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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Patrick C. Fant, Circuit Court Judge

Lower Court Case No. 2024-GS-23-05734

The State, Respondent,

v.

Travis Lee Douglass, Appellant.

Appellate Case No. 2024-001965

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial judge erred in finding that the search warrants of Mr. Douglass' phone and Verizon records were not overbroad where those search warrants placed zero limitations on the data sought and as a result of the search warrants law enforcement obtained the entirety of the contents on Mr. Douglass' cell phone and the entirety of his Verizon cell phone records?
2. Whether the trial judge erred in allowing expert testimony that Mr. Douglass' cell phone was physically present at the location of the shooting where that testimony was based on a geolocation artifact obtained from Mr. Douglass' cell phone which was unreliable?
3. Whether the trial judge erred in allowing the introduction of Mr. Douglass' statements that he made while in custody and without receiving his *Miranda* warnings?
4. Whether the trial judge erred in admitting body-worn camera footage which showed first responders administering aid to Mr. Baum who was in severe distress from a gunshot wound to his chest where any probative value was substantially outweighed by the danger of unfair prejudice?
5. Whether the trial judge erred in allowing the introduction of body-worn camera footage which showed Mr. Douglass being escorted in silence to an interview room where the footage was irrelevant and prejudicial by improperly suggesting that Mr. Douglass was interviewed and did not answer questions?

STATEMENT OF THE CASE

This is an appeal from a jury verdict finding Travis Douglass guilty of attempted murder and possession of a weapon during the commission of a violent crime.

Mr. Douglass was indicted by the Greenville County Grand Jury for attempted murder and possession of a weapon during the commission of a violent crime. His trial was held before the Honorable Patrick C. Fant, III and a jury from November 4 – 14, 2024. Mr. Douglass was represented by Jim Bannister and Matthew Kappel. The State was represented by Brian Moroney and Seth Johnson. (R. 24).

The jury found Mr. Douglass guilty as charged. (R. 1222, l. 11 – 17). The trial judge sentenced Mr. Douglass to twenty-five years for attempted murder and a consecutive five years on the possession of a weapon. (R. 1229, ll. 1 – 13).

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” *State v. Jenkins*, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (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. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009).

STATEMENT OF FACTS

Day of Shooting

On April 18, 2023, John Paul Baum was working as an attorney for Truluck Thomason Law Firm which was located at 3 Boyce Avenue. (R. 185, ll. 18 – 20). On the day of the shooting, he was working in his office in preparation for a trial. Sometime before seven o’clock, Mr. Baum left to go home. (R. 186, ll. 1 – 18). Mr. Baum walked to his car, put his trial binder in the back seat and then felt a “snap” and “a lot of pain.” (R. 187, ll. 1 – 10). He “felt blood,” ran back to his office door screaming for his boss, and called 911. (R. 187, l. 11 – 188, l. 2). Mr. Baum had been shot in the upper right chest with a .22 caliber bullet.

After Mr. Baum called 911, he called his wife and told her he loved her. In that moment, Mr. Baum believed he was going to die. Mr. Baum recalled that “[t]he cops were there, felt like we [were] there for ten seconds, then they threw me on a stretcher, put me in an ambulance, [and] brought me to the hospital.” (R. 188, ll. 18 – 21).

Officer Bowdoin with the Greenville Police Department arrived within seconds. (R. 168, ll. 6 – 21). Bowdoin went straight to Mr. Baum to render first aid. (R. 169, ll. 1 – 4). Bowdoin asked Mr. Baum if he knew of anyone who might want to hurt him and Mr. Baum gave the name “Donna Boyd.” Donna Boyd was a former client of Mr. Baum’s who had threatened him. (R. 169,

ll. 7 – 17). One of Mr. Baum’s colleagues, Devin Puriefoy, also suggested that Donna could be the shooter. (R. 181, l. 16 – 182, l. 17).

Mr. Baum told law enforcement officers while he was at the hospital that he “didn’t see anything.” (R. 201, l. 14 – 202, l. 3). However, Mr. Baum later recalled seeing an RV “going up the alleyway” behind the law firm immediately after the shooting. (R. 188, ll. 3 – 17). Mr. Baum also gave two other names of people he thought might have been involved in the shooting. Dan Collins and Dan Breland were two individuals that Mr. Baum was suing and the lawsuits were particularly contentious. (R. 215, l. 8 – 217, l. 8).

Lawsuit Against David Smith

David Smith was not initially on Mr. Baum’s radar as a person who might have been involved in the shooting. (R. 218, ll. 18 – 21). David Smith was a contractor who had built Truluck and Thomason’s law office. (R. 221, l. 17 – 222, l. 14). Mr. Baum’s firm later sued Smith for construction defects. Besides possibly drafting the complaint and some discovery requests, Mr. Baum did not have any involvement in the lawsuit. (R. 223, l. 17 – 224, l. 24). The primary lawyer involved in the lawsuit against Smith was Devin Puriefoy. (R. 225, ll. 8 – 24). Travis Douglass was completely unrelated to Mr. Baum’s law firm. (R. 226, ll. 1 – 11).

Devin Puriefoy testified Truluck and Thomason hired David Smith to build an office for them. (R. 494, l. 13 – 496, l. 5). After the build was completed and the firm moved into the new building, the lawyers began noticing problems. (R. 496, l. 3 – 497, l. 3). They sent a demand letter to Smith outlining the things they wanted fixed and his response was “[go] kick rocks.” (R. 497, ll. 4 – 13). The firm sued him. (R. 497, ll. 14 – 17). Puriefoy recalled the amount they were suing David Smith for was “north of seven figures.” R. 498, ll. 2 – 14).

The lawsuit against Smith was scheduled for trial on June 26, 2023. (R. 500, ll. 8 – 13). Puriefoy believed the lawsuit against Smith had the potential to put him out of business and jeopardize his personal assets. (R. 503, ll. 1 – 16).

Camper Van BOLO

Law enforcement interviewed two employees of adjacent law firms who both said they had seen a “camper van” parked in the parking lot on the day of the shooting. (R. 275, ll. 16 – 22; R. 287, l. 19 – 288, l. 5). The investigation then became focused on finding video of the camper van. (R. 295, ll. 5 – 17). Law enforcement obtained security video that showed a camper van leaving through an alleyway right after the shooting occurred. (R. 296, ll. 14 – 24).

The van had certain distinctive characteristics including an American flag sticker under the driver’s side mirror, damage to the driver’s side, and a metal rack on top. (R. 298, ll. 16 – 25). Law enforcement obtained surveillance video from several different locations which showed the van travelling in and around Greenville. (R. 300, ll. 16 – 23). The license plate on the van in the surveillance videos had been removed. (R. 296, ll. 14 – 18). Based on the surveillance video obtained of the camper van, law enforcement sent out a BOLO (be on the lookout) for the van to all Greenville City law enforcement officers. (R. 309, l. 10 – 310, l. 8).

Arrest and Search of Travis Douglass

On May 15, 2023, twenty-eight days after Mr. Baum was shot, Officer Tabitha Vergeils with the Greenville Police Department saw the camper van that was pictured in the BOLO. (R. 364, ll. 9 – 25). Officer Vergeils was transporting an arrestee to jail so she called other officers in the area for help. (R. 365, ll. 18 – 24). Officer Thomas Garbutt was in the area and stopped the van because it matched the BOLO and he believed he had “reasonable suspicion that this was involved in an attempted murder.” (R. 372, l. 9 – 373, l. 5).

Officer Jeffrey Nunez was also involved in stopping Mr. Douglass. Nunez told the jury that the stop was not routine but “high risk.” (R. 386, ll. 9 – 23). Mr. Douglass was ordered from the van at gunpoint, frisked by Officer Nunez, handcuffed, and placed in the back of Nunez’s patrol car. (R. 389, ll. 9 – 25; State’s Ex. 43). Law enforcement held Mr. Douglass in the back of Nunez’s patrol car until Detective Bixby arrived to question him about the attempted murder. When Bixby arrived, he questioned Mr. Douglass and learned that “no one else had been in control of the vehicle. No one else had been in the vehicle and no one else had the keys to the vehicle.” (R. 853, ll. 20 – 25). Mr. Douglass was arrested for a minor traffic violation and held in jail until law enforcement could obtain a warrant for the attempted murder. (R. 110, ll. 2 – 10).

Law enforcement searched Mr. Douglass’ van and found a cell phone, a GPS device, and a .22 caliber shell casing. (R. 444, ll. 8 – 16). They also discovered gunshot residue from the porthole window and the back of the driver’s seat. (R. 432, ll. 2 – 24). Law enforcement obtained a search warrant for the iPhone and discovered that it was registered to Mr. Douglass. (R. 445, ll. 10 – 19). A “full extraction” of the iPhone’s accessible data was completed after the warrant was obtained. (R. 695, ll. 1 – 3).

Matt Wilde with the FBI was qualified as an expert in “historical call detail record analysis and cellular technology.” (R. 744, ll. 3 – 13). Wilde reviewed the business records from the providers for Mr. Douglass’ and David Smith’s cell phones. (R. 746, ll. 11 – 16). The “data sessions” on Mr. Douglass’ phone showed the phone located at Mr. Douglass’ residence in Hilton Head for the entire day that the shooting took place. (R. 754, ll. 13 – 25). Wilde also reviewed the data extraction report which came from Mr. Douglass’ iPhone. Wilde claimed that a “location point” from the extraction of Mr. Douglass’ iPhone showed the phone located near 1311 Altamont

Road—Mr. Smith’s residence—from 1:13 pm until 3:09 pm, (R. 755, ll. 7 – 12), and at 3 Boyce Avenue between 3:56 pm and 6:56 pm, (R. 755, l. 25 – 756, l. 3).

Wilde testified that there were five “vehicle parked events” on the day of the shooting that came from the Douglass iPhone extraction. None of these “vehicle parked events” corresponded to the incident location. (R. 817, ll. 9 – 23). Wilde said this was “weird,” since it was inconsistent with the State’s theory that the van was parked at the incident location with Douglass inside for hours. (R. 820, l. 23 – 821, l. 14).

James Bass was qualified as an expert in digital forensics and testified for the defense. (R. 1072, ll. 8 – 11). Bass explained that Douglass’ iPhone extraction showed several google searches during the time frame he was allegedly parked at 3 Boyce Avenue. However, the “geofence”¹ that law enforcement did for that time frame around the incident location did not show Mr. Douglass’ iPhone present. Bass testified Mr. Douglass’ iPhone search should have appeared within that geofence if it was present. (R. 1096, ll. 1 – 14; R. 1099, l. 24 – 1099, l. 11). Bass also would have expected to see a “parked event” in the Douglass’ iPhone extraction at 3 Boyce Avenue if the iPhone had been present for several hours as the State claimed. (R. 1107, ll. 9 – 23).

