 445, 699 S.E.2d at 174–75. *See State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) ("In the discharge of its gatekeeping role [under Rule 702], a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.").

The State did not attempt to qualify Lake as an expert witness. Lake admitted he did not know how the tracking device determined speed, or whether the speeds reported were accurate. If this was beyond Lake's knowledge, it was beyond the jury's. The fact that Lake did not understand how speed was determined illustrates the "complexity and technical nature of the evidence," and the need for expert testimony. *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. at 153, 747 S.E.2d at 481.

In *State v. Westmoreland*, 421 S.C. 410, 413, 807 S.E.2d 701, 703 (Ct. App. 2017), this Court addressed the propriety of allowing a coroner, Clevenger, to testify as a lay witness that the cause of the victim's death was a homicide. Clevenger was not qualified as an expert. He testified that he determined the manner of a deceased as part of his duties. He explained the

process of determining the manner of death included considering the pathologist report and the findings of investigators and law enforcement. He stated one manner of death was homicide, which was the intentional act of taking the life of another. Finally, he asserted that he determined the case was a homicide. *Id.*, 421 S.C. at 416, 807 S.E.2d at 704. This Court found admitting this testimony was an error of law because it was "improper opinion testimony by a lay witness in violation of Rule 701(a), SCRE." *Id.*, 421 S.C. at 418, 807 S.E.2d at 706. This Court explained that "Clevenger testified his determination of Victim's cause of death was based on the findings of the pathologist and the investigation of law enforcement. Thus, Clevenger's opinion regarding the cause of Victim's death was not based on his perceptions or observations but instead was based on his review of the perceptions of others. As a result, his testimony as a lay witness was improper opinion testimony under Rule 701(a)." *Id.*, 421 S.C. at 419–20, 807 S.E.2d at 706.

In this case, like in *Westmoreland*, the testimony was improper under Rule 701(a), SCRE, which requires that a lay witness's opinion be one which is "rationally based on the perception of the witness." Lake's testimony that Appellant was traveling at speeds of up to 105 miles an hour was not based on his own perception or observation. He did not see Appellant driving. His "perception" that Appellant was driving at high speeds was based on his secondhand review of the "perceptions" of the tracking device software. The testimony failed 701(a). *See State v. Gibbs*, 438 S.C. at 548-49, 885 S.E.2d at 381 (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").

The testimony also failed 701(b). Because the court recognized Lake made no claim the speeds were accurate, the testimony was not "helpful to the determination of a fact in issue."

The testimony also failed 701(c). Rule 701(c) requires a lay witness opinion to be one which does "not require special knowledge, skill, experience or training." Rule 701(c), SCRE although phrased slightly differently from Rule 701(c), Fed. R. Evid., "carries a virtually identical intent," which is in part to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing[.]" D. Garrison Hill, *Lay Witness Opinions*, S.C. Law., September 2007, at 34, 39. 701(c), SCRE "guards against the introduction of evidence that should undergo the stricter reliability testing required of expert testimony." *Id.* Lake needed specialized knowledge to be able to determine whether the monitoring device's conclusions about Appellant's speed were reliable and accurate, in order to opine that Appellant was driving at those speeds. Lake admitted he did not have that knowledge. The court improperly allowed the State to evade the requirements of Rule 702 by offering an expert opinion through a lay witness.

The court did not uphold its gatekeeping role. The trial court ruled that Appellant's objections went to the weight of the evidence, not its admissibility: "You can argue to the jury the weight of the evidence, whether it is accurate or not. And so—he didn't testify that it is accurate. He's just testifying as to what he is observing as he is tracking it[.]" R. 222, l. 22 – 223, l. 2. However, the "familiar evidentiary mantra" about weight and admissibility only holds true where the trial court has acted as gatekeeper. Lake did not know whether the speed evidence was reliable, and neither did the trial court, but the court erroneously ruled that did not matter. The State was required to offer this type of an opinion through an expert. Rule 702, SCRE. Had it done so the court would have assessed reliability. *Watson v. Ford Motor Co.*, 389 S.C. at 446, 699 S.E.2d at 175. If the court had determined, among other things, that the evidence was reliable, only then would it have been within the jury's province to determine how

much weight the evidence deserved. *State v. White*, 382 S.C. at 274, 676 S.E.2d at 689. The admission of this evidence was error. Rules 701 – 702, SCRE.

