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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Case Nos. 2024-GS-32-02743; 2024-GS-32-02744
Appellate Case No. 2026-000693

Diane S. Goodstein, Circuit Court Judge

State of South Carolina,

Respondent,

v.

Vernon Jenkins, Jr.,

Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	3
ARGUMENT.....	4
1. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE FIREARM SEIZED FROM APPELLANT'S HOME, WHERE THE ONLY "CONSENT" WAS OBTAINED THROUGH MISSTATEMENTS OF LAW AND A THREAT OF JAIL, AND THE ALTERNATIVE INEVITABLE-DISCOVERY FINDING RESTED ON AN UNPROVEN ASSUMPTION ABOUT NORTH CAROLINA PROBATION LAW.....	4
2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, TWICE, THAT MALICE MAY BE INFERRED FROM THE USE OF A DEADLY WEAPON, AN INSTRUCTION THE SOUTH CAROLINA SUPREME COURT HAS PROHIBITED IN EVERY CASE SINCE 2019.	10
3. THE TRIAL COURT ERRED IN DENYING A MISTRIAL AFTER THE LEAD INVESTIGATOR TOLD THE JURY THAT THE STATE'S KEY WITNESS HAD SAID FROM THE BEGINNING THAT "EVERYONE WAS SHOOTING," WHEN HER OWN REPORT RECORDED THAT THE WITNESS SAID APPELLANT DID NOT SHOOT.	14
4. THE TRIAL COURT ERRED IN REFUSING TO LIMIT THE STATE'S MOTIVE EVIDENCE TO A ROBBERY OF "SOMETHING OF VALUE," THEREBY ADMITTING EVIDENCE THAT APPELLANT SUPPLIED DRUGS FOR SALE, WHEN A STIPULATION WAS OFFERED AND THE EVIDENCE WAS NOT NECESSARY TO THE STATE'S CASE.	18
5. THE TRIAL COURT ERRED IN ADMITTING A NON-TESTIFYING CO- DEFENDANT'S TEXT MESSAGES AGAINST APPELLANT, BECAUSE A STATEMENT AGAINST PENAL INTEREST IS ADMISSIBLE ONLY AGAINST THE DECLARANT AND NO CO-CONSPIRATOR EXCEPTION APPLIES TO STATEMENTS MADE AFTER THE CONSPIRACY ENDED.....	20
6. THE TRIAL COURT ERRED IN ADMITTING EXPERT "INFORMAL SPEECH" TESTIMONY INTERPRETING ORDINARY TEXT MESSAGES, BECAUSE THE TESTIMONY DID NOT ASSIST THE JURY AND SUPPLIED THE STATE'S INFERENCES UNDER THE LABEL OF EXPERTISE.....	23
CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968).....	6
<i>Maryland v. Buie</i> , 494 U.S. 325 (1990)	8
<i>Nix v. Williams</i> , 467 U.S. 431 (1984).....	9
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973).....	3, 8
<i>State v. Adams</i> , 354 S.C. 361 (Ct. App. 2003).....	18
<i>State v. Barnes</i> , 421 S.C. 47 (Ct. App. 2017)	21
<i>State v. Battle</i> , 304 S.C. 191 (Ct. App. 1991)	6, 7
<i>State v. Belcher</i> , 385 S.C. 597 (2009).....	3, 11, 12, 13
<i>State v. Bruce</i> , 412 S.C. 504 (2015).....	3
<i>State v. Burdette</i> , 427 S.C. 490 (2019).....	3, 11, 12, 13, 14
<i>State v. Campbell</i> , 443 S.C. 182 (2024).....	11, 12
<i>State v. Council</i> , 335 S.C. 1 (1999).....	24
<i>State v. Cross</i> , 427 S.C. 465 (2019)	20
<i>State v. Dunbar</i> , 356 S.C. 138 (2003)	12
<i>State v. Forrester</i> , 343 S.C. 637 (2001).....	8
<i>State v. Fulton</i> , 333 S.C. 359 (Ct. App. 1998)	17
<i>State v. Harris</i> , 382 S.C. 107 (2009)	3, 16
<i>State v. Hough</i> , 325 S.C. 88 (1997)	19
<i>State v. Johnson</i> , 324 S.C. 38 (1996)	21
<i>State v. Johnson</i> , 333 S.C. 62 (1998)	13
<i>State v. King</i> , 424 S.C. 188 (2018)	19, 20
<i>State v. Kromah</i> , 401 S.C. 340 (2013).....	24
<i>State v. Lombardo</i> , 306 N.C. 594 (1982)	10
<i>State v. Lyle</i> , 125 S.C. 406 (1923)	18, 19
<i>State v. Mattison</i> , 352 S.C. 577 (Ct. App. 2003)	8
<i>State v. Pagan</i> , 369 S.C. 201 (2006).....	3
<i>State v. Sims</i> , 387 S.C. 557 (2010)	22
<i>State v. Spears</i> , 393 S.C. 466 (Ct. App. 2011).....	9
<i>State v. Stewart</i> , 278 S.C. 296 (1982)	16
<i>State v. Tindall</i> , 388 S.C. 518 (2010)	3
<i>State v. White</i> , 382 S.C. 265 (2009).....	24
<i>State v. Young</i> , 420 S.C. 608 (Ct. App. 2017)	23
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71 (1998)	12

Constitutional Provisions, Statutes and Rules

N.C. Gen. Stat. § 15A-1343(b)(13)	7
S.C. Code Ann. § 16-3-29	12
Rule 403, SCRE	19, 20
Rule 404(b), SCRE	18, 19, 20
Rule 702, SCRE	23, 24
Rule 801, SCRE	17
Rule 801(d)(1)(B), SCRE	15, 17
Rule 801(d)(2)(E), SCRE	22
Rule 802, SCRE	22
Rule 804(b)(3), SCRE	22
Rule 29, SCRCrimP	3

