The Supreme Court of South Carolina

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July 17, 2015

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: The State v. Daniel J. Jenkins
Lower Court Case No. 2006GS1009254
Appellate Case No. 2012-212544

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Kathrine Haggard Hudgins, Esquire
Mark Reynolds Farthing, Esquire
Scarlett Anne Wilson, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Daniel J. Jenkins, Respondent.

Appellate Case No. 2012-212544

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 27537
Heard March 3, 2015 – Filed July 1, 2015

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Petitioner.

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State appeals the court of appeals' decision reversing the trial court's finding that a search warrant for samples of Daniel Jenkins's (Respondent) DNA was valid, and remanding for an evidentiary hearing regarding whether the State would have inevitably discovered Respondent's DNA during the course of its investigation.[1] *State v. Jenkins*, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012). We reverse, and reinstate Respondent's conviction for criminal sexual conduct in the first degree (CSC-First).

FACTS/PROCEDURAL BACKGROUND

In 2006, H.M. (the victim) lived by herself in downtown Charleston, South Carolina. At the time, she worked for a local bakery, to which she commuted by bicycle or bus. During her commute, the victim frequently passed Jabbers, a local grocery store, and casually greeted the people loitering outside, many of whom lived in the area and often gathered there. Although the victim did not know any of these people beyond exchanging a passing greeting, she came to learn that one of the people with whom she exchanged pleasantries was nicknamed "Black."

The victim testified that on April 5, 2006, she arrived home from work, consumed several alcoholic beverages, and fell asleep around 8 p.m. Approximately two hours later, the victim awoke to a knock at her door. She opened the door and saw Black, who asked the victim if she either wanted to go out and share a drink, or if she would lend him money to buy beer that he could then bring back to her apartment. When the victim declined, Black continued to pester her, asking her those same two questions repeatedly.

The victim stated she became uncomfortable, so she took a step back into her apartment to place some distance between herself and Black. However, Black stepped in "aggressively" behind her, and the two sat on the victim's sofa for a brief time while Black smoked a cigarette. Shortly thereafter, Black began making lewd sexual demands and threatening the victim, stating that if she did not comply with his demands, he would kill her.

The victim firmly told Black to leave because her boyfriend was coming over.[2] Thereafter, Black grasped a heavy glass candleholder and repeatedly struck

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[1] *See Nix v. Williams*, 467 U.S. 431 (1984) (establishing and explaining the inevitable discovery doctrine).

[2] The victim did not have a boyfriend at the time, and was merely trying to induce Black into leaving her apartment.

the victim around the forehead, ears, and mouth.

A struggle ensued, during which Black pushed the victim's cordless telephone out of her reach. Ultimately, Black wrestled the victim's pants off of her, tore off her underwear, and forcibly engaged in sexual intercourse with the victim. Black then threatened to kill the victim if she told anyone about the encounter, and left the victim's apartment.

After the victim could not find her telephone, she ran outside for help. She unsuccessfully knocked on several neighbors' doors and attempted to stop three passing cars before encountering a woman on the street near Jabbers. The woman asked the victim what happened to her, but before the victim could speak, Black approached the women.

The victim stated that she became overwhelmed by Black's presence and started crying and asking to use a telephone. Black grabbed the victim's arm and "half-carried, half-guided" the victim to an alley across the street. He told her that he had her telephone and would return it if she washed the blood off of her face. Black then forcibly held the victim's head under a nearby faucet.

After Black returned the telephone, the victim ran back to her apartment and hid under a tarp on the side of the building while she called the police. She described her assault to the responding officers and told them that her attacker's nickname was Black.

The officers were familiar with a man from the neighborhood whose nickname was Black, but whose true identity was Respondent. They searched for and located Respondent within a matter of minutes in an abandoned building across the street from Jabbers, where he was sleeping nude. Other officers escorted the victim to Jabbers's parking lot, where she positively identified Respondent as her attacker.

After identifying Respondent, the victim underwent a rape examination. The nurse conducting the examination testified that the victim had a blackened eye, a bloody nose, a split lip, bleeding on the inside of her mouth, bruising on her arms and shoulders, abrasions and lacerations on her genitals, and defensive wounds on her hands. Further, the nurse found semen on vaginal and rectal swabs taken from the victim, as well as on various clothing and bodily swabs. The nurse stated that while the wounds and semen could be consistent with consensual sex, they were more likely the result of forcible sex.

In processing the alleged crime scene at the victim's apartment, police officers found blood stains on the victim's sofa, and her ripped underwear and a heavy glass candleholder lying on the floor. A fingerprint examiner testified that two of the three fingerprints recovered from the candleholder were Respondent's.

