STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2025-001075

THE STATE, ...RESPONDENT

v.

TERRY ALLEN PAIGE, JR., ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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II.

Whether the trial court erred in imposing a five-year sentence for possession of a weapon during the commission of a violent crime when it also imposed a life sentence?

STATEMENT OF THE CASE

During their May, 2022 term, a Marion County grand jury indicted Appellant Terry Allen Paige, Jr. for the offenses of murder, first-degree burglary, and possession of a weapon during the commission of a violent crime relating to the shooting death of Gloria Swinton in her home. (R. pp. 358–363 (Indictments)). On May 19, 2025, Appellant proceeded to a jury trial before the Honorable Michael G. Nettles, Circuit Court Judge.[1] Appellant was represented by Ralph Wilson, Jr., Esq. while Assistant Solicitor Todd Tucker represented the State. (R. p. 1). At the end of trial, the jury found Appellant guilty on all charges. (R. pp. 353–354). Judge Nettles sentenced Appellant to a term of life imprisonment for murder, fifteen years for first-degree burglary, and five years for the weapons charge, all to be served concurrently. (R. p. 355).

This appeal follows.

[1] As noted by Judge Nettles pre-trial, this was Appellant's second trial on these charges. The first trial resulted in a mistrial due to an "outburst" from a member of the Victim's family. (R. p. 23).

STATEMENT OF FACTS

On the morning of October 25, 2021, at approximately 9:20 AM, Gloria Swinton (Victim) called Marion County 911 to report someone breaking into her home. (R. pp. 144–146). Law enforcement shortly arrived and found Victim unresponsive and not breathing in her bedroom. (R. pp. 148–152). Victim was pregnant with Appellant's child at the time of her death.[2] (R. pp. 185–186, 198–201). The back door of the home was broken, and a single 9mm cartridge case was found on the floor. (R. pp. 165–168, 208). The back door consisted of a "wooden door that swings inward" and a glass storm door that "swung outward." Investigators processed the glass storm door for fingerprints and collected two intact prints. (R. pp. 170–172). These prints were compared to a known standard of Appellant, and the two "positively matched."[3] (R. pp. 189–196). They also swabbed the door for DNA evidence. (R. p. 175). From the door swabs, the DNA analyst developed a "partial DNA profile suitable for comparison" and compared it to a known standard of Appellant. However, these results did not conclusively implicate Appellant, although it appeared there was some trace amount of his DNA on the door. (R. pp. 201–207). Investigators also collected Victim's cell phone which was with her in the bedroom. (R. pp. 210–211).

After obtaining the passcode and a search warrant for Victim's phone, investigators found text messages from two different cell phones—a "717" and an "843" number—which were of a "threatening nature." Appellant became a person of interest when investigators learned from Victim's family members that the two were together on and off. (R. p. 211). The following day, investigators went to Appellant's nearest physical address where they talked to Appellant's

[2] The forensic pathologist testified that Victim's cause of death was a single gunshot wound "in the mid-back towards the arm side, towards the armpit" that passed through her lung and heart. (R. pp. 301–305).

[3] The examiner emphasized that fingerprints are fragile and that it was rare in his career to find an intact fingerprint on a doorknob. (R. p. 197).

grandfather. Grandfather told investigators that Appellant was out-of-town working but called Appellant on his phone when asked about Appellant's phone number. Grandfather handed the phone to investigators who quickly noted that the number Appellant was speaking from was the *same* 717 number sending threatening text messages to Victim's phone. (R. pp. 213–214). After speaking with Grandfather and Appellant briefly, investigators obtained footage from a camera operated by Lake View Police Department viewing "the avenue that most people take getting off of the interstate also coming into Marion and Mullins." The camera captured Appellant's vehicle traveling towards Mullins, where Victim lived, at 9:00 AM.[4] (R. pp. 215–218).