STATEMENT OF ISSUES ON APPEAL

- 1. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE FIREARM SEIZED FROM APPELLANT'S HOME, WHERE THE ONLY "CONSENT" WAS OBTAINED THROUGH MISSTATEMENTS OF LAW AND A THREAT OF JAIL, AND THE ALTERNATIVE INEVITABLE-DISCOVERY FINDING RESTED ON AN UNPROVEN ASSUMPTION ABOUT NORTH CAROLINA PROBATION LAW.**
- 2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, TWICE, THAT MALICE MAY BE INFERRED FROM THE USE OF A DEADLY WEAPON, AN INSTRUCTION THE SOUTH CAROLINA SUPREME COURT HAS PROHIBITED IN EVERY CASE SINCE 2019.**
- 3. THE TRIAL COURT ERRED IN DENYING A MISTRIAL AFTER THE LEAD INVESTIGATOR TOLD THE JURY THAT THE STATE'S KEY WITNESS HAD SAID FROM THE BEGINNING THAT "EVERYONE WAS SHOOTING," WHEN HER OWN REPORT RECORDED THAT THE WITNESS SAID APPELLANT DID NOT SHOOT.**
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- 5. THE TRIAL COURT ERRED IN ADMITTING A NON-TESTIFYING CO-DEFENDANT'S TEXT MESSAGES AGAINST APPELLANT, BECAUSE A STATEMENT AGAINST PENAL INTEREST IS ADMISSIBLE ONLY AGAINST THE DECLARANT AND NO CO-CONSPIRATOR EXCEPTION APPLIES TO STATEMENTS MADE AFTER THE CONSPIRACY ENDED.**
- 6. THE TRIAL COURT ERRED IN ADMITTING EXPERT "INFORMAL SPEECH" TESTIMONY INTERPRETING ORDINARY TEXT MESSAGES, BECAUSE THE TESTIMONY DID NOT ASSIST THE JURY AND SUPPLIED THE STATE'S INFERENCES UNDER THE LABEL OF EXPERTISE.**

STATEMENT OF THE CASE

On the evening of February 20, 2023, two people sitting in a parked Honda Accord at the Country Inn and Suites on Piney Grove Road in Lexington County were shot at. (Tr. pp. 359-61).

The State claimed that Appellant Vernon Jenkins, Jr., his cousin Dyshawn Hines, and Altariq Cole had come to the hotel looking for a man who had robbed Hines of drugs the day before, mistook the Accord for the robber's car, and shot at the wrong people. (Tr. pp. 268–76). The State's primary evidence tying Appellant to the shooting came from three sources: (1) Karim Hampton, a Lyft driver and childhood acquaintance of Appellant who drove him to the hotel and was himself charged with the same two attempted murders ten days before trial (Tr. pp. 553-639); (2) a .40-caliber Glock pistol seized from the kitchen of Appellant's home in Roanoke Rapids, North Carolina, ninety-two days after the shooting, which a firearms examiner matched to seven cartridge cases from the scene (Tr. pp. 447–51, 464–65, 911–12); and (3) cell-phone, Facebook and cell-site records placing Appellant in contact with Hines and Cole and in the Columbia area that day (Tr. pp. 774–865, 924–53). No witness identified Appellant as a shooter. Hampton testified that Appellant's back was to him when the shooting started and that he could not say Appellant had a gun. (Tr. pp. 573, 632–33).

Appellant was arrested on May 23, 2023, by United States Marshals. (Tr. pp. 126–28, 448). After he was in custody, officers searched his home and found the Glock above the kitchen cabinets. (Tr. pp. 133, 448). Appellant moved to suppress the firearm. The trial court denied the motion on two grounds. It found Appellant's pregnant partner, Shenabian Cunningham, had voluntarily consented to the search, and further ruled that the firearm would inevitably have been discovered by her North Carolina probation officer. (Tr. pp. 108–47).

Appellant was tried jointly with Hines and Cole. Each defendant was charged with two counts of attempted murder. (Tr. pp. 163, 1037). The jury convicted all three

defendants on both counts. (Tr. pp. 1078–79). The court sentenced Appellant to thirty years on each count, concurrent, with credit for 690 days served. (Tr. pp. 1095–96).

Appellant reserved his post-trial motions under Rule 29, SCRCrimP. (Tr. p. 1091). The motions were heard on September 29, 2025, in Dorchester County. (PT Tr. pp. 3–29). The court requested proposed orders. (PT Tr. p. 29). An order denying the post-trial motions was entered December 22, 2025, but Appellant's counsel did not receive notice of the order until March 5, 2026.

Because the issues on appeal are fact-dependent, the relevant portions of the record are set out in the argument sections.

STANDARD OF REVIEW

The admission or exclusion of evidence, the denial of a mistrial, and the decision whether expert testimony will assist the trier of fact are reviewed for abuse of discretion, which occurs when the ruling is controlled by an error of law or rests on factual findings without evidentiary support. *State v. Pagan*, 369 S.C. 201, 208 (2006); *State v. White*, 382 S.C. 265, 269–70 (2009); *State v. Harris*, 382 S.C. 107, 117 (2009).

On a motion to suppress, this Court reviews the trial court's factual findings for clear error but also conducts its own review of the record to determine whether the ruling is supported by the evidence. *State v. Tindall*, 388 S.C. 518, 521 (2010). Whether consent was voluntary is a question of fact determined from the totality of the circumstances; whether the facts found satisfy the Fourth Amendment is a question of law. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *State v. Bruce*, 412 S.C. 504, 510–11 (2015).

A jury charge is reviewed as a whole. An instruction that is an incorrect statement of the law is reversible unless the State shows beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Belcher*, 385 S.C. 597, 611–12 (2009); *State v. Burdette*, 427 S.C. 490, 496–98 (2019).

ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE FIREARM SEIZED FROM APPELLANT'S HOME, WHERE THE ONLY "CONSENT" WAS OBTAINED THROUGH MISSTATEMENTS OF LAW AND A THREAT OF JAIL, AND THE ALTERNATIVE INEVITABLE-DISCOVERY FINDING RESTED ON AN UNPROVEN ASSUMPTION ABOUT NORTH CAROLINA PROBATION LAW.

a. The search.

Appellant lived with Shenabian Cunningham and their two children in a single-wide trailer in Roanoke Rapids, North Carolina. (Tr. pp. 126–27). On the morning of May 23, 2023, United States Marshals, Halifax County deputies, and other officers surrounded the trailer to execute a South Carolina fugitive warrant. (Tr. pp. 126–28). Appellant and Cunningham came out when called; Appellant was handcuffed and placed in a chair in the yard. (Tr. pp. 127–28). Cunningham was pregnant. (Tr. p. 126).

With Appellant in custody, the marshals asked to enter the trailer to make sure no one else was inside and said they would "only look in a place where a person might be." (Tr. pp. 111–13). Cunningham did not want them to search but Appellant told her to let them. (Tr. pp. 112–13). Two marshals were inside for four minutes and fifty seconds; two more were inside for seven minutes. (Tr. pp. 112, 116). As the first marshal came out, he keyed his radio, and the marshal in the foreground of the body-camera video broke off a conversation about transport to say, "okay, now they want us to look for the gun." (Tr. pp. 113–15, 121). The officers in the yard began discussing how to get into the trailer. (Tr. pp. 117–18, 139).