The following day, a police officer obtained a search warrant for Respondent's DNA to compare to the DNA recovered from the rape examination swabs. The affidavit necessary to establish probable cause for the warrant read:

> On 4/5/06 at approximately 22:30 hours while at [the victim's address], the subject, [Respondent] . . . , did enter the victim's residence and threatened to kill her if she did not comply with his demand to perform oral sex on her. The victim attempted to fight the subject, however he overpowered her by striking her in and about her face using a glass candle holder [sic].
>
> The subject then penetrated the victim's vagina with his tongue and penis. The DNA samples of blood, head hair and public hair will be retrieved from the suspect by [] trained medical personnel in a medical facility. The collection of these samples will be conducted in a noninvasive manner.[3]

A forensic DNA analyst developed a DNA profile from the rape examination swabs, and compared that profile to Respondent's DNA profile. The DNA profiles matched, with a 1 in 8.6 quintillion chance that the semen on the rape examination swabs came from an unrelated person.

Prior to the State introducing it at trial, Respondent moved to suppress the DNA evidence, arguing that the affidavit did not establish probable cause because it omitted: (1) the source of the officer's information regarding the assault, so that the Magistrate could judge the source's credibility; (2) how the officer came to suspect Respondent of the crime; (3) the victim's positive identification of Respondent as her attacker in Jabbers's parking lot; (4) photographs and physical evidence obtained of both the victim and the alleged scene of the crime; and (5) the results of the rape examination that the victim underwent, including the genital abrasions and lacerations, as well as the presence of semen. The trial court denied

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[3] The officer did not supplement the affidavit with oral testimony in front of the Magistrate who granted the warrant.

the motion to suppress.[4]

Ultimately, the jury convicted Respondent of CSC-First. Because of Respondent's two prior convictions for CSC-First and carjacking, both of which are "most serious offenses" under section 17-25-45(C)(1) of the South Carolina Code, the trial court imposed a mandatory sentence of life in prison without the possibility of parole. *See* S.C. Code Ann. § 17-25-45 (2014).

Respondent appealed, and the court of appeals remanded the case for an additional evidentiary hearing. *Jenkins*, 398 S.C. at 215, 727 S.E.2d at 761. Specifically, the court of appeals found the search warrant to obtain Respondent's DNA was invalid for two reasons. *Id.* at 221–25, 727 S.E.2d at 764–66. First, the court of appeals held that the affidavit in support of the warrant did not establish probable cause because it contained only conclusory statements; failed to set forth the source of the facts contained therein; and lacked any information allowing the Magistrate to make a credibility determination regarding the source of the information. *Id.* at 222–24, 727 S.E.2d at 764–66. Second, the court of appeals found that the affidavit was defective because it did not contain any indication that the police had obtained DNA evidence from the rape examination, and thus it did not establish that Respondent's DNA would have been relevant to the investigation. *Id.* at 224–25, 727 S.E.2d at 766. Moreover, the court of appeals found that admitting the DNA evidence was not harmless error because it bolstered the victim's credibility regarding two critical facts: that Respondent was her attacker, and that the sexual intercourse was not consensual. *Id.* at 225–27, 727 S.E.2d at 766–67.

Despite reversing the trial court's admission of the DNA evidence, the court of appeals did not order a new trial, but instead remanded the case for an evidentiary hearing. *See id.* at 227–30, 727 S.E.2d at 767–69. The court of appeals did so in response to the State's argument that Respondent's DNA would have been inevitably discovered regardless of the defective search warrant. *Id.* Specifically, the State asserted that Respondent's DNA was already on file in the State's DNA Identification Record Database due to his prior conviction for CSC-First. *See id.* at 228, 727 S.E.2d at 768; *see also* S.C. Code Ann. §§ 23-3-610, -620(A), -620(B), -640, -650(A) (2007 & Supp. 2014) (allowing the State to

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[4] As a result, Respondent's counsel changed strategies mid-trial from attempting to blame the assault on the victim's abusive ex-boyfriend to attempting to characterize the encounter as consensual sexual intercourse between Respondent and the victim.

obtain, store, and use a criminal defendant's DNA sample as a result of prior convictions). However, because the trial court found the search warrant was not defective, the State contended it never had the opportunity to present this evidence. *Jenkins*, 398 S.C. at 228, 727 S.E.2d at 768. The court of appeals therefore remanded Respondent's case to the trial court to determine whether the inevitable discovery doctrine applied in this particular situation. *Id.* at 230, 727 S.E.2d at 769.

We granted the State's petition for a writ of certiorari to review the court of appeals' decision.

ISSUE

Whether admission of the DNA evidence obtained as a result of the defective search warrant constituted harmless error?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

ANALYSIS

The State has not challenged the court of appeals' finding that the affidavit did not establish probable cause, and that the search warrant to obtain Respondent's DNA was thus invalid. As such, we need only determine whether the trial court's error in admitting the DNA evidence was harmless beyond a reasonable doubt, and whether remand for an evidentiary hearing was the appropriate remedy.