Zero firearms were located in the search of Mr. Douglass’ home in Hilton Head. (R. 674, ll. 14 – 18). And while there was some firearm ammunition found at Mr. Douglass’ home, none of it was .22 caliber ammunition. (R. 677, ll. 2 – 4).

¹ Geofencing enables Google to search a particular area at a particular time to determine if any cell phones during that area were accessing google applications. (R. 814, l. 2 – 816, l. 3).

David Smith

Mr. Douglass' ex-wife told law enforcement that Mr. Douglass was close friends with David Smith, the contractor being sued by Mr. Baum's law firm. (R. 450, l. 22 – 451, l. 17). On May 17, 2023, law enforcement executed a search warrant at Smith's house. In that search, two .22 caliber guns were seized along with thousands of rounds of .22 ammunition, and a laptop. (R. 330, ll. 10 – 25). When law enforcement arrived to Smith's house, they learned that he had killed himself by driving his car into a tree. (R. 451, l. 18 – 452, l. 1; R. 951, ll. 2 – 11).

Law enforcement later compared the shell casing found in Mr. Douglass' van and the bullet that was recovered from Mr. Baum to the .22 rifle that was recovered from Mr. Smith's house. They were unable to conclusively match or exclude the rifle from the shell casing due to the lack of markings present. The firearms examiner noted that it was difficult to make a comparison because she only had one shell casing and one bullet to compare. (R. 607, ll. 12 – 25). DNA swabs were taken from the .22 caliber rifle that could not be excluded as the offending firearm. Mr. Douglass was excluded as a contributor to the DNA that was taken from the swabs of the rifle, (R. 638, l. 25 – 639, l. 24), and from the fingerprints taken from the rifle, (R. 649, l. 10 – 21).

Law enforcement also searched David Smith's phone and found several alarming google searches. Specifically, there were multiple searches for Devin Puriefoy prior to the shooting. (R. 862, ll. 10 – 19). There were also searches for "silencer design," "22 bullet dimensions," "PVC pipe dimensions," searches for Mr. Puriefoy's address and searches for the Law Office of Truluck Thomason. (R. 863, ll. 5 – 13). Other searches on Smith's phone included "stopping power of .22 caliber," and "gel test 22." (R. 863, l. 22 – 864, l. 2). Furthermore, there was a search on Smith's phone about how to change the name on a deed of a house owned by a married couple, (R. 864, ll. 11 – 23), and the day after Mr. Douglass was arrested, there were searches for how to delete Ring

account records, (R. 865, ll. 1 – 13). Smith had Ring video cameras on his front door and over his garage which were operating on the date of the incident. (R. 590, ll. 4 – 16).

Julie Eldridge was Smith's wife. (R. 516, ll. 15 – 16). On the day of the shooting, Eldridge was expecting Mr. Douglass to be at her house because Mr. Douglass and Smith were supposed to go look at houses for Mr. Douglass. (R. 518, l. 19 – 519, l. 13). Eldridge said that because Mr. Douglass was not there, she and David went out to dinner at Chicora Alley in Traveler's Rest. (R. 519, ll. 14 – 23). Eldridge said they finished eating at Chicora Alley at around 6:25 pm and went home. (R. 521, l. 18 – 522, l. 4).

On the day that Mr. Douglass was arrested, Eldridge said that Mr. Douglass was again supposed to be at her house. (R. 522, ll. 5 – 17). She said that Smith called her around 4:00 pm worried because Mr. Douglass had not yet arrived and Smith couldn't get in touch with him. (R. 522, ll. 18 – 25). Eldridge later discovered that Mr. Douglass had been arrested. (R. 524, ll. 1 – 12). Two days after Mr. Douglass was arrested, David died in the car crash. Eldridge found out about David's death at around 10:00 am, and just a "couple hours later," approximately thirty law enforcement officers arrived at her house with a search warrant. (R. 529, l. 6 – 530, l. 4).

Eldridge had three different interviews with law enforcement: May 17, October 18, and November 1. (R. 538, ll. 9 – 21). Eldridge testified that she was led to believe that law enforcement thought Mr. Douglass was the person who shot Mr. Baum and that Smith was involved. (R. 544, ll. 15 – 24). Eldridge did not think that Mr. Douglass and Smith spoke after Mr. Douglass was arrested. (R. 550, ll. 4 – 11). However, Eldridge claimed that Smith told her that "Travis did something stupid," and that "Travis shot [Mr. Baum]." (R. 551, l. 21 – 552, l. 7).

Eldridge knew of the lawsuit between Truluck and Thomason and David. She also knew that Smith was "financially wrecked" by a different lawsuit some twenty years ago which led to the

ending of his first marriage. (R. 564, ll. 12 – 20). Eldridge also acknowledged that Mr. Baum was potentially going to sue Smith's estate. (R. 569, ll. 1 – 11). Smith transferred his interest in the marital home to Eldridge the day before he died. (R. 577, l. 18 – 578, l. 5).

Civil Lawsuit Against Travis Douglass

After Mr. Douglass' arrest and prior to his trial, Mr. Baum filed a civil lawsuit against Mr. Douglass. (R. 231, l. 11 – 232, l. 3; R. 1839). Mr. Baum attempted to obtain a warrant of attachment on Mr. Douglass' home in Hilton Head to prevent him from selling it, but that request was denied twice by the circuit court. (R. 234, l. 1 – 235, l. 14). Mr. Baum later dismissed the lawsuit without prejudice. (R. 236, ll. 7 – 19). Mr. Baum testified that he was not interested in Mr. Douglass' money: "we don't care about his money. My wife's a doctor, I'm a lawyer. I grew up a blue collar kid. I've been poor, screw his money, I don't need his money. That's why we made the decision to drop all of this and just go." (R. 236, l. 21 – 237, l. 2).

Approximately one year after dismissing the lawsuit without prejudice, Mr. Baum's lawyers sent a letter to Mr. Douglass asking for \$75,000. (R. 238, l. 21 – 239, l. 14). Mr. Baum acknowledged that because the lawsuit was dismissed without prejudice, and because he did want money from Mr. Douglass, that the lawsuit against Mr. Douglass still potentially exists. In fact, Mr. Baum did re-file his lawsuit against Mr. Douglass after his conviction. *Baum v. Douglass, et al.*, CA No. 2024-CP-23-07005 (13th Judicial Circuit Ct. of Common Pleas).

ARGUMENT

1. The trial judge erred in finding that the search warrants of Mr. Douglass' phone and Verizon records were not overbroad because those search warrants placed zero limitations on the data sought and as a result of the search warrants law enforcement obtained the entirety of the contents on Mr. Douglass' cell phone and the entirety of his Verizon cell phone records.

Relevant Facts

Mr. Douglass moved to suppress the information extracted from his iPhone on the grounds that the warrant was overbroad. (Def. Mot. to Suppress Cell Phone Searches). Counsel for Mr. Douglass cited to *Riley v. California*, 573 US 373 (2014), the Fourth Amendment to the United States Constitution, and Article I, Section 10 of the South Carolina Constitution.

At the pretrial hearing regarding the motion to suppress, Counsel for Mr. Douglass pointed out that the language in the search warrants for Mr. Douglass' phone and phone records was "completely unlimited as to what law enforcement had the authority to go in, look at and search." (R. 63, ll. 1 – 14). Counsel pointed to *Riley* which noted that the privacy interest in the contents of a cell phone is even greater than that of a home because the information contained in a cell phone far exceeds the information inside a person's home. (R. 63, ll. 15 – 23).

Counsel argued that "there simply isn't a broader warrant that you could issue" which seeks to seize "every single thing that they can physically access off the phone." (R. 64, ll. 1 – 8). The program law enforcement used to search Mr. Douglass' phone has the capability to perform a limited search which would enable law enforcement to conduct a more focused search of a phone instead of obtaining a general warrant. (R. 64, l. 9 – 65, l. 4). Counsel also pointed out there were 56 gigabytes of data pulled from Mr. Douglass' phone and that most of that data was irrelevant to the investigation. (R. 72, ll. 1 – 7).

In response, the State argued that "officers are not to be limited to some date range or time on a violent crime when they have no idea when the motive was formulated" and that "a full

extraction is what's necessary.” (R. 69, ll. 10 – 20). The State argued that the officers acted in good faith which should prevent the exclusion of the evidence obtained because of the search. (R. 73, ll. 16 – 23). The judge found that the search warrants “were sufficiently particular and supported by probable cause” and denied the motion to suppress. (R. 75, ll. 4 – 13).

The search warrant of Mr. Douglass’ phone gave the following “description of property” sought to be seized:

All digital data that can be forensically retrieved from the device including but not limited to:

Call logs, including incoming, outgoing and missed calls, Phonebook and contacts to include phone numbers, and e-mail address. SMS/MMS messages and attached multimedia files, to include incoming and outgoing. E-mails to include incoming and outgoing. Pictures, Videos, Audio files and all ExIF information to include geotagging information. Secondary phone number accounts such as Skype, Line 2 and other applications that can assign a second roaming phone number. WiFi network information, to include SSID and GPS information of the network including GPS directions. Calendar information, including sync’ed calendars, internet history and usage to including websites visited, search terms and Cookies, Any account information, settings, and save usage information for any and all installed applications, also known as “apps” on the device.

(R. 1230). The search warrant for Mr. Douglass’ Verizon records gave the following “description of property” sought to be seized:

All customer/subscriber information, including any listed addresses, telephone numbers, social security numbers, dates of birth, names, addresses, any other customer identifying information, mobile handset or device identifiers/serial numbers (MEID, ESN, IMSI, IMEI), activation date and deactivation date, and location device was purchased if applicable.

Device Purchase Information. This is specifically to include the Date, Time and Location of where the device or any pre-paid refill cards were purchased.

Any email addresses associated with the account. This is to

specifically include Google Gmail addresses associated with any Android device associated with this device or any email associated with an iPhone and/or iTunes account associated with this device that is currently on file and stored in the normal course of business of Verizon; Attn: VSAT.

Call detail records, including detailed information in reference to all known outgoing and incoming calls associated with the account, dates and times calls were made, and duration of all calls made or received. This is to include any other pertinent call detail records including special features codes, or any other codes that are maintained in the normal course of business for Verizon; Attn: VSAT, of any Verizon; Attn: VSAT cellular numbers identified in the course of the investigation. In addition to voice calls, this would also include any detail records showing text messages, MMS messages, or data activity.

In the event the requested Call Detail Records contain other Verizon; Attn: VSAT customer numbers, identified as either incoming or outgoing calls, Verizon; Attn: VSAT will provide subscriber information to the specific numbers identified, if requested.