That conversation is on Deputy Jacob Pignanello's body camera, Court's Exhibit 4. (Tr. pp. 134–36, 147, Court Ex. 4). One officer suggested asking Cunningham for consent. Another responded that consent was "out the window" with the yard full of officers, and that because Cunningham was on probation her agent could search "her bedroom and the common areas." (Tr. pp. 118–20, 138). Pignanello had already called her probation agent. (Tr. pp. 128–29, 134).

Pignanello then approached Cunningham. He told her that the house "is gonna get searched today" one way or the other; that if she did not consent, probation "can go in and search the house"; that she would be "violated" and go to jail if she refused the probation officer; and that the officers could get a search warrant. (Tr. pp. 119–23, 129–31, 139–41). Cunningham repeatedly asked him to get a warrant: "please get a search warrant, please get a search warrant." (Tr. pp. 121–22, 130). She said more than once that the officers had frightened her. (Tr. pp. 123, 131).

After a seven-minute exchange, and after a phone call with Appellant's sister, Cunningham relented, telling the officers to go ahead if they promised not to wreck her house. (Tr. pp. 131, 134). Officers entered, found the Glock on top of the kitchen cabinets, saw powder cocaine, stopped, and obtained a search warrant for the drugs at 3:41 that afternoon. (Tr. pp. 133–35, 448). The warrant affidavit stated that the contraband was seen while the marshals were searching for Appellant; the State conceded at the hearing that this was not accurate. (Tr. pp. 110–11, 144–45). Despite the promise that "we are not here for you," Cunningham was taken to jail. (Tr. p. 136).

No marshal testified. (PT Tr. p. 20). Pignanello was not sworn at the suppression hearing; the State's account of what North Carolina probation law permits came from Pignanello whispering to the solicitor, who relayed it to the court. (Tr. pp. 132–33). The court acknowledged it did not know North Carolina law and that the proponent of another state's law must prove it, then accepted the solicitor's relay that a probationer is subject to warrantless search of "any areas that she would have access or control over." (Tr. pp. 131–33, 137). As it turns out, the State's information on North Carolina law was not entirely correct.

The court denied the motion. It found that Cunningham was not misled, that the officers "were very clear that probation was on the way," that "the weapon was gonna be found," and that the consent was "genuine" because Cunningham "genuinely didn't believe there was a gun in the house." (Tr. pp. 145–47). As a "fallback position," the court found inevitable discovery: "The house was going to get searched, it was going to

be discovered." (Tr. p. 147). The court called the marshals' search "speculation." (Tr. pp. 140, 145). Appellant renewed the objection when the firearm and photographs were offered at trial (Tr. pp. 449, 451), at the close of the State's case (Tr. p. 959), and post-trial (PT Tr. pp. 19–25).

b. Consent extracted by misstatements of the law is not consent.

The State bears the burden of proving that consent to a warrantless search was "freely and voluntarily given," a burden that "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968). In *Bumper*, officers told a homeowner they had a warrant; they did not. The Court held that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.* at 550.

In this case, the officers made similar coercive claims. First, Pignanello told Cunningham the trailer would be searched that day regardless of what she said. (Tr. pp. 130–31). Second, he told her that her probation officer could search "the house," when the officers' own understanding, stated on the same body camera minutes earlier, was that a probation search was limited to her bedroom and the common areas. (Tr. pp. 118–21, 138). Third, he told her the officers could get a search warrant, when by the State's own account they had no probable cause for one until after they went in on her consent and found the gun. (Tr. pp. 122–23, 133, 145). Each statement told Cunningham she had no right to resist. *Bumper* holds that a search obtained by such a claim is not consensual, whether or not the officer believed what he said.

The trial court treated the probation statements as true and therefore not coercive, relying on *State v. Battle*, 304 S.C. 191 (Ct. App. 1991), for the proposition that accurately explaining a person's options does not vitiate consent. (Tr. pp. 140–42, 145–46). But the record does not establish that the statements were true. The only

evidence of what North Carolina law allows a probation officer to search was an unsworn proffer relayed by the solicitor. (Tr. pp. 132–33). The court had just said it could not take judicial notice of North Carolina law and that the proponent must prove it. (Tr. p. 131). It then proceeded as if the law had been proved. That is an error of law.

Importantly, the State's information was wrong. The North Carolina statute at issue is not an unlimited waiver of a probationer's Fourth Amendment rights. Instead, it states: "[A probationer must] [s]ubmit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision, but the probationer **may not be required to submit to any other search that would otherwise be unlawful.**" N.C. Gen. Stat. § 15A-1343(b)(13) (emphasis added).

To meet the statute, the court was required to determine whether the search was directly related to supervision. It was not, so the officers were clearly not entitled to search the premises without a warrant, as explained in the last phrase of the applicable North Carolina statute. The State's information on North Carolina law relayed as an unsworn proffer was incorrect. It was not true that failure to consent to a warrantless search was grounds to take someone to jail. (Tr. p. 132). That search had to be related to the supervision.

Battle is distinguishable in any event. The officers in *Battle* told the defendant they would seek a warrant; here the officer said the officers could get one, which the State's own evidence shows was not so. (Tr. pp. 143, 145). The threat in *Battle* was directed at the defendant; here the threat of jail was directed at a pregnant woman who was not the target of the investigation and who was, in the court's words, between "a rock and a hard place." (Tr. pp. 129, 142). And *Battle* did not involve a woman asking four times for a warrant before giving in. (Tr. pp. 121–22, 130). A request for a warrant is the opposite of consent; it is an invocation of the warrant requirement.

This Court must consider the circumstances present at the time of the alleged consent. The yard was full of armed officers and the arrest just completed. There were misstatements of law, the threat of jail, and repeated requests for a warrant.

Cunningham said that she was frightened, and the officers admitted that consent was "out the window." The totality of the circumstances establishes acquiescence to a claim of authority, not a free and voluntary choice. *Schneckloth*, 412 U.S. at 227; *State v. Mattison*, 352 S.C. 577, 584–85 (Ct. App. 2003) (collecting cases).

c. The marshals' seven-minute search exceeded the scope of any consent or protective sweep.

