

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

FEB 11 2014

SC Court of Appeals

Appeal from Pickens County
Honorable Edward R. Miller, Circuit Court Judge
Appellate Case Tracking No. 2013-000682

The State,

Respondent,

vs.

Larold Lee Morris,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

NORMAN MARK RAPOPORT
Special Assistant Attorney General
S.C. Bar No. 4635

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Ste. 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
ARGUMENT	
Morris's Issue is not available for appellate review. The trial court did not err by refusing to suppress evidence obtained pursuant to a search warrant for Morris's residence.....	8
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<u>Brightman v. State</u> , 336 S.C. 348, 520 S.E.2d 614 (1999)	16
<u>Campbell v. Bi-Lo, Inc.</u> , 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990)	11
<u>Illinois v. Gates</u> , 462 U.S. 213 (1983)	15, 16
<u>State v. Adams</u> , 291 S.C. 132, 352 S.E.2d 483 (1987).....	14
<u>State v. Adolphe</u> , 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994).....	13, 14
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006).....	13, 14, 16, 18
<u>State v. Bailey</u> , 298 S.C. 1, 377 S.E.2d 581 (1989).....	11
<u>State v. Banda</u> , 371 S.C. 245, 639 S.E.2d 36 (Ct. App. 2006)	12
<u>State v. Bellamy</u> , 336 S.C. 140, 519 S.E.2d 347 (1999).....	12
<u>State v. Bennett</u> , 256 S.C. 234, 182 S.E.2d 291 (1971).....	13
<u>State v. Bernotas</u> , 277 S.C. 106, 283 S.E.2d 580 (1981)	16
<u>State v. Bowman</u> , 366 S.C. 485, 623 S.E.2d 378 (2005).....	9
<u>State v. Broaddus</u> , 361 S.C. 534, 605 S.E.2d 579 (Ct. App. 2004)	18
<u>State v. Bultron</u> , 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995)	15
<u>State v. Burton</u> , 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997)	10
<u>State v. Covert</u> , 382 S.C. 205, 675 S.E.2d 740 (2009)	16
<u>State v. Crane</u> , 296 S.C. 336, 372 S.E.2d 587 (1988).....	14
<u>State v. Davis</u> , 309 S.C. 326, 422 S.E.2d 133 (1992).....	15, 16
<u>State v. Davis</u> , 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003)	12
<u>State v. Evans</u> , 371 S.C. 27, 637 S.E.2d 313 (2006).....	9
<u>State v. Floyd</u> , 295 S.C. 518, 369 S.E.2d 842 (1988).....	10

<u>State v. Forrester</u> , 343 S.C. 637, 541 S.E.2d 837 (2001).....	9, 10
<u>State v. Gagum</u> , 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997).....	10
<u>State v. Gentile</u> , 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007).....	14
<u>State v. Gentry</u> , 363 S.C. 93, 610 S.E.2d 494 (2005).....	11
<u>State v. Hamilton</u> , 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).....	11
<u>State v. Haselden</u> , 353 S.C. 190, 577 S.E.2d 445 (2003)	18
<u>State v. Herring</u> , 387 S.C. 201, 692 S.E.2d 490 (2009).....	16
<u>State v. Jenkins</u> , 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012).....	13, 14
<u>State v. Johnson</u> , 302 S.C. 243, 395 S.E.2d 167 (1990).....	15
<u>State v. Jones</u> , 342 S.C. 121, 536 S.E.2d 675 (2000)	12
<u>State v. King</u> , 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002).....	9, 12
<u>State v. Kirkpatrick</u> , 320 S.C. 38, 43, 462 S.E.2d 884, 888 (Ct. App. 1995)	18
<u>State v. McKnight</u> , 291 S.C. 110, 352 S.E.2d 471 (1987).....	11
<u>State v. McLaughlin</u> , 307 S.C. 19, 22, 413 S.E.2d 819, 821 (1992).....	15
<u>State v. Mitchell</u> , 330 S.C. 189, 193 n. 3, 498 S.E.2d 642, 644 n. 3 (1998).....	10
<u>State v. Mueller</u> , 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995).....	10
<u>State v. New</u> , 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999).....	11
<u>State v. Nichols</u> , 325 S.C. 111, 481 S.E.2d 118 (1997).....	11
<u>State v. Owen</u> , 275 S.C. 586, 274 S.E.2d 510 (1981).....	14
<u>State v. Patton</u> , 322 S.C. 408, 472 S.E.2d 245 (1996)	12
<u>State v. Philpot</u> , 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)	12, 13
<u>State v. Robinson</u> , 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999)	13
<u>State v. Rutledge</u> , 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007).....	14