The United States Supreme Court has distinguished between trial errors and structural defects in the trial mechanism itself. *State v. Mouzon*, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (discussing *Arizona v. Fulminante*, 499 U.S. 279 (1991)). Structural defects "affect the entire conduct of the trial from beginning to end," whereas trial errors "occur during the presentation of the case to the jury, and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* (quoting *Fulminante*, 499 U.S. at 307–08, 309) (internal quotation marks omitted). Differentiating between structural and trial errors serves "to enforce procedural safeguards while ensuring that inconsequential, technical errors do not result in a new trial." *State v. Chavis*, 412 S.C. 101, 115, 771 S.E.2d 336,

343 (2015) (Hearn, J., dissenting). Most errors that occur during trial, including those that violate a defendant's constitutional rights, are trial errors that are subject to harmless error analysis. *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013).

Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011); *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). Rather, appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case. *Byers*, 392 S.C. at 448, 710 S.E.2d at 60; *see also Black*, 400 S.C. at 27–28, 732 S.E.2d at 890 (stating that with respect to wrongly-admitted evidence impacting a witness's credibility, the Court should consider "the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case"). An error is harmless if it did not reasonably affect the result of the trial. *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); *see also State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.").

Here, the court of appeals found that absent the DNA evidence, the case boiled down to a credibility contest between the victim—asserting that she was sexually assaulted by Respondent—and Respondent—alternatively asserting that the perpetrator of the assault was the victim's abusive ex-boyfriend, or that any sexual intercourse between the victim and Respondent was consensual. We find this conclusion to be incomplete based on our review of the totality of the evidence presented by the State.

Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found Respondent guilty. For example, the victim testified at length, giving a detailed account of the assault and the events that followed. Moreover, the State presented physical evidence regarding the results of the rape examination conducted on the victim, including the extensive nature of the victim's injuries, the defensive wounds on the victim's body, and the presence of semen. The State likewise presented testimony from the nurse who performed the rape examination that the victim's wounds were consistent with sexual assault. Other testimony revealed that the responding

officers described the victim as "roughed up pretty good," and the rape examination nurse described the victim's face as "quite bruised." Additionally, the investigation of the alleged crime scene at the victim's apartment uncovered the victim's ripped underwear and blood and fingerprint evidence corroborating the victim's version of events. Finally, the responding police officers independently connected Respondent to the crime by his nickname "Black" due to their previous dealings with him. Further, after the officers searched for Respondent and found him naked and asleep a short distance away from the scene of the crime, the victim positively identified Respondent as her attacker within thirty minutes of the assault.

Accordingly, contrary to the court of appeals' assertion, this case was not dependent on the credibility of the victim and Respondent, with the DNA evidence serving as the only physical evidence that Respondent committed the assault. *Cf. State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94–95 (2011) ("We further find the trial court's admission of the reports did not amount to harmless error. *There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred* and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of the case, we find the admission of the written reports was not harmless." (emphasis added) (citation omitted)). Rather, there was other physical evidence that the victim was sexually assaulted, and that Respondent was the perpetrator.[5]

Further, while we agree that the DNA evidence was compelling, there is no jurisprudence in this State that DNA is either necessary or conclusive to establishing a defendant's guilt beyond a reasonable doubt. Rather, there are countless cases in which the State has not presented DNA evidence—either because it could not or chose not to do so—and a jury nonetheless properly

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[5] Moreover, the DNA evidence only established that the victim and Respondent engaged in sexual intercourse, which Respondent's counsel conceded to the jury. However, the DNA evidence did *not* establish whether the encounter was consensual or non-consensual, which the rape examination nurse stated under cross-examination by Respondent's counsel. Thus, the DNA evidence did not boost the victim's credibility that the intercourse was forced on her. Rather, the victim's claim that the intercourse was unwanted was supported by, *inter alia*, evidence of the injuries to her face and genitals, including the tears, abrasions, and defensive wounds.

convicts the defendant. DNA evidence is merely one way to establish that the accused is the perpetrator. However, the presence or absence of DNA evidence does not taint the remainder of the evidence in the record, nor does it overwhelm the jury's ability to make credibility determinations and decide whether a defendant is guilty. Like with fingerprinting and blood typing, both of which are similarly compelling types of evidence, DNA evidence can be disputed.

Accordingly, we find the admission of the DNA evidence in this case was harmless error, and we decline to adopt a per se rule that a new trial is mandatory any time DNA evidence is wrongly admitted.[6]

CONCLUSION

For the foregoing reasons, we reverse the portion the court of appeals' decision remanding the case for an evidentiary hearing regarding the applicability of the inevitable discovery doctrine. Instead, we reinstate Respondent's conviction for CSC-First because any error made by the trial court was harmless.

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

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[6] Because this issue is dispositive, we do not reach the State's second issue regarding whether it would have inevitably discovered Respondent's DNA during the course of its investigation. *See Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009).

JUSTICE PLEICONES: I respectfully dissent from the majority's decision to reverse the court of appeals as in my view, the erroneous admission of the DNA evidence—which the majority finds "compelling"—was not harmless. I would remand for a new trial.