The State justified the marshals' entry as a protective sweep. (Tr. p. 128). A protective sweep incident to an arrest is limited to "a cursory inspection of those spaces where a person may be found" and may last "no longer than is necessary to dispel the reasonable suspicion of danger." *Maryland v. Buie*, 494 U.S. 325, 335–36 (1990). It does not permit officers to search cabinet tops. The claimed consent Cunningham gave for that entry was equally limited; the marshals said they would look only where a person could be. (Tr. pp. 111–13). Consent to search for a person is not consent to search for a gun. *State v. Forrester*, 343 S.C. 637, 648–49 (2001) (scope of consent is measured by what a reasonable person would have understood from the exchange regarding the limitation).

Four marshals spent between five and seven minutes inside a twelve-by-forty-foot trailer looking for a person they had already arrested. (Tr. pp. 112, 116, 140). When the first marshal emerged, the officers' agenda changed, on camera, from transport to "they want us to look for the gun." (Tr. pp. 113–15, 121). The affidavit for the later search warrant recited that the contraband was seen during the marshals' search for Appellant. (Tr. pp. 110–11). The trial court dismissed all of this as speculation without making a finding about what the marshals did inside. (Tr. pp. 140, 145). The State did not call any of the marshals to testify. The absence of any finding on the first entry is itself a reason the consent finding cannot stand: if the officers already knew the gun was

there, the consent discussion that followed was pretext, and the misstatements made to obtain it were made knowing that probable cause for a warrant had already been manufactured by an unlawful search.

d. The inevitable-discovery finding has no evidentiary basis.

The inevitable-discovery doctrine requires the State to prove by a preponderance of the evidence that the challenged evidence "ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). The lawful means must be independent of the illegality and must actually have been in motion; a speculative possibility that officers could have obtained a warrant is not enough. *State v. Spears*, 393 S.C. 466, 482–84 (Ct. App. 2011).

The court's alternative ruling was a single sentence: the probation officer was on the way, "the house was going to get searched, it was going to be discovered." (Tr. p. 147). That finding assumed three things the record does not establish: that North Carolina law authorized the probation officer to search the kitchen cabinets of a residence Cunningham shared with a non-probationer; that the probation officer would in fact have done so rather than conducting the limited search the officers themselves described; and that the search would have been a legitimate probation search rather than one conducted at the direction of out-of-state investigators looking for a specific gun. The officers' own on-camera statement was that probation could search "her bedroom and the common areas." (Tr. pp. 118–19). The court did not find that the kitchen was a common area or that cabinet tops were within Cunningham's control; it supposed that "probably the entire mobile home" was. (Tr. p. 137). A fallback finding built on an unproven premise of foreign law and a guess about what a probation officer would have done is not proof by a preponderance that discovery was inevitable.

The State also argued, and the court appeared to accept, that the probation search would have been lawful because Cunningham could not refuse it. (Tr. pp. 132, 141, 146). But the question under *Nix* is not whether the probation officer could have

searched; it is whether he inevitably would have found this gun in this place by lawful means. The record is silent on what the probation officer did when he arrived, other than that he "did also show up on-scene after this search." (Tr. pp. 135–36). By then the gun was already seized.

The North Carolina Supreme Court has held that refusal to submit to an unlawful search should not be grounds for a probation revocation. *State v. Lombardo*, 306 N.C. 594, 601 (1982). In expressing concern that a court could have the power to rescind a defendant's Fourth Amendment rights, the North Carolina Supreme Court appears to recognize the limitations of the statute allowing warrantless searches of probationers, as well as the inherent limitation of such searches to matters related to supervision. *Id.*¹

e. The error was not harmless.

The Glock was the only physical evidence connecting Appellant to the shooting. The firearms examiner identified all seven .40-caliber cartridge cases from the scene to it. (Tr. pp. 464–65). The solicitor's closing put it plainly: "the gun that matches seven of the shell casings in this case were found where? In his kitchen on top of his cabinet." (Tr. p. 987). Without the Glock, the State's case against Appellant was circumstantial at best. It relied on Hampton, a witness charged with the same crimes ten days before trial, hoping for consideration, who could not say Appellant had a gun. Other than Hampton, the State had phone records showing Appellant was in Columbia. (Tr. pp. 556, 573, 608, 632–33). The State cannot show beyond a reasonable doubt that the firearm did not contribute to the verdict.

2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, TWICE, THAT MALICE MAY BE INFERRED FROM THE USE OF A DEADLY

¹ While the subsection referenced regarding searches is different, the language is the same. It appears the subsections of this statute have changed since the *Lombardo* opinion, but not the substance.

WEAPON, AN INSTRUCTION THE SOUTH CAROLINA SUPREME COURT HAS PROHIBITED IN EVERY CASE SINCE 2019.

a. The charge.

The trial court instructed the jury on the malice element of attempted murder as follows: "Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon." (Tr. p. 1055, ll. 18–20). The court then defined a deadly weapon, with a knife as the example. (Tr. pp. 1055–56).

After the charge and before the jury retired, the court asked for additions or exceptions. Counsel for Appellant responded: "Judge, just renewing the *Belcher* and the implied malice, Judge." The court replied: "All right. Thank you so much. I'm satisfied with it. I note your exception for the record." (Tr. p. 1069, ll. 16–20).

During deliberations the jury sent a note asking for a "breakdown" of the charges. (Tr. p. 1070; Court's Ex. 14). The court recharged attempted murder and the lesser offenses and repeated the instruction verbatim: "Inferred malice may also arise when the deed is done with a deadly weapon." (Tr. p. 1073, ll. 5–6). Counsel again renewed: "Just the same. Renewing the previous objections." (Tr. p. 1077, ll. 14–15). The jury returned its verdicts seventy-eight minutes later. (Tr. pp. 1077–78).

At the post-trial hearing counsel argued the instruction violated *State v. Burdette*, 427 S.C. 490 (2019), and handed up *State v. Campbell*, 443 S.C. 182, 190–92 (2024), which restates the rule. (PT Tr. pp. 4–5). The court raised preservation sua sponte, noting that the matter had been discussed at an unreported charge conference and that the on-record words were "*Belcher*, implied malice." (PT Tr. p. 5). The State said it did not recall the issue being "litigated" and argued harmlessness.

The trial court did not base its order on preservation issues. Rather, it denied the matter on the merits.

b. The Supreme Court has prohibited this instruction in every case, regardless of the evidence.