<u>State v. Simmons</u> , 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).....	11
<u>State v. Smith</u> , 301 S.C. 371, 392 S.E.2d 182 (1990).....	13, 14
<u>State v. Stahlnecker</u> , 386 S.C. 609, 690 S.E.2d 565 (2010)	11
<u>State v. Sullivan</u> , 267 S.C. 610, 230 S.E.2d 621 (1976).....	13
<u>State v. Weston</u> , 329 S.C. 287, 494 S.E.2d 801 (1997).....	12, 13, 14, 15
<u>State v. Woods</u> , 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2007)	16
<u>United States v. Leon</u> , 468 U.S. 897 (1984).....	15, 16
<u>York v. Conway Ford, Inc.</u> , 325 S.C. 170, 480 S.E.2d 726 (1997).....	11

Statutes

S.C. Code Ann. §17-13-140 (1985).....	11, 12
---------------------------------------	--------

STATEMENT OF ISSUES ON APPEAL

I.

Is Morris's Issue available for appellate review?

II.

Did the trial court err by refusing to suppress evidence seized pursuant to a search warrant for Morris's residence?

STATEMENT OF THE CASE

Appellant Larold Lee Morris (Morris) was indicted in Pickens County for first degree burglary, possession of a pistol with an obliterated serial number, armed robbery, and conspiracy. His case came to trial before the Honorable Edward R. Miller, and a jury, on March 19-20, 2013. Morris was convicted as charged. Morris was sentenced to twenty-five years' imprisonment for first degree burglary and armed robbery. He received a concurrent five years' imprisonment on the conspiracy and possession charges. A Notice of Appeal was filed and served.

STATEMENT OF FACTS

On the evening of February 3, 2011, college student Kyle Whitaker was playing video games inside Apartment 190H at University Village in Central, which he shared with three other men. Whitaker heard a knock at the door and looked through the peephole. He saw a man who he thought might be a friend. When Whitaker opened the front door, he was confronted by two individuals. One of the men produced a black handgun and ordered Whitaker to lie on the floor. The individuals then ransacked the bedrooms. (Tr. 102-08, 110-12). One of the robbers had a mask on or a “hoodie that zipped all the way up including the face . . . [with] eye holes on it . . . almost like a Halloween mask.” (Tr. 106). Whitaker also recalled that one of the robbers referred to the other as “Junior.” (Tr. 106, 110). The robbers told Whitaker that if he contacted the police there would be “bloodshed.” (Tr. 115).

Michael Capo lived in the apartment with Whitaker. (Tr. 122-23). Capo testified that his X-Box and several games were stolen. (Tr. 123). Shortly after the robbery, Capo was playing on a friend’s X-Box when he saw his name “Capo Almighty” online. (Tr. 124). When Capo clicked the bio, he noticed that his motto was now “Flight Risk,” “North Carolina Get Money,” and the avatar was changed to an African-American male. Capo saw that the “gamer tag” was changed to “Lil Abbel.”¹ (Tr. 123-28, 132-33). Capo reported this to the police. (Tr. 128).²

¹The State notes that the X-Box “gamer tag” referred to by witnesses throughout the record is cited by the court reporter under different spellings, *i.e.*, “Lil Abbel,” “Lil Abbe,” “Little Abe.” However, there is no dispute from the record that the “gamer tag” referred to by the witnesses is one in the same.