The majority holds that notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found Respondent guilty. In addition to the victim's testimony—which in my view is the only evidence *Respondent* sexually assaulted the victim—the majority relies on the results of the rape examination on the victim,[7] the testimony from the nurse who performed the rape examination that the victim's face was "quite bruised," the testimony from the responding officer that described the victim as "roughed up pretty good," and the presence of the victim's ripped underwear and "blood and fingerprint evidence"[8] at the scene. In my opinion, this evidence merely shows that the victim was likely sexually assaulted and that Respondent has been in the victim's home, not that Respondent was the perpetrator of the sexual assault. Accordingly, this case is indeed a battle of credibility between the victim and Respondent regarding Respondent's involvement in the sexual assault. In my view, the majority fails to point to the existence of overwhelming evidence of guilt as the victim's testimony was the only evidence that identified Respondent as the perpetrator of the sexual assault. *See State v. Chavis*, 412 S.C. 101, 109-10 & n.7, 771 S.E.2d 336, 340 (2015) (stating the materiality and prejudicial character of the error must be determined from its relationship to the entire case and the wrongful admission of evidence can be deemed harmless where there is other overwhelming evidence of guilt).[9]

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[7] The results of the rape examination were not conclusive that a sexual assault occurred. In fact, the nurse who performed the rape examination agreed that everything discovered in the pelvic examination could be consistent with consensual intercourse.

[8] Blood was found on the victim's couch and Respondent's fingerprints were recovered from a glass candleholder.

[9] In my view, the majority's reliance in footnote 5 on the concession by Respondent's counsel during argument that Respondent and the victim had consensual sex is improper because the concession was a necessary by-product of the lower court's erroneous decision to admit the DNA evidence. Respondent should not be bound by this concession because his attorney unsuccessfully sought to ameliorate the prejudice from an erroneous evidentiary ruling.

Since I find the admission of the DNA evidence not harmless, I address the propriety of the court of appeals' decision to remand for an evidentiary hearing. In my view, remand for an evidentiary hearing to determine whether the inevitable discovery doctrine applies is improper. Here, inevitable discovery is advanced as an additional sustaining ground and it is well settled that the evidence forming the basis for an additional sustaining ground must appear in the record on appeal. There is no evidence in the record on appeal that Respondent's DNA is in the State DNA database. *See* Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). I would reverse respondent's conviction and remand for a new trial.

For the reasons given above, I would find the erroneous admission of DNA evidence not harmless, reverse respondent's conviction, and remand to the lower court for a new trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Daniel J. Jenkins, Appellant.

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4958
Heard December 6, 2011 – Filed March 28, 2012
Withdrawn, Substituted, and Refiled June 20, 2012

REMANDED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

FEW, C.J.: Daniel Jenkins appeals his conviction for criminal sexual conduct in the first degree. Jenkins argues the trial court erred in denying his motion to suppress DNA test results because the affidavit offered in support of the search warrant for samples of his DNA did not meet the constitutional and statutory requirements for issuance of the warrant. We agree. We remand the case to the trial court for a factual determination of whether the inevitable discovery doctrine precludes application of the exclusionary rule in this case.

I. Facts and Procedural History

The victim testified that on the evening of April 5, 2006, she came home from work, drank several beers, ordered a pizza, and fell asleep on her couch. She awoke approximately two hours later to a knock at the door. The victim recognized the man at her door as "Black," a man she sometimes saw at a neighborhood grocery store called Jabbers. Black frequently hung around outside Jabbers, and she occasionally said hello to him.

According to the victim, she answered the door, and Black asked if she wanted to get a beer with him. After the victim declined, Black asked her to put away her two dogs. She put away the dogs, and Black entered her house. The two of them sat on the victim's couch while Black smoked a cigarette, using a glass candle holder as an ashtray. Black then demanded she show him her genitals or else he would kill her. A struggle ensued in which Black hit the victim in the head and face multiple times with the candle holder, removed her pants and underwear, and raped her. Black told the victim "don't tell anyone or I will kill you," and left.

The victim explained that because she could not find her cordless phone, she ran down the street looking for help. Near Jabbers, the victim encountered a woman who asked her what happened. At that moment, Black approached the victim, took her by the arm, and guided her to a hose so she could wash blood off of her face. Black then handed the victim her cordless phone. She ran home and called 911.

When the police arrived at the victim's house, she described the incident and gave them the name "Black." Within thirty minutes, police located Jenkins in an abandoned building across the street from Jabbers. The police brought the victim to the store parking lot, where she identified Jenkins as the man who raped her. After the victim identified Jenkins, she underwent a rape examination. The nurse who performed the examination observed a large amount of fluid in the victim's vagina, and she took evidence swabs of the victim's vagina and other parts of her body.