2.

The court erred by permitting a lay witness to testify that Appellant left the scene travelling at speeds of up to 105 miles per hour according to a GPS tracker, where the witness did not know how the tracker determined speed,

C. Since Appellant was denied the opportunity for confrontation and cross-examination regarding this evidence.

i. Standard of review

The Court is presented with a "mixed question of law and fact" regarding the admission of evidence when "a defendant's constitutional right is in play." *State v. English*, 443 S.C. 49, 55–56, 902 S.E.2d 385, 388 (2024). "We will affirm the trial court's factual findings underpinning its legal conclusion if the factual findings are supported by any evidence in the record; however, the legal conclusion—whether [the evidence] is testimonial and therefore subject to the Confrontation Clause—is a question of law we review de novo." *Id.* "[W]hether a statement is testimonial and therefore subject to the confrontation clause is a question of law reviewed de novo." *State v. Brewer*, 438 S.C. 37, 44, 882 S.E.2d 156, 160 (2022).

ii. Discussion: The Confrontation Clause commands that the reliability of a testimonial statement be assessed through cross-examination. The State was improperly allowed to present testimonial evidence about which the witness could not be cross-examined.

Counsel correctly argued that she would be unable to cross-examine Lake about the accuracy of his opinion that Appellant was driving at speeds of up to 105 miles an hour. That is because it was not Lake's own opinion that he was offering, it was the "opinion" of the tracking device. In addition to failing Rules 602, 701, and 702, the admission of this evidence deprived Appellant of his right to confrontation.

The Sixth Amendment guarantees an accused the right to be confronted with the witnesses against him. U.S. Const. amend. VI. This protection applies in state prosecutions by virtue of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

Whether the Confrontation Clause applies turns on whether the challenged out-of-court statement is testimonial, and it applies to witnesses against the accused—those who bear testimony. *State v. Brewer*, 438 S.C. 37, 48, 882 S.E.2d 156, 162 (2022); *Crawford v. Washington*, 541 U.S. at 51. "Under the primary purpose analysis required by the Confrontation Clause, where the primary purpose of an out-of-court statement is to serve as evidence or 'an out-of-court substitute for trial testimony,' the statement is considered testimonial." *State v. Brockmeyer*, 406 S.C. 324, 342, 751 S.E.2d 645, 654 (2013) (quoting *Bullcoming v. New Mexico*, 564 U.S. 647, 671-72 (2011) (Sotomayor, J., concurring)). "However, '[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Brockmeyer*, 406 S.C. at 342, 751 S.E.2d at 654 (quoting *Michigan v. Bryant*, 562 U.S. 344, 359 (2011)).

In *Brewer*, 438 S.C. at 53, 882 S.E.2d at 164–65, the Supreme Court concluded that while the court must review the primary purpose of the evidence to ascertain whether it is testimonial, other considerations that inform that analysis may include whether the evidence would be critical to prove the State's case, whether the evidence was used to prove the truth of the matter asserted, and whether the substitute witness (there an expert) vouched for the integrity of the laboratory where the items were tested. Put differently, the Supreme Court has stated "the question is

whether a reasonable person preparing the report would have believed the reports would be used to establish or prove facts potentially relevant to a criminal prosecution." *State v. English*, 443 S.C. 49, 58, 902 S.E.2d 385, 390 (2024). The evidence in this case was collected by the Department of Probation, Parole and Pardon Services. Lake testified the GPS reports "can be considered probation violations." R. 227, ll. 5-7. A reasonable person preparing the GPS report would have believed the report would be used to establish facts potentially relevant to a criminal trial. The primary purpose was thus to serve as evidence. The evidence was offered for the truth of the matter asserted—to show that Appellant was in fact speeding away from the crime scene. Lake also vouched for the accuracy of the GPS records generally before the jury. The evidence was critical to prove the State's case, which relied entirely on circumstantial evidence. The evidence was testimonial. *Brewer*, 438 S.C. at 53, 882 S.E.2d at 164–65; *English*, 443 S.C. at 58, 902 S.E.2d at 390.