Cell site information, to include all known cell towers associated with outgoing and incoming calls (Call Detail Records). This information is to include any sector information, if known, cell site location, and any other related material that would be necessary to identify the location and sector in reference to the cell site information associated with the call detail records. In the event text messages, MMS messages, LTE and Data activity including IP session and destination addresses that were produced are also available with cell site information, this information would be included in this request.

Cell Site locations for all Verizon; Attn: VSAT Cell Sites, sector information, including Azimuth headings, in the regional market associated with the requested cell site information.

Trap and trace device, means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication.

Pen Register, means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic

communication is transmitted, provided, however, that)> such information shall not include the contents of any communication.

Location information, to include any estimated or known Longitude and Latitude of the cellular device's current location, or approximate location, information received by cell tower(s) in reference to direction and distance from the tower a device may be located (timing and triangulation information). Radio Frequency signal strengths, direction, and transmission information. The geographical constraints of location information be limited to the United States.

Location information can be in the form of historical records. Specific to Verizon; Attn: VSAT, this would include any reports of device activity that would include the approximate latitude and longitude of the device at the time of the activity, direction and distance from the tower, and other location related information commonly referred to as an RTT(Round Trip Timing), EVDO, ALULTE, and Levdot report. This further includes any other report similar in nature.

For real-time location information this would include the E-911 automated email system, providing emails to the affiant every 15 minutes with the estimated latitude and longitude of the device.

All text message and/or MMS messages, including message content, currently stored in the normal course of business for Verizon; (emphasis added) Attn: VSAT, to include any cloud services which allow for the long term storage of both voicemails and SMS/MMS messages.

Cloud Data, any content that may have been backed up to Cloud Storage for the listed dates/times. If said Cloud Storage has been provided by a third-party provider, please provide relevant contact information for that provider.

(R. 1242 – 1244).

The evidence from Mr. Douglass' cell phone and records included geolocation artifacts that allegedly placed his phone at the incident location on the date of the crime. It also included a video of Mr. Douglass walking on the beach which was compared to the video from 3 Boyce Avenue showing a person walking through the parking lot. (R. 897, l. 21 – 898, l. 13).

Discussion

The language used to describe the parameters for the search of Mr. Douglass' cell phone and cell phone records were couched in terms to make the request as broad as the English language would permit. The terms of the search warrants were not restricted by any applicable date, times, subject matter, recipient, or key words. The warrants were also not restricted to any specific sources of data. These search warrants were unconstitutional general warrants and the trial judge erred by not suppressing the evidence that was seized pursuant to these general warrants.

The United States and South Carolina Constitutions both provide protections to those whose property is subject to an investigatory police search. The Fourth Amendment to the United States Constitution contains the following protections:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const, amend. IV.

Article I, Section 10 of the South Carolina Constitution provides a broader protection, including protection against “unreasonable invasions of privacy”:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

Both constitutions require that a warrant be supported by probable cause and describe the places and things to be searched with specificity. *See also* S.C. Code § 17-13-140 (providing that warrants must specify the property to be searched).

In South Carolina, “[t]he magistrate’s task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, . . . there is a fair probability that contraband or evidence of a crime will be found in the *particular place* to be searched.” *State v. Dupree*, 354 S.C. 676, 685, 583 S.E.2d 437, 442 (Ct. App. 2003) (emphasis added). This particularity requirement constrains law enforcement by “prevent[ing] the seizure of one thing under a warrant describing another,” *Marron v. United States*, 275 U.S. 192, 196 (1927), and avoids the issuance of search warrants “on loose, vague[,] or doubtful bases of fact,” *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). With a properly particularized warrant, it is the issuing judge who decides “what is to be taken,” and “nothing is left to the discretion of the officer executing [it],” making “general searches . . . impossible.” *Marron*, 275 U.S. at 196.

A search warrant that lacks particularity is a general warrant. The Supreme Court has observed that “[g]eneral warrants, of course, are prohibited by the Fourth Amendment.” *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). The Supreme Court has described general warrants as an “evil . . . abhorred by the colonists.” *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The *Coolidge* Court noted that what makes the general warrant evil is “not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings.” *Id.* The Fourth Amendment avoids this evil by “requiring a ‘particular description’ of the things to be seized. *Id.*”

In *Riley v. California*, the Supreme Court considered whether a cell phone could be searched incident to arrest without a search warrant and ultimately concluded that it cannot. 573 US 373 (2014). The *Riley* Court held that a smartphone is entitled to the constitutional protections guaranteed by the requirements of a search warrant. *Id.* at 386. In reaching this conclusion, the *Riley* Court highlighted why government searches of smartphones are so intrusive. A smartphone

search “typically expose[s] to the government far more than the most exhaustive search of a house,” including “a broad array of private information never found in a home in any form.” *Id.* at 396-97. Smartphones are “a pervasive and insistent part of daily life” and “an important feature of human anatomy.” *Id.* at 385. They “collect[] in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record.” *Id.* at 394. Smartphone searches “implicate privacy concerns far beyond those implicated” by other searches. *Id.* “A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form.” *Id.* at 396-97.

Four years after *Riley*, the Supreme Court decided *Carpenter v. United States*, 585 U.S. 296 (2018). *Carpenter* expanded the protections against government searches, not just of the cell phone itself, but the cell phone records as well. *Id.* at 300. The Supreme Court rejected the Government’s contention that an individual had no reasonable expectation of privacy in their cell phone records because those records were held by a third party. *Id.* at 309. The *Carpenter* Court said: “The Government’s position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years.” *Id.* at 313.

The *Carpenter* Court also highlighted the ubiquity of cell phones and the vast amount of personal information contained on both the physical phone and in the phone records. “[T]he time-stamped [cell phone] data provides an intimate window into a person’s life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations.” *Id.* at 311 (internal quotations omitted). *See also United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009) (noting that the particularity requirement for search warrants is

especially important in the digital context because of a computer's ability to "store and intermingle a huge array of one's personal papers in a single place" which "increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs").

A faithful application of the Supreme Court's reasoning in *Riley* and *Carpenter* leads to the inescapable conclusion that a search warrant for data on a cell phone must be particular in the information being searched for. General warrants like the ones in this case are far too overbroad to withstand constitutional scrutiny. It is not enough for police to show there is probable cause to arrest the owner or user of the cell phone, or even to establish probable cause to believe the phone may contain evidence of a crime. To comply with the Fourth Amendment to the United States Constitution, Article I, Section 10 of the South Carolina Constitution, and *Riley* and *Carpenter*, a search warrant for a cell phone must specify the particular data sought within the phone.

At least two appellate courts have invalidated search warrants which sought to search the entire contents of a cell phone. In *Taylor v. State*, 260 A.3d 602, 604 (Del. 2021), the Supreme Court of Delaware held that a search warrant of a defendant's cell phone that was "[u]nlimited in time and scope" constituted a general warrant that violated the Fourth Amendment. Accordingly, the *Taylor* Court held that the evidence seized pursuant to the search warrant had to be suppressed.

In *Taylor*, a defendant was suspected of murder, robbery, and firearm-related offenses in connection with a gang killing. The search warrant allowed investigators to search "any/all data stored by whatever means . . . of said cellular telephone, to include but not limited to registry entries, pictures, photographs, images, audio/visual recordings, multi-media messages, web browsing activities, electronic documents, location information . . . and any other information/data pertinent to this investigation within said scope." *Id.* at 609.

The Delaware Supreme Court held that this warrant did not meet the particularity requirement because it “authorized a top-to-bottom search of any and all stored data of the digital contents of the devices” and “used the open-ended language including but not limited to describe the places to be searched.” *Id.* at 615 (internal quotations and alterations omitted). The *Taylor* Court concluded that the warrant “allowed investigators to conduct an unconstitutional rummaging through all of the contents of Taylor’s smartphones to find whatever they decided might be of interest to their investigation.” *Id.* See also *United States v. Rosa*, 626 F.3d 56, 64 (2d Cir. 2010) (holding search warrant for a house which authorized unlimited search of “computer equipment” and “electronic digital storage media” found within the house was unconstitutionally overbroad).

The District of Columbia Court of Appeals also reversed a conviction that was obtained by evidence seized pursuant to an overbroad search warrant of a smartphone. In *Burns v. United States*, 235 A.3d 758, 771 (D.C. 2020), the defendant was accused of murdering his best friend and partner in a drug distribution operation. Upon seizing Burns’ phones, law enforcement sought to find text messages between Burns and the deceased on a particular date and time. Law enforcement also requested GPS to establish Burns whereabouts at the time of the shooting.

In *Burns*, the D.C. Court of Appeals determined that there was not probable cause to have an open-ended comprehensive search of the entire contents of Burns’ phones. The Court relied on *Riley* in noting that “[t]he privacy interests underlying these fundamental Fourth Amendment principles [including the particularity requirement] may be at their most compelling when police wish to search the contents of a modern smartphone.” *Id.* at 772-73. The Court found that, in order to comply with the particularity requirement, “the warrant must specify the particular items of evidence to be searched for and seized from the phone and be strictly limited to the time period and information or other data for which probable cause has been properly established.” *Id.* at 773.

The *Burns* Court concluded that the search warrants were invalid because they were not particularized. *Id.* at 774. The Court acknowledged that law enforcement had probable cause to search for text messages between the defendant and victim, phone calls between the defendant and a witness, and location data for the day of the crime and the day after. *Id.* However, probable cause for these discrete pieces of data did not justify a search of the entire phone. The warrant did not specify these categories of evidence but instead authorized the seizure of everything on the phones. *Id.* Furthermore, like the search warrant in this case, the warrants in *Burns* “imposed no meaningful limitations as to how far back in time police could go or what applications they could review and, instead, endorsed the broadest possible search without regard to the facts of the case or the limited showings of probable cause set forth in the affidavits.” *Id.* at 774-75.

In this case, law enforcement got exactly what they asked for in the search warrants—the entirety of the contents on Mr. Douglass’ phone and the entirety of his cell phone records. In terms of computer data, a “bit” is the smallest unit of data that a computer can process and store. A data “bit” is one of two physical states, usually a 0 or a 1. The breadth of the request and the data acquired from these two search warrants included every single “bit” of data available on Mr. Douglass’ cell phone and every single “bit” of data from Verizon’s records. A “byte” is 8x a bit. A kilobyte is one thousand bytes. A megabyte is one million bytes. A gigabyte is one billion bytes.