On October 27th, investigators were notified by Pennsylvania State Police that Appellant was stopped for a minor traffic violation. After traveling to Pennsylvania, investigators spoke to Appellant, who agreed to speak with them following a waiver of his *Miranda* rights. An hour-long recorded interview was admitted into evidence and played before the jury. (R. pp. 218–227; *see generally* State's Ex. 107 (Interview)). Investigator Rogers testified that they asked Appellant if he was in Marion County on October 25th. Appellant initially claimed he was not in Marion County but later changed his story claiming he went to "a friend's house in Lake View" after being told investigators had "proof" he was in South Carolina that day. (R. pp. 228–229). Investigators also executed search warrants on cell records related to the 717 and 843 numbers that sent threatening messages to Victim. The last text was sent from the 843 number to Victim at 8:43 AM on October 25th. No other messages were sent from these two phones to Victim's phone after that. (R. pp. 230–233).

[4] Appellant was driving a gray 2021 Ram 3500 pickup truck with a SC tag number "TMQ-493." Appellant admitted possession and control of the vehicle in his interview with law enforcement. (*See* R. pp. 229, 237–240).

The record reflects possible prior difficulties between Victim and Appellant as noted in discussion of prior domestic violence reports, but this evidence was not elicited before the jury. (*See* R. pp. 43–48, 153–154, 155–156). However, Jaleesa Page, a friend of Victim, testified that Victim and Appellant had an "on-again/off-again" kind of relationship and that Victim was "afraid" of Appellant. She stated that Victim moved to Pennsylvania in the "early part" of 2021 to live with Appellant before later returning to Marion County around June or July the same year. (R. pp. 185–187). The night before her death, Victim was staying with Markel Williams, the father of her other child, in Williams' mother's house. The morning of October 25th, Victim left Williams' house and returned home. Williams was at work when Victim was killed. (R. pp. 176–182, 187–188, 218, 234–236).

After executing search warrants on Appellant's vehicle in a Pennsylvania impound, Pennsylvania investigators obtained access to the vehicle's infotainment system discussed in greater detail *infra*. After using a "dib" and software to "image" the device, investigators obtained GPS location data, in addition to other vehicle data, from October 24th through the early to mid-morning hours of October 25th showing Appellant's vehicle driving down from Pennsylvania to Victim's home in Mullins, South Carolina and then returning to Pennsylvania after Victim's death. Specifically, the GPS location data from the vehicle showed Appellant leaving a Motel 6 in Pennsylvania at 1:16 AM, traveling just north of Emporia, Virigina at 5:43 AM, traveling east of Raleigh, North Carolina at approximately 7:15 AM, arriving at Victim's home address at 9:18 AM (specifically the vehicle was put into park), leaving Victim's home at 9:22 AM, stopping in Lake View at 9:44 AM, and then heading north through North Carolina at 12:22 PM. The data also placed Appellant's vehicle at the exact place it was stopped at by Pennsylvania State Police on

October 27th.[5] The vehicle's movements are also corroborated by other sources referenced by investigators, such as a camera capturing the vehicle leaving the Motel 6 at 1:16 AM and an automated-license-plate reader capturing the vehicle driving south on I-95 at 6:13 AM. (R. pp. 279–300; *see generally* State's Ex. 123 (Vehicle Data PowerPoint)). Appellant did not testify or present any witnesses.

[5] Other data was also collected. For example, the same moment Appellant's vehicle turns on and is put into reverse at Victim's home, "Terry's iPhone" connects to the car, and the car registers one of the wheels slipping. (*See* R. pp. 297–298).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Johnson*, 413 S.C. 458, 776 S.E.2d 367, 371 (2015). "The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 848 (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." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

ARGUMENT

I. The trial court did not abuse its discretion in admitting into evidence location data extracted from Appellant's vehicle's infotainment system where sufficient evidence was presented demonstrating that the process used to extract the location data from Appellant's vehicle was not only reliable but also repeatable and not subject to modification or manipulation; and any error in admitting the location data was harmless beyond a reasonable doubt