The judge's ruling, that Lake could testify to what he observed, was error. Lake's observations were secondhand observations of the conclusions of the software, which Lake did not understand. Because Lake admittedly did not know anything about how the speed determinations were made (notably, the judge found Lake made no claim the data was accurate as to speed during the proffer), Appellant could not cross-examine Lake on the validity of the conclusions. For instance, he could not ask Lake to explain how speed calculations could be wildly affected by the distance to within which the location data was accurate (i.e., if the location data was accurate to within ten meters versus a hundred meters, how speed calculations would be affected). The State was thus permitted to present testimonial evidence that was not subject to cross-examination. The court's ruling, that Appellant could always argue accuracy to the jury, was error: Appellant had the right to confront the witness as to accuracy. Moreover, lawyers

cannot argue things that are not in evidence. Since Appellant could not get that testimony out of Lake, he had no right to argue it in front of the jury.

The general acceptance of GPS technology does not exempt it from the Confrontation Clause's demand that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. at 61. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009) (rejecting argument that forensic testing's inherent reliability overcomes the purpose of cross-examination); *Bullcoming v. New Mexico*, 564 U.S. at 662 (Confrontation "Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."). *Cf. State v. Brown*, 424 S.C. 479, 489, 818 S.E.2d 735, 740 (2018) ("we acknowledge that the reliability or operation of GPS technology in general is not genuinely disputed," but the "general acceptance of GPS technology does not, however, translate to the State getting a pass from making a minimum showing that the GPS records it seeks to introduce into evidence are accurate").[2]

The opportunity to confront a substitute witness in the form of Lake, or to argue to the jury (based on no evidence) that the data was inaccurate, did not satisfy Appellant's Sixth Amendment right to confrontation and cross-examination. *Bullcoming v. New Mexico*, 564 U.S. at 663; U.S. Const. amend. VI.

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[2] The challenge in *Brown* was to authentication, not confrontation. *State v. Brown*, 424 S.C. at 492, 818 S.E.2d at 742.

3.

The court erred by admitting jail phone call recordings from Ohio, where the State failed to comply with § 19-5-520 and failed to call the custodian of records, since the recordings were not authenticated.

i. 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).

ii. Relevant facts: The State sought to admit purported jail call recordings from Ohio absent a records custodian. The court found the calls authenticated based on voice identification.

Extensive arguments and proffers were heard on the admissibility of jail phone recordings from Ohio. R. 59, l. 21 – 111, l. 20. The State moved to admit the recordings pursuant to S.C. Code Ann. § 19-5-520, the Uniform Business Records as Evidence Act. On the second day of trial, the State gave Appellant what it called an "affidavit" for the Ohio jail calls. Defense counsel stated the "affidavit" was not signed. The court observed this was not an affidavit because it was not "sworn to." Defense counsel also noted the document was not turned over in advance of trial so that she could confirm its authenticity, and thus, counsel argued the records were not authenticated. Counsel also noted a date was left blank. Counsel stated she had no way to know if the "certification" was that of a "custodian or other qualified person." R. 17, ll. 16-17; R. 59, l. 21 – 66, l. 16; R. 71, ll. 14-24; R. 76, ll. 9-19.

The State argued it should not have to call the Ohio records custodian because the custodian did not listen to the calls, he just retrieved them. "[W]e didn't want to have to bring a person here from Ohio to tell you that there is a system." The State claimed the calls were of Appellant talking to his sister. R. 56, l. 17 – 67, l. 25; R. 73, ll. 7-15; R. 72, ll. 17-22.

According to the State, the calls were emailed to the investigator in South Carolina from Ohio. R. 69, ll. 7-18. The State claimed the calls were admissible as a hearsay exception, since they contained statements made by the defendant. R. 69, ll. 19-24. The court inquired how the State proposed to authenticate the calls. R. 69, l. 25 – 72, l. 16; R. 74, l. 21 – 76, l. 7. The State argued that a person on the calls states: "this is Marquise," and the South Carolina officer who requested the calls had listened to them. R. 71, ll. 4-13.

Defense counsel again argued the calls were inadmissible:

> **[W]hether or not they could authenticate** [sic] **my client's voice, they are not able to authenticate the phone calls themselves. There is no affidavit. There is no one from Ohio to authenticate them. They could have been manipulated or whatever.** But while they can say, yes, that is Mr. Franklin's voice—or maybe they can't because we haven't gotten there—but even if the Court is satisfied that they could, it is still not authenticating the phone call itself.

