ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVIN JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-000766

INITIAL BRIEF OF APPELLANT

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II. Did the trial judge err in admitting Appellant's statement to a police officer where the statement was not given knowingly, intelligently, and voluntarily in light of the totality of the circumstances, including the officer's repeated refusal to permit Appellant an opportunity to smoke a cigarette, the officer's statement that cigarettes were for cooperators, and the officer's statement that non-cooperators got prison, not cigarettes?

III. Violating Appellant's right to due process of law, did the trial judge err in instructing the jury concerning "the hand of one is the hand of all" after the jury began deliberating where the evidence did not support the instruction?

IV. Violating Appellant's right to due process of law, did the trial judge err in instructing the jury concerning "the hand of one is the hand of all" after the jury began deliberating where the timing of the instruction prevented Appellant from addressing the theory in his closing argument rendering his trial fundamentally unfair?

STATEMENT OF THE CASE

On September 12, 2011, a Charleston County grand jury indicted Appellant for murder (2011-GS-10-5207) and possession of a firearm during the commission of a violent crime (2011-GS-10-5208). R. * (indictments). On March 31, 2014, the state, represented by Chad Simpson and Drew Evans, called the case to trial before the Honorable R. Markley Dennis and a jury. Beattie Butler and Rhett Dunaway represented Appellant. Tr. 1. The jury found Appellant guilty as indicted. Tr. 676, line 20 – Tr. 677, line 1. Judge Dennis sentenced Appellant to thirty-six years' imprisonment for murder and to five years' imprisonment for possession of a firearm during the commission of a violent crime. He ordered the sentences to be served concurrently. Tr. 688, lines 8-14; R. * (sentence sheets).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

Tenika Elmore and Appellant lived together in Orangeburg in June 2011. Tr. 182, line 19 – Tr. 184, line 16. At that time, Appellant's sister, Charmaine Johnson, lived at Georgetown Apartments in Charleston. Tr. 185, lines 6-19: Tr. 302, lines 10-18. Charmaine's boyfriend was Akeem Smalls. Tr. 186, lines 13-24. Appellant had loaned Smalls money, approximately $400, in April or May of 2011. Tr. 186, line 25 – Tr. 187, line 25; Tr. 189, lines 7-15. However, Appellant made no efforts to collect the debt and there was no animosity or bad blood between the two concerning the debt. Tr. 187, lines 14-16; Tr. 189, lines 19-24; Tr. 209, line 16.

On June 8, 2011, DeAngelo Buncum went to Georgetown Apartments to hang out with friends. While there, he saw Smalls on the second floor. The two were talking and drinking while Smalls worked on a music CD. Tr. 493, lines 7-16. At some point, Buncum left Smalls's apartment and went to another apartment to visit other friends. Tr. 494, lines 1-5. Sometime after Buncum left Smalls's apartment, Buncum saw flashlights moving around outside of the apartments and went out to investigate. He saw police officers, who informed him that Smalls had been shot. Tr. 494, lines 9-22; Tr. 495, lines 9-14; Tr. 500, lines 6-9.[1]

On that same day, Appellant, who had dreadlocks, drove Elmore to her place of work in North Charleston around 11 a.m. in Elmore's car, a 2008 blue Toyota Camry with a specialty license plate, "L-1207." Tr. 190, line 20 – Tr. 193, line 17; Tr. 196, lines 2-8; Tr. 213, lines 9-16. Appellant kept Elmore's car that day. Tr. 193, line 24 – Tr. 194, line 2. During his interrogation, Appellant stated that he went to Georgetown Apartments to get

[1] Initially, Buncum was charged with murder. Buncum remained in jail for three months until the charges were dropped. Tr. 498, lines 3-8.

some of his clothing from his sister. He was accompanied by a friend, whom he knew only as "Creep." While walking to his sister's apartment, Appellant saw a dark-skinned black male in the area. Appellant heard gunshots. Scared, he and Creep ran back to the car and left. Tr. 330, lines 3-13; Tr. 350, line 11 – Tr. 353, line 23; State's Exhibit #56. Appellant dropped off Creep, and then went to pick up Elmore from work. State's Exhibit #56. However, at trial, Appellant maintained that he was not at Georgetown Apartments on the night of the shooting. Tr. 557, line 18 – Tr. 571, line 18. Specifically, in closing argument, it was made clear that Appellant "didn't see a murder. He didn't participate in a murder. He wasn't there." Tr. 562, lines 1-4.

Elmore got off from work at 11 p.m., but Appellant did not arrive until 11:15 p.m. to pick her up. She was upset with Appellant for being late yet again. Tr. 196, line 21 – Tr. 197, line 25. The two then went to Summerville top pick up Appellant's daughter from his mother's house, stopped for gas, and then went home to Orangeburg. Tr. 199, line 16 – Tr. 200, line 18.

Meanwhile, the Charleston City Police responded to Georgetown Apartments concerning gunshots fired and a man saying he had been shot, but he did not know where he was. Officers found Smalls, wearing only boxer shorts and socks, in a lot next to the apartment complex. He had been shot, but was conscious. Tr. 230, line 9 – Tr. 231, line 10. Officers found shell casings and blood drops in the hallway of Building C at Georgetown Apartments. The blood drops went through the apartment complex common areas to an air conditioning unit adjacent to the vacant lot where Smalls was found. Based on the location of the shell casings and the blood drops, the police surmised the shooting occurred on the

first level of Building C. Tr. 237, line 25 – Tr. 252, line 10; Tr. 302, line 19 – Tr. 303, line 3.

The apartment complex had stationary surveillance cameras in various spots, but no camera angle captured the shooting. Tr. 303, line 22 – Tr. 309, lines 24; State's Exhibit #55. However, the video from the cameras showed Smalls running across the parking lots. Tr. 311, line 8 – Tr. 313, line 10. Based on the video, the police estimated the shooting occurred at 10:18 p.m. Tr. 310, lines 22-24; Tr. 314, lines 19-20. The police were interested in one camera angle showing a parking lot near the office. That camera showed a car back into a spot at 10:15 p.m. Tr. 314, line 6 – Tr. 315, line 14. Two people got out of the car and walked down a breezeway toward Building C. Tr. 318, lines 2-13. Approximately two minutes later, the two people get back into the car and drive away. Tr. 320, line 25 – Tr. 321, line 9.

Robert Watts and Alise Buckner, who were living in Georgetown Apartments, heard gunshots. Watts called for help while he and Buckner looked outside. Tr. 521, lines 12-25; Tr. 522, lines 8-15; Tr. 536, lines 16-20; Tr. 537, lines 4-6. Watts saw two men running. He also saw a car that had an "A" in the license plate. Tr. 523, lines 19-22. Buckner also saw an "A" in the license plate. She further testified the plate was a regular license plate, not a specialty plate. Tr. 538, lines 2-13.

Days later, on June 14, 2011, the police found an unfired 9 mm Luger bullet made by FC in a nightstand drawer in Charmaine's apartment in Building C. Tr. 264, line 6 – Tr. 268, line 4; Tr. 301, lines 2-10; Tr. 302, lines 10-18. A fingerprint examiner identified a latent lift from the unfired bullet to Appellant. Tr. 481, lines 8-21.

ARGUMENT

I. In violation of Appellant's state constitutional right to privacy and the Fourth Amendment to the United States Constitution, the trial judge erred in admitting text messages and historical cell service location information obtained from Appellant's cellular service provider by a search warrant lacking probable cause where the search warrant failed to establish a nexus between Appellant's cell phone records and the crime and the warrant was overly broad.