²Capo testified that when his X-Box was later returned to him by the police, “Lil Abbe” remained on his game system. (Tr. 128-29).

Zeke Quinn, another roommate, admitted that he had some marijuana and paraphernalia stolen from his bedroom, in addition to electronic equipment and cash. (Tr. 137, 148-49). He described the ransacked condition of his room after the robbery as “variously worse” than the other bedrooms in the apartment. (Tr. 136-37, 148-49).

Quinn further testified that late in the evening on March 8, he was returning to University Village when he observed three African-American individuals standing outside the door of what was, at this point, his old Apartment 190H. One of the individuals was peering through the peephole, while the others appeared to be acting as lookouts. (Tr. 140, 142-43). Quinn explained that he and his roommates moved out of the old apartment because of the earlier incident. (Tr. 138-39). Quinn called the police, as well as Whitaker and another roommate, Derek Mahaney, who then met him there. Quinn reported this suspicious activity to the police and informed them that the individuals were leaving the parking lot in an Impala. (Tr. 143-47, 151).

Mahaney testified that he observed the three individuals outside the apartment that evening while he was in his vehicle. He was about 50 feet away. He was suspicious of them because of the earlier robbery. (Tr. 155-57, 162-63, 165-67). One of the individuals wore a “half-mask.” (Tr. 155-56, 168, 171). Another was looking through the window of the apartment. (Tr. 155-56). Mahaney testified that he watched the individuals get into an Impala and drive off. At this time, a police officer had just arrived and followed the car out of the parking lot. The car was stopped a short distance away. (Tr. 157-58, 168-70). Mahaney testified that he then drove by the stopped car and saw the same individuals that he just observed outside the apartment. (Tr. 159).

Officer Kevin Peppers of the Central Police Department testified that he was dispatched to University Village. (Tr. 172-75). Peppers and another officer pulled over the Impala shortly after it left the parking lot. (Tr. 175-76, 191). D'Andre Draper was the driver. Morris was in the front passenger seat, and Ernest Cade, Morris's brother, was in the back seat. (Tr. 177-78). All of the passengers wore dark clothing. (Tr. 196). Draper consented to a search of the car. (Tr. 178). Peppers subsequently seized a box of latex gloves located on the floor at Morris's feet. A black and green TEC-9, a silver .380 with the serial number obliterated, and a gun magazine were seized from inside a backpack in the rear passenger compartment behind where Morris was seated. A black mask was also found on the floor of the back of the car. (Tr. 179-90). The backpack was within reach of all three passengers in the car. (Tr. 198). Cade had latex gloves on his person. (Tr. 192). There was a "pile of clothing" on the back seat which Peppers testified "was not thoroughly gone through" at the time. (Tr. 193, 198).

Draper testified at trial. Draper claimed that he was giving Morris and Cade a ride to University Village, because he was going there himself to see a friend. (Tr. 201-04). Draper said that he refers to Morris as "Junior." (Tr. 201). Draper testified that his friend was not there, so they got back into the car and drove off when they were stopped by Peppers. (Tr. 204). Draper said he had no idea where Morris and Cade went at University Village and that he did not go with them. (Tr. 216-18).

Central Police Department Investigator Khristy Justice was informed by Capo that someone else using his "gamer tag" and changing it to "Little Abe." She testified Morris admitted to her that his "gamer tag" was "Little Abe." (Tr. 232-33, 240, 262-63).