Appellant argues the trial court erred in admitting GPS location data derived from a vehicle "infotainment" system because the process used to extract the data was insufficiently reliable. Specifically, he alleges the trial court was not presented with sufficient evidence to find the data extraction process reliable under the factors announced in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) and further argues that *any* software that makes use of "secret, proprietary code" when used by experts who are themselves unfamiliar with the source code should be considered inherently unreliable. Respondent contends the trial court properly acted as a gatekeeper in its assessment of the process used to obtain the location data from Appellant's vehicle, and properly found the process used was not only reliable but also repeatable. Furthermore, the trial court was presented with sufficient evidence from at least one qualified expert on the subject demonstrating that the process was not subject to manipulation or modification. Notably, Appellant seems to take issue only with the process used to obtain the location data, not the location data itself. This concession seriously constrains the scope of this claim on appeal. Even assuming the trial court erred in admitting the location data, there was plenty of other competent evidence before the jury to find Appellant guilty beyond a reasonable doubt.

This Court should affirm.

A. Relevant Facts

Before trial, Appellant presented several motions for consideration by the trial court. After the disposition of a *Franks v. Delaware* issue, the State offered the testimony of Jason Morgan, a corporal with Pennsylvania State Police who was one of the Pennsylvania officers who processed the infotainment system from Appellant's vehicle. Morgan testified he was certified to process infotainment data through Berla, a company based out of Annapolis, Maryland that develops software and tools to obtain data from modern vehicle infotainment systems. In order to be certified on their software, Morgan testified he attended a week-long training with the company and is required to annually recertify his license, in addition to monthly or quarterly online trainings regarding new information and techniques. Every other year requires a complete recertification test. (R. p. 83). Morgan generally described an infotainment system as follows:

> For lack of a better term, it's the center screen that carries your phone connections, your navigation, anything that you would see on the screen. Within that, depending on the year, make, model, and trim level, the collection of data that the vehicle logs, whether that be events, speed, anything that that particular year, make, and model may log is contained within the module of the infotainment system.

(R. p. 82, ll. 5–13; *see also* R. pp. 80–81).

Morgan testified that many infotainment systems retain GPS data stored as "track logs" which will save location data assuming proper connection with a minimum of three satellites. (R. p. 82). The process of obtaining such data depends on the specific vehicle. Morgan testified that the process usually involves removing the infotainment module from the vehicle and then attaching a "dib" directly to the motherboard of the infotainment system. The "dib," itself connected to the motherboard of the infotainment system, is then connected to the laptop, where a program called "IVI" takes information from the "dib" and processes it into a readable format. Morgan testified that only licensed users are allowed to access the IVI software. (R. pp. 83–84). Morgan referred to

this process generally as "imaging" or an extraction of pre-existing data. (R. pp. 87, 90–92). Once processed, the IVI software produces two reports, one containing all extracted information and one "parse" report that contains less information, such as a more limited time frame. (R. pp. 87–88). Morgan emphasized that once the data is extracted, the IVI software does not allow modification or manipulation of the data. (R. p. 88).

Morgan testified that Detective Restori, another Pennsylvania investigator, was the original investigator who processed the infotainment system from Appellant's vehicle and stored the generated reports on his laptop. However, when he retired, his laptop was decommissioned, so investigators had to extract or image the data a second time from the infotainment system. (R. pp. 88–90). On cross-examination, Appellant inquired regarding any rate of error that Morgan was aware of. Morgan responded:

> I was never aware *of any issue relating to an error of information* being downloaded. And, frankly, I don't quite perceive the question to be accurate. I'm taking your question as a perception that IVI will pull off incorrect data, you know, whether that be to an incorrect car, whether that be data that doesn't exist within the motherboard. Maybe I'm misunderstanding your question. *But based upon my experience and my knowledge and the downloads or imaging that I have done, the data within that particular motherboard has never been incorrect*.