Relevant facts

On June 13, 2011, the Charleston Police obtained a search warrant for records associated with Appellant's cell phone, including "[s]ubscriber information, account comments, billing records, outbound and inbound calls from 06/04/2011 to 06/09/2011" for Appellant's phone number, "subscriber information on any other Verizon numbers listed in the report, call origination location, physical address of cell sites and rf coverage map, all stored communications, or files, including voice mail, e-mail, digital images, text messages, buddy lists, and any other files associated" with Appellant's phone number. The affidavit in support of the search warrant provided (1) that officers responded to a call on June 8, 2011 at Georgetown Apartments and found Smalls suffering from multiple gunshot wounds; (2) Smalls had been in an ongoing dispute with Appellant that escalated to the shooting; (3) that a witness, Shaconnar Goff,[2] saw Appellant holding a firearm moments after hearing the gunshots; (4) that the investigators believed the requested phone records would help further the investigation. The affidavit continued that the records maintained by the cellular service providers "may assist in the identification of person/s accessing and utilizing the account." Further, the affidavit noted that cellular service records included cell site information to coordinate with geographical location of cell sites and the possibility of GPS. According to

[2] Shaconnar Goff did not testify at the trial. No witness testified to seeing Appellant at Georgetown Apartments on the night of the shooting or to seeing Appellant with a gun.

the affidavit, "[u]sing the cell site geographical information or GPS information, officers would be able to determine the physical location" of the user, which was "information ... necessary to the investigating officers in order to investigate the crime." R. * (Defendant's Exhibit #1).

Appellant filed a motion to suppress the evidence secured in response to the search warrant based upon a lack of probable cause. During the suppression hearing, Craig Kosarko, the affiant, testified that he orally supplemented the affidavit as follows: Appellant had been arrested and had the cellphone in his possession at the time and Appellant's sister and girlfriend provided Appellant's cell phone number. Further, Kosarko testified, "I told them that he was using the cellphone, according to his girlfriend during the time period of the murder, that whole day." Tr. 132, lines 12-21. On cross-examination, Kosarko clarified that he told the magistrate that Appellant's girlfriend indicated Appellant was using the phone before and after the murder. Kosarko admitted Appellant's girlfriend would not have known what Appellant was doing at the time of the murder and, therefore, was unable to provide that information. Tr. 140, lines 1-16.

Kosarko informed the magistrate that during the interrogation, Appellant admitted he was at Georgetown Apartments that day with an individual identified only as "Creep." Tr. 133, lines 14-22. Kosarko told the magistrate that he believed Appellant's cell phone "would have information or contact information of Creep." Tr. 134, lines 21-25. Finally, Kosarko claimed he told the magistrate that during the interrogation, Appellant indicated he had used his cell phone "on the day of before and just after the murder" "[w]hen he said he had called a family member, something like that." Tr. 135, line 14 – Tr. 136, line 2.

The prosecutor argued the affidavit satisfied the nexus requirement because "it is perfectly fine for a magistrate to make commonsense assumptions about life as he knows it, that people these days carry cell phones, and they use them and a treasure trove of information is completely appropriate to obtain when probable cause is asserted that a certain specific individual committed a serious crime." However, the prosecutor also argued that Kosarko's oral supplementation more clearly established the nexus between the phone and the crime. Tr. 145, line 1 – Tr. 146, line 16.

Appellant countered that "[m]aking calls does not allow them to get his text messages" and no one had said anything about text messages and there was no reason to think he was sending text messages. Appellant noted the fact that he had the phone that day and was using it that day was not sufficient. He explained the probable cause requirement consisted of two parts: a nexus and specificity. The affidavit contained no reason to think Appellant's text messages and phone records were relevant to the case. Tr. 146, line 18 – Tr. 148, line 1.

Judge Dennis held the affidavit was sufficient to establish probable cause for the items sought:

> Frankly, the statement that the testimony was someone had seen him using the phone, his own statement that he was. Clearly - - Creep, he said he didn't know and they're certainly entitled to get that information, to find, to try to ascertain whether they could get a potential very significant witness.
>
> And, frankly, when a person denies where they've been and then says, I was, this is another way to establish where he was. See if there was any - - I think that's good police work. I don't think that's an invasion of anything.

Tr. 148, line 2 – Tr. 149, line 11.

Officer Craig Kosarko requested Appellant's cell phone records from Verizon Wireless pursuant to a search warrant. Using the phone records, Kosarko testified that

Appellant contacted Smalls on June 4, 2011, four days before the shooting. Tr. 441, line 16 – Tr. 442, line 19; Tr. 450, lines 8 - 25. Kosarko, using the phone records, claimed that Appellant called his sister, Charmaine Johnson, at 9:30 p.m. on June 8, 2011, the day of the shooting. Tr. 442, line 20 – Tr. 443, line 12.

Kosarko also received the content of Appellant's text messages from Verizon Wireless. Kosarko relayed a series of text messages between Appellant's phone and Terry Stevens on June 8, 2011. At 4:37 p.m., a text message from Appellant's phone to Stevens' phone read: "hey, I go wet dude ass up tonight." Then, at 9:34 p.m., a text message from Appellant's phone to Steven's phone stated, "I can't wait on you. I gotta handle my biz." Tr. 444, line 1 – Tr. 449, line 7; R. * (State's Exhibit #59 & #69). Kosarko then claimed that he had heard the terms "wet somebody up" and "wet 'em up" under his experience as a law enforcement officer and the terms meant "[t]o shoot somebody or kill someone." Tr. 449, lines 17-24.[3]

Willis Walker used Appellant's phone's historical cell site location information to plot the location of Appellant's phone on June 8, 2011. According to Walker, most of the cell sites for that day were in the Summerville and North Charleston area. Tr. 472, lines 6-17; R. * (State's Exhibits #71, #72, #73, #74, #75). However, there was one call at 10:02 p.m. where the phone used a tower at the interchange of Cosgrove Road and I-26. Tr. 472, line 18 – Tr. 473, line 15.

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[3] According to Elmore, the phrase "wet up" meant to shoot someone or get drunk. Tr. 208, lines 1-8. Osborne found multiple definitions for the term "wet up" in the Urban Dictionary, including to shoot or stab someone and to take shots or drink any alcoholic beverage until at least tipsy. Tr. 359, line 18 – Tr. 362, line 3.

In his closing argument, the solicitor argued Appellant's phone records were "incredibly important." He went through the series of text messages and emphasized his interpretation of "wet up." He reiterated Appellant's phone call to his sister at 9:30 p.m. as indicating Appellant knew where Smalls was shortly before the shooting. Further, the solicitor used historical cell site location information to show an "anomaly" indicating Appellant was only a "short hop" from Smalls's apartment at 10:02 p.m., mere moments before the shooting. Tr. 575, line 15 – Tr. 581, line 2.[4]

Discussion

A. *Pursuant to the Fourth Amendment to the United States Constitution, Appellant had a reasonable expectation of privacy in his cell phone records, including text messages and historical cell site location information.*

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Katz v. United States, 389 U.S. 347, 351, (1967); Oliver v. United States, 466

[4] During the deliberations, the jury asked to re-hear the testimony about the text messages and asked about a phone number presented during the state's case. R. *(Court's Exhibit #2); R. * (Court's Exhibit # 6).