The cell phone extraction of Mr. Douglass’ phone contained roughly fifty-six gigabytes of data or *four-hundred-and-forty-eight billion bits* of Mr. Douglass’ personal and constitutionally-protected private data. There was not a single “bit” of data on Mr. Douglass’ phone that law enforcement did not extract. The Verizon response also included roughly fifty-six gigabytes of data. There was not a single Verizon source of data that was not requested by the search warrant.

The search warrant in this case could not have been broader or more general. In light of the Supreme Court’s acknowledgment in *Riley* and *Carpenter* of the enormous amount of personal and private information on a cell phone, this Court should hold that a search warrant must specify with particularity what on the phone is being sought and why law enforcement has probable cause to seek that specific data. A search warrant that seeks to obtain the entirety of the contents of a cell phone and the entirety of the cell phone records simply because the phone is in the possession of someone who is suspected of being involved in a crime does not satisfy the particularity requirement. Such a warrant is exactly the kind of general warrant which authorizes the rummaging through an individual’s personal information. This Court should reverse the trial judge’s ruling and remand with instructions to suppress the evidence seized from Mr. Douglass’ phone.

Good Faith

The exclusionary rule generally does not apply “when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.” *United States v. Leon*, 468 U.S. 897, 920 (1984). However, the good faith exception does not apply where a search warrant is “facially deficient” due to its “fail[ure] to particularize the place to be searched or the things to be seized.” *Id.* at 923. In such a case, “the executing officers cannot reasonably presume [the search warrant] to be valid.” *Id.*

Cellebrite, the program that law enforcement used to search Mr. Douglass’ phone, offers specific narrowly tailored search functionality that can dramatically limit what law enforcement may review. Cellebrite has the capability to limit what a law enforcement officer may review by date, time, location, source or data field. (R. 699, ll. 2 – 11). When law enforcement chooses to state with particularity and specificity what it is looking for, it can easily comply with these restrictions with Cellebrite. (R. 71, ll. 11 – 19).

The officers who obtained and executed the search warrant of Mr. Douglass' phone and phone records had the technological capacity to limit the search to dates, times, types of files, and key words. (R. 64, ll. 8 – 14). However, the search warrant did not state with particularity the things they were searching for but instead simply sought every piece of information on the phone. Accordingly, the good faith exception does not apply and the evidence seized from Mr. Douglass' phone and phone records should be suppressed. *See Burns*, 235 A.3d at 779 (finding good faith did not apply where search warrants were issued more than a year after *Riley* and that “any reasonably well-trained police officer with a reasonable knowledge of what the Fourth Amendment prohibits would have known they were invalid” given the sheer breadth of information sought in the warrant).

2. The trial judge erred in allowing expert testimony that Mr. Douglass' cell phone was physically present at the location of the shooting because that testimony was based on a geolocation artifact obtained from Mr. Douglass' cell phone which was unreliable.

Relevant Facts

The trial judge held a pretrial hearing to determine the admissibility of the State's cell phone expert's testimony. The proffered expert, Matthew Wilde, was “supervisory special agent with the FBI.” (R. 25, ll. 22 – 24). Wilde had taken courses on GrayKey and Cellebrite, two common tools used to unlock, extract, and interpret raw data from cell phones. (R. 28, l. 22 – 29, l. 9). Wilde testified that in his review of the “Cellebrite extraction from Mr. Douglass' iPhone,” he determined that on the day of the shooting, Mr. Douglass' phone was “in the area of Altamont Road in the early afternoon [and] in the area of 3 Boyce Avenue . . . from about 3:00 until . . . about 6:56.” (R. 31, ll. 1 – 7). The Altamont Road location is near David Smith's residence and 3 Boyce Avenue was the incident location. (R. 40, l. 19 – 41, l. 2).

Wilde admitted that he did not preform the extraction of Mr. Douglass' cell phone but that he believed both GrayKey and Cellebrite were used. (R. 36, ll. 16 – 19). Wilde said that he believed GrayKey was reliable based on his personal experience in using it but that he did not have any knowledge of any peer-reviewed research which indicated that it was reliable or accurate. (R. 37, ll. 5 – 25). Wilde explained how he analyzed Mr. Douglass' phone: "I used Cellebrite physical analyzer. So I take those files from GrayKey, put them into Cellebrite and Cellebrite would churn through the data and generate a report." (R. 38, ll. 8 – 14). The report generated by Cellebrite comes from the raw data of the GrayKey iPhone extraction.

Wilde also admitted that he did not look at the raw data from the phone to compare it to the Cellebrite report. (R. 39, l. 23, p. 95, l. 5). Wilde testified that the geolocation artifacts on a cell phone, and specifically an iPhone like Mr. Douglass', are acquired through the iOS software of the iPhone and can come from many different sources which might include GPS, Bluetooth, WiFi, and cellular data. (R. 42, ll. 17 – 25). Wilde admitted that he did not know the source of the geolocation artifacts that provided the data for the Altamont Road and 3 Boyce Avenue locations because "the Cellebrite records don't provide me that level of information." (R. 44, ll. 10 – 16). Wilde also couldn't say how often the location points were being logged or how many location data points were logged within a given time period. (R. 44, ll. 17 – 22). Wilde had no information about how the iOS Apple software decides to retain a geolocation artifact.

Counsel for Mr. Douglass objected to Wilde's testimony, particularly geolocation artifacts, on the grounds that the underlying science used to form his opinions was unreliable. The testimony regarding the geolocation artifacts which purportedly placed Mr. Douglass' phone at David Smith's house and at the incident location on the day of the shooting were particularly problematic. The methodology used to discovery those points was unknown, the manner in which the software

acquires the data was unknown, and the source of the data points on the phone was unknown. Further, there has been no peer-reviewed verification that geolocation artifacts acquired by the iOS Apple software are reliable. Nor is there any known margin of error. (R. 58, ll. 8 – 18). The geolocation artifacts were derived from software and algorithms which were unknown to Wilde, lacked peer-reviewed verification, and therefore, formed an unreliable basis for Wilde’s opinion. (R. 59, l. 1 – 60, l. 1). The trial judge found the testimony reliable. (R. 60, l. 4 – 19).

Mr. Douglass presented James Bass as a witness who was qualified as an expert in digital forensics to explain to the jury the unreliability of the science used by Wilde. (R. 1072, ll. 8 – 11). Bass explained that Apple has proprietary software that is used to create and store geolocation information on their cell phones. (R. 1081, l. 4 – 1082, l. 8). Importantly, the reason Apple tracks information on a user’s cell phone is not for law enforcement purposes but rather advertising purposes: “They’re harvesting your information to target ads for traffic routing, for shopping. They are going to harvest as much information about the customer to turn into money.” (R. 1082, ll. 9 – 19). In doing this, Apple creates a kind of profile of the cell phone user to track their likes and dislikes and areas they visit or might visit. (R. 1082, ll. 20 – 23).

Apple’s operating system, iOS, takes geolocation information from a variety of different sources like phone calls, Bluetooth, WiFi, and data, and stores it in a “complicated text file and a sequel-like database” that resembles a “big Excel spreadsheet.” (R. 1083, ll. 11 – 23). Bass explained that it is unknown exactly how iOS’ process for collecting geolocation data works. (R. 1083, l. 24 – 1084, l. 25).

Bass also testified about Cellebrite as a forensic examination tool. Bass explained that the report generated by Cellebrite when it analyzes data from a cell phone is very different from the raw data from the phone itself. (R. 1086, ll. 3 – 9). Bass further explained that the report generated

from Cellebrite is not always reliable so that it is critical to compare the report from Cellebrite with the raw data from the phone. (R. 1086, l. 10 – 1087, l. 12).

Bass compared the geolocation point from Cellebrite which purported to show Mr. Douglass' phone at 3 Boyce Avenue on the day of the shooting with the underlying raw data. (R. 1087, ll. 15 – 20). The raw data includes a table called the “learned locations of interest.” (R. 1089, l. 13, p. 1215, l. 1). That table includes a column which shows the number of times the phone has been at a particular location. For 3 Boyce Avenue, the raw data from Mr. Douglass' phone showed that the phone had never been to that location—in the “data point count” column, the raw data showed a value of “0” for 3 Boyce Avenue. (R. 1090, l. 20 – 1091, l. 15). Another column on this table shows the “confidence” level for each location of interest. The confidence level for 3 Boyce Avenue was labeled as only 25% in the raw data. (R. 1091, l. 16 – 1092, l. 10). The raw location data related to David Smith's residence, the Altamont Road location, also showed a low level of confidence. The raw data there showed Mr. Douglass' phone having been at David Smith's residence 379 times but with a confidence level of only 31%. (R. 1093, ll. 10 – 21).

Another geolocation artifact from Mr. Douglass' iPhone extraction showed that he was at 3 Boyce Avenue at some point on the date that he was arrested. As with the previous 3 Boyce Avenue geolocation artifact, the number of times visited was zero and the confidence level was only 25%. (R. 1102, l. 4 – 1103, l. 21). Unlike the date of the incident, cell tower RTT data was available on the date of arrest. (R. 1857). All experts agreed that this data conclusively showed that Mr. Douglass was in Hilton Head at his home. This cell tower data also conclusively showed Mr. Douglass's travel from his home to the Greenville area and the arrest site. This cell tower data proved that Mr. Douglass was never at 3 Boyce Avenue on the date of arrest. The 3 Boyce Avenue geolocation artifact on the date of the arrest was wrong.

Discussion

As an initial inquiry, the Court must determine if the proposed testimony is technical or experiential. Rule 702, SCRE. Testimony is technical if it is of a scientific nature. Testimony is experiential if it is of a non-scientific nature. Scientific testimony is subjected to a 4-factor review to determine if the testimony is admissible. *State v. White*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009). In evaluating the admissibility of expert testimony under Rule 702, the trial judge must determine whether the expert's method is reliable and whether the substance of the expert's opinion is reliable. *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365 (Ct. App. 2020). The party offering the expert bears the burden of establishing both the expert's qualifications and the reliability of his methods and opinion. *White*, 382 S.C. at 273, 676 S.E.2d at 688.

In *State v. Council*, 335 S.C. 1 (1999), our Supreme Court set forth the four factors:

In considering the admissibility of scientific evidence under the Jones standard, the Court looks at several factors, including: (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.

Id. at 26-27 (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)).

South Carolina has addressed and allowed the admissibility of expert testimony regarding CSLI (Cell Site Location Information) in both *State v. Wallace*, 440 S.C. 537, 549, 892 S.E.2d 310, 316 (2023) and *Warner*, 430 S.C. at 87, 842 S.E.2d at 366. However, South Carolina has not yet addressed the admissibility of geolocation artifacts extracted directly from an iPhone.