The next day, the police sought a search warrant for samples of Jenkins' blood and hair. A detective who responded to the victim's 911 call prepared the affidavit in support of the warrant. In the affidavit, the detective wrote only the following:

> On 4-5-06 at approx. 2230hrs while at [victim's address], the subject Daniel Jerome Jenkins (BM, dob 6-17-60) did enter the victim's residence and threatened to kill her if she did not comply with his demands to perform oral sex on her. The victim attempted to fight the subject, however he overpowered her by striking her in and about her face using a glass candle holder. The subject then penetrated the victim's vagina with his tongue and penis. The DNA samples of blood, head hair, and pubic hair will be retrieved from the subject by a trained medical personnel in a medical facility. This collection of these sample [sic] will be conducted in a noninvasive manner.

The detective did not supplement the affidavit with oral testimony. The magistrate read the affidavit and signed the warrant. The police executed the warrant, obtaining blood and hair samples from Jenkins.

SLED analyzed Jenkins' samples and the swabs taken from the victim. A SLED forensic DNA analyst found semen on several swabs, including the vaginal swab. The analyst developed a DNA profile from the vaginal swab and compared it to a DNA profile developed from Jenkins' samples. The

profiles matched, with a one-in-8.6 quintillion[1] chance the semen came from an unrelated person.

At trial, the victim testified in the detail set out above that Jenkins raped her. Later in the trial, the State called the DNA analyst to testify to the results of the DNA comparison. After the trial court found the warrant was valid and denied Jenkins' motion to suppress, the witness testified to the results of the comparison and its degree of certainty.

The jury found Jenkins guilty. Because he had prior convictions for criminal sexual conduct in the first degree and carjacking, both "most serious offense[s]" under section 17-25-45(C)(1) of the South Carolina Code (Supp. 2011), the trial court imposed a mandatory sentence of life in prison with no possibility of parole. See S.C. Code Ann. § 17-25-45(A)(1)(a) (Supp. 2011).

II. The Validity of the Search Warrant

A search warrant allowing the government to obtain evidence from a suspect's body is a search and seizure under the Fourth Amendment and, therefore, must comply with constitutional and statutory requirements. State v. Baccus, 367 S.C. 41, 53, 625 S.E.2d 216, 222 (2006). To secure a warrant for the acquisition of such evidence, the State must establish the following elements: (1) probable cause to believe the suspect committed the crime; (2) a clear indication that relevant evidence will be found; and (3) the method used to secure it is safe and reliable. 367 S.C. at 53-54, 625 S.E.2d at 223 (quoting In re Snyder, 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992) (per curiam)); see also S.C. Code Ann. § 17-13-140 (2003). The magistrate must also consider the seriousness of the crime and the importance of the evidence to the investigation, weighing "'the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures.'" Baccus, 367 S.C. at 54, 625 S.E.2d at 223 (quoting Snyder, 308 S.C. at 195, 417 S.E.2d at 574).

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[1] The number representing one quintillion is a one followed by eighteen zeros. Webster's New World College Dictionary 1178 (4th ed. 2008).

We find the affidavit, which was the only information presented to the magistrate in support of the warrant application, does not meet the requirements of Baccus. See State v. Arnold, 319 S.C. 256, 259, 460 S.E.2d 403, 405 (Ct. App. 1995) (per curiam) (stating a court reviewing the validity of a warrant may consider only information presented to the magistrate who issued the warrant). In particular, we find the affidavit does not demonstrate that the police had probable cause to believe that Jenkins raped the victim or that Jenkins' DNA was relevant to the investigation. Therefore, we hold the trial court erred in finding the warrant was valid.

A. Probable Cause that Jenkins Committed the Crime

A probable cause determination requires a magistrate to "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before her, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that . . . evidence of a crime will be found in a particular place.'" State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495-96 (2009) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). On review, our duty is to ensure that the magistrate had a substantial basis for concluding probable cause existed. 387 S.C. at 212, 692 S.E.2d at 495; see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) (stating a reviewing court should give great deference to a magistrate's determination of probable cause). Considering the totality of the circumstances, we find the affidavit in this case did not provide the magistrate a substantial basis for concluding there was probable cause that Jenkins committed the crime.

First, the affidavit must set forth facts as to why the police believe the suspect whose DNA is sought is the person who committed the crime. See State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (finding an affidavit defective because it "sets forth no facts as to why police believed Smith" committed the robbery). Applying that requirement in Baccus, our supreme court found the affidavit defective and therefore found there was an insufficient basis for a finding of probable cause. 367 S.C. at 52, 625 S.E.2d at 222. The court stated: "This affidavit fails to set forth any facts as to why police believed Appellant committed the crime. The language in the affidavit

lacks [specificity] and contains conclusory statements. Given the totality of the circumstances, we conclude the issuing magistrate did not have a substantial basis to find probable cause." Id. Similarly, the affidavit in this case lacks specificity and contains nothing more than conclusory statements. "The affidavit 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." 367 S.C. at 50-51, 625 S.E.2d at 221 (citing Franks v. Delaware, 438 U.S. 154, 165 (1978)). The affidavit in this case fails to meet the requirement of showing why the police believed Jenkins committed the crime.