U.S. 170, 177 (1984). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

> [I]n order to claim the protection of the Fourth amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'

Id. (quoting Rakas, 439 U.S. at 143-144, and n.12). The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); see also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light).[5]

Recently, this Court held an individual does not have an expectation of privacy pursuant to the Fourth Amendment in his historical cell site location records. State v. Drayton, Op. No. 2012-213295 (S.C. Ct. App. filed Feb. 4, 2015). A petition for rehearing is pending currently in that case. Respectfully, Appellant urges this Court to reconsider its decision in Drayton as it applies to this case. A careful examination of recent Supreme Court precedent indicates that an individual has an expectation of privacy in not only the historical cell site location records, but the call records and text messages as well; thus,

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[5] The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Appellant asks this Court to consider the matter in the present case.

The United States Supreme Court's recent decision in Riley v. California, 134 S.Ct. 2473 (2014) supports Appellant's contention that individuals have an expectation of privacy in cell phone records, including phone call records, text messages and historical cell site location information. The Supreme Court held that that a search warrant is required to search a cell phone, even when the phone is seized incident to arrest. Id. at 2493. The Court rested its opinion upon the "quantitative and qualitative" difference between cell phones and other items of personal property. Id. at 2489. "One of the most notable and distinguishing features of modern cell phones is their immense storage capacity." Id. "Cell phones couple that capacity with the ability to store many different types of information." Id. One of the Court's many concerns with cell phones was the ability of the cell phone to allow the reconstruction of the sum of an individual's private life, including the person's whereabouts on particular dates. Id. The Court explained "[h]istoric location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." Id. at 2490 (citing United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 955 (2012)(Sotomayor, J., concurring)).

In City of Ontario, Cal. v. Quon, 560 U.S. 746, 756 (2010), the United States Supreme Court assumed the city employee had a reasonable expectation of privacy in the text messages he sent on his employer-issued pager. However, numerous courts have held that individuals have expectations of privacy in their text messages stored on their cell phones. United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008); United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007); United States v. Davis, 787 F.Supp.2d 1165, 1170 (D. Or. 2011); United States v. Quintana, 594 F.Supp.2d 1291, 1299 (M.D. Fla. 2009); State v.

Boyd, 992 A.2d 1071, 1081 (Conn. 2010). Further, courts have found a privacy expectation in text messages stored by the service provider. State v. Clampitt, 364 S.W.3d 605, 611 (Mo. Ct. App. 2012).

In Katz, the United States Supreme Court held the government's conduct of electronically listening to and recording Katz's words while he was using a public telephone booth violated his privacy. Katz, 389 U.S. at 353. In other words, individuals have a reasonable expectation of privacy in the content of their telephone conversations, even those taking place on public telephones. Likewise, senders of letters through the mail service have an expectation of privacy in those letters. In Ex Parte Jackson, 96 U.S. 727 (1877), the Court held that "[l]etters, and sealed packages are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." In fact, "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." Id. The Court re-affirmed this holding in United States v. Van Leeuwen, 397 U.S. 249 (1970).

Appellant had a reasonable expectation of privacy pursuant to the Fourth Amendment to the United States Constitution in his cell phone records, including text messages and historical cell site location information. The easier question presented here concerns Appellant's text messages. The Fourth Amendment clearly protects text messages as those are akin to the contents of telephone conversations and letters dropped in the mail. The transmission of the content of the text message is no different than the transmission of a voice conversation in which an operator could listen or in a letter which is deposited in the mail for delivery.

Although historical cell site location information appear to pose a more difficult question at first blush, a closer examination reveals a finding of an expectation of privacy in that information as well. Justice Alito explained that technology can change what is considered a reasonable expectation of privacy: "[d]ramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes." Jones, 565 U.S. ____, 132 S.Ct. at 962 (Alito, J. concurring). Continuing, Justice Alito recognized that cell phones and other wireless devices permit wireless carriers to track and record the location of users shaping the average person's expectations about privacy. Id. at 963. Certainly, if the police must obtain a search warrant to search a cell phone – even when conducting a search incident to arrest – due to the expectation of privacy an individual has in his phone, then the police may not circumvent this warrant requirement by going to the cellular service provider seeking the same information. In other words, if an individual has an expectation of privacy in the information contained on the phone itself, then an individual has an expectation of privacy in the information stored by the cellular service provider. The phone is useless without the cellular service provider.

B. *By obtaining Appellant's cell phone records, including phone call logs, text messages, and historical cell site location information using a warrant unsupported by probable cause, the police invaded Appellant's privacy rights under the South Carolina Constitution.*

In Drayton, supra, this Court resolved the question of whether South Carolina's Constitution required probable cause for historical cell site information by relying on federal precedent to conclude "Drayton did not have a reasonable expectation of privacy in his historical cell site location data because he voluntarily contracted with the cellular provider, thereby conveying his cell site location data to the provider who created the records in the

ordinary course of business." State v. Drayton, Op. No. 2012-213295 (S.C. Ct. App. filed Feb. 4, 2015). As mentioned, a petition for rehearing is pending currently in that case. Respectfully, Appellant urges this Court to reconsider its decision in Drayton as it applies to this case.

South Carolina's Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. Art. I, Section 10. "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. at 647, 541 S.E.2d at 842. Our Supreme Court explained, "the drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches." Id. at 647, 541 S.E.2d at 842.[6] According to the South Carolina Supreme Court, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007).

Without question, South Carolinians consider historical cell site location

[6] In her dissent in State v. Dykes, Justice Hearn provided an eloquent analysis and assessment of the growing threat of technological advances to individual liberty. She explained that "the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives." State v. Dykes, 403 S.C. 499, 511-522, 744 S.E.2d 505, 511-517 (2013)(Hearn, J. dissenting).

information, call logs, and the contents of text messages, maintained by cellular service provides to be private information and obtaining of such information without a warrant is an invasion of that privacy. To understand just how much of an invasion occurs when considering historical cell site location information, it is necessary to understand how cell phones work and how the information can be used to track individuals. "When a cell phone is turned on, it identifies its location to nearby cell towers, every seven seconds, on a continuous basis." Eric Lode, Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under State Law, 94 A.L.R.6th 579 (2014). This sort of tracking "may identify a cell phone's location to within about 200 feet." Id. Using information received by multiple cell towers, the location can be determined even more precisely. Id. If a phone has GPS capabilities, and more than 90% do, a phone may be tracked to within fifty feet. Id.

Recognizing how cell phones work and the increasing view that cell phones are necessary to social interactions and business, the Massachusetts Supreme Court held that "[c]learly, tracking a person's movements implicates privacy concerns." Commonwealth v. Augustine, 4 N.E.3d 846, 859-860 (2014). The Massachusetts court held the third-party doctrine was not applicable to historical cell site location information under the state constitution's protection against unreasonable searches and seizures. The court distinguished the historical cell site location information from the record of telephone numbers dialed as maintained by the telephone company. As explained by the court, the user knowingly provided the telephone numbers dialed to the telephone company. "No cellular telephone user, however, voluntarily conveys [cell site location information] to his or her cellular service provider" because such information "is purely a function and

product of cellular telephone technology. Id. at 862. The court noted the police were "not seeking to obtain information provided to the cellular service provider by the defendant" but were looking "only for the location-identifying by-product of the cellular telephone technology – a serendipitous (but welcome) gift to law enforcement investigations." Id. at 863.