(R. p. 93, ln. 9—R. p. 94, ln. 8) (emphasis added). Morgan noted that he had never testified as an expert on the process but had otherwise testified twice regarding the process generally in Pennsylvania state court and he had personally been involved in over forty data extractions using this process, of which none of the extractions produced incorrect information. (R. pp. 95, 98).

Next, Detective Mark Restori testified. Restori testified that he was involved in "hundreds" of infotainment system extractions. He also testified that he appeared as an expert witness on the process in a federal homicide trial in Las Vegas, Nevada, in addition to testifying in Pennsylvania lower courts. (R. pp. 101–103, 248). Restori testified similarly to Morgan regarding the

certification process through Berla—an initial week-long training followed by additional monthly/yearly training and/or testing. (R. pp. 104–105). Restori testified in greater detail to the specific process used to extract the data from the infotainment system on Appellant's vehicle:

> A. In this situation, we hook up what is called a dib. It's an auxiliary circuit board that connects to the main circuit board of the unit, infotainment unit. It requires disassembly. We connect that dib to the board with little plastic nuts, but at the same time, there are some solder connections that need to be made. There were pins that touch each connection that's needed in that board in order to take out what is in the memory of the board itself.
>
> Q. Do these memory chips, do they have different kinds of information as far as what the car tabulates?
>
> A. Every vehicle is different. It is manufacturer specific. It depends on what the engineers for that company . . . decide to have accessible in there.
>
> Q. And in this particular case it was a 2021 Dodge Ram 3500 pickup truck?
>
> A. That's correct.
>
> Q. Were you able to ascertain what kind of process you needed to undergo to get the data from it?
>
> A. In this case we were able to connect the dibs to it. . . . The reason for the dibs is so you don't destroy the unit. The data is held in the memory chip that's in that unit. It is similar to an SD card, to a thumb drive. All it is is [sic] a storage device that holds data.
>
> Q. So there is no software involved in terms of arranging the data? It just stores it?
>
> A. No. It's just stored there.
>
> Q. *So it's like a cell phone or computer in that regard?*
>
> A. *Correct. You can get the data by directly taking the data from the chip itself*, but you have to destroy the unit in order to do that. You are removing that chip from the board, and the unit is no longer usable. So when we're done, we like to put it back together, put it back in the car so that the person, whoever it is, gets the car back and the radio functions and the GPS functions and so forth.
>
> Q. And you were called to do another data extraction on that same infotainment system?

A. Yes.

Q. *And the way you do it would be such a way that you can reimage the data the same way you did the first time?*

A. *Exactly.*

(R. p. 105, ln. 20—R. p. 107, ln. 21) (emphasis added).

Restori testified that Berla's devices and software is utilized by "[t]housands" of law enforcement agencies around the world. (R. p. 108). Restori further emphasized that he was unaware of any issues with Berla in terms of mishandling or changing data; rather, he noted that there is only ever a problem with attempting to extract the data, which Berla fixes by providing new "systems or new dibs" to get the data out. Similarly, once the dib is properly attached and connected to the motherboard of the infotainment unit, Restori noted it is impossible to manipulate the data therein. Whether one extracts the data once, twice, or "10, 15 times," the data does not change. (R. pp. 109–110). Restori explained that if law enforcement agencies were having an issue with the process or software, Berla would be contacted. Restori also testified similarly to Morgan regarding having to extract the data twice from the infotainment system in Appellant's vehicle due to his retirement and his laptop being decommissioned. He testified that, once he extracted the data the second time, the results were the same as the first time. If necessary, he could extract the same data again. (R. pp. 111–113). On cross-examination, Restori continued to emphasize he was unaware of any issues or design flaws with the extraction process. (R. pp. 116–122).

Restori described in further detail on re-direct the process generally and the collaborative nature of the extraction process:

Q. . . . [Appellant] asked you about different codes for each specific car. Isn't it true that the Berla programs are for a specific manufacturer and a specific model of car? In other words, BMW has one for one series?