After the incident on March 8, Draper spoke to the police and claimed that Morris removed a pair of gloves from his hands and put them inside the glove compartment after he returned to the car. (Tr. 234-36). At trial, Draper denied telling this to the police. (Tr. 224-25). Draper also told the police that the gloves in the car belonged to Morris. (Tr. 237). At trial, however, Draper claimed the box of latex gloves belonged to his mother. (Tr. 218-19). Morris also spoke to the police after his arrest. Morris claimed he was at his sister's house playing X-Box before he was arrested. (Tr. 238-39). Morris denied ownership of the backpack found in the car. (Tr. 239, 263). When the police spoke to Draper again, he was informed that Morris denied ownership of the backpack. Draper, who appeared "upset, scared," then showed the police a text message he received on his cell phone that night from Morris which stated, "Man, let's get Zeke" or "Zikee." (Tr. 208, 215, 240-43, 263-64). Draper also provided this information in his written statement to the police. (Tr. 242-43). Draper testified at trial that "Zeke," or "Zigee" was a "big drug dealer" who lived at University Village. Draper admitted that he had "bought Bud from him a couple of times. . ." (Tr. 215-16, 222-23, 264-65). Draper claimed at trial that he did not receive the text message from Morris the night of his arrest, although he admitted this was contradictory to the written statement which he provided to the police after his arrest. (Tr. 220-23).

Based upon the investigation, Justice obtained a search warrant for the residence of Morris's sister, where he lived at the time. (Tr. 243-44, 262). During the execution of the search warrant, Justice observed an X-Box on the floor of the living room in front of the television, and some games. The X-Box was on at the time. Justice then turned on the television and photographed the X-Box, including the avatar, the "gamer tag", and the

serial number. (Tr. 245-46 272-73; see State's Exhibits 76-96). Nothing else of significance was found inside the residence. (Tr. 262). At trial, the defense stipulated that the X-Box discovered in Morris's residence was the same one stolen from the apartment. (Tr. 246).

Justice also executed a search warrant for the Impala. She seized two more masks, a loaded TEC-9 magazine, what appeared to be a used glove in the floorboard, and identification for a "Ronald Hemmett" from Kingtree. (Tr. 249-53, 260-61).

Morris's DNA was found on one of the masks which were seized from inside the car. (Tr. 282-83). Draper's DNA was not found on any of the masks. (Tr. 282).³

³No fingerprints were found on the handguns. (Tr. 255, 259).

ARGUMENT

Morris's Issue is not available for appellate review. The trial court did not err by refusing to suppress evidence obtained pursuant to a search warrant for Morris's residence. (Issues I & II).

On March 9, 2011, Central Police Department Investigator Khristy Justice sought a search warrant for "Ipods, X-box game systems/games, laptops, luggage, backpacks, masks, televisions, cell phones or any other electronic devices" for an apartment Morris shared with his sister. The search warrant affidavit read as follows:

[Morris], a tenant in the above referenced apartment, is suspected in several armed robberies in the City of Central. During the course of the robberies items such as, IPODS, laptops, Televisions, Xbox game Systems/games, cell phones and other electronics were taken from the victim's homes. The suspect(s) in these cases used a handgun, latex gloves, masks and dressed in all black driving a silver Chevy Impala. This vehicle was stopped on 3/8/11 in the Town limits of Central and once I began interviewing the subjects and locating the firearms it is believed that the stolen property is located in said apartment.

(R. ____). The magistrate thereafter issued the search warrant. The search warrant was executed, and Justice seized an X-Box and games. (R. ____).

Defense counsel moved *in limine* to suppress the items obtained pursuant to the search of the residence, arguing the warrant was based on conclusory statements of opinion from the affiant which were insufficient to establish probable cause. (Tr. 75-77). The trial court denied the motion to suppress the evidence. (Tr. 77-78). The seized X-Box and games were not introduced into evidence at trial. Instead, the State introduced photographs taken at the time of the search warrant which, *inter alia*, showed the X-Box. (Tr. 246-47; see State's Exhibits 76-96).

On appeal, Morris argues the trial court erred by denying his motion to suppress the evidence obtained pursuant to the search warrant, because the warrant was based on a conclusory statements in the affidavit which were insufficient to establish probable cause to issue the search warrant.