Here, we need to be clear that analyzing a geolocation artifact falls into the scientific field. Digital forensics is the process of extracting data. Software coding/engineering is the subject of interpreting the data. The learned location data Wilde based his opinions on comes from a version

of iOS that is currently inaccessible. Our Supreme Court considered a similar scenario as here in *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

As with this case, *Graves* involved the interpretation of data coming from an electronic device whose operation was governed by computer software, i.e. computer code. *Id.* The *Graves* Court concluded that because the data from the electronic device was coming from the software running the device, the interpretation of that data was scientific or technical in nature. *Id.* The Court in *Graves* concluded the testimony at issue was scientific because “it involves complex issues of computer science.” *Graves*, 401 S.C. at 81, 735 S.E.2d at 659. The *Graves* decision stands for the proposition that data from software is scientific and technical and must be analyzed accordingly. The *Graves* decision refuted the idea that interpretation of data produced by software is non-technical, i.e. experiential. Such is the case with Wilde’s opinion testimony about the location of Mr. Douglass’ phone.

In this case, the geolocation artifact at issue is created by software, stored by software, internally transferred by software, externally accessed by software, externally translated by software, and externally searched by software. The creation of the geolocation artifact, its storage, and its transfer to the database within the iPhone is dictated by the software operating the iPhone 12. The iPhone 12 uses the iOS operating system. iOS is a closed-source, proprietary operating system, meaning its internal workings and data-handling processes are not publicly available or independently verifiable. This lack of transparency makes it impossible to fully understand how geolocation artifacts are generated, stored, or manipulated by the software.

Further complicating iOS produced data is the fact that reverse-engineering the software is a violation of Federal criminal and civil statutes. For instance, there are anti-circumvention provisions in the Digital Millennium Copyright Act (DMCA), codified at 17 U.S.C. section 1201.

These anti-circumvention provisions prohibit bypassing any “technical protection measures” without authorization from the copyright holder. Apple has zealously guarded its iOS software.

Therefore, there are several software algorithms to which we do not have access: (A) the iOS software or application that initially harvested the historical location data (it is unknown whether this was iOS code or an app, or the source from which the data was acquired, or the origin of the data connected to the location artifact); (B) the iOS software application that initially stored the data; (C) the iOS software that decided to place the geolocation artifact into the SQLite database associated with the locations of interest; (D) the iOS software application that maintained the stored location data; and (E) algorithms that may have intentionally or unintentionally manipulated the data. No one can explain how the 3 Boyce Avenue geolocation artifact erroneously indicated that the iPhone was at this location on the date of Douglass’ arrest.

The extraction of Mr. Douglass’ phone involved multiple layers of software coding. In this case, law enforcement used proprietary software known as Graykey, that is only available to law enforcement. The process included the following steps: (1) Graykey’s proprietary software is used to unlock and access the phone; (2) Graykey inserts on-device agent (i.e. a virus) into phone software to gain access to the databases maintained by the phone; (3) Graykey extracts the files from the cell-phone in its raw form; (4) Cellebrite uses its software referred to as Physical Analyzer to translate the raw data from Graykey into understandable human-readable information, dates, times, and numbers. Translation is based on its proprietary understanding of Apple File Systems, reverse engineered aspects of iOS; and (5) Cellebrite Physical Analyzer to search the translated raw data and limit the raw data to a working sub-set. (R. 713, l. 17 – 719, l. 21).

The opinion that was given by Wilde that Mr. Douglass’ cell phone was present at David Smith’s residence on the day of the shooting and later at the location of the shooting during the

time when the shooting occurred was based on this unreliable scientific data. Both Wilde and Bass agreed that location data from cell phone tower RTT data is by far the most reliable source of location information. (R. 785, ll. 1 – 786, l. 4; R. 1074, ll. 2 – 3). As noted above in the relevant facts, the data which provided the basis of Wilde’s opinion did not come from cell tower data or voice calls. Instead, it came from the learned location of interest or frequent location history data stored via Apple’s iOS operating system into a database that is accessed by GrayKey.

This learned location of interest or frequent location history type of data from an Apple iPhone, indistinguishable from Mr. Douglass’ iPhone, was recently found to be unreliable and inadmissible by the Supreme Court of Massachusetts. *Commonwealth v. Arrington*, 226 N.E.3d 851, 853 (Mass. 2024). In *Arrington*, a full extraction was made of the defendant’s phone which included the frequent location history data. One of the frequent locations was an address near the home of the victim. *Arrington*, 226 N.E.3d at 856. The prosecution sought to introduce expert testimony based on the frequent location data to show that the defendant’s phone was at the victim’s home at the time of the crime. *Id.*

Just like in this case, the cell phone analyst in *Arrington* admitted that he did not have access to the algorithm that generated the data and he did not know how the algorithm converted location data inputs into frequent location history data. *Id.* And just like in this case, the expert in *Arrington* had no peer-reviewed articles to support the reliability of the location data. *Id.* at 863. The *Arrington* Court found that there “was little evidence that the process of obtaining and analyzing FLH data has been generally accepted in the scientific community.” *Id.* Accordingly, the *Arrington* Court found that the opinion testimony based on the unreliable location data was not admissible. *Id.* at 867.

Wilde admitted on cross-examination that not only has the FBI historically considered this information suspect, but that the purveyors of Cellebrite struggle to assess the reliability of historical geolocation artifacts. (R. 786, ll. 2 – 13). The trial judge erred in allowing Wilde to opine that the extracted data from Mr. Douglass’ iPhone showed that it was present at David Smith’s home before the shooting and at the scene of the shooting on the date and time the shooting occurred. Wilde’s opinion was based on the unreliable geolocation artifacts and the completely unknown methodology of how or why geolocation artifacts are created. This is more than just an unreliable scientific basis, it is completely unknown. This Court should reverse the admission of this expert testimony and remand this case for a new trial.

3. The trial judge erred by allowing the introduction of Mr. Douglass’ statements that were made while he was in custody and without receiving his *Miranda* warnings.

***Jackson v. Denno* Testimony**

The trial judge held a pretrial hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964) to determine whether Mr. Douglass’ statements made to law enforcement at the time of his arrest were admissible. (R. 77, ll. 5 – 12).

Officer Garbutt conducted a traffic stop on Mr. Douglass on May 15, 2023. (R. 77, ll. 14 – 21). The reason he stopped Mr. Douglass was because his vehicle matched the BOLO from the attempted murder investigation. (R. 78, ll. 1 – 13). Garbutt testified that *after* he stopped Mr. Douglass’ vehicle, he observed “a license plate cover that was covering the letters on the bottom of the license plate” which “changed the nature of the traffic stop from just reasonable suspicion to now I had reason to stop the vehicle.” (R. 78, l. 20 – 79, l. 2). Garbutt admitted that the “sole reason” for stopping Mr. Douglass was because the vehicle matched the description in the BOLO. (R. 90, l. 23 – 91, l. 3).

The State asked whether the stop was “a standard car stop [or] a felony car stop.” (R. 81, ll. 7 – 8). Garbutt answered that the officers “conduct[ed] a high risk traffic stop . . . due to the concern that there would be a high probability of weapons in the vehicle.” Garbutt continued: “we believed this vehicle had been involved in an attempted murder and the probability for weapons was higher. So rather than approach the doors as we went in, which we call a routine traffic stop, we called the driver out and had him come back to us.” (R. 81, ll. 9 – 19). Mr. Douglass was ordered out of the vehicle at gunpoint, handcuffed, and placed in the back of a patrol car. Mr. Douglass was not free to leave. (R. 82, ll. 10 – 24; Court’s Ex. 4).

Once Mr. Douglass was handcuffed in the back of a patrol car, Garbutt called Detective Bixby to come out because Bixby was the lead investigator on the attempted murder case. Garbutt needed Bixby to determine whether the vehicle Mr. Douglass was driving was the same vehicle that was suspected as being involved in the attempted murder. (R. 83, ll. 3 – 8).

Garbutt explained that he did not read Mr. Douglass his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) because Mr. Douglass “was just detained at the time and [Garbutt] did not intend to speak with him about the case [because] Detective Bixby was handling the investigation.” (R. 85, ll. 14 – 20). Even though Garbutt had just explained that the stop of Mr. Douglass was not routine, he attempted to justify his decision not to read Mr. Douglass his *Miranda* warnings because that is not something he does in a routine traffic stop. (R. 85, ll. 21 – 23). Garbutt admitted that he has been involved in high-risk traffic stops before where he did read a suspect his *Miranda* warnings but that he wouldn’t typically give *Miranda* warnings if the questions he was asking were “safety questions.” (R. 92, l. 21 – 93, l. 10).

Detective Bixby obtained a statement from Mr. Douglass while he was handcuffed in the back of a patrol vehicle. (R. 100, ll. 8 – 17). Bixby acknowledged that at the time he questioned

Mr. Douglass, Mr. Douglass was in “investigative detention,” i.e., detained for the purpose of being interrogated about an attempted murder. (R. 101, l. 13 – 102, l. 23). In fact, Bixby had responded to the scene only because he was notified that the suspected vehicle in his attempted murder investigation had been located and he wanted to question the driver. (R. 105, l. 24 – 106, l. 6). Bixby explained that his primary purpose in speaking with Mr. Douglass “was to attempt to find out who was involved with that vehicle, who had been in possession of that vehicle on April 18th and if anybody else had been associated with that vehicle in the last 60 days.” (R. 107, ll. 12 – 19). More than twenty minutes elapsed from the time Mr. Douglass was ordered out of the van at gunpoint to the time that Bixby arrived to question him. (Court’s Ex. 7, 1:00 – 21:30).

Upon questioning by Bixby, Mr. Douglass said “no one else had been operating the vehicle or in the vehicle for the last 60 days.” Bixby also asked Mr. Douglass whether anybody else might have had possession of the keys or control of the vehicle and that Mr. Douglass indicated that “no, he was the only person associated with that vehicle in the last two months.” (R. 106, l. 20 – 107, l. 3; Court’s Ex. 7 21:30 – 23:30). These statements were critical to the State in its effort to exclude David Smith as the shooter.

***Jackson v. Denno* Arguments and Ruling**

Counsel for Mr. Douglass argued that Mr. Douglass was subjected to custodial interrogation by Bixby in violation of *Miranda*. Counsel pointed out that Mr. Douglass was pulled over solely because the vehicle he was driving was suspected to have been involved in an attempted murder. Furthermore, Bixby came to the scene for the purpose of questioning Mr. Douglass about his potential involvement in that attempted murder. It was obvious that reasonable person would not have felt free to leave—in fact, Mr. Douglass was not free to leave as he was handcuffed in the back of a patrol car after being removed from the van at gunpoint. Accordingly, Mr. Douglass was

in custody and was questioned by Bixby about his exclusive possession of the van. In other words, Bixby specifically sought to elicit incriminating information from Mr. Douglass without first providing Mr. Douglass with his *Miranda* rights. (R. 117, l. 6 – 118, l. 4).