The Supreme Court of New Jersey held "individuals have a reasonable expectation of privacy in the location of their cell phones under the State Constitution." State v. Earls, 70 A.3d 630, 632 (N.J. 2013). It was settled law that the state constitution of New Jersey afforded greater protection than the Fourth Amendment and that individuals did not lose their privacy rights simply because they gave information to a third-party provider. Id. The Court recognized that disclosure of cell phone location information was required by users in order to receive service and that such information "can reveal a great deal of personal information about an individual," including "not only where individuals are located at a point in time but also which shops, doctors, religious services, and political events they go to, and with whom they choose to associate." Id. The Court further recognized that "people do not buy cell phones to serve as tracking devices or reasonably expect them to be used by the government in that way." Id.

Using its state constitution, the Washington Supreme Court held a police officer's reading of text messages on a cell phone seized from an arrestee invaded the arrestee's right to privacy. State v. Hinton, 319 P.3d 9, 12-13 (Wash. 2014). The Washington Court explained that its Constitution provided greater protections than the federal constitution. Id. at 13. To determine that text messages were "private affairs" protected by the state constitution, the Washington Court explained that "[t]ext messages can

encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected." Id. According to the court, "text messages often contain sensitive personal information about an individual's associations, activities, and movements." Id.

The ability of law enforcement to obtain historical cell site location information and text messages falls squarely within our state constitution's prohibition against unreasonable invasions of privacy and the concerns of the drafters regarding new technologies used by the government to conduct searches of its citizens. Therefore, Appellant had an expectation of privacy in the records based upon this state's protection of individuals against governmental invasions of privacy.

C. *The search warrant failed to establish a nexus between appellant's cell phone records and the crime.*

The United States Constitution and the South Carolina Constitution provide that a search warrant may not issue except upon probable cause. U.S. Const. amend IV; S.C. Const. art. I, §10. "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." Dupree, 354 S.C. at 684, 583 S.E.2d at 441 (citations omitted). In terms of a court's review of the magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).

In determining whether a substantial basis exists, the crucial element is not whether

the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978).

> This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). South Carolina's search warrant statute permits a search warrant to search for and seize "property constituting evidence of crime or tending to show that a particular person committed a criminal offense." S.C. Code Ann. § 17-13-140.

An affidavit that is submitted in support of the issuance of a search warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. Baccus, 367 S.C. at 52, 625 S.E.2d at 222; Dupree, 354 S.C. at 684, 583 S.E.2d at 441; State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995).

In State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990), the South Carolina Supreme Court held a search warrant affidavit was defective where the affidavit set forth no facts as to why the police believed the defendant robbed the motel. The affidavit provided a conclusory statement that the defendant had robbed the motel and the police sought to search his room at another motel for a knife used in the robbery. Id. at 372, 392 S.E.2d at 183. The Court found "[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. Id. at 373, 392 S.E.2d at 183.

In Baccus, the Court found the affidavit in support of the search warrant failed to set

forth any facts as to why police believed the defendant had committed the crime. The search warrant sought clothing and forensic evidence possibly connected to the homicide of the victim. The basis for the search warrant was that at the time of the defendant's arrest, a pile of what appeared to be clothing was lying on the ground beside the residence smoldering and the defendant's bloodstained vehicle was located a quarter mile from his residence. Baccus, 367 S.C. at 51-52, 625 S.E.2d at 221-222. The Court found the affidavit failed to set forth any facts as to why police believed the defendant committed the crime. The Court explained that "[t]he language in the affidavit lack[ed] specificity and contain[ed] conclusory statements." Id. at 52, 625 S.E.2d at 222. Thus, the Court held the magistrate did not have a substantial basis to find probable cause for a search of the defendant's residence. Id.

Similarly, the South Carolina Supreme Court found a search warrant defective where the affidavit "failed to set forth any facts as to why police believed [the defendant] committed the Crumlin crime." State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997). The affidavit provided that Crumlin was the victim of an armed robbery at a certain date, time, and location. It further provided that the defendant was a suspect and the registered owner of the vehicle to be searched. A witness stated that the defendant was driving the vehicle at the time of the incident. Id. at 289, 494 S.E.2d at 802. The Court found the first three sentences to be "mere conclusory statements." Although the fourth sentence linked the defendant to his car at the time of the incident, it failed to link the defendant or his car to the crime itself. Id. at 291-292, 494 S.E.2d at 803.

The affidavit supporting the search warrant was devoid of any facts to support any theory that Appellant's cell phone records, including the phone call logs, text messages, and

historical cell-site location information, was evidence tending to show that Appellant committed a criminal offense or that the records contained evidence of a crime at all. The affidavit provided that a shooting occurred, that Appellant had an on-going dispute with the Smalls, and that a named witness claimed she saw Appellant with a firearm moments after hearing gunshots. Those three facts simply fail to support any suggestion that Appellant's cell phone records would contain information of the shooting.

The additional information before the magistrate pursuant to the oral supplementation was that Appellant had a cellphone in his possession at the time of his arrest, which was two days after the shooting, that Appellant's girlfriend indicated Appellant used the phone before and after the murder, and that Appellant admitted he was at Georgetown Apartments that day with an individual named "Creep." Although Kosarko told the magistrate that he believed Appellant's cell phone "would have information or contact information of Creep," he provided no basis for this belief. These additional facts also fail to support a conclusion that Appellant's cell phone records would contain any evidence of the shooting.

D. *The search warrant was overly broad.*

Both the Fourth Amendment to the United States Constitution and the South Carolina Constitution require a search warrant to particularly describe the place to be searched and the persons or things to be seized. U.S. Const. amend IV; S.C. Const. art. I, § 10. The requirement that a search warrant particularly describe the person, place, or thing to be searched "is aimed at preventing general warrants – those authorizing a 'general, exploratory rummaging in a person's belongings.'" State v. Williams, 297 S.C. 404, 407, 377 S.E.2d 308, 310 (1989)(quoting Coolidge v. New Hampshire, 403 U.S.

443, 467 (1971)); see also Marron v. United States, 275 U.S. 192, 196 (1927). "'By limiting the authorization to search to the specific area and for things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.'" Id. (quoting Maryland v. Garrison, 480 U.S. 79 (1987)). "Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited to the probable cause on which the warrant is based." United States v. Hill, 459 F.3d 966, 973 (9th Cir. 2006).

This Court found a search warrant overly broad in State v. Thompson, 363 S.C. 192, 201, 609 S.E.2d 556, 561 (Ct. App. 2005) where the warrant authorized the search of any transportation that Thompson was riding in or on and any type of luggage in his possession. Law enforcement's belief that Thompson was in possession of contraband was based on information from a confidential informant that Thompson had been seen in the last three days with crack cocaine on his person. Id. This Court found the warrant was overbroad in its authorization to search Thompson's car and luggage because the only information given to the magistrate regarded seeing crack cocaine on Thompson's person. "There was no basis upon which the magistrate could conclude that probable cause existed to search any vehicle Thompson was traveling in or on any luggage in Thompson's possession." Id.

In United States v. Galpin, 720 F.3d 436 (2d Cir. 2013), the Second Circuit grappled with the particularity requirement for search warrants in the context of searching digital files on a computer. According to the court, when "the property to be searched is a computer

hard drive, the particularity requirement assumes even greater importance." Id. at 446. "[A]dvances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain." Id. (citing United States v. Payton, 573 F.3d 859, 861-862 (9th Cir. 2009); United States v. Otero, 563 F.3d 1127, 1132 (10th Cir. 2009); Orin Kerr, Searches and Seizures in a Digital World, 119 Harv. L. Rev. 531, 569 (2005)). The court noted "[t]he potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous." Id. at 447. Normal physical limitations or a residence "are largely absent in the digital realm, where the size or other outwardly visible characteristics of a file may disclose nothing about its content." Id. There is "'a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant.'" Id. (quoting United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010)).