Second, the affidavit does not set forth the source of the facts alleged in it. In Smith, the defendant sought to suppress a knife seized from his hotel room that was allegedly used in a robbery. 301 S.C. at 372, 392 S.E.2d at 183. The affidavit supporting the search warrant stated that the defendant committed the robbery, he had been staying in the hotel room, "and there is every reason to believe the weapon and clothes used in the robbery will be located in the room." Id. The affidavit also stated "[t]his information was confirmed in person by Sgt. Sherman . . . ." Id. Our supreme court found the affidavit "defective on its face," in part because "[a]lthough the record reveals that police relied upon information from an informant, there is no indication that this fact was made known to the magistrate . . . ." 301 S.C. at 373, 392 S.E.2d at 183. Similarly, the affidavit in this case is defective because it contains no indication as to where the detective obtained the information.

Nevertheless, the State argues that because this case involves a sex crime, the magistrate could reasonably have inferred the victim was the source of the information. We disagree. The law does not allow the State to justify a bodily intrusion on the possibility that a magistrate made a correct inference as to the source of the information in the affidavit. Rather, "[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." Smith, 301 S.C. at 373, 392 S.E.2d at 183. Moreover, the complete absence of a source for any of the information makes a variety of scenarios possible. For example, the detective could have pieced together the information from other officers, the victim's neighbors, or even an anonymous tip. This is precisely what the law forbids a magistrate from doing. The magistrate's "'action cannot be a mere

ratification of the bare conclusions of others.'" Id. (quoting Gates, 462 U.S. at 239).

Third, the affidavit does not contain even a conclusory assertion that the information or its source is reliable. See Gates, 462 U.S. at 238 (stating the circumstances a magistrate must consider include the "veracity" of the persons supplying the information on which the warrant is based). "Without any information concerning the reliability of the informant, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime . . . ." State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990) (citation and quotation marks omitted).

Viewing these deficiencies together and considering the totality of the circumstances, we find the police did not provide the magistrate a substantial basis on which to find probable cause to believe Jenkins committed this crime.

B. Clear Indication that Jenkins' Samples Are Relevant

The information presented to a magistrate to obtain a warrant for bodily intrusion must contain "a clear indication that relevant evidence will be found." Baccus, 367 S.C. at 53-54, 625 S.E.2d at 223. The trial court stated: "Clearly DNA or genetic material is . . . evidence relevant to the question of the suspect's guilt on the crime of criminal sexual conduct in the first degree." However, this statement is true only if the police have DNA from the victim or the crime scene to which they can compare the suspect's DNA. Accordingly, to show that a suspect's DNA is relevant under the second element of Baccus, the State must show there is other DNA evidence in the case to which it can be compared, or in some other manner clearly indicate the relevance of the DNA sought.

The affidavit in this case does not contain any indication as to whether the police had other DNA evidence to which Jenkins' DNA profile could be

compared.[2] Cf. State v. Chisholm, 395 S.C. 259, 266-68, 717 S.E.2d 614, 617-18 (Ct. App. 2011) (affirming an order requiring defendant to provide a DNA sample where the State presented evidence to the magistrate that the victim's clothing contained the DNA of an unidentified male); State v. Sanders, 388 S.C. 292, 298, 696 S.E.2d 592, 595 (Ct. App. 2009) (finding the second Baccus element met because the State showed it could compare defendant's blood sample to blood found on a victim's shirt); State v. Simmons, 384 S.C. 145, 176, 682 S.E.2d 19, 35-36 (Ct. App. 2009) (affirming an order requiring defendant to provide a palm print because it could be compared to a palm print lifted from the car he was accused of stealing). Thus, the affidavit failed to clearly indicate the relevance of Jenkins' DNA.

III. Whether the Trial Court's Error Was Harmless

The State argues any error in admitting the DNA comparison results was harmless in light of other evidence of Jenkins' guilt. "To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct. App. 2009) (quoting Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)), aff'd, 393 S.C. 229, 711 S.E.2d 906 (2011); see also Baccus, 367 S.C. at 55, 625 S.E.2d at 223 ("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."). In Baccus, the supreme court found the trial court's error in admitting the DNA to be harmless. 367 S.C. at 56, 625 S.E.2d at 224. As the court indicated, however, the other evidence in the case conclusively proved the defendant guilty.

> The State presented the testimony of [the victim's friend] who overheard Appellant tell the victim he was going to kill her and who overheard a

[2] The detective who prepared the affidavit admitted that when she prepared it, she did not know the results of the victim's rape examination.