The State argued that *Miranda* warnings were not required because Mr. Douglass was not under arrest at the time Detective Bixby questioned him. (R. 120, ll. 2 – 10). The State cited to *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995) in support of their argument that the stop of Mr. Douglass was akin to a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968) as opposed to a custodial interrogation which meant that the officers were not required to read Mr. Douglass his *Miranda* rights. (R. 120, l. 11 – 121, l. 6). The State also cited to *State v. Corley*, 383 S.C. 232, 679 S.E.2d 187 (Ct. App. 2009), and *State v. Barksdale*, 433 S.C. 324, 857 S.E.2d 557 (Ct. App. 2021) to support their argument that *Miranda* warnings were not required to be given to suspects in routine traffic stops. (R. 122, l. 10 – 123, l. 8). Of course, the State had already admitted this was not a routine traffic stop but was instead a “high risk” or “felony” stop in furtherance of an attempted murder investigation.

Counsel for Mr. Douglass responded by pointing out that a *Terry* stop is limited to ensuring the suspect is not armed. At the time Bixby was questioning Mr. Douglass, he had already been searched and handcuffed and placed in a patrol car. (R. 123, l. 22 – 124, l. 23). The trial judge found that the statements made by Mr. Douglass while handcuffed in the back of a patrol car in response to Detective Bixby’s questions which sought to elicit incriminating information from Mr. Douglass about his involvement in the attempted murder were admissible. (R. 126, ll. 8 – 23).

Trial

Officer Garbutt testified before the jury that he stopped Mr. Douglass because the van matched the BOLO and he believed he had “reasonable suspicion that this was involved in an

attempted murder.” (R. 372, l. 9 – 373, l. 5). Garbutt again testified that because the vehicle was stopped on suspicion of attempted murder, law enforcement “did not do . . . a routine traffic stop. We did a high-risk traffic stop.” (R. 374, l. 13 – 375, l. 3). Garbutt told the jury that “as soon as we had everything safely secured,” he “call[ed] Detective Bixby, because it’s his investigation, to let him do what he needed to do with it from there. But as far as what we did initially, we were just to *detain and hold*.” (R. 384, ll. 6 – 17) (emphasis added). Garbutt’s body-worn video was introduced and played for the jury. (State’s Ex. 39).

Officer Nunez also explained to the jury that the stop of Mr. Douglass was not routine but “high risk.” The State asked Officer Nunez whether the manner in which they stopped Mr. Douglass was “standard or . . . *totally unique to the case*?” (R. 386, ll. 9 – 23) (emphasis added). Officer Nunez responded that the manner in which they stopped Mr. Douglass was “not standard at all,” and was “very uncommon.” (R. 386, l. 24 – 387, l. 2).

Officer Nunez’s body-worn camera was admitted over Mr. Douglass’ renewed objection. (R. 388, ll. 12 – 19; State’s Ex. 43). Nunez’s body camera video was played for the jury, including the portion which captures Bixby questioning Mr. Douglass while he is handcuffed in the back of a patrol car. The questioning by Bixby begins approximately twenty minutes after Mr. Douglass is initially placed in handcuffs. (R. 390, ll. 9 – 21; State’s Ex. 43, 21:30 – 23:30).

Detective Bixby also testified about the May 15th stop of Mr. Douglass. Bixby was notified by Garbutt that he had “located the vehicle” that was involved in the attempted murder investigation. (R. 850, ll. 12 – 19). When Bixby arrived on scene, he immediately knew that the van was the one that was involved in the attempted murder. (R. 851, ll. 10 – 25). Bixby admitted that he questioned Mr. Douglass while Mr. Douglass was handcuffed in the back of Nunez’s patrol car without first reading Mr. Douglass his *Miranda* rights. (R. 852, l. 1 – 853, l. 7).

The purpose of Bixby's questioning was "to determine whether or not there was anybody else involved in this vehicle, if anybody had been in possession of the vehicle or possession of the keys, had been driving the vehicle in the last two months because that encompassed the date of April 18th." (R. 853, ll. 8 – 19). As a result of his questioning of Mr. Douglass, Bixby concluded that "no one else had been in control of the vehicle. No one else had been in the vehicle and no one else had the keys to the vehicle." (R. 853, ll. 20 – 25). This statement was used by the State to assert Smith could not be the shooter because he did not have access to the van.

Discussion

In *Miranda v. Arizona*, 384 U.S. 436, 478 (1966), the Supreme Court of the United States held that the Fifth Amendment privilege against self-incrimination prohibits the admission of statements made by a criminal defendant who is subjected to "custodial interrogation" unless the suspect is first advised of certain constitutional rights. Specifically, "[a suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479. The suspect can, of course, choose to waive these rights and answer questions, however, "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Id.*

A. A reasonable person in Mr. Douglass' position would have understood himself to be in police custody.

"To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409-10 (2003). The determination of whether a suspect was in custody

is objective, not subjective. The test is “whether a reasonable person would have concluded that he was in police custody.” *Id.* at 583, 582 S.E.2d at 410.

There is no question that a reasonable person in Mr. Douglass’ position would have concluded that he was in police custody. Mr. Douglass was ordered from his car at gunpoint by numerous officers, a police dog was barking at him, he was patted down, handcuffed, and placed in the back of a patrol car, and was detained for more than twenty minutes awaiting the arrival of Detective Bixby. Mr. Douglass was also in fact not free to leave. Officers Garbutt, Nunez, and Detective Bixby all acknowledged that Mr. Douglass was not free to leave.

Accordingly, Mr. Douglass was in custody under the objective circumstances in this case. The next question is whether the circumstances fall within the “routine traffic stop” exception to the requirement that law enforcement read a suspect his *Miranda* rights.

B. The stop of Mr. Douglass was not a routine traffic stop, and accordingly, was not exempt from the requirement that officers Mirandize a suspect before questioning them.

Notwithstanding the definition of custody as being whether a reasonable person would have believed himself to be in custody, an important exception to this general rule has been established—routine traffic stops. Even when a reasonable person does not feel free to leave, if the reason they don’t feel free to leave is because they have been pulled over for a “routine” or “ordinary traffic stop,” *Miranda* does not apply.

In *Berkemer v. McCarty*, the Supreme Court of the United States considered whether “the roadside questioning of a motorist detained pursuant to a traffic stop constitute[s] custodial interrogation for the purposes of . . . *Miranda*.” 468 U.S. 420, 422-23, (1984). The Court answered no, but for specific reasons related to the nature of “ordinary” or “routine” traffic stops. *Berkemer* was a DUI (driving under the influence) case. *Id.* at 424. After being pulled over for swerving, the

driver was asked to get out of the car. The officer observed the driver had difficulty standing and performed a field sobriety test which the driver failed. *Id.* at 423. The officer asked the driver whether he had been “using intoxicants,” and the driver admitted that he had. *Id.* The officer did not read the driver his *Miranda* rights prior to questioning him. *Id.* at 424.

The *Berkemer* case made it to the Supreme Court after a somewhat convoluted procedural history, but the Supreme Court granted cert “to resolve confusion in the federal and state courts regarding the applicability of our ruling in *Miranda* to interrogations *involving minor offenses and to questioning of motorists detained pursuant to traffic stops.*” *Id.* at 426-27 (emphasis added). The driver in *Berkemer* argued that *Miranda* rights must be given in all traffic stops because the language of *Miranda* defining custody included when a person is “deprived of his freedom of action in any significant way.” *Id.* at 435-36 (quoting *Miranda*, 384 U.S. at 444). The *Berkemer* Court acknowledged that a traffic stop significantly curtails the freedom of the driver and passengers and that “few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.” *Id.* at 436-37. Nevertheless, the Court carved out an exception to *Miranda* for routine traffic stops.

The Court in *Berkemer* reasoned that in an “ordinary traffic stop,” the detention is “presumptively temporary and brief.” The Court explained that “[a] motorist’s expectations, when he sees a policeman’s light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.” *Id.* at 437-38. The second reason given by the Court for exempting “ordinary traffic stops” from the *Miranda* rule is that the “circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police.” *Id.*

The *Berkmer* Court compared a traffic stop to a *Terry* stop where a police officer is permitted to briefly detain a person when he has reasonable suspicion to believe that the “person has committed, is committing, or is about to commit a crime . . . in order to ‘investigate the circumstances that provoke suspicion.’” *Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). In comparing *Terry* stops to traffic stops, the Court noted that the questioning must be “reasonably related in scope to the justification for their initiation” which “[t]ypically . . . means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.” *Id.* at 440. Accordingly, the *Berkmer* Court concluded that “persons temporarily detained pursuant to [ordinary traffic] stops are not ‘in custody’ for the purposes of *Miranda*.” *Id.*

This case does not involve an “ordinary” or “routine” traffic stop. The State made that very clear repeatedly throughout both the *Denno* hearing and in front of the jury. This case involves a “high-risk” or “felony” traffic stop that was performed as part of an attempted murder investigation. Mr. Douglass was not pulled over for a traffic violation. He was pulled over on suspicion of attempted murder. Once he was detained in the back of the police car, he was not being questioned as part of a routine traffic stop but was instead being questioned about an attempted murder. Although the officers’ subjective beliefs are not relevant to the custody analysis, the fact that the stop was not a routine traffic stop is. That is because it is the routine and ordinary traffic stops that have been exempted from *Miranda*. Detaining a person on suspicion of attempted murder is nothing like the circumstances the Supreme Court dealt with in *Berkmer*.

Furthermore, none of the cases that the State cited at trial support their argument. For instance, in *United States v. Leshuk*, a turkey hunter discovered a marijuana growing site and reported it to the local sheriff’s department. 65 F.3d 1105, 1106-07 (4th Cir. 1995). Two deputies

responded to investigate, and they found two individuals nearby. The deputies were not in uniform and only one of them had a firearm which was not drawn. *Id.* at 1107. The officers conducted a *Terry* frisk of the individuals and determined they were not armed. However, there were two backpacks and a garbage bag near the defendants which they denied ownership of. *Id.* The officers opened the garbage bag and found marijuana plants, and inside the backpacks they found a machete and fertilizer among other suspicious items. The officers questioned the defendants about the items and the defendants did not respond. *Id.* The defendants were then placed under arrest and escorted back to patrol cars where one of the defendants tried to run away. *Id.* After the fleeing defendant was caught, the officers read the defendants their *Miranda* rights. *Id.*

Leshunk argued that his denial of ownership of the backpack should be suppressed because it was obtained in violation of *Miranda*. *Id.* at 1108. Leshunk argued that he was in custody because the deputies did not inform the defendants that they could leave or could remain silent. *Id.* at 1110. The Fourth Circuit disagreed, finding that officers are not required to advise a suspect in a voluntary encounter that he is free to leave. *Id. Leshunk*, a case involving plain clothes officers without firearms drawn and who were displaying no signs of authority while having a consensual conversation with two individuals in the woods is so vastly different from the circumstances Mr. Douglass faced as to have virtually zero application.