The search warrant at issue here for records associated with Appellant's cell phone, including "[s]ubscriber information, account comments, billing records, outbound and inbound calls from 06/04/2011 to 06/09/2011" for Appellant's phone number, "subscriber information on any other Verizon numbers listed in the report, call origination location, physical address of cell sites and rf coverage map, all stored communications, or files, including voice mail, e-mail, digital images, text messages, buddy lists, and any other files associated" with Appellant's phone number. Essentially, the police sought any and all records associated with Appellant's cell phone restricted only by a date range. Even the date range restriction appears arbitrary in that the date of the shooting is included, but the five days preceding the shooting are included as well when the record is devoid of any reason to

believe any information contained in the cell phone records would disclose evidence about the shooting five days prior to its actual occurrence.

II. The trial judge erred in admitting Appellant's statement to a police officer where the statement was not given knowingly, intelligently, and voluntarily in light of the totality of the circumstances, including the officer's repeated refusal to permit Appellant an opportunity to smoke a cigarette, the officer's statement that cigarettes were for cooperators, and the officer's statement that non-cooperators got prison, not cigarettes.

Relevant facts

Prior to trial, Appellant moved to suppress his video-recorded statements to law enforcement. David Osborne, a former Charleston Police Officer, interrogated Appellant on June 10, 2011. Tr. 55, lines 4-25. This five-hour interrogation began with Osborne requesting a buccal swab from Appellant pursuant to a search warrant, which was provided to Appellant for review. State's Exhibit #56 at 21:03. Immediately before and after Osborne swabbed Appellant's mouth, Appellant asked Osborne if he could have a cigarette. Initially, Osborne responded that he may be able to work that out. State's Exhibit #56 at 21:05-21:06.

Shortly thereafter, an officer read the arrest warrants and left Appellant with the paperwork. State's Exhibit #56 at 21:08-21:12. Then, Osborne requested Appellant's clothes and provided him with jail clothing to wear. Appellant asked for water and a cigarette. Osborne agreed, but provided neither. State's Exhibit #56 at 21:13-21:14. A little while later, Osborne advised Appellant of his rights pursuant to Miranda.[7] Tr. 57, line 5 – Tr. 58, line 7; State's Exhibit #56 at 21:19. Although Appellant indicated he understood his rights, there was no request by Osborne that Appellant waive those rights. State's Exhibit #56 at 21:19. Initially, Appellant maintained that he was at home in Orangeburg on June 8, 2011. Tr. 63, lines 4-13; State's Exhibit #56 at 21:21-21:44. Forty-five minutes into the interrogation, Osborne became exasperated and aggressive. Tr. 65, line 22 – Tr. 67, line 6;

[7] Miranda v. Arizona, 384 U.S. 436 (1966).

State's Exhibit #56 at 21:45. When Appellant requested a cigarette an hour into the interview, Osborne informed him that individuals who cooperate get cigarettes, and individuals who fail to cooperate go to prison. State's Exhibit #56 at 22:12; see also State's Exhibit #56 at 23:46 (Osborne told Appellant that if he cooperated, he would get a cigarette, but if he failed to cooperate, he would not). At another point when Appellant requested a cigarette, Osborne refused stating a cigarette would not change the trouble he was in. State's Exhibit #56 at 22:29-22:30. An hour later, Appellant begged for a cigarette, comparing his nicotine habit to a heroin addict. At this, Osborne responded that if Appellant told what happened, they would walk outside and have a cigarette. State's Exhibit #56 at 23:20-23:21. Within minutes, Appellant asked for a cigarette again. Osborne responded, "We are not going to have a cigarette until we get a truthful story out of you." State's Exhibit #56 at 23:24. Three hours into the interrogation, Appellant remained steadfast that he was in Orangeburg and had requested a cigarette multiple times. State's Exhibit #56 at 22:05; 22:12; 22:29; 23:20; 23:24; 23:46.

Osborne decided to try a new interrogation strategy – allowing Appellant to contact his mother and girlfriend using Osborne's phone. Tr. 68, line 9 – Tr. 69, line 20; R. State's Exhibit #56 at 00:20. Thereafter, approximately four hours into the interrogation, Appellant stated he was at Georgetown Apartments, but denied he was involved in the shooting death of Smalls. Tr. 70, lines 3-18.

Prior to trial, Appellant moved to suppress the statement as involuntary based on the totality of the circumstances, including Appellant's request for cigarettes. Tr. 84, line 21 – Tr. 85, line 11. Appellant argued the request and denial involved deprivation and inducement. Tr. 287, line 24 – Tr. 288, line 2. Appellant compared the cigarette request to

one for water. Tr. 289, lines 12-15. Appellant further noted that many courts have relied upon supplying of cigarettes and/or breaks as a consideration for determining when a statement is voluntary. Thus, courts routinely consider cigarette breaks in the "totality of the circumstances" analysis. Tr. 289, line 16 – Tr. 290, line 12. While pondering the motion, the trial judge explained that cigarettes "could be construed in that vein of creature comforts [a]nd also could be construed in promising him something if he says what they want him to say." The judge also noted that Appellant put his head down when the detectives left the room indicating he was tired, as would be expected during a five-hour interrogation. Finally, the judge noted that Appellant indicated he was cold. The judge explained the situation could be construed as threatening. Tr. 86, line 21 – Tr. 87, line 25.

The prosecutor argued the interrogation was a good example of proper police work, "with the exception of the one statement … 'cigarettes are for cooperators.'" Tr. 286, lines 7-13. According to the prosecutor, such a tactic was "perhaps not" "best practices." Tr. 286, lines 14-15. Nevertheless, the prosecutor argued the denial of Appellant's repeated requests for a cigarette did not "arise to a degree of government coercion" to render the statement voluntary. Tr. 286, lines 14-20.

In ruling on the motion, the judge acknowledged the obvious inference to be drawn from Osborne's statement about cigarettes being for those who cooperate. However, the judge found the statement admissible based on the totality of the circumstances: "while I believe that it certainly could be construed to be coercive, taken in light of the entire interview I don't find that it was enough, didn't rise to the level of being excluded." Tr. 290, line 13 – Tr. 291, line 15.

Following the judge's ruling, David Osborne took the stand. Osborne described his interrogation of Appellant to the jury, including his recitation of the Miranda warnings. Tr. 332, line 14 – Tr. 333, line 14. Osborne claimed he made no physical threats to Appellant and no promises of future leniency. Tr. 333, line 24 – Tr. 334, line 5. Appellant initially told Osborne that he was in Orangeburg – nowhere near the shooting. Appellant remained steadfast for approximately three and a half hours. Tr. 337, lines 5-21.

The prosecution played portions of the video of Appellant's interrogation. As clearly evidenced by the video, Osborne was confrontational and aggressive with Appellant when Osborne thought Appellant was untruthful. Tr. 342, lines 9-14; Tr. 343, lines 10-13. Almost three hours into the interview, Osborne raised his voice because Appellant maintained he was in Orangeburg, not at the apartments. Tr. 346, lines 1-7. Although Osborne allowed Appellant bathroom breaks and water, Osborne repeatedly refused to allow Appellant the opportunity to smoke. Tr. 346, line 19 – Tr. 347, line 8; Tr. 385, lines 23 - 25.