In *State v. Belcher*, 385 S.C. 597 (2009), the Supreme Court held that a jury may not be instructed that malice may be inferred from the use of a deadly weapon where evidence is presented that would reduce, mitigate, excuse or justify the homicide, because the inference is a "half-truth." *Id.* at 609–10. Ten years later, in *State v. Burdette*, 427 S.C. 490 (2019), the Court removed the condition: "[R]egardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon." *Id.* at 505. The instruction is "an improper court-sponsored emphasis of a fact in evidence." *Id.* at 503–04. The Court has since reiterated the prohibition. *State v. Campbell*, 443 S.C. 182, 190–92 (2024).

The rule applies to attempted murder, which requires malice aforethought. S.C. Code Ann. § 16-3-29. This trial took place in April 2025, almost six years after *Burdette*. The instruction given was identical to the instruction *Burdette* forbids.

c. The issue is preserved.

An objection is preserved if it fairly apprises the trial court of the ground asserted so that the court has an opportunity to correct the error. *State v. Dunbar*, 356 S.C. 138, 142 (2003); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76 (1998). As long as the matter has been raised and ruled upon by the trial court, it is preserved for this Court's review.

Counsel's objection named *Belcher* and "implied malice." (Tr. p. 1069). *Belcher* is the decision that first prohibited the implied-malice-from-deadly-weapon charge; the only part of the malice instruction it could refer to is the sentence beginning "Inferred malice may also arise when the deed is done with a deadly weapon." The court did not ask what counsel meant. It said it was "satisfied with" the charge and noted the exception. (Tr. p. 1069). A judge who notes an exception to a specific instruction has been apprised of the objection and has ruled. The exception was renewed after the recharge. (Tr. p. 1077).

The post-trial record confirms the court understood the objection. When counsel raised *Burdette* by name, the court did not say it was hearing the argument for the first time; it said the matter had been discussed at the charge conference and that counsel had said "Belcher, implied malice." (PT Tr. p. 5). The State's own position at the post-trial hearing was that the issue, "if preserved," is subject to harmless-error review. (PT Tr. p. 9). The court entertained the argument on the merits. (PT Tr. pp. 5–11).

That the detailed discussion took place at an unreported charge conference does not defeat preservation. The on-record exception, taken immediately after the charge was read and ruled on by the court, is the preservation. *State v. Johnson*, 333 S.C. 62, 64 n.1 (1998).

d. The error was not harmless.

An erroneous malice instruction is reversible unless the State proves beyond a reasonable doubt that it did not contribute to the verdict. *Belcher*, 385 S.C. at 612. There are four reasons this was not harmless error.

First, malice was the contested element as to Appellant. No witness saw Appellant with a gun. (Tr. pp. 573, 602, 632–33). The State's case for Appellant's own malice rested on inference from his presence, his phone, and the weapons the jury was told everyone had. The solicitor argued malice almost entirely from the guns: "surrounding a car at night with guns saying get out, that's malice. If you have a gun pulled on someone, that is evil, that is wrong"; "We have people travelling five hours with guns"; "Multiple gunshots through your vehicle while you are in it ... Malice. Malice." (Tr. pp. 992–94). The instruction told the jury the law endorsed exactly that inference, which is not a correct statement of the law.

Second, the jury heard two accounts of what happened at the hotel. In Hampton's first statement to police, which the defense made the centerpiece of its theory, the trip was to look for women, the shooting erupted without plan when the men in the SUV got out, and Appellant did not shoot. (Tr. pp. 284–85, 621–24, 914–20). The State's

account was a planned revenge mission. (Tr. pp. 973–99). If the jury credited the State's account, there was ample evidence of express malice. If it credited Hampton's first account, the only evidence of malice as to Appellant was that a deed was done with deadly weapons by someone. (PT Tr. pp. 6–8). The verdict does not reveal which account the jury accepted, and the instruction supplied malice on the account that otherwise lacked it. That is the situation in which *Burdette* error is most damaging.

Third, the instruction was given twice, the second time in direct response to the jury's request to have the elements explained again. (Tr. pp. 1070–73). The last thing the jury heard on malice before returning its verdicts was the prohibited inference. A repeated instruction given in answer to a jury question cannot be dismissed as a stray sentence in a long charge.

Fourth, the court gave no curative or counterbalancing instruction. It did not tell the jury that the inference was permissive only, that it was for the jury alone to decide whether to draw it, or that the court expressed no opinion on the facts by giving it.

3. THE TRIAL COURT ERRED IN DENYING A MISTRIAL AFTER THE LEAD INVESTIGATOR TOLD THE JURY THAT THE STATE'S KEY WITNESS HAD SAID FROM THE BEGINNING THAT "EVERYONE WAS SHOOTING," WHEN HER OWN REPORT RECORDED THAT THE WITNESS SAID APPELLANT DID NOT SHOOT.

a. The defense theory and Hampton's testimony.

Throughout the trial, Appellant's defense was that Karim Hampton told the truth the first time he spoke to police and changed his story only after the State arrested him ten days before trial. Counsel told the jury that Hampton had said "for two years" that "Vernon did not have a gun," that "Vernon did not shoot," and that the group was "going to look for some girls," and asked the jury to watch what Hampton would say "now that they've got him under lock." (Tr. pp. 283–85).

Hampton testified largely as predicted. He said that when the shooting began "it seemed like everybody was shooting," but that Appellant's back was to him, that he could not say he saw Appellant with a gun, and that he still could not say so. (Tr. pp.

573, 602, 632–33). On cross-examination by counsel for Appellant, Hampton did not deny that his first statement described a trip to look for women and did not place a gun in Appellant's hand. (Tr. pp. 621–27). He did not say, at any point, that he had told police Appellant was shooting.

b. The investigator's testimony.

The State called the lead investigator, Sergeant Stephanie Cobb, after Hampton. The solicitor announced at a sidebar that she intended to put Hampton's prior statements before the jury through Cobb under Rule 801(d)(1)(B), SCRE. (Tr. pp. 795–97). Counsel for all three defendants objected that if the State wanted to rehabilitate Hampton with his prior statements, the proper vehicle was redirect examination of Hampton, who was in custody five minutes from the courthouse, not the lead investigator's summary of what Hampton had said. (Tr. pp. 797–99). The court sustained only a leading objection and permitted the State to proceed with non-leading questions. (Tr. pp. 801–02).