A. The way to extract the data, *but it's how they are able to get to that data to read that data off of the memory chip*. The only reason is because every circuit board is different in these vehicles, and the reason is we don't want to destroy that unit. We want to put it back in this multi-thousand dollar vehicle.

Q. So despite the individual type and type of manufacturer, you are able to pull the boards and conduct such an extraction?

A. Correct. Some vehicles even have a separate hard drive in them. Some of the German vehicles you take the hard drive and connecting directly to a hard drive just like in a computer.

Q. Now, the term "peer review" has been used. You are in communication through these training seminars with other agencies who are using Berla and IVI?

A. Yes.

Q. *And you are exchanging and sharing information?*

A. *Yes.* Mainly through Berla itself.

Q. And they kind of report problems or push out information in terms of changes in technology?

A. Correct. They maintain the database. In many situations it is not listed in their program. I might get a vehicle that's not supported for a direct download, but we know it has a memory capability, so we would do a chip-off on that vehicle, *and we relay back to Berla what we found and what we get out of it and work with them, and it helps to build their database*. When we call them or someone else calls them from California and says I have this car, they go back in the database and say, oh, Detective Restori did one of these and this is what he got.

Q. So in that context of peer review, *are you aware of any systemic problems with Berla and/or IVI?*

A. *No.*

(R. p. 122, ln. 10—R. p. 124, ln. 4) (emphasis added). Finally, the trial court asked a single question, whether Restori was "familiar with any error rate with regard to the information that is stored on this technology?" Restori responded in the negative. (R. p. 124, ll. 9–13).

Later, before the testimony of Restori and Morgan were offered before the jury, the trial court made its ruling finding the infotainment data evidence to be admissible:

> [W]e have expert testimony with regard to that, and I think that the Daubert standard would, indeed, apply. I think things have come out on the record that are relevant that this technology is used . . . according to the testimony , and it has been unrefuted . . . it is used worldwide. They also say that it's used in law enforcement throughout the nation.
>
> As far as the reliability of it, of the information that comes out with regard to the data is corroborated by independent evidence, independent evidence that has already been in the record about the trouble being in Dillon. He was up in Pennsylvania and/or Indiana, and he's coming down this way, and the truck is there, which would verify that the data that is on this infotainment system is, indeed, accurate.
>
> I do find that, in many respects, it is more reliable than the satellite location, because they at least use three different satellites. And I find it is more accurate than the cell phone locations.
>
> Also, the information with regard to the use of the phone that's going through this system, that also corroborates the fact that the information is correct, that the truck is coming from Pennsylvania and/or Indiana down this way.
>
> This is a little bit different in that, you know, when you talk about peer review and can these results be duplicated, I think a good example of that would be if you had a control test that, say, for instance, in a products liability case where they are saying that radar can adversely affect the cruise control in some way. Maybe there is a test to verify that. I think that would be something that needed to be tested, and could it be repeated, and if it could or could not would hinge on whether it is admissible. *But this is a direct download of data. We've heard testimony that the only way to get the data out of there is by that chip that they put in there.* And I'm not very technological [sic] savvy, but *they have to put it in there.* He also testified that he, nor anyone else, *could put data into the system or take it out*. So I think . . . or can be added to or deleted.
>
> For these reasons, I believe that it is admissible. And, once again, you have done a great job of putting it on the record, and you are protected on the record in all respects.

(R. p. 157, ln. 12—R. p. 159, ln. 10) (emphasis added).

When Restori later testified before the jury, Appellant renewed his objection to the testimony after the trial court found Restori qualified as an expert. (R. p. 249). Restori and Morgan both testified similarly as they did pre-trial. (R. pp. 241–300).