Osborne explained what he meant when he told Appellant that cigarettes were for cooperators:

> Q. What you're telling him is, 'I don't believe what you're telling me, so I'm not going to give you a cigarette.'
>
> A. No. Well, I guess you could say that. But I know what I'm thinking. What I am thinking is, 'I'm not going downstairs with this guy to give him a cigarette, where I am to have to go outside of the station, with someone who has been sitting there lying to me for two and half hours, three hours. He can't tell me the truth. So how can I trust him outside the station? We could get in a fight or whatever.'
>
> And cigarettes are for cooperators, someone who you feel comfortable with. If I feel comfortable with someone, yeah, then I will walk outside the station for them to have a cigarette. I am not going to do that with someone that I don't feel comfortable with, who has been sitting there lying to me for the last three or four hours."

Tr. 386, line 7 – Tr. 387, line 6.

Relying upon the video and Osborne's testimony, during his closing argument, the prosecutor asked the jury why Appellant would lie about his whereabouts for four hours. Tr. 584, lines 14-17; Tr. 585, lines 11-14. The prosecutor claimed that when Appellant told the police, after the hours-long interrogation, that he was at Georgetown Apartments, he followed the evidence, which is what a guilty person does. He claimed, "They don't tell the truth and stick to the truth. That's what an innocent person does." Tr. 585, lines 15-25; Tr. 586, lines 7-12.

The prosecutor circled back to the video interrogation during his closing to argue that Appellant's statement that he was at Georgetown Apartments on the evening of the shooting was true. He continued to argue that Appellant was not completely truthful because Appellant had followed the evidence to "come up with a story that counter[ed] his guilt, but follow[ed] the evidence." Tr. 588, lines 2-15.[8]

Discussion

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689,

[8] One of the jury's first requests was to see the interrogation video again. Tr. 635, lines 19-21; Tr. 637, lines 1-2; R. *(Court's #2).

694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted).

"A statement may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.'" State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007)(quoting State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)).

In State v. Owens, 643 N.W.2d 735, 750-751 (S.D. 2002), the South Dakota Supreme Court found a statement given to police during custodial interrogation was voluntary in light of the totality of the circumstances. Those circumstances included the suspect's age of thirty-seven, his average intelligence, and the officer's advisement of rights. Id. at 750. Further, the court noted the suspect had "broke[n] off the questioning on more than one occasion" showing his knowledge of his right to silence. The court recognized the interview was lengthy, but noted "it was not particularly adversarial or coercive" where there was "substantial give-and-take" between the officer and the suspect. Finally, the court explained there was "no evidence was of any physical punishment" where the suspect was not deprived of sleep, and he was supplied with soda and cigarettes." Id. at 750-751.

In State v. Cook, 847 A.2d 530, 547-548 (N.J. 2004), the New Jersey Supreme Court found a statement given to police was voluntary based on an examination of the totality of the circumstances. The Court noted that although the suspect, who was a high school graduate, was very emotional over the course of the nine-hour interrogation, he received intermittent breaks, drinks, cigarettes, and bathroom breaks. Id. at 547. The

Court's concerns about the lengthy interrogation were assuaged by the fact that it occurred "all during the general work day, and there was no indication that he was sleep deprived, or that he was in any way physically or mentally abused." Id.

Appellant's statement was the product of coercive police practices and should have been excluded. The interrogation occurred over a five-hour period – lengthy by any measurement. The interrogation occurred during the evening hours, not beginning until 9 p.m. and not ending until after one in the morning on the following day. Appellant was exhausted physically and mentally as evidenced by his placing his head on the table. Appellant had limited involvement with law enforcement. Osborne was well aware of this fact and brought it to Appellant's attention repeatedly as he tried to "advise" Appellant on the best way to negotiate through the system. State's Exhibit #56 at 21:36; 21:44; 21:57; 22:02; 22:08; 22:38; 22:41; 22:46 ("You are ignorant to the system."); 22:54; 23:06; 23:16; 23:21; 23:36; 23:50. The detectives repeatedly used Appellant's six-year old daughter as leverage to get Appellant to talk. For example, Kosarko told Appellant that if persisted in "lying," then he would never see his daughter again. State's Exhibit #56 at 22:01; see also State's Exhibit #56 at 21:35; 21:46; 22:06; 22:30; 00:09.

Perhaps the most coercive tactic used by the police during the interrogation was the denial of cigarettes to Appellant despite his repeated requests and his admission of nicotine addiction. Not only did Osborne refuse to allow Appellant to smoke, Osborne used the request for a cigarette break as a bargaining chip when he told Appellant that he would get to smoke only if he cooperated and that if he failed to cooperate, he would go to prison. This was Osborne's most obvious coercive technique regarding cigarettes, but he continued with more subtle methods, such as when he told Appellant that if Appellant changed his

story, he would say that Appellant "told the truth" and then the two of them "went out and smoked a cigarette." State's Exhibit #56 at 23:21. Shortly thereafter, Appellant asked for a cigarette again, and Osborne continued to use the cigarette request and denial to coerce Appellant by stating Appellant would not get a cigarette until he gave "a truthful story." State's Exhibit #56 at 23:24.

Based on the totality of the circumstances, including the length of the interview, the time of the interview, Appellant's limited experience with criminal proceedings and Osborne's exploitation of this limited experience, Appellant's lack of sleep and obvious exhaustion, and Osborne's coercive behavior in response to Appellant's repeated requests for cigarettes, Appellant's statement was the product of police coercion and should have been suppressed by the trial judge.

III. Violating Appellant's right to due process of law, the trial judge erred in instructing the jury concerning "the hand of one is the hand of all" after the jury began deliberating where the evidence did not support the instruction.

Relevant facts

Throughout the trial, the state presented one consistent story of the case – that Appellant shot Smalls. In opening statements, the prosecutor told the jury that when Smalls walked out of his apartment and down the stairs, he was met by two males, one of whom had a nine millimeter handgun. According to the state, Appellant was the male with the handgun and he fired four shots killing Smalls. Tr. 169, line 18 – Tr. 170, line 8. The state claimed Appellant had a motive to kill Smalls – a $400 debt. Tr. 173, lines 9-22.

The video from the apartment complex showed a small car park in the lot shortly before the shooting. Two people exited the car – a driver and a passenger. Tr. 318, lines 5-13. The state theorized that Appellant was the driver of the car, but the state presented no evidence of the identity of the passenger. Seconds later, the video showed the same two individuals walk back to the car and leave the parking lot. Tr. 321, lines 2-5. During the interrogation, Appellant told police that he went to Georgetown Apartments to get some of his clothing from his sister. He was accompanied by a friend, whom he knew only as "Creep." While walking to his sister's apartment, Appellant saw a dark-skinned black male in the area. Appellant heard gunshots. Scared, he and Creep ran back to the car and left. Tr. 330, lines 3-13; Tr. 350, line 11 – Tr. 353, line 23; State's Exhibit #56. Appellant dropped off Creep, and then went to pick up Elmore from work. State's Exhibit #56.

In his closing, the prosecutor argued Appellant was the driver of the car on the video. The prosecutor claimed Appellant wore a beanie, which was why the person in the video did not have the short dreadlocks that Appellant had at the time. Tr. 573, line 8 – Tr.