Initially, the State submits Morris's Issue is not preserved for appellate review. Although defense counsel made an *in limine* motion to suppress evidence obtained pursuant to the search warrant of the residence, he failed to renew his objection at trial when the photograph evidence was actually entered into evidence.⁴ In fact, when the assistant solicitor moved for admission of the photographs, and the trial court asked if there were any objections, defense counsel affirmatively stated, "No objection." The photographs were then admitted into evidence. (Tr. 126, line 22 – p. 127, line 2; p. 246, line 21 – p. 247, line 2).

Since no objection was renewed at the time the evidence was offered, the matter is not preserved for appeal. State v. Bowman, 366 S.C. 485, 500-01, 623 S.E.2d 378, 386 (2005), *abrogated on other grounds*, State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006); State v. King, 349 S.C. 142, 149-50, 561 S.E.2d 640, 643-44 (Ct. App. 2002); *see State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("In most cases, '[m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced' ");

⁴One of the photographs (State's Exhibit 88) was actually introduced into evidence during Capo's testimony. (Tr. 127). The State notes that the court reporter indicates during the later testimony of Investigator Justice that this same photograph, along with other photographs taken inside of Morris's residence, was introduced into evidence. (Tr. 247). Regardless, the time when State's Exhibit 88 was actually admitted into evidence at trial is insignificant to the procedural bar presented in this appeal.

see also State v. Mitchell, 330 S.C. 189, 193 n. 3, 498 S.E.2d 642, 644 n. 3 (1998) (“We have consistently held a ruling *in limine* is not final, and unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review”); State v. Floyd, 295 S.C. 518, 521, 369 S.E.2d 842, 843 (1988) (“We caution Bench and Bar that these pretrial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence”); State v. Gagum, 328 S.C. 560, 564-65, 492 S.E.2d 822, 824 (Ct. App. 1997) (“Because a ruling in an *in limine* motion is not final, the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for appeal”); cf. State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997) (noting the general rule that a court's ruling on *in limine* motion is not a final decision, but applying State v. Mueller and holding that where an objection is made during trial and there are no intervening witnesses before the disputed testimony, the decision is final and the objection need not be renewed); State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995) (holding an objection to the use of prior convictions for impeachment purposes was preserved where motion was made during trial, rather than during an *in limine* proceeding, and no evidence was received between the ruling and the disputed testimony).

In Forrester, the Supreme Court noted that a defendant's *in limine* motion to suppress evidence should be renewed at trial to preserve the issue for review, but found the defendant's objection to the admission of crack cocaine evidence was preserved in that particular case based on Mueller, because the trial court's ruling was obtained immediately prior to the admission of the drug evidence. Id. at 642-43, 541 S.E.2d at 840.

These circumstances are not present in Morris's case. Capo was the second witness for the State. Investigator Justice was the eighth State's witness at trial. Morris was, therefore, required to renew the objection to the evidence when it was admitted into evidence to preserve his Issue for appellate review.⁵

The State further notes that an additional ground raised by Morris is an alleged violation of South Carolina's search warrant statute. See §17-13-140.⁶ A contemporaneous objection is required to properly preserve an error for appellate review. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009). It is a long-standing appellate practice that to be preserved for review, an objection must be sufficiently specific to bring into focus the precise nature of the alleged error. State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010); State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999); see also Campbell v. Bi-Lo, Inc., 301 S.C. 448, 454, 392 S.E.2d 477, 481 (Ct. App. 1990) (holding where the ground for objection is not stated in the record, there is no basis for appellate review). Significantly, a party cannot argue one ground below and then argue another ground on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); see State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997)

⁵There was an off-the-record conference prior to the introduction of the photographs, but it is apparent from the record the discussion involved defense counsel's stipulation that the X-Box recovered from Morris's residence was the same one stolen from the apartment, rather than a renewal of the earlier motion to suppress items seized pursuant to the search warrant of Morris's residence. (Tr. 246, lines 12-19). In any event, it is well-settled that an objection made during an off-the-record conference, which is not made part of the record, does not preserve an issue for appellate review. York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997); cf. State v. Hamilton, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001) (York is inapplicable when the initial off-the-record bench conference is later made a part of the record). *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

⁶Section 17-13-140 provides that "[a] warrant issued hereunder shall be issued only upon affidavit sworn to before the ... judge of a court of record establishing the grounds for the warrant. . . ." This statute imposes stricter requirements than does either the State or federal Constitutions. State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987).