This Court considered the “routine traffic stop” exception to *Miranda* in *State v. Barksdale*, 433 S.C. 324, 857 S.E.2d 557 (Ct. App. 2021). In *Barksdale*, police responded to a traffic accident where one of the drivers had not been identified by the first responders. *Id.* at 328, 857 S.E.2d at 559. A police officer began asking individuals nearby who the driver was and Barksdale answered that he was the driver. *Id.* The officer asked Barksdale to produce his driver’s license, registration, and proof of insurance and allowed Barksdale to retrieve the items from his car. The officer

remarked to another officer that Barksdale smelled like alcohol and that he believed Barksdale had been drinking. *Id.* When Barksdale returned with his driving information, the officer asked him how much he had to drink that night and Barksdale answered that he had a forty-ounce beer. *Id.*

The officer also found an open, cold, forty-ounce beer bottle near Barksdale's car. The officer performed field sobriety tests on Barksdale and asked Barksdale to rate his sobriety on a scale of one to ten. Barksdale said: "I wouldn't say I'm drunk. But I'd say [about] five." *Id.* at 329, 857 S.E.2d at 559. The officer placed Barksdale under arrest and advised him of his *Miranda* rights. Barksdale confessed that the open container was his. *Id.*

The trial court suppressed Barksdale's pre-*Miranda* answers because the officer "would not have allowed" Barksdale to leave once he smelled alcohol on his breath. *Id.* at 330, 857 S.E.2d at 560. This Court reversed, finding that the trial court's decision was based on the officer's subjective intent rather than considering whether a reasonable person in Barksdale's position would have believed himself to be in custody. *Id.* at 332, 857 S.E.2d at 561.

In *Barksdale*, this Court concluded that "[b]ecause [the officer's] questions regarding Barksdale's alcohol consumption occurred during a routine [traffic] investigation, *Miranda* warnings were not warranted. *Id.* at 335, 857 S.E.2d at 562. This Court also noted that Barksdale was not "detained or limited in his freedom of movement such that a reasonable person would believe he was in custody." *Id.*; see also *State v. Corley*, 383 S.C. 232, 243, 679 S.E.2d 187, 193 (Ct. App. 2009) (holding *Miranda* rights not required in "routine traffic stop"); *State v. Kerr*, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998) (finding *Miranda* not required for questioning of driver on the scene of a "routine investigation into the cause of a traffic accident"); *State v. Morgan*, 282 S.C. 409, 412, 319 S.E.2d 335, 336-37 (1984) (finding *Miranda* warnings not required where officers were questioning a driver on the scene of a "routine traffic accident").

What the above cited cases demonstrate is that *Miranda* warnings are not required during routine traffic stops where the officer briefly questions a person about the reason for the traffic stop. What these cases do not demonstrate is that *Miranda* is not required during a “highly unusual,” “high-risk,” “felony,” or “non-routine” traffic stop where a suspect of an attempted murder is forced from his car at gunpoint, handcuffed and placed in the back of a patrol car for twenty minutes to wait for a Detective to arrive and question him.

This case is more like *State v. Medley*, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016). In *Medley*, officers attempted to stop a motorcycle that ran a stop sign and the motorcycle fled. The chase ended at Medley’s parents’ house where he jumped off the motorcycle and ran onto the front porch. The officers “apprehended [Medley] and ‘put him on the ground.’” The officer asked Medley if he had a license and how much he had been drinking. Medley said he did not have a license and he had “too much” to drink. *Medley*, 417 S.C. at 22, 787 S.E.2d at 849.

The trial court denied Medley’s motion to suppress his statements finding that Medley was not in custody. This Court disagreed. This Court found that because Medley was handcuffed and pinned to the ground when the officers questioned him, “a reasonable person would have undoubtedly concluded he was in custody because Medley was restrained and, thus, deprived of his freedom of action.” *Id.* at 26, 787 S.E.2d at 851. This Court held that the trial court erred in refusing to suppress the pre-*Miranda* statements. *Id.* at 26, 787 S.E.2d at 852.

This case also bears some similarities with the situation this Court faced in *State v. Ledford*, 351 S.C. 83, 567 S.E.2d 904 (Ct. App. 2002). In *Ledford*, two individuals sitting in their car were hit by another driver who fled the scene. The individuals were able to record the license plate of the fleeing vehicle and provided it to law enforcement. *Id.* at 85, 567 S.E.2d at 905. Officers ran the tag and went to the driver’s home and located the vehicle there. *Id.* The driver was “passed

out” and smelled of alcohol. *Id.* at 85, 567 S.E.2d at 905. The officer carried the driver back to his patrol car and drove him back to the scene of the accident where the individuals positively identified him as having been the driver who caused the accident.

The driver in *Ledford* objected to the admission of statements he made to the officer while being transported back to the scene of the accident. This Court determined that the driver was in custody and that law enforcement was required to read him his *Miranda* rights prior to questioning him. Specifically, this Court found it was “difficult to conceive of another set of circumstances which would create a more unequivocal custodial posture than when a person is physically carried from a residence to a patrol car where he is handcuffed.” *Id.* at 88, 567 S.E.2d at 907.

Mr. Douglass was physically ordered at gunpoint out of his vehicle, handcuffed and placed in a patrol car. Like in *Ledford*, it is difficult to conceive of a more unequivocal custodial posture than what occurred in this case. Accordingly, the trial judge erred in finding that Mr. Douglass was not in custody for purposes of *Miranda* and this Court should reverse.

C. Mr. Douglass was interrogated by Detective Bixby who asked him direct questions in an effort to elicit incriminating information.

“Interrogation is the express questioning, or its functional equivalent which includes words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response.” *State v. Kennedy*, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (internal alterations and quotations omitted).

Mr. Douglass was subjected to interrogation, direct questioning by law enforcement in an effort to elicit incriminating information that Douglass had not loaned the van out at any time. Accordingly, law enforcement was required to provide Mr. Douglass with his *Miranda* rights prior to questioning him and their failure to do so renders his subsequent statements inadmissible.

4. The trial judge erred in admitting body-worn camera footage which showed first responders administering aid to Mr. Baum who was in severe distress from a gunshot wound to his chest because any probative value was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

The State moved to introduce Officer Bowdoin's body-worn camera and Counsel for Mr. Douglass objected. (R. 170, l. 23 – 171, l. 5). Counsel argued that the video, which showed Mr. Baum with a gunshot wound to his chest, would be too prejudicial and would inflame the passions of the jury. (R. 172, ll. 14 – 23). There were apparently people in the gallery of the courtroom who were crying at the sight of the video. (R. 174, ll. 16 – 25).

The State responded by saying that “we can’t ignore the fact that this is an extremely violent crime that took place” and that “[t]here’s been instances of much more gruesome things that have been introduced into evidence.” (R. 175, ll. 2 – 6). The State further argued that the video was relevant to the element of malice. (R. 175, ll. 6 – 11).

Although the trial judge noted that he was required to perform a balancing test under Rule 403 of the South Carolina Rules of Evidence, (R. 173, ll. 10 – 19), no specific analysis was ever placed on the record. Instead, the judge simply stated: “I am going to allow this to come in in that limited amount.” (R. 175, ll. 14 – 21). Immediately after this exchange, the jury returned to the courtroom and the State moved to admit the video. Counsel for Mr. Douglass renewed his objection and the judge admitted the exhibit. (R. 176, ll. 15 – 23). The trial judge then interrupted the playing of the video and said: “Just for the record, I think I’ve already indicated it, but I allowed this in after doing Rule 403 analysis. I just want to make sure that’s clear on the record, thanks.” (R. 176, l. 24 – 177, l. 3). The video was then played for the jury. (R. 177, ll. 4 – 22).

Bowdoin's body-worn camera shows an up-close view of Mr. Baum with a gunshot wound to his chest, bleeding through his shirt, while on the phone with his wife telling her that he loves

her. (State's Ex. 3, 00:50 – 01:05). Mr. Baum appears terrified and is heard saying "I'm gonna die." (*Id.*) When Bowdoin asks who might want to do this, Mr. Baum initially responds that he doesn't know and immediately follows up with "Donna Boyd." (*Id.* at 1:25 – 1:35). Bowdoin is seen removing Mr. Baum's shirt exposing the bullet hole to his chest. Bowdoin is also seen searching for an exit wound on Mr. Baum's back. (*Id.* at 1:35 – 1:50). Mr. Baum's boss—Attorney Kimberly Thomason—can be heard frantically speaking in the background about how Mr. Baum has just been shot while leaving work and attempting to enter his car.

The body camera continues with Bowdoin asking Mr. Baum basic questions like where he's from, what he does for a living, and whether he's married or has children. The questions are apparently geared toward keeping Mr. Baum conscious. (R. 169, ll. 5 – 17). Sirens are heard blaring throughout the video and, for the first several minutes, Bowdoin and another officer appear to be searching through first aid materials for a chest seal. (State's Ex. 3, 1:00 – 3:00). Mr. Baum is seen groaning in severe distress. (*Id.* at 3:00 – 3:30). EMS are seen with an ambulance and a stretcher. Mr. Baum remains visible with his shirt open and chest exposed. (*Id.* at 3:45 – 4:00). EMS uses scissors to cut the rest of his shirt off and Mr. Baum is placed in a neck brace. The video then shows EMS and the officers lifting Mr. Baum's apparently limp body onto a stretcher, strapping him down, and wheeling him away. (*Id.* at 4:00 – 5:45).

The very next witness to testify after the introduction of this distressing and emotionally charged body-camera video was Mr. Baum himself. Mr. Baum testified that on the day of the shooting, he spent the day working in his office. When Mr. Baum left the office he recalled walking to his car, putting his trial binder in the back seat and then feeling a "snap" and "a lot of pain." (R. 186, l. 1 – 187, l. 10). Mr. Baum "felt blood," ran back to his office door screaming for his boss and called 911. (R. 187, l. 11 – 188, l. 2).

After Mr. Baum called 911, he called his wife and told her he loved her. In that moment, Mr. Baum believed he was going to die. (R. 188, ll. 3 – 17). Mr. Baum recalled that “[t]he cops were there, felt like we [were] there for ten seconds, then they threw me on a stretcher, put me in an ambulance, [and] brought me to the hospital.” (R. 188, ll. 18 – 21). Mr. Baum also testified about being treated at the hospital and having a “chipped clavicle, a collapsed lung and . . . a bullet stuck in [his] back.” (R. 189, ll. 10 – 14).