R. 77, ll. 2-11 (emphasis added). "I don't believe that they can say how these phone calls were kept or made or when or anything." R. 80, ll. 4-6. "[J]ust because his voice is on it, it is a recording. I think it is important to know when the recordings were made by the person that made a record of the recording itself." R. 81, ll. 12-15.

Defense counsel referred to Rule 803(6), SCRE. R. 79, l. 15 – 80, l. 18. The court stated that if the calls were authenticated, they would be admissible as statements against interest from the defendant, not as business records under Rule 803(6). R. 80, l. 23 – 81, l. 6. Counsel responded that the State still had to authenticate the recordings as business records; simply

identifying Appellant's voice was insufficient to authenticate them. R. 81, ll. 7-15; R. 108, ll. 17-23.

The State proffered the testimony of two witnesses who identified Appellant's voice on the recordings—Investigator Jalisa Brown (Brown) and Tykia Carson, the woman Appellant had been seeing. Brown claimed she recognized Appellant's voice from when she offered him an interview and he declined. Brown testified she requested and received records from "Cuyahoga County." Brown stated she gave SLED the number Appellant had been calling and asked them for information about the person associated with that number. She stated Appellant also made calls from the Williamsburg County Detention Center and she could see those numbers. Brown stated she listened to Appellant's Williamsburg County jail calls and it was the "same voice," which was consistent with Appellant's voice when he declined her interview, and consistent with voice on the Ohio calls. Brown stated the speaker identified himself as Marquise on the calls. Brown stated she could not "explain [how] any other detention center['s]" system works to retrieve phone calls. R. 82, l. 3 – 99, l. 12.

Carson testified she knew Appellant for about a month before the incident, and subsequently talked to him on the phone while he was in jail in Ohio and in Williamsburg. Carson identified Appellant's voice as being the voice in the recordings. Carson was unsure if her voice was on one of the calls (State's Exhibit #70, which was admitted before the jury as State's Exhibit #77) or if it was the voice of another woman. Carson stated she did not know what Appellant was talking about on the calls. R. 100, l. 3 – 107, l. 25.

At the conclusion of the proffer, the State moved to admit the recordings as statements against interest. Counsel again argued the State still needed to authenticate the calls as business records, such as by showing when the calls were recorded. R. 108, ll. 17-23.

The court ruled the recordings were admissible under Rule 901(5) or 901(6), SCRE. "[I]t is authenticated that the voice on that recording is the defendant's voice." The court concluded the recordings did not need to be authenticated as business records. The court found the voice identifications made by the witnesses during the proffer were sufficient to authenticate the recordings. R. 109, l. 8 – 111, l. 22. The court found that, as to hearsay, the recordings were admissible as statements against interest. "So the parts of these tapes that are against his interest are admissible under the hearsay rule." R. 109, l. 24 – 110, l. 8. Counsel reiterated that the State had not proven when the calls were recorded. She noted he could have been incarcerated another time in Ohio. The court appeared frustrated by the amount of time the jury was being kept waiting. The court stated counsel could ask the defendant, her client, when the calls were recorded. R. 111, ll. 12-22.

The State initially offered unredacted versions of the recordings (State's Exhibit #70 – 74), but when Appellant objected to hearsay regarding the women's voices on the calls, the judge ordered that the State redact the recordings to remove all but Appellant's voice. Thus, what the jury heard was the redacted versions—State's Exhibit # 76 – 80. R. 145, ll. 14-16; R. 136, l. 23 – 138, l. 11; R. 143, l. 10 – 149, l. 9.

As seen, the statements on the jail calls were as follows.

- "I ain't knew this was gonna happen but now that I think bruh this junk happened, like, it was meant for this junk, like, it wasn't no way around this." State's Exhibit #77.
- "I don't, I don't want you like, I don't know man. I feel like its my fault if people hate you, well I know it is, bruh, every time I think about it bruh it wasn't gonna be no way around this shit bruh. It was not gonna be no way around the shit cause if I woulda dropped you off at [unintelligible] house, I was really going to go see my brother then I

was going out there anyway, you feel what I'm saying, so this shit would have happened regardless girl, but it was meant for this shit to happen because there wasn't no way around this shit bruh." State's Exhibit #80.