(an exception is not preserved for review because appellant simply made a general objection during the experts' testimony without giving the specific ground. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review); State v. Patton, 322 S.C. 408, 411, 472 S.E.2d 245, 247 (1996) (the defendant must articulate specific factual and legal grounds to support his claim that evidence was obtained by conduct violative of his constitutional rights); State v. Banda, 371 S.C. 245, 257, 639 S.E.2d 36, 42 (Ct. App. 2006) (same). In this case, Morris failed to cite §17-13-140 during his suppression motion at trial. (Tr. 75-77). His failure to do so precludes appellate review of this ground for suppressing the search for the first time on appeal.

Despite the lack of preservation of Morris's Issue, the State will address the merits. An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding that probable cause existed. State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). This review, like the determination by the magistrate, is governed by the 'totality of the circumstances' test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. A reviewing court must give great deference to a magistrate's determination of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003).

A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999); see also S.C. Code Ann. §17-13-140 (1985) (providing that search warrants may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant"). The affidavit must

contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Philpot, 317 S.C. at 461, 454 S.E.2d at 907. Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and must therefore be viewed in a common sense and realistic fashion. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). In other words, affidavits must be judged on the facts presented and not on the precise wording used.

The task of the reviewing court is to decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). The term “probable cause” does not import absolute certainty. State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971). Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties. Sullivan, 267 S.C. at 617, 230 S.E.2d at 624. Oral testimony may be used to supplement search warrant affidavits. State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. State v. Baccus, 367 S.C. 41, 47, 625 S.E.2d 216, 219, 222 (2006); State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990); State v. Jenkins, 398 S.C. 215, 222-23, 727 S.E.2d 761, 765 (Ct. App. 2012); see also Weston, 329 S.C. at 291, 494 S.E.2d at 803 (an affidavit supporting a search warrant could not have provided a substantial basis for finding probable cause to search Weston’s car when the affidavit failed to set forth any facts as to why police believed Weston committed the crime and the first three sentences of the affidavit contained conclusory statements).

The magistrate's task in determining whether to issue the search warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007); State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994); see also State v. Crane, 296 S.C. 336, 338-39, 372 S.E.2d 587, 588-89 (1988) (holding the magistrate should determine probable cause based on all the information available to him at the time the warrant is issued, including sworn oral testimony); State v. Adams, 291 S.C. 132, 133-34, 352 S.E.2d 483, 485 (1987) ("A determination of probable cause depends upon the totality of the circumstances"). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Owen, 275 S.C. 586, 274 S.E.2d 510 (1981); State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007).

Distinguishable from the conclusory statements in the affidavits in Baccus, Smith, Weston, or Jenkins, as cited by Morris, the affidavit here did not fail to set forth sufficient facts as to why the affiant believed evidence of criminal activity would be found in Morris's residence. Justice explained that Morris was suspected of several armed robberies, that the suspects used handguns, and that they drove a silver Impala. The affidavit states that on March 8, Morris was stopped in the Impala and that firearms were recovered. Based upon this corroborative information regarding her investigation and Morris's probable involvement in the armed robberies as a result of the evidence recovered from the suspect car, it was reasonable for the magistrate to conclude that stolen property and/or other instruments used in the crimes would be located in the

described residence. The affidavit, therefore, included more than mere conclusory statements, and established probable cause to issue the search warrant. See State v. McLaughlin, 307 S.C. 19, 22, 413 S.E.2d 819, 821 (1992) (holding probable cause to search a toolbox was established by defendant's suspicious behavior, his possession of large amounts of cash, the presence of a marijuana cigarette, and his repeated denials of ownership of the toolbox); Davis, 354 S.C. at 358, 580 S.E.2d at 783 (circumstances of defendant's flight from police after they attempted traffic stop allowed a reasonable inference of guilty conduct, supporting probable cause to search motel room for which key was found in search of defendant); State v. Bultron, 318 S.C. 323, 333, 457 S.E.2d 616, 622 (Ct. App. 1995) (holding defendant's suspicious activity was part of the basis for finding that probable cause existed for a search).