B. Discussion

Rule 702 of the South Carolina Rules of Evidence governs the admission of expert testimony at trial. As explained by our supreme court recently in *State v. Phillips*, *Council* was the first test case for Rule 702, which was itself new as part of South Carolina's new rules of evidence. 430 S.C. 319, 325, 844 S.E.2d 651, 654 (2020). *Council* "set forth what has become the standard South Carolina formulation of the elements of the foundation for scientific evidence under Rule 702." *Phillips*, 430 S.C. at 325, 844 S.E.2d at 654. Thus, when admitting scientific evidence under Rule 702, "the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *Council*, 335 S.C. at 20, 515 S.E.2d at 518. In assessing reliability, the trial court must assess "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (quoting *People v. Marx*, 54 Cal.App.3d 100, 126 Cal.Rptr. 350 (1975)) (internal quotations omitted). The trial court must determine that the expert's method is reliable and that the substance of the expert's testimony is reliable. *State v. Moorer*, 439 S.C. 525, 544, 888 S.E.2d 725, 734 (Ct. App. 2023).

The *Council/Jones* standard has been further articulated as four factors trial courts must assess: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Council*, 335 S.C. at 20, 515 S.E.2d at 517 (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990). These same reliability standards apply to nonscientific but nonetheless technical or otherwise specialized expert testimony. *State v. White*, 382 S.C. 265, 269–71, 676 S.E.2d 684,

686–87 (2009) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999)). To the extent Appellant argues that the reliability factors of *Daubert*[6] apply in South Carolina rather than the *Council/Jones* factors as evidenced by the *Phillips* majority's referral to "*Daubert/Council* hearings," Respondent contends this is plainly dicta and only the factors from *Council/Jones* apply as a matter of state law. *See Phillips*, 430 S.C. at 343–45, 844 S.E.2d at 664–65 (Beatty, C.J., concurring in result joined by Hearn, J.). As a reminder, the assessment of reliability as a threshold inquiry should not be conflated with the assessment of credibility or whether the expert testimony is ultimately determinative to the issue(s) at trial. That is the jury's job:

> As long as the trial court is satisfied the expert's testimony consists of *a reliable method faithfully and reliably applied, the gate of admissibility should be opened*. The correctness of the conclusion reached by an expert's faithful application of a reliable method (and the credibility of the expert who reached it) is for the jury, for the trial judge must remain at the gatepost and not tread on the advocate's or the jury's turf.

Moorer, 439 S.C. at 545, 888 S.E.2d at 735 (emphasis added) (citing *State v. Jones*, 423 S.C. 631, 639–40, 817 S.E.2d 268, 272 (2018) ("There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts *are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable* such that it be may offered into evidence.")) (emphasis added); *see also State v. Rowland*, 444 S.C. 84, 103, 902 S.E.2d 825, 835 (Ct. App. 2024) (Trial court is not required to decide if expert's testimony is "correct.").

In this case, the trial court properly exercised its gatekeeping responsibility in finding Restori qualified as an expert witness and in finding the process used to obtain the infotainment data reliable. Appellant's arguments to the contrary primarily take issue with the fact that Morgan

[6] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

and Restori could not testify to the exact programming or internal workings of the IVI software while ignoring the unrefuted testimony demonstrating success with Berla's data extraction process, especially as to the facts of this case.

Both Morgan and Restori testified to attending an initial week-long training with Berla followed by yearly recertification/testing and monthly/quarterly training regarding updates or new developments with the process. Morgan and Restori collectively processed "hundreds" of infotainment systems using the Berla process. (R. pp. 84, 98, 101, 105, 243). And while Morgan had not testified as an expert before (and in fact was not admitted as an expert in this case), Restori previously testified as an expert witness on the process in a federal homicide trial in Las Vegas, Nevada. (R. pp. 101–103, 248). Accordingly, based on the testimony presented both pre-trial and before the jury, the trial court properly found that Restori was qualified to testify as an expert witness on infotainment data recovery given his training and requisite experience. *See State v. Franks*, 432 S.C. 58, 76, 849 S.E.2d 580, 590 (Ct. App. 2024) (trial court properly found officer qualified to testify as expert on cell location technology where officer had fifteen years of experience and used it in over fifty cases). As to reliability of the underlying process, consider the four *Council/Jones* factors.