- "Boy came through and ransack this shit. They said they seen on my ankle monitor that I been there for thirteen minutes. Cause like when I dropped myself off, I ain't even stay there long. Cause I went to go see my mama. And like I wasn't gonna do the shit bruh, I was not gonna cut my ankle monitor off bruh, but soon as I seen my mama bruh like she just starts . . . fuck's going on like them boys, them boys already knew what the fuck's going on before I even got to the [unintelligible]. Cause my sister Danielle was calling me when I was on the way, that's who I was on the phone . . . So that shit's really frustrating me out and godammit I got to my mama and shit, she was spazzing on me all type of shit, crying and shit. I was just like, fuck it bruh, I got in my car and I left . . . I left, I got on the four-wheeler and I left, I went to my mama and she started talking crazy so I went straight to my house, got in my car, and I just dipped, bruh, like." State's Exhibit #79.
- "Cause I was with [unintelligible] like I was asleep but then when I heard you yell I was like, man, let me just go ahead and get up. You know, my plan was to goddamn whenever them boys come I was just gonna go on in one of them empty rooms. But shit, I couldn't even make it, boy. Bruh, I coulda beat them boys if I wasn't sleeping I coulda beat them boys, I coulda go right in one of them other apartments and just chill. I coulda really hid in one of them motherfucking cabinets or something cause they ain't really did shit, they just walked in that motherfucker. Saying shit, them boys ain't really did shit. I coulda got away, if I was up bruh I coulda got away, but . . . And that's what I know they

ain't got no evidence to go to trial, so they gonna try to get somebody to testify or whatever, bruh, you feel me so, that's most likely what they gonna try to do to you, get you to motherfucking come and tell something and if you don't tell nothing they gonna try to hit you with, oh, well you hiding a fugitive and this, that, and the third; this, that, and the third . . . Man, I been telling y'all boy, ever since I first told y'all that girl said I was in Cleveland, bro, I been know they was looking for me, that's why they, bro they started setting up roadblocks and shit, remember you talking about said damn there's a ass of police and shit. I ain't wanted to say the shit to scare you up but I already knew what the fuck." State's Exhibit #76.

- "If I woulda got up and go and went to McDonald's like I was posed to that morning, bruh, I probably woulda met them bitches in the fucking parking lot or something like that. It wasn't. If I woulda jumped out the window and tried to run they couldn't shoot me though. And they ain't have no, cause they ain't even look for no gun, they ain't found no gun, nothing like that boy. If I'da jump out that window; had it, I thought they had it cause when dude put me in handcuffs, that little short white dude, he was walking in the house and he was meeting somebody who was coming out, he was like: 'yeah, that right there seal the deal right there.' So I don't, I thought he was talking about the gun but he musta been talking about me, cause like: 'yep, that'll seal the deal right there.' I swear to god, so I'm thinking he, they found the phone." State's Exhibit #78.

The lead investigator admitted she never talked to the person on the other end of the phone calls "to get the context of what was being said." R. 127, ll. 15-17; R. 167, ll. 5-16.

iii. Discussion: Voice identification was insufficient to authenticate the recordings on these facts.

"It is black letter law that evidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (citing *State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987)). "Upon adoption of the South Carolina Rules of Evidence, this common law rule was codified at Rule 901, SCRE." *Brown*, 424 S.C. at 488, 818 S.E.2d at 740. The burden to authenticate is not high and requires only that the proponent offer a satisfactory foundation from which the jury could reasonably find that the evidence is authentic. *Deep Keel, LLC v. Atl. Priv. Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE.

Rule 901, SCRE provides:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
> . . .
>
> (5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> (6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

. . .

S.C. Code Ann. §19-5-520 provides in relevant part that:

> In addition to those matters provided by Rule 902, South Carolina Rules of Evidence, **extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:**
>
> (A) **The original or a copy of a domestic record that meets the requirements of Rule 803(6), South Carolina Rules of Evidence, as shown by a certification of the custodian or another qualified person that complies with a state statute or a court rule. Before the trial or hearing, the proponent shall give an adverse party reasonable written notice of the intent to offer the record and shall make the record and certification available for inspection** so that the party has a fair opportunity to challenge the record.

(emphasis added).