In addition, the search warrant should be upheld under United States v. Leon, 468 U.S. 897 (1984). The Leon Court held that when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause. Id. at 915-16. In Weston, the Court cited to State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990), which generally precluded application of the Leon good-faith exception when an affidavit fails to provide a magistrate with a substantial basis for finding probable cause. Weston, 329 S.C. at 293, 494 S.E.2d at 804. The Weston Court noted, however, that “Johnson should not be read as prohibiting application of the good-faith exception every time an affidavit fails to satisfy the technical requirements of Gates.⁷ Suppression is appropriate in only a few situations, including when an affidavit is

⁷Illinois v. Gates, 462 U.S. 213 (1983).

‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ ” Id. (quoting Leon, 468 U.S. at 923). In the present case, there was clearly good-faith, measured objectively, on the part of the police to comply with the warrant requirements for the residence, and the affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009); State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

In the event the affidavit is found insufficient to establish probable cause, and the Leon good-faith exception is rejected by this Court, any error in the admission of the evidence obtained pursuant to the search of the residence was harmless beyond a reasonable doubt. See, e.g., Baccus, 367 S.C. at 55-56, 625 S.E.2d at 223-242 (“When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result”); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (erroneous admission of evidence may constitute harmless error if the evidence did not affect the outcome of the trial), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Bernotas, 277 S.C. 106, 283 S.E.2d 580 (1981) (for an error in the erroneous admission of unlawfully seized evidence to require reversal, the appellant must be sufficiently prejudiced); State v. Woods, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2007).

Independent of the items Morris sought to have suppressed at trial,⁸ the State presented overwhelming evidence of Morris's guilt from several different sources. Two men, one wearing a mask or "hoodie" covering his face, confronted Whitaker in the apartment after he opened the door. They threatened him with a black gun. One of the robbers referred to the other as "Junior." The robbers ransacked the bedrooms, particularly Zeke Quinn's, and stole several items, including Capo's X-Box and Quinn's drugs and paraphernalia. A little over a month later, three men were observed outside the same apartment. One was looking into the apartment. One of them wore a mask. The three men - - Morris, Draper, and Cade - - were stopped in a car by police a short distance away after leaving University Village. Among other items found inside the car, the police seized a black gun, masks, and a box of latex gloves. Cade had gloves in his possession. Draper, who drove the others to University Village, told the police that Morris removed a pair of gloves from his hands when he returned to the car. Draper said the box of gloves belonged to Morris. Morris's DNA was found on one of the masks. Also, Morris earlier that night suggested in a text message to Draper that they "get," *i.e.*, rob, "Zeke" or "Zikee." Draper testified "Zeke" was a known drug dealer living in University Village and that he "bought Bud from him a couple of times." Draper referred to Morris as "Junior." The testimony thus demonstrated substantial evidence that Morris ("Junior") and his friends robbed the apartment in February, ostensibly to steal drugs as well as other valuable items, and then decided to return to the same apartment a month later to rob Quinn once again. Given this abundant evidence of Morris's guilt, any error in

⁸As previously noted, the items obtained pursuant to the search warrant of the residence and admitted into evidence were simply photographs taken inside the residence, including photographs of the X-Box stolen from Apartment 190H.

admission of the photographs taken inside Morris's residence as a result of the search was harmless beyond a reasonable doubt.