First, while the Berla process may have not had "peer review" in the formal, academic sense, Morgan and Restori's testimony clearly show that the process is used and relied upon by law enforcement agencies not only across the nation, but also across the world to extract data from vehicle infotainment systems. Restori further emphasized that law enforcement agencies who use Berla do not operate within a vacuum. Rather, Berla encourages and facilitates continual, ongoing refining and development of the process—including not only the monthly/quarterly trainings regarding new information but also taking insights or new developments directly from law

enforcement regarding the data extraction process, with Restori describing how the process to take data from a new vehicle (in the sense of not having had data extracted from it before) is shared back to Berla to update their "database." (*See* R. pp. 122–124). Berla also continually develops new processes, such as new "dibs" or software updates to support different vehicle systems. Both Morgan and Restori continually emphasized they were unaware of any systemic issues with the process and that, if there were problems, Berla would be notified so the problem could be fixed. (R. pp. 108–109, 111). The trial court explicitly noted in its ruling that it was "unrefuted" that the process is used worldwide. (R. p. 157).

Second, Morgan and Restori collectively testified to "hundreds" of successful applications of the Berla process to extract data, including location data, from vehicle infotainment systems. (R. pp. 84, 98, 101, 105, 243). Moreover, as discussed above, Restori testified to the use of Berla by "thousands" of agencies across the world, all of which assumingly use the process for similar applications with similarly successful results. (R. pp. 107–108). Berla's process is solely to extract data from vehicle infotainment systems, including the GPS location data at issue here on appeal. The fact that the exact process or software interface is different for each type of vehicle is irrelevant where the same type of data is sought *and acquired* in each instance. Both Morgan and Restori emphasized that it is not a matter of whether the process extracts incorrect data from the infotainment system but rather whether the process is successful in getting the data at all. (*See* R. pp. 93–94, 109, 122–124). The Berla process merely reads data already stored on the infotainment device's memory and then converts it into a readable format for law enforcement.

Next, Morgan and Restori both testified to various quality control measures to ensure data integrity. First, only qualified users are allowed to use the software, with Morgan in particular testifying to having to use a specific "key" to gain access to the software generally and to gain

access to specific data dumps—suggesting the software is likely protected from outside, malicious influence. (*See* R. pp. 84, 88–98, 280). Second, once data is downloaded and converted into a readable format, users like Morgan or Restori cannot make any changes or manipulations, with the exception of creating a "parse" report that merely limits what data is viewed based on a specific timeframe. Relatedly, Berla's IVI software cannot manipulate or change any data stored on the infotainment device's memory—it merely reads it and transmits it to the user's laptop. (R. pp. 87–88, 110, 258, 270, 288).

Finally, the record thoroughly supports a finding that the Berla data extraction process comports with generally recognized scientific/technical laws and procedures. As discussed previously, the process is continually updated and maintained with the help of law enforcement agencies who use Berla's product. Though Morgan nor Restori could identify any issues with the process they had dealt with themselves, it is clear that such a problem would be reported to Berla and rectified in order to improve and maintain their product. Further, the limited nature of the extraction process lends itself to a finding that Berla's process follows standard technical laws and procedures. Their product simply reads pre-existing data, extracts it, and converts it into a readable format, very similar to Cellebrite's process of dumping the contents of a cell phone. In the absence of a direct challenge to how the manufacturer of a specific infotainment system reads and stores data, it is hard to argue that Berla's process does not comport with industry standards. Restori emphasized he could do the same data extraction as many times as he wants and it would produce the same data every time. That is reliability. *See Franks*, 432 S.C. at 76–77, 849 S.E.2d at 590 (trial court did not abuse discretion in finding substance of call records/CSLI expert testimony reliable).