The State also introduced security video from Mr. Baum’s law firm. (State’s Ex. 4). That video shows Mr. Baum walking to his car and placing items in the back seat. (*Id.* at 00:00 – 00:30). A single pop can be heard, and Mr. Baum hollers out in pain and drops the items in his hands on the ground. (*Id.* at 00:30 – 00:40). He runs back to the door of the law firm and starts screaming out for his boss, “Kim.” (*Id.* at 00:40 – 00:55). Mr. Baum pulls his phone out of his pocket and runs out of view of the camera. (*Id.* at 00:55 – 01:05). Mr. Baum’s screams can still be heard on the video and his boss exits the front door and begins calling out Mr. Baum’s name. Mr. Baum is heard exclaiming that he’s been shot and his boss runs out of view of the camera. (*Id.* at 01:05 – 01:45). Mr. Baum’s boss runs back inside the law firm and sirens are heard in the background. Mr. Baum’s boss exits the firm again and runs towards Mr. Baum’s location. (*Id.* 01:45 – 4:00).

Discussion

The trial judge erred in allowing the jury to see an up-close video of Mr. Baum with a gunshot wound to his chest, frantically telling his wife that he loves her, frantically exclaiming that he is going to die, and being administered aid by law enforcement and EMS which included him being placed in a neck brace and loaded onto a stretcher. The video had zero probative value. Nothing shown on the video was in dispute, and everything shown on the video was testified to by Mr. Baum and Officer Bowdoin. Furthermore, the actual shooting was visible on the much less

inflammatory and prejudicial video of State's Exhibit 4. That video is not up-close and is far less graphic and distressing than what is shown on State's Exhibit 3.

The State gave two reasons to justify the admissibility of State's Exhibit 3: (1) this was a violent crime; and (2) the video supported the element of malice. But whether the attempted murder of Mr. Baum was a violent crime and whether the shooter acted with malice were not in dispute. Only the identity of the shooter was in dispute. Accordingly, the State's arguments were meritless.

Under Rule 403 of the South Carolina Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "To constitute unfair prejudice, the photographs [or other evidence] must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). "[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (citing *State v. Edwards*, 194 S.C. 410, 10 S.E.2d 587 (1940)).

The recent rise in the use of body-cameras by first responders will necessarily lead to more cases where the admissibility of videos of active crime scenes will hinge on Rule 403. And while our appellate courts have not addressed that specific question in a published opinion, there is a long history of our courts addressing the admissibility of autopsy photographs.

In just the last few years, our Supreme Court has addressed the admissibility of gruesome photographs several times. For instance, in *State v. Nelson*, 440 S.C. 413, 891 S.E.2d 508 (2023), our Supreme Court considered the admissibility of autopsy photographs of a victim that had been stabbed to death. In *Nelson*, the only disputed issue was who committed the murder. *Id.* at 419-20,

891 S.E.2d at 511. The Court determined that the photographs had minimal probative value because the manner and cause of death were not in dispute. The defendant in *Nelson* “raised no argument that Victim was not murdered, no argument that Victim was not murdered in the way the State claimed . . . and no argument that Victim did not have around 100 wounds on her body.” *Id.* at 424, 891 S.E.2d at 513. The Court also found that the “undisputed facts” that were shown in the autopsy photographs “were established by other convincing evidence.” *Id.*

The Supreme Court also considered the admissibility of gruesome autopsy photographs in *State v. Heyward*, 441 S.C. 484, 895 S.E.2d 658 (2023). The majority in *Heyward* held that the photographs were admissible because they showed facts that were in dispute. The defense in *Heyward* denied the manner and cause of death. The majority noted that “[i]f Heyward had accepted [the pathologist’s] finding the head injuries did not occur during a fall, or even if he had not specifically challenged the finding, her testimony might not have needed corroboration [through the use of the autopsy photographs].” *Id.* at 502-03, 895 S.E.2d at 668. The majority noted that if the defense had not challenged the cause of death, they “would likely agree with Justice Kittredge’s conclusion [in his dissenting opinion that] the photos had little probative value.” *Id.*

In this case, the body-camera video did not show anything that was in dispute. Mr. Douglass did not dispute any element of the attempted murder charge other than the element that he was the person who committed the crime. Just like in *Nelson*, the only disputed issue was whether Mr. Douglass or someone else, specifically David Smith, had shot Mr. Baum. Beyond not showing anything in dispute, there was other competent and far less prejudicial evidence that was introduced to establish the elements of attempted murder.

Furthermore, any minimal probative value the video had was substantially outweighed by the danger of unfair prejudice. To be sure, the video is not particularly gruesome in the way that

autopsy photographs are. But it is graphic and emotionally powerful. Watching a video of man writhing in pain with a gunshot wound to his chest, who is on the phone with his wife telling her he loves her because he believes he is facing imminent death creates exactly the kind of undue tendency to move the jury to make a decision on an improper basis. The inherent feeling this video creates that someone must be punished is particularly prejudicial in a case where another equally plausible suspect is deceased, and therefore, not present. Mr. Douglass was the only target left.

In *United States v. Bailey*, 840 F.3d 99 (3rd Cir. 2016) the Third Circuit Court of Appeals considered the admissibility of a video which showed a murder. The video “show[ed the victim] standing in front of a populated restaurant as [the killer] rides up on a bicycle, draws his gun, and shoots [the victim] in the head at point blank range.” *Id.* at 121. The killer “casually rides away as [the victim] crumples and collapses to the ground.” *Id.* The Third Circuit noted that even though no blood was visible, it was still “highly disturbing.” *Id.* The Court concluded that it was “difficult to understand how the emotional impact of this video would not unfairly prejudice the jury against” the defendants. *Id.* at 121-22.

Given the exceedingly low probative value of State’s Exhibit 3, the danger of unfair prejudice easily, and substantially, outweighed that value. Accordingly, the trial judge erred by allowing the jury to see State’s Exhibit 3 and this Court should reverse and remand for a new trial.

5. The trial judge erred in allowing the introduction of body-worn camera footage which showed Mr. Douglass being escorted in silence to an interview room because the footage was irrelevant and prejudicial by improperly suggesting that Mr. Douglass was interviewed and did not answer questions.

Relevant Facts

In addition to objecting to Mr. Douglass’ statements that were made in response to Detective Bixby’s questioning as outlined above in Issue 3, Counsel for Mr. Douglass also objected to the portion of Officer Nunez’s body-camera which showed Mr. Douglass being transported to

the police station and placed into an interview room. At that moment in time, Mr. Douglass was under arrest and being transported to the jail. The video was therefore an improper attack on his right to remain silent. (R. 353, ll. 6 – 354, l. 9). Counsel cited to *State v. Green*, 440 S.C. 292, 890 S.E.2d 761 (2023) and *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999) in support of his position that the State cannot introduce evidence or comment in argument on a defendant’s exercise of his right to remain silent except for impeachment purposes. (R. 354, ll. 10 – 21). Counsel maintained that the portion of the video showing Mr. Douglass being driven to jail was irrelevant. (R. 360, ll. 9 – 12). The trial judge overruled Counsel’s objection. (R. 361, l. 14).

Counsel for Mr. Douglass renewed his objection prior to the testimony of Officer Nunez. Counsel pointed out that the video shows Mr. Douglass being escorted into the police station and into a room with the placard “INTERVIEW ROOM” which is clearly visible on the video. (R. 380, ll. 2 – 11; State’s Ex. 43, 1:49:40 – 1:56:00). Mr. Douglass is placed in a chair while still wearing handcuffs. Counsel argued that “it’s pretty obvious that he is choosing to remain silent at [that] point” and that the probative value, if any, was substantially outweighed by the prejudicial effect of commenting on a defendant’s right to remain silent.” (R. 380, ll. 11 – 381, l. 3).

The State argued that the video was relevant to show “how the Defendant walks, his gait, the way he carries himself,” because of the surveillance video from 3 Boyce Avenue which shows a suspicious person walking through the parking lot. (R. 381, ll. 5 – 14). The trial judge said “I’ve made my ruling. I’ll stand by that.” (R. 381, ll. 23 – 24).

Discussion

“[T]he Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of

guilt.” *Griffin v. California*, 380 U.S. 609, 615 (1965); *see also State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987) (“[W]hen a defendant invokes the Fifth Amendment, the prosecutor cannot proffer the accused’s silence as evidence of guilt”).

A comment on a defendant’s exercise of his right to remain silent “may not be made either directly or indirectly.” *Edmond v. State*, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). More specifically, “the State may neither comment upon *nor present evidence at trial* of a defendant’s decision to exercise his right to remain silent or be represented by an attorney.” *Id.* (emphasis added). “The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions.” *Id.* at 346, 534 S.E.2d at 685.

Here, the introduction of the video violated Mr. Douglass’ due process rights because it was an improper comment on his right to remain silent. The video shows Mr. Douglass in handcuffs and being placed in an interview room in silence. Furthermore, the State’s argument that the video was necessary to show Mr. Douglass’ gait is without merit. The video does not show Mr. Douglass’ gait. Beginning at the 1:49:30 time stamp, the video shows Mr. Douglass getting out of Nunez’s patrol car in handcuffs. (State’s Ex. 43, 1:49:30). The video then shows Mr. Douglass’ left arm and shoulder as he is escorted by Nunez who has his right hand on Mr. Douglass’ left arm to the door of the police station. The video very briefly shows Mr. Douglass’ feet. (State’s Ex. 43, 1:49:40 – 1:50:15).

After that, because Mr. Douglass is walking to Nunez’s right, and Nunez’s body camera is forward facing, Mr. Douglass’ gait is not visible. Furthermore, Mr. Douglass is handcuffed behind his back and a police officer is holding his arm while he walks. To the extent his gait is minimally visible during brief portions of the video, it is not probative evidence of Mr. Douglass’ gait.

Even if the video was probative of Mr. Douglass' gait as the State suggested, the video taken from Mr. Douglass' iPhone which shows him walking on the beach was much more probative of this point. Accordingly, the video was both an improper comment on Mr. Douglass' exercise of his right to remain silent and its probative value was substantially outweighed by the danger of unfair prejudice in violation of Rule 403 of the South Carolina Rules of evidence. This Court should reverse Mr. Douglass' convictions and sentence and remand this case for a new trial.

CONCLUSION

By reason of the foregoing arguments, this Court should reverse Mr. Douglass' convictions and sentences and remand this case to Greenville County for a new trial.

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