The solicitor then asked Cobb what Hampton had said in his first interview on March 22, 2023. Cobb testified that Hampton told her the group was looking for the woman who had set up the robbery; that when they pulled behind the white car "the other guys jumped out and they started drawing their guns"; that "he said everyone was shooting"; and that "he said everyone had guns." (Tr. pp. 808–10). The solicitor asked whether Hampton's account had "ever change[d]" over three or four meetings; Cobb said it had not. (Tr. pp. 810–11). That testimony came in at about 2:35 p.m. (Tr. p. 807).

Cobb's own report of the March 22 interview, which the defense had relied on in building its theory, recorded that Hampton said "Vernon did not shoot." (Tr. pp. 866, 869–70, 874, 919–20). Counsel for Appellant immediately asked the solicitors, off the record, to correct the testimony. (Tr. pp. 866–67, 870). The State did not do so until the last question of a direct examination that ran another hour and a half, when the solicitor

asked: "did you have in your report ... that Vernon Jenkins did not shoot?" and Cobb answered "Yes, I did." (Tr. pp. 864–65).

c. The mistrial motion and ruling.

Counsel for Appellant moved for a mistrial as soon as the jury left the courtroom. (Tr. pp. 865–66). He explained that the defense theory, announced in opening, was that Hampton's first statement exonerated Appellant and that the lead investigator had now told the jury the opposite, that Hampton had said from the beginning that "everyone was shooting," and had let that testimony "settle in" for ninety minutes while the jury absorbed the State's phone-record evidence. (Tr. pp. 866–74). He argued that the testimony was false as measured against the report, that the eventual correction was "too baked in" to cure, and that his credibility with the jury, on which the defense depended, had been destroyed. (Tr. pp. 867, 870–71, 873).

The State responded that "two things can be true at the same time": Hampton's recorded interview contained both a statement that "they" were all shooting and a statement that Appellant was not. (Tr. pp. 871–72, 874–75). The court denied the motion in two sentences: "it's not appropriate for a mistrial in my estimation. I think it's subject to cross-examination." (Tr. p. 875). Counsel renewed the motion at the close of the State's case. (Tr. p. 959).

d. The denial was an abuse of discretion.

A mistrial should be granted when an incident is so prejudicial that it deprives the defendant of a fair trial and the prejudice cannot be removed by other means. *State v. Harris*, 382 S.C. 107, 117 (2009). Whether the prejudice can be cured is for the trial court in the first instance, but the court must actually address it; a ruling that mischaracterizes the nature of the prejudice is an error of law. The trial court is required to explore the grounds for the mistrial and determine the amount and type of prejudice. *See State v. Stewart*, 278 S.C. 296, 302 (1982).

The court's determination that the matter was "subject to cross-examination" misunderstood the harm. The harm was not that Cobb's testimony was unhelpful and needed to be rebutted. It was that the State had used its own case agent to tell the jury that the defense's opening statement was untrue and had then waited ninety minutes to supply the qualification that made its witness's testimony accurate. Cross-examination cannot correct that problem. Counsel's only option was to accuse the lead investigator, before the jury, of misleading them, which is what he did. (Tr. pp. 914–24, 1026–31). The State's response was to tell the jury that "two things can be true at the same time." (Tr. p. 921).

The jury was left to choose between the defense lawyer and the sergeant on a question the State itself had framed as whether counsel had lied in opening. By using the investigator instead of the actual witness, the State insulated the witness from the very cross-examination the court said was the fix for this problem.

The prejudice was concentrated on Appellant. Of the three defendants, he was the only one as to whom Hampton's first statement was exculpatory on the question of shooting, and the only one whose defense had been built on that statement. (Tr. pp. 283–85, 866). The State knew this and admitted as much in its closing when it told the jury "it don't matter if Vernon didn't shoot." (Tr. p. 987). But it mattered to the jury's assessment of Appellant's individual malice and intent, which the court had instructed the jury to assess separately. (Tr. pp. 1037–38, 1056).

The manner in which the jury heard the testimony compounds the error. The State chose to present Hampton's prior statements through Cobb rather than through Hampton, over all three defendants' objections, and the court itself observed that Rule 16(b) and the extrinsic-evidence procedure it contemplates concern inconsistent, not consistent, statements. (Tr. pp. 797–801). Rule 801(d)(1)(B) permits a prior consistent statement to rebut a charge of recent fabrication or improper motive only if the statement was made before the motive to fabricate arose. *State v. Fulton*, 333 S.C. 359, 364 (Ct. App. 1998).

Hampton had been Mirandized and told his statement could be used against him before he gave it; the motive to minimize his own role and shift blame to others existed from the first words of the interview. (Tr. pp. 791–92, 913–14; PT Tr. pp. 15–16). The statement therefore did not qualify, and presenting it through the investigator, especially selectively, as the solicitor acknowledged she was doing, "to hit the statements that were specifically attacked" (Tr. p. 797), invited the very distortion that occurred.

4. THE TRIAL COURT ERRED IN REFUSING TO LIMIT THE STATE'S MOTIVE EVIDENCE TO A ROBBERY OF "SOMETHING OF VALUE," THEREBY ADMITTING EVIDENCE THAT APPELLANT SUPPLIED DRUGS FOR SALE, WHEN A STIPULATION WAS OFFERED AND THE EVIDENCE WAS NOT NECESSARY TO THE STATE'S CASE.

a. The motion and ruling.

Before trial, Appellant moved under Rules 403 and 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406 (1923), to limit the State's motive evidence. The State's theory was that the shooting was retaliation for a drug robbery of Hines the day before. Appellant did not seek to exclude the robbery. Instead, he asked that it be described as a robbery of "something of value" rather than a robbery of drugs, and offered to stipulate to a value. (Tr. pp. 98–101). Counsel explained that the relevant fact was retaliation for a robbery, not the nature of the thing taken, and that describing a drug robbery and Appellant's role as the supplier of the drugs would prejudice the jury with "just the drugs in the mind." (Tr. pp. 99, 101).

The State responded that it could not present its case without the drugs because the quantity and "perceived disrespect" explained why Appellant would travel from North Carolina to retaliate, and that Appellant himself had said "it was his drugs that were stolen." (Tr. pp. 100–02). The State cited *State v. Adams*, 354 S.C. 361 (Ct. App. 2003) and *res gestae*. (Tr. p. 102).

The court took the motion overnight and ruled the next day. It found that "the fact that it was drugs that was taken ... is part of *res gestae* because that evidence furnishes part of the context of the crime and it really is necessary to a full presentation

of the case," that it explained "motive and intent," and that the difference between a robbery of something of value and a robbery of drugs was "the likelihood ... of someone potentially to go to law enforcement as opposed to doing self-help." (Tr. pp. 264–66, citing *State v. Hough*, 325 S.C. 88 (1997)). The court noted Appellant's exception. (Tr. p. 266). It conducted no separate Rule 403 balancing on the record.

b. What the ruling let in.