Further, the testimony established that shortly after the robbery, Capo saw that his X-Box user name was online. Capo's avatar was changed to an African-American male and his "gamer tag" was changed to "Lil Abel." Morris admitted to the police that his "gamer tag" was "Little Abel." Thus, evidence that the police seized Capo's computer in Morris's residence was merely cumulative to other competent evidence that Capo's X-Box was in Morris's possession and that he was using it shortly after the armed robbery. The admission of the photographs of the stolen X-Box obtained from the execution of the search warrant for Morris's residence was, therefore, harmless. Baccus, 367 S.C. at 55-56, 625 S.E.2d at 224 (blood evidence drawn pursuant to the court order which should have been excluded was cumulative, where physician testified the blood sample collected from defendant on the night of his arrest matched the blood found on the swabs and cuttings from the door, blind, and sheet in the victim's house); State v. Kirkpatrick, 320 S.C. 38, 43, 462 S.E.2d 884, 888 (Ct. App. 1995) (even if seizure of key to truck containing marijuana was improper, evidence was cumulative and its admission was harmless, where defendant admitted he had rented the trailer in question and bought a lock to put on it); cf. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence introduced at trial); State v. Broaddus, 361 S.C. 534, 542, 605 S.E.2d 579, 583-84 (Ct. App. 2004) (concluding error in admission of drug evidence was harmless where it was cumulative to other unobjected-to testimony at trial regarding drug use and drug dealing).

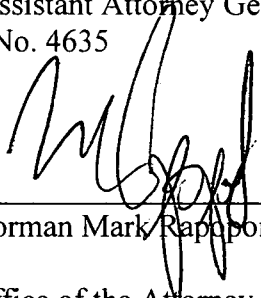
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

NORMAN MARK RAPOPORT
Special Assistant Attorney General
S.C. Bar No. 4635

BY: 
Norman Mark Rapoport

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Ste. 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

February 11, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

FEB 11 2014

SC Court of Appeals

Appeal from Pickens County
Honorable Edward R. Miller, Circuit Court Judge
Appellate Case Tracking No. 2013-000682

The State,

Respondent,

vs.

Larold Lee Morris,

Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the following to be included in the Record on Appeal:

- (1) Tr. 56-85;
- (2) Tr. 102-286;
- (3) State's Exhibits 76-96; and
- (4) Court's Exhibits 1 & 2.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

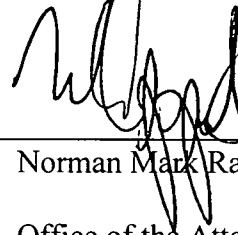
The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

AW
#1/2

NORMAN MARK RAPOPORT
Special Assistant Attorney General
S.C. Bar No. 4635

BY: _____



Norman Mark Rapoport

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Ste. 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

February 11, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

FEB 11 2014

SC Court of Appeals

Appeal from Pickens County
Honorable Edward R. Miller, Circuit Court Judge
Appellate Case Tracking No. 2013-000682

The State,

Respondent,

vs.

Larold Lee Morris,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Chris Paton, Esquire
Chris Paton LLC
40 Calhoun Street, Ste. 411
Charleston, SC 29401

I further certify that all parties required by Rule to be served have been served.
This 11th day of February, 2014.

Ellen R. DuBois

Ellen R. DuBois
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



RECEIVED
FEB 11 2014
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

February 11, 2014

Chris Paton, Esquire
Chris Paton LLC
40 Calhoun Street, Ste. 411
Charleston, SC 29401

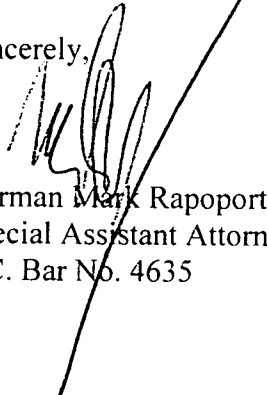
Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Larold Lee Morris
Appellate Case Tracking No. 2013-000682

Gentlemen:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,


Norman Mark Rapoport
Special Assistant Attorney General
S.C. Bar No. 4635

Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Services