574, line 6. Just as promised in the opening, the state argued during closing that Smalls saw Appellant as Smalls walked down the stairs of the apartment complex. Smalls was frightened by Appellant and turned to flee. However, Smalls was shot. Tr. 574, line 20 – Tr. 575, line 14.

At trial, Appellant maintained that he was not at Georgetown Apartments on the night of the shooting. Tr. 557, line 18 – Tr. 571, line 18. Specifically, in argument, it was made clear that Appellant "didn't see a murder. He didn't participate in a murder. He wasn't there." Tr. 562, lines 1-4. He presented evidence from Watts and Buckner, who were living in Georgetown Apartments and heard gunshots that two men left in a car that had an "A" in the license plate, which was unlike the specialty plate on Appellant's girlfriend's car. Tr. 521, lines 12-25; Tr. 522, lines 8-15; Tr. 536, lines 16-20; Tr. 537, lines 4-6; Tr. 523, lines 19-22; Tr. 538, lines 2-13.

Prior to the closing arguments, the judge entertained a charge conference. The prosecution requested "the hand of one charge" because the state had not "been able to identify a co-defendant." Tr. 546, lines 5-11. To support the request, the prosecutor agreed "all the circumstances certainly – suggest he was the shooter and certainly proved that he was involved in the shooting. We just don't have anything certain saying it was the other guy that pulled the trigger. I don't think it was." Tr. 547, lines 12-19.

The judge rejected the question because "the whole testimony in the case [had been] he's the shooter," referring to Appellant. The judge elaborated that all of the evidence presented by the state was that Appellant was the person with the gun. Tr. 546, lines 12-23. The judge acknowledged that the state's evidence showed there was a passenger in the car, but the state presented no evidence or even allegation that the "passenger had anything to do

with it." As a result, the judge concluded there was no evidence to support the theory of "hand of one is the hand of all." Tr. 546, line 25 – Tr. 547, line 12.

Rejecting the charge based on the lack of evidence to support instructing the jury on the alternative theory of liability, the judge explained:

> But if you take his statements, his inconsistent statements, which the jury can consider, and his possibly being the person driving the car, pull all of those together, there's probably substantial circumstantial evidence to support a verdict, but there is no evidence to support that he was a - - that someone else shot, other than him if he shot at all.

Tr. 547, line 25 – Tr. 548, line 8.

After the closing arguments, the judge instructed the jury concerning the presumption of innocence, reasonable doubt, circumstantial evidence, and criminal intent. He defined murder and malice for the jury and instructed the jury regarding the permissible inference of malice from the use of a deadly weapon. Tr. 591, line 21 – Tr. 620, line 4.

About an hour into the deliberations, the jury sent a note asking the judge to define murder again and asking "if the other individual pulled the trigger can the defendant still be guilty?" Tr. 620, lines 15-25; R. * (Court's #2). When the judge indicated that he was now going to instruct the jury concerning the "hand of one is the hand of all," Appellant objected. Appellant explained he had been unable to address the theory in closing argument. Tr. 621, lines 1-7. Appellant requested the judge instruct the jury as follows: "you have all the evidence and you have all the law." Tr. 622, lines 1-9. The judge offered the opportunity to argue about it at that time, but Appellant declined. When Appellant explained that argument may waive the issue for appeal, the judge responded that "it's curable if, in fact, you're entitled to an argument about the charge." Tr. 621, line 10 – Tr. 622, line 22; Tr. 624, lines 1-3; Tr. 625, lines 3-6. Appellant emphasized the prejudicial nature of the charge in light of

the jury having started deliberations; further Appellant cited State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) to support his position. Tr. 623, lines 1-23.

The judge explained that he considered declaring a mistrial based on his "error in not charging the hand of one being the hand of all" initially. He explained the facts supporting the theory where that "two people go back. There are shots fired. ... [U]nder the theory that two people are leaving that car and there's evidence that they are on a mission, they could conclude that's circumstantial evidence that they conclude they were acting in concert." Tr. 633, lines 1-16. At this, Appellant expressed his preference for a mistrial, not the jury charge. Tr. 633, lines 17-19; Tr. 644, lines 17-19. Regarding the opportunity to re-argue based on the hand of one charge, Appellant explained he would worry that he would be "shifting theories" on the jury. Essentially, he had argued to the jury that Appellant was not present at Georgetown Apartments on the night of the shooting, and now he would be forced to argue that Appellant was "merely present." This change in the argument and defense theory would divest Appellant of credibility with the jury. Tr. 643, lines 15-24.

Thereafter, the judge charged the jury as follows concerning the hand of one is the hand of all:

> If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person, which occurs as a natural consequence of the acts done in carrying out the common plan and purpose. If two or more people are together, acting together, assisting each other, committing the offense, the act of one is the act of all or as is sometimes said, the hand of one is the hand of all.
>
> Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the Defendant is present when the crime is committed, is not sufficient to convict the Defendant as a principal.

> Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for finding of guilt as a principal. The state must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all.
>
> A principal in a crime is one who either actually commits the crime or who is present aiding, abetting, or assisting in committing the crime. When a person does an act in the presence of, and with the assistance of another, the act is done by both. When two or more are acting with a common plan or intent are present at the commission of [a] crime, it does not matter who actually commits the crime. All will be guilty.
>
> Present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of a crime. However, as I have previously stated, mere presence at the scene of a crime alone is not sufficient to convict one as a principal on the theory of aiding and abetting. It is a necessary element, for there must have been a common scheme or intent to commit the crime. And the crime must have been committed pursuant thereto with the person aiding and abetting by sole overt act.
>
> Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the Defendant and other circumstances, from which you may naturally and reasonably infer the intent. The state must prove these elements, each one, beyond a reasonable doubt.

Tr.649, line 3 – Tr. 651, line 12; R. *(Court's Exhibit #4).

Appellant renewed his objection to this charge and reiterated the lack of evidence to support giving the charge. Tr. 656, lines 24-25. The judge explained his changed position that the evidence supported the charge: "[W]e had two leaving the car, walking towards where the shooting occurred, the shooting, and two people come back, running, leaving, and identified by eyewitnesses as two people. A person is shot, cartridges are found, all of that is as to who was the shooter." Tr. 657, lines 2-16.

Discussion

"'The law to be charged must be determined from the evidence presented at trial.'" State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007)(quoting State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). There must be some evidence in the record to support the charge to the jury. Id. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (citing State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999)). According to the South Carolina Supreme Court, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Langley, 334 S.C. at 648, 515 S.E.2d at 101.

"Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" Id. at 648-649, 515 S.E.2d at 1010(quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). Mere association with admitted members of a conspiracy or an admitted perpetrator of a crime is insufficient to constitute the guilt of the defendant on trial. See State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Mouzon, 326 S.C. 191, 485 S.E.2d 918 (1997). Further, "[p]rior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime." Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995); see also State v. Thompson, 347 S.C. 257, 647

S.E.2d 702 (Ct. App. 2007). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010)(quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)) Rather, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal." State v. Hill, 268 S.C. 390, 395-396, 234 S.E.2d 219, 221 (1977).

In Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011), the Supreme Court examined the propriety of an accomplice liability charge. The Court explained that "an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Id. Resolving the issue of whether the "hand of one" charge was correct, the Court asked whether there was any evidence that another co-conspirator was the shooter and the defendant was acting with him when the robbery took place. Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 295-296, 534 S.E.2d 268, 269 (2000); see also State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). The evidence showed the robbers were clothed in black and wrapped shirts around their heads, that the defendant was involved in the planning and execution of the robbery, and that one of the robbers other than the defendant may have been the shooter. Id.