The ruling opened the door to a body of evidence that portrayed Appellant as a drug supplier. Hampton testified that Appellant told him what had been taken. (Tr. p. 568). Inmate Daryll Thompson testified that Appellant told him in the jail "my cousin said he had a play for ten ounces," that the drugs were Appellant's, and that "they robbed me." (Tr. pp. 641–42). The State played a recording of that jail conversation in which Appellant says the robbery was of "my s****" and that his cousin did not "have to go to Jersey" because Appellant had product. (Tr. pp. 519–30, 645–50; State's Ex. 115). Cobb testified that Appellant said in the video the drugs were his. (Tr. p. 843). The State's closing built on it: Appellant was "the common denominator ... His drugs"; the robbery was "of Vernon Jenkins's drugs"; "it was his drugs he gave him and shortly after he was robbed." (Tr. pp. 973–74, 996).

c. Evidence of other crimes is admissible as res gestae only when it is necessary, and it was not necessary here.

Evidence of other bad acts is inadmissible to show character or propensity. Rule 404(b), SCRE; *Lyle*, 125 S.C. at 416. The res gestae doctrine permits such evidence when it "furnishes part of the context of the crime," is "necessary to a full presentation of the case," and is "so intimately connected with and explanatory of the crime charged" that its exclusion would "handicap" the State. *Hough*, 325 S.C. at 92–93. Even then, the evidence must survive Rule 403: its probative value must not be substantially outweighed by the danger of unfair prejudice. *State v. King*, 424 S.C. 188, 200–01 (2018) (the trial court must conduct the Rule 403 balancing and the record must reflect it).

The necessity element was absent. Appellant did not seek to deprive the State of its motive. The jury would have heard that Hines was robbed the night before, that the robbery involved something valuable enough to prompt retaliation, that Appellant and Hines exchanged messages about the robber's girlfriend, and that Appellant drove to Columbia the next day. The only thing the ruling added was that the stolen property was drugs and that the drugs were Appellant's. The court's stated reason for finding the evidence necessary was that a drug dealer is less likely to call the police. But that is not a fact the State needed to prove; nobody suggested the defendants had called the police, and the State's theory of self-help was fully presented without it. The court's reasoning shows that the evidence was admitted to explain why these defendants, as drug dealers, would behave as drug dealers do. That is the propensity inference barred by Rule 404(b).

The prejudice was substantial and concentrated on Appellant. Of the three defendants, he was the only one the evidence described as the source of the drugs. The jail recording and Thompson's testimony, which came in only because the drug subject matter had been ruled relevant, told the jury Appellant was a supplier who moved weight between New Jersey and the Carolinas. (Tr. pp. 519–30, 641–42). The State then argued that status as the reason for the crime. (Tr. pp. 973, 996).

A stipulation was offered. (Tr. p. 101). While a defendant cannot ordinarily force the State to accept a stipulation in place of its evidence, the availability of a less prejudicial alternative that proves the same fact is a factor the trial court must weigh under Rule 403, and the court did not weigh it. *See State v. Cross*, 427 S.C. 465, 476–77 (2019) (discussing the use of Rule 403's balancing test). The court's ruling contains no Rule 403 analysis at all; it stops at *res gestae*. (Tr. pp. 264–66). That omission is itself an abuse of discretion. *King*, 424 S.C. at 200–01.

5. THE TRIAL COURT ERRED IN ADMITTING A NON-TESTIFYING CO-DEFENDANT'S TEXT MESSAGES AGAINST APPELLANT, BECAUSE A STATEMENT AGAINST PENAL INTEREST IS ADMISSIBLE ONLY AGAINST THE DECLARANT AND NO CO-CONSPIRATOR

EXCEPTION APPLIES TO STATEMENTS MADE AFTER THE CONSPIRACY ENDED.

a. The exhibits and the objection.

Through its digital-forensics examiner, the State introduced text messages extracted from co-defendant Cole's iPhone. State's Exhibit 76 is a thread in which Cole, on the evening after the shooting, offers a ".380 for 350" with a "box of shells included," responds "all my s*** clean" to a question whether the gun is "clean," and sends a photograph of a Bersa .380 pistol. (Tr. pp. 669–71, 688–89). State's Exhibit 77 is a thread in which Cole asks whether the recipient knows "anybody that need a pole" and, asked "what kind of pole," answers ".380." (Tr. pp. 689–91). Cole did not testify.

Counsel for Appellant objected to Exhibit 76 as hearsay. (Tr. p. 669). After a sidebar the exhibit was admitted "as redacted." (Tr. p. 669). The next morning, before the jury returned, the State placed its ground on the record: under *State v. Johnson*, 324 S.C. 38 (1996), the questions in the thread are not assertions and therefore not hearsay, and Cole's own messages are statements against interest. (Tr. pp. 676–77, 679).

Counsel for Appellant responded with *State v. Barnes*, 421 S.C. 47, 55–56 (Ct. App. 2017): a co-defendant's statement against penal interest is admissible, if at all, only against the co-defendant who made it, because the statement is not against the interest of anyone else. (Tr. pp. 678–82). The court declined to exclude the exhibit and offered a limiting instruction; counsel stated that an instruction would not cure the problem and preserved the objection. (Tr. p. 682). The court directed counsel to renew the objection exhibit by exhibit. (Tr. p. 689). Counsel objected to Exhibit 77 on the same ground; it was overruled. (Tr. pp. 689–90). The State had earlier argued, as to a different exhibit, that post-shooting statements were "in furtherance of the conspiracy"; the court rejected that theory, finding the conspiracy ended with the shooting. (Tr. pp. 516–19).

b. A statement against penal interest is admissible only against its maker.

Hearsay is inadmissible unless an exception applies. Rules 801, 802, SCRE. Cole's messages were offered for their truth: that Cole possessed and was trying to sell the .380 used in the shooting. The State's exception was Rule 804(b)(3), statement against interest. Cole's statements said nothing about Appellant, but they were admitted against him in a joint trial in which the State's theory was that every defendant was responsible for every other defendant's acts, and the State argued them to the jury as proof that "these three" acted together and that "two of the guns were recovered." (Tr. pp. 987–88, 994–95).