> pop and clicking sound. Additionally, the State presented evidence that Appellant's fingerprints matched fingerprints on the window sill of the broken window in the victim's bedroom. Also, [a DNA analyst] testified the blood sample collected from Appellant 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. Therefore, the blood evidence drawn pursuant to the court order which should have been excluded was cumulative.

367 S.C. at 55, 625 S.E.2d at 223-24.

In Baccus, the DNA match to the defendant would have been in evidence regardless of the trial court's ruling on the motion to suppress. The admissible DNA evidence, combined with the friend's testimony she heard a gunshot immediately after she heard the defendant tell the victim he was going to kill her, "conclusively" proved the defendant guilty and left no rational conclusion but that he was guilty of murder. 367 S.C. at 55-56, 625 S.E.2d at 224. Without the DNA in this case, on the other hand, the State would have been forced to rely heavily on the credibility of the victim. Jenkins' fingerprint in the victim's home proved he was there, the presence of fluids in her body proved someone had sex with her, and the facial injuries proved someone violently assaulted her. However, removing the DNA leaves only the victim's credibility to prove two key facts necessary for a conviction: that Jenkins was the person who had sex with her,[3] and that the

[3] The State suggests that Jenkins argued the sex was consensual and thus conceded he had sex with the victim. We disagree. Jenkins' counsel cross-examined witnesses to elicit evidence that many of the victim's injuries were consistent with consensual sex, argued this evidence to the jury, argued that "all [the DNA] can do is tell you they had sex," and further argued several points supporting an inference the sex was consensual. We do not believe this rises to a concession. Rather, counsel is entitled to argue to the jury that the State has failed to prove an essential element of the crime—the sex was not consensual—without conceding the occurrence of sex.

sex was not consensual. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011) (stating "[b]ecause the [victim]'s credibility was the most critical determination of this case, we find the admission of the written reports was not harmless"), reh'g denied, (Oct. 19, 2011); 394 S.C. at 482, 716 S.E.2d at 96 (Kittredge, J., concurring) (stating "it may be a rare occurrence for the State to prove harmless error . . . in these circumstances").[4] We cannot find beyond a reasonable doubt that the DNA comparison results in this case, which the DNA analyst testified had a one-in-8.6 quintillion likelihood of error, did not contribute to or affect the verdict.[5]

IV. Inevitable Discovery of Jenkins' DNA

As an additional sustaining ground, the State argues that even if the search was illegal because of the defective affidavit, the DNA evidence was admissible under the inevitable discovery doctrine. The inevitable discovery doctrine is an exception to the exclusionary rule which requires the State to establish by a preponderance of the evidence that the same evidence seized unlawfully would have been discovered inevitably by lawful means. See State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010), cert. granted, (Dec. 15, 2011); see also Nix v. Williams, 467 U.S. 431, 447 (1984) (holding evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of

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[4] Our finding that the error was not harmless is based on our analysis of the facts of this individual case, not based on any categorical rule. See Jennings, 394 S.C. at 482, 716 S.E.2d at 95-96 (Kittredge, J., concurring), and 394 S.C. at 483, 716 S.E.2d at 96 (Toal, C.J., dissenting) (collectively overruling Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), to the extent Jolly imposes a categorical or per se rule regarding harmless error).

[5] We acknowledge the DNA evidence does not bear directly on the question of whether the sex was consensual. However, the DNA corroborated the victim's testimony that it was Jenkins who had sex with her. Because the DNA bolstered her credibility on this important point, we cannot say the DNA did not contribute to her credibility as to whether the sex was consensual.

any overreaching by the police"). When the doctrine applies, the evidence will not be suppressed despite the fact it was obtained pursuant to an illegal search. Brown, 389 S.C. at 483, 698 S.E.2d at 816.

The State first argues that because probable cause did in fact exist, the inevitable discovery doctrine applies. We disagree. While the police could have presented evidence to the magistrate sufficient to establish probable cause, that does not satisfy the requirement that the State prove it would inevitably have discovered Jenkins' DNA. As the Fourth Circuit has stated: "The inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment." United States v. Allen, 159 F.3d 832, 842 (4th Cir. 1998).[6]

The State also argues that discovery of Jenkins' DNA was inevitable because the State DNA Identification Record Database Act required that Jenkins' DNA be tested for inclusion in the State DNA database. See S.C. Code Ann. § 23-3-610 (2007) (establishing State DNA database); § 23-3-620(A) (Supp. 2011) (providing a person arrested for a felony must provide a DNA sample); § 23-3-620(B) (Supp. 2011) (providing a prisoner may not be released until he provides a DNA sample); § 23-3-640 (2007) (requiring all DNA samples taken pursuant to the Act be submitted to SLED for testing and secure storage); § 23-3-650(A) (Supp. 2011) (permitting SLED to make samples available to local law enforcement and solicitor's offices "in furtherance of an official investigation of a criminal offense"). The State contends on appeal that Jenkins was tested pursuant to the Act because of his prior conviction and imprisonment for criminal sexual conduct, and his DNA profile is included in the State DNA database. However, because the trial