This Court concluded the trial judge correctly charged the jury concerning "the hand of one is the hand of all" where the evidence revealed the defendant and his co-defendant were with a large group of people during a confrontation, the co-defendant used language indicating the two were acting together, the defendant and co-defendant got into a truck that chased after an individual in a car, and witnesses claimed the defendant shot his gun toward

the car. State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007). This evidence supported the theory that the defendant and his co-defendant joined together to accomplish an illegal purpose. Id.

Recently, this Court affirmed a grant of post-conviction relief where appellate counsel failed to raise on appeal the trial judge's error in instructing the jury on accomplice liability and mere presence where the evidence failed to support the charge. Wilds v. State, 407 S.C. 432, 435, 756 S.E.2d 387, 388 (2014).[9] On the afternoon of March 29, 1999, Wilds was walking down the street with two companions when they saw Rumph approaching them. Wilds commented to the others that he thought Rumph had some money. Id. Wilds stopped to talk to Rumph while his companions continued walking. Id. at 436, 756 S.E.2d at 388. Wilds unexpectedly pulled out a pistol. Rumph handed over his wallet. Id. at 436, 756 S.E.2d at 389. Wilds ordered his companions to hit Rumph and they complied. Wilds' companions took items from Rumph, including a cigarette lighter and change. Wilds then shot Rumph. Id. After the shooting, Wilds and his companions ran. When the stopped, Wilds gave the companions money from Rumph's wallet and told them to stay quiet. Id. One of the companions told Wilds to get rid of the gun. Id.

Wilds was charged with armed robbery and murder of Rumph. During the deliberations, the jury sent a note asking if the jury found Wilds guilty of murder, would that be a finding that Wilds alone pulled the trigger. Id. at 437, 756 S.E.2d at 389. Over Wilds' objection, the judge instructed the jury on accomplice liability, but refused to instruct the jury concerning mere presence. Id.

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[9] The South Carolina Supreme Court granted the petition for certiorari on November 20, 2014.

This Court explained that "no evidence ... indicated anyone other than Wilds was the shooter." Id. at 439, 756 S.E.2d at 390. "The only evidence presented was that Wilds was the shooter, and [his companions] joined in the robbery after Wilds pulled the gun on Rumph." Id. This Court recognized that the jury may have had doubts about the companions' testimony; however, those doubts failed to support a charge on the alternate theory of liability, such as accomplice liability. An alternative theory "'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. (quoting Barber, 393 S.C. at 236, 712 S.E.2d at 438). This Court found prejudice to Wilds "[b]ecause the instruction was given in response to the jury's question regarding whether a conviction meant it found Wilds actually pulled the trigger, and because the jury returned guilty verdicts after receiving the instruction." Id. at 439, 756 S.E.2d at 390-391.

In the present case, the prosecution presented no evidence to support an instruction to the jury concerning accomplice liability or "the hand of one is the hand of all." Initially, the judge recognized this dearth of evidence, but back-tracked when the jury asked a question. The only evidence presented by the state was that Appellant was the shooter. There was no evidence that the passenger in the car was the shooter or that Appellant and the passenger agreed upon some criminal enterprise prior to the shooting. The evidence was not equivocal on some integral fact as would be required in order to instruct the jury on accomplice liability. In fact, the evidence presented by the state was that Appellant and an unknown passenger arrived at the apartment complex, walked in the direction where the shooting occurred, Appellant shot Smalls due to a debt, then Appellant and the passenger ran back to Appellant's car. There was no indication that Appellant and the passenger had

planned to engage in any action upon arrival at the apartment or that the shooting was the natural and probable consequence of any agreed upon action.

IV. Violating Appellant's right to due process of law, the trial judge erred in instructing the jury concerning "the hand of one is the hand of all" after the jury began deliberating where the timing of the instruction prevented Appellant from addressing the theory in his closing argument rendering his trial fundamentally unfair.

Appellant incorporates by reference the applicable facts and law discussed in Issue III, supra.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), the trial judge informed the parties that he intended to instruct the jury as to reasonable doubt as defined in State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991). Manning defined a reasonable doubt as the kind of doubt that would cause a reasonable person to hesitate to act. Jones, 343 S.C. at 576, 541 S.E.2d at 820. In closing argument, counsel for Jones focused on the evidence tending to exonerate him and inculpate another person. Id. Additionally, Jones told the jury that the judge would define a reasonable doubt as kind of doubt that would cause a reasonable person to hesitate to act. Jones then argued the evidence would cause the jury to hesitate. He crafted an entire section of his argument around the jury hesitating. He asked the jury to listen carefully to the judge's instruction about reasonable doubt. Id. at 576-577, 541 S.E.2d at 820-821. Following the closing argument, the judge decided not to charge the "hesitate to act" language. Id. at 577, 541 S.E.2d at 821.

The South Carolina Supreme Court found the judge's failure to give the "hesitate to act" instruction was fundamentally unfair in light of Jones' reasonable reliance on the judge's representation as to what he would instruct the jury. Id. at 578, 541 S.E.2d at 821. The Court explained that the judge's "after the fact decision" to remove the "hesitate to act" language from his charge, after Jones told the jury what the judge would charge them, diminished the defense's credibility in the eyes of the jury. Id.; see also United States v. Kostoff, 585 F.2d 378 (9th Cir. 1978)(finding prejudicial error in the judge's instructions to

the jury that were materially different from those proposed where counsel relied on the judge's initial agreement to give the proposed instructions).

In State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000), the South Carolina Supreme Court found the trial judge's refusal to give a self-defense charge in the initial instructions to the jury was erroneous where there was sufficient evidence at trial entitling Day to the instruction. Further, the Court found the judge's self-defense instruction, which was in response to a jury question asking about the law of self-defense, was inadequate "because defense counsel was unable to present a complete defense during her summation." Id. at 418, 535 S.E.2d at 435. According to the Court, "[p]roviding an 'after-the-fact' instruction was inadequate because the prejudice to Day was incurable" where "Day was unable to adequately assert a complete defense during the trial, and the jury was left with the impression that the trial judge did not think the law of self-defense was applicable to the case." Id. at 419, 535 S.E.2d at 436.

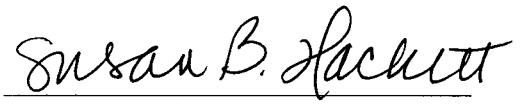
There can be no question here that Appellant relied upon the trial judge's assurance during the charge conference that he was not going to instruct the jury concerning the alternative theory of the "hand of one." Appellant crafted his closing argument using the theory that he was not present at Georgetown Apartments on the night of the shooting. He completely denied being present at the scene. Had Appellant known the judge would charge the jury concerning an alternative theory of guilty – the hand of one – Appellant could have crafted his closing argument to incorporate and dispel the alternative theory. Appellant relied upon the judge's assurance during the charge conference that the evidence did not support the alternative theory. The judge was unequivocal during the charge conference that the evidence simply did not support the hand of one charge and as such, he refused to give

it. His lack of equivocation assured Appellant that he need not address the hand of one or mere presence in his closing argument to the jury. Appellant's reliance on the trial judge's assurance in the crafting of his closing argument and the judge's subsequent reversal of his earlier ruling and charging of the hand of one to the jury rendered the trial fundamentally unfair.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of February, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
FEB 26 2015
SC Court of Appeals

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVIN JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Devin Johnson, #359432, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of February, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.