The court correctly recognized that the State did not comply with § 19-5-520. The State gave the document to defense counsel the second day of trial, which was not "reasonable written notice of the intent to offer the record." The State did not "make the record and certification available for inspection so that the party has a fair opportunity to challenge the record." According to the judge, the document the State claimed was sufficient to authenticate the recordings was not an affidavit.

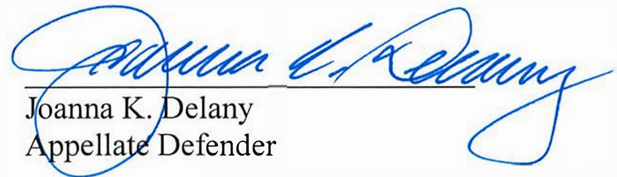
The court instead found the recordings were authenticated pursuant to Rule 901(b)(5) and (6). However, the recordings were not authenticated pursuant to Rule 901(b)(6), since the State did not show that the calls were "made to the number assigned at the time by the telephone company to a particular person . . . if . . . in the case of a person, circumstances, including self-identification, show the person answering to be the one called." These calls were not made *to* Appellant, at a number assigned to Appellant by the phone company. Appellant was not the one "answering" the call.

Whether they were authenticated pursuant to Rule 901(b)(5) is a closer call. The recordings do appear to meet 901(b)(5)'s requirement of voice identification. However, the concerns brought up by defense counsel—that because there was no custodian, there was no showing these recordings had not been manipulated, and there was no showing the calls were made during Appellant's detention on these charges, as opposed to a different arrest—are not satisfied by a simple voice identification. No one testified that the matter was what it purported to be. The State alleged the calls were between Appellant and his sister. Carson stated she may have been on one of the calls. *See* State's Exhibit #70, which was admitted for the jury as State's Exhibit #77. However, Carson stated she was not sure if the voice on that call was hers. She stated the voice did not sound like her, but conceded it was "probably" her. The solicitor did not ask Carson if she remembered the conversation. R. 77, l. 23 – 78, l. 2. Even if this was sufficient to authenticate State's Exhibit #77, it was insufficient to authenticate the rest of the recordings.

Notably, these recordings were digital recordings, since the investigator received them via e-mail. *See,* e.g., *State v. Green*, 427 S.C. 223, 234, 830 S.E.2d 711, 716 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020) ("documents that once sat in dusty file cabinets crammed into office corners now float in the 'cloud,' making them susceptible to a wider range of mischief"). The State did not submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a). The court erred by admitting the calls absent authentication.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this court reverse his convictions and sentences and remand the case for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of November, 2025.

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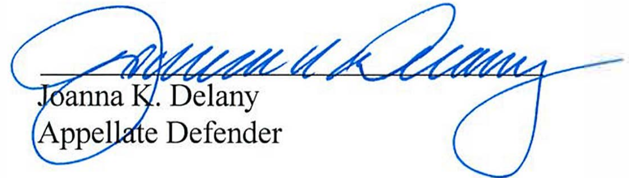
SC Court of Appeals

CERTIFICATE OF COUNSEL

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

November 3, 2025.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE, RESPONDENT,

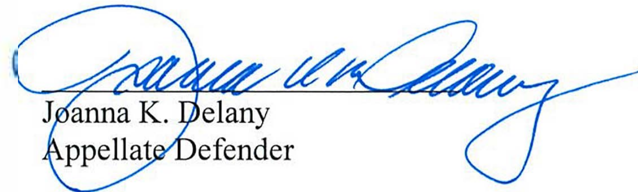
V.

MARQUISE D. FRANKLIN, APPELLANT

APPELLATE CASE NO. 2024-001277

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 3rd day of November, 2025.



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ATTORNEY FOR APPELLANT

From: Mcinnis, Sara
To: amabry@scag.gov
Cc: Donna D"Alessio; Delany, Joanna
Subject: 2024-001277 The State v. Marquise D. Franklin Final Brief of Appellant
Date: Monday, November 3, 2025 10:13:00 AM
Attachments: 2024-001277 The State v. Marquise D. Franklin Final Brief of Appellant.pdf

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Good Morning Mr. Mabry,

Attached for service in the above-referenced case is the final brief of appellant, which will be filed with the Court of Appeals today, November 3, 2025, via email filing.

Thank you!

Sara McInnis
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