[6] Allen involved a situation where the police never sought a warrant in the first place. See 159 F.3d at 834-37. The difference between that situation and this case, where the police obtained a defective warrant, is immaterial as to the inevitable discovery doctrine. In both situations, allowing the doctrine to excuse the requirement of a valid warrant simply because the State can later establish that probable cause existed would render the Fourth Amendment meaningless.

court ruled the search was legal, the State never had an opportunity to present evidence to prove its contention.[7]

The purpose of the exclusionary rule "'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" State v. Sachs, 264 S.C. 541, 560-61, 216 S.E.2d 501, 511 (1975) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). However, the exclusionary rule was not designed to apply to every violation of the Fourth Amendment. See Weston, 329 S.C. at 293, 494 S.E.2d at 804 ("Suppression is appropriate in only a few situations . . . ."); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued." (citing Sachs, 264 S.C. at 556, 216 S.E.2d at 509)). In Sachs, our supreme court observed "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where deterrence is clearly subserved." 264 S.C. at 566, 216 S.E.2d at 514. When the State has met its burden of proving it inevitably would have discovered the evidence, the "deterrence" purpose of the exclusionary rule is not "clearly subserved," id., and "'there is no rational basis to keep that evidence from the jury in order

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[7] The State's petition for rehearing includes an uncertified copy of a printout from SLED indicating the State DNA database contains Jenkins' DNA profile. The printout has not been authenticated under Rule 901(a), SCRE, is not part of the record on appeal, and contains no indication a DNA expert could actually use the profile. The State's contention that the printout proves its inevitable discovery claim misses the point of the inevitable discovery doctrine. The issue as to inevitable discovery is not whether a state agency separate from the prosecutor has Jenkins' profile in its database. Rather, the doctrine places on the State the burden of proving that the law enforcement agencies investigating or the solicitor's office prosecuting Jenkins inevitably would have obtained Jenkins' genetic profile from this database and that the lawfully-obtained profile could be compared to the profile developed from the semen found in the victim. Standing alone, the printout establishes only that the solicitor's office or investigating agency might have obtained the profile from the State DNA database. The inevitable discovery doctrine requires the State to establish it inevitably would have obtained it and could have used it.

to ensure the fairness of the trial proceedings.'" State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (quoting Nix, 467 U.S. at 447). Therefore, the inevitable discovery doctrine represents an important policy determination that the "harsh medicine" of excluding probative evidence should be avoided when doing so does not advance the objectives of the exclusionary rule by deterring violation of constitutional rights. See James v. Illinois, 493 U.S. 307, 312 (1990) (noting the basis of exceptions to the exclusionary rule includes "the likelihood that admissibility of such evidence would encourage police misconduct").

In this particular case, we find it appropriate to remand to the trial court for an evidentiary hearing as to whether the inevitable discovery doctrine applies. The issue is presented to us on appeal from the trial court's denial of Jenkins' suppression motion on the basis that the search was legal. Therefore, the State did not need to present evidence in support of the inevitable discovery doctrine to proceed with the trial. While it would have been possible for the State to make a record on this issue, doing so would have been impractical. As our supreme court has explained: "It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments . . . . It also could violate the principle that a court usually should refrain from deciding unnecessary questions." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Given the important policy considerations behind the exclusionary rule and the inevitable discovery doctrine, we believe the determination of whether the illegally seized evidence of Jenkins' DNA must be suppressed should not be made by this court on a blank record. Rather, the determination should be made first by the trial court after an evidentiary hearing.[8] If the trial court determines on remand that the inevitable discovery

[8] The appellate courts of South Carolina have addressed the inevitable discovery doctrine in only three published decisions. In two of the cases, the factual record before the appellate court was sufficient to enable the court to determine whether the State met its burden of proof. Compare Spears, 393 S.C. at 481, 713 S.E.2d at 332 (reviewing the trial court's ruling that the State met its burden of proving inevitable discovery), and State v. McCord, 349 S.C. 477, 485 n.2, 562 S.E.2d 689, 693 n.2 (Ct. App. 2002) (noting the police would have inevitably discovered defendant's blood because they had a

doctrine applies, the conviction must be affirmed. If the trial court determines the doctrine does not apply, the illegally seized evidence must be suppressed, and Jenkins must receive a new trial.

V. Conclusion

We find the trial court erred in finding the search warrant for samples of Jenkins' DNA was valid. The case is **REMANDED** for an evidentiary hearing on the applicability of the inevitable discovery doctrine and a determination of whether the illegally seized evidence should have been suppressed.

THOMAS and KONDUROS, JJ., concur.

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search warrant for a sample of it), with Brown, 389 S.C. at 483-84, 698 S.E.2d at 817 (noting standard procedures would allow for inventory search and thus discovery of the drugs, but finding the State did not present evidence it would have followed such a procedure).