Appellant's speculative arguments that Berla's process may be subject to unspecified malicious attack from unknown third parties fail to refute the soundness of the process—especially

when considering the other evidence of data integrity before the trial court. As to error rate, although not a specifically required factor to consider under *Council* and similar cases, both Morgan and Restori testified that they were not aware of any issues with the process here. Restori himself specifically told the trial court he was not aware of any error rate when directly questioned. (R. p. 124). While not the same as explicitly testifying as to a known error rate in terms of percentage or a direct number as a DNA scientist may testify to regarding a DNA analytical process, the answer given by both is about as far as any user of this technology could reasonably testify given the focused and technically limited nature of the Berla data extraction process. The mere fact that a technician or engineer from Berla could have testified to a possible error rate is irrelevant when the testimony by Morgan and Restori demonstrated to the trial court that in the vast majority of cases, the Berla process works and produces reliable evidence.

Accordingly, when considering all the relevant evidence as to each of the factors announced in *Council*, the trial court did not abuse its discretion in finding that the Berla data extraction process produced reliable and probative evidence. In finding so, the trial court also correctly recognized that the reliability of the data extraction process here was established through corroborating evidence outside of testimony regarding the process itself—especially with respect to location data—showing the movements of Appellant's vehicle to and from Pennsylvania in the proximity of Victim's death. To the extent Appellant argues that any expert testimony that relies on proprietary or secret source code should be deemed inherently unreliable, Respondent contends such an approach would grossly exceed the bounds of the tests established by our courts in assessing expert testimony. Not only are the central premises of the argument flawed, but the argument also seeks to strip trial courts of the discretion our supreme court has continually and consistently entrusted them with in the admission of evidence, expert testimony or any other

evidence for that matter. Accepting such an argument would displace the law of evidence and the deference entrusted to the trial court.

Furthermore, Appellant cannot show prejudice from the admission of said location data given the other overwhelming evidence of his guilt, including but not limited to (1) an intact fingerprint on the back door of Victim's house (the same door that was broken into), (2) threatening text messages sent to Victim from a phone used by Appellant (confirmed from law enforcement's interaction with Grandfather and Appellant), (3) suggestions of prior difficulty between Victim and Appellant (as testified to by one of Victim's friends and suggested by Victim's carrying of Appellant's unborn child while dating or co-parenting with another man), (4) Appellant initially claiming to law enforcement that he was never in Marion County but later changing his story, and (5) other evidence corroborating Appellant's movements in his vehicle such as the camera footage in Lake View showing Appellant driving towards Mullins and camera/ALPR footage showing Appellant's general course of travel from Pennsylvania to South Carolina on October 25th. Appellant makes no mention of these other major pieces of evidence in his brief.

Accordingly, any error in admitting the location data from the infotainment system in Appellant's vehicle would be harmless beyond a reasonable doubt. This Court should affirm.

II. The State agrees the trial court erred in sentencing Appellant to an additional five-year sentence under S.C. Code Ann. § 16-23-490.

Appellant argues that the trial court erred by imposing a five-year sentence under S.C. Code Ann. § 16-23-490 when Appellant was also sentenced to life imprisonment for murder. The State agrees. Under Section (A) of the statute, the "five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime."

There was no objection to the sentence, and the trial court had no opportunity to consider its error. (*See* R. p. 355). Under standard preservations rules, this would normally bar an issue from appellate review. *See, e.g., State v. Carmack*, 388 S.C. 190, 200, 694 S.E.2d 224, 229 (Ct. App. 2010) (citing *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003)). However, in *State v. Plumer*, 439 S.C. 346, 887 S.E.2d 134 (2023), our Supreme Court considered whether an objection was required to reach such an issue and reasoned that an objection was not required to address an illegal sentence. Our Supreme Court determined that an "appellate court *may* correct that sentence on direct appeal *or remand* the issue to the trial court even if the defendant did not object to the sentence at trial[.]" *Id.* at 351, 887 S.E.2d at 137. This is so "even if there is no real threat of incarceration beyond the limits of a legal sentence," which had been a condition precedent in prior cases to reach an unpreserved sentencing issue. *Id.* Consequently, the manner of treatment to effect correction of the sentence is in this Court's discretion.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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