The co-conspirator rule does not apply. Rule 801(d)(2)(E), SCRE, requires that the statement be made during and in furtherance of the conspiracy. The shooting was over; the court so found when it rejected the same theory for the jail recording. (Tr. p. 519). A statement made to sell a gun after the crime is not in furtherance of the crime. *State v. Sims*, 387 S.C. 557, 565–66 (2010) (co-conspirator's statement that "spilled the beans" about the crime was not in furtherance of the conspiracy; "casual admissions of culpability" are not admissible).

c. The error was not harmless and the declined instruction does not waive it.

Exhibits 76 and 77 were the State's proof that a second gun used in the shooting belonged to one of the defendants. The firearms examiner connected the .380 cartridge case from the scene to a Bersa pistol recovered two months later at an unrelated incident in Greensboro; only Cole's texts connected that pistol to any defendant. (Tr. pp. 443–45, 475–76, 987–88). The State used that connection to argue that "two of the guns were recovered," one from Appellant's house and one through Cole, and that the three men were therefore a team. (Tr. pp. 994–95). In a hand-of-one prosecution, evidence that a co-defendant disposed of a gun from a crime is evidence against every defendant.

The court offered a limiting instruction and counsel declined it. (Tr. p. 682). This did not result in a waiver of the objection. Counsel's objection was that the evidence was inadmissible against Appellant at all; a limiting instruction would have told the jury to consider the evidence against Cole only. Such a limiting instruction in a joint trial under a hand-of-one theory is disfavored and generally not acceptable under South Carolina law. *State v. Young*, 420 S.C. 608, 624–25 (Ct. App. 2017).

6. THE TRIAL COURT ERRED IN ADMITTING EXPERT "INFORMAL SPEECH" TESTIMONY INTERPRETING ORDINARY TEXT MESSAGES, BECAUSE THE TESTIMONY DID NOT ASSIST THE JURY AND SUPPLIED THE STATE'S INFERENCES UNDER THE LABEL OF EXPERTISE.

a. The testimony.

Appellant moved before trial to exclude expert testimony on "street language," on the ground that "the jurors all speak English." (Tr. pp. 104–05). The court deferred the ruling to a Rule 702 hearing. (Tr. p. 105). At that hearing the State offered Sergeant Brian Zwolak, a gang investigator with no training in linguistics, no publications, and no peer review of his work, whose method was to read messages "in context" and form an opinion about what the words "more than likely" meant. (Tr. pp. 734–46). Counsel for Appellant did not contest his qualifications but objected that the testimony would not assist the jury and asked the State to proffer each word it wanted translated. (Tr. pp. 741–42, 746–48).

The State proffered the following: that ".380 for 350" meant a .380-caliber handgun for \$350; that "shells" meant ammunition; that "pole" and "tools" meant firearms; that "low" and "laying low" meant staying out of public view; that "ten birds" meant "something of value"; that "naked" meant without a gun; that "tore ... up" meant an assault; and that "heart" meant courage. (Tr. pp. 751–62). Counsel for Appellant objected to each. (Tr. pp. 752–62). The court renamed the field "informal speech," barred the words "gang" and "street," and found that each opinion "would assist the

jury." (Tr. pp. 749–50, 755, 758, 760–62). Zwolak then gave the same opinions to the jury over renewed objection. (Tr. pp. 764–69).

b. The testimony did not assist the jury.

Expert testimony is admissible only if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE. The trial court must find that the subject is beyond the ordinary knowledge of jurors and that the testimony is reliable. *State v. White*, 382 S.C. 265, 270–74 (2009); *State v. Council*, 335 S.C. 1, 20 (1999). Where the jury is as capable as the witness of drawing the inference, the testimony does not assist; it substitutes the witness's judgment for the jury's and clothes the State's argument in the authority of expertise. *See State v. Kromah*, 401 S.C. 340 (2013).

Nothing in the proffered testimony was beyond a juror's competence. A message offering a ".380 for 350" with "a box of shells," accompanied by a photograph of a pistol, does not require a sergeant to explain that it concerns a gun; the jury had already heard a firearms examiner testify about the .380 cartridge case and seen the pistol in evidence. (Tr. pp. 475–76, 753). Even the solicitor conceded she had asked for the opinion only because "not everyone knows what a .380 is." (Tr. p. 751). "Laying low," "heart," and "tore him up" are ordinary English. The witness's own method, reading the surrounding messages and inferring meaning from context, is what jurors do. (Tr. pp. 737, 745–46, 771–72). Zwolak acknowledged he had reviewed five messages and nothing else about the case. (Tr. pp. 770, 772).

Where the testimony went beyond the obvious, it was not expertise but advocacy. Zwolak's opinion that "ten birds" meant "something of value" was derived not from any knowledge of the term but from the fact that "somebody took that person for something ... which led to them going and looking for that person." (Tr. pp. 757–58). His opinion that "naked" meant unarmed was derived from the messages that followed. (Tr. pp. 758–59). These are the State's inferences about what the messages show, delivered by a

police sergeant under the label of expert opinion. The jury was instructed that it could reject expert opinion (Tr. pp. 1045–46), but it was also told the opinions were given "for the purpose of helping you understand the evidence" by a witness the court had "qualified" to give them. (Tr. pp. 459, 659).

The prejudice to Appellant lay in what the testimony accomplished. The messages were Cole's and Hines's. (Tr. pp. 765–69). Zwolak's testimony converted ambiguous texts into a narrative — a co-defendant disposing of a crime gun, another co-defendant boasting of an assault, retaliating for a theft of "something of value," and declaring that laying low was a "dummy move" he would do again — that the State then argued as proof of the group's shared purpose. (Tr. pp. 983–84, 987). In a hand-of-one trial, that narrative was evidence against Appellant.

CONCLUSION

Appellant was convicted of two counts of attempted murder in a joint trial in which no witness saw him with a gun, the only physical evidence against him was seized from his home on a consent obtained by telling a frightened pregnant woman that her refusal would be futile, the jury was twice instructed on an inference of malice the Supreme Court has prohibited, the lead investigator was permitted to tell the jury that the State's key witness had implicated Appellant from the start when her own report said otherwise, and the State was allowed to try him as a drug supplier and to prove its case with a non-testifying co-defendant's text messages translated by a police sergeant.

Any one of the first three errors requires a new trial. Together with the fourth, fifth and sixth, they denied Appellant the individualized determination of guilt the trial court itself told the jury he was owed.

Appellant Vernon Jenkins, Jr. respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,
s/ Joshua Snow Kendrick

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