

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from Horry County  
Markley Dennis, Circuit Court Judge

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**SC Court of Appeals**

**THE STATE,**

**Respondent,**

v.

**MARQUIS SPENCER MCDONALD,**

**Appellant.**

Appellate Case No. 2014-002181

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**INITIAL BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....iii

APPELLANT'S STATEMENT OF ISSUES ON APPEAL.....1

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS .....3

ARGUMENTS

I.

The trial court did not abuse its discretion in allowing AT&T's records custodian to testify as a lay witness. ....11

    Introduction.....11

    How the Issue Was Raised.....11

    Standard of Review.....13

    Analysis.....14

        Harmless Error .....17

II.

Appellant's argument that the trial court erred in allowing SLED agent Megan Lukacs to testify as a lay witness is not preserved.....18

    Introduction.....18

    How the Issue Was Raised.....18

    Analysis.....20

        Issue Preservation .....21

        Merits Analysis.....22

        Harmless Error .....25

III.

The trial court did not abuse its discretion in admitting appellant's prior conviction.....27

    Introduction.....27

    How the Issue Was Raised.....27

    Analysis.....29

        No Prejudice.....29

Harmless Error .....32

CONCLUSION.....34

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

### Cases

<i>Burnside v. State</i> , 352 P.3d 627 (Nev. 2015).....	23
<i>Collins v. State</i> , 172 So. 3d 724 (Miss. 2015).....	16
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	24
<i>Divine v. Robbins</i> , 385 S.C. 23, 683 S.E.2d 286 (Ct. App. 2009).....	15
<i>Donlin v. Philips Lighting N. Am. Corp.</i> , 581 F.3d 73 (3d Cir. 2009).....	25
<i>Fleming v. State</i> , 179 So. 3d 1115 (Miss. 2015).....	16
<i>Green v. State</i> , 338 S.C. 428, 527 S.E.2d 98 (2000).....	30, 31
<i>Jackson v. Allstate Ins. Co.</i> , 785 F.3d 1193 (8th Cir. 2015).....	24
<i>Perez v. State</i> , 980 So. 2d 1126 (Fla. 3d Dist. Ct. App. 2008).....	16
<i>State v. Baccus</i> , 367 S.C. 41, 625 S.E.2d 216 (2006).....	13
<i>State v. Beekman</i> , 405 S.C. 225, 746 S.C.2d 483 (Ct. App. 2013).....	33
<i>State v. Blurton</i> , 484 S.W.3d 758 (Mo. 2016).....	24
<i>State v. Byers</i> , 392 S.C. 438, 710 S.E.2d 55 (2011).....	21
<i>State v. Colf</i> , 337 S.C. 622, 525 S.E.2d 246 (2000).....	30, 31
<i>State v. Commander</i> , 396 S.C. 254, 721 S.E.2d 413 (2011).....	13
<i>State v. Douglas</i> , 369 S.C. 424, 632 S.E.2d 845 (2006).....	13
<i>State v. Douglas</i> , 380 S.C. 499, 671 S.E.2d 606 (2009).....	15, 25
<i>State v. Ford</i> , 454 S.W.3d 407 (Mo. 2015).....	17
<i>State v. Jennings</i> , 394 S.C. 473, 716 S.E.2d 91 (2011).....	13
<i>State v. Johnson</i> , 334 S.C. 78, 512 S.E.2d 795 (1999).....	33
<i>State v. Johnson</i> , 363 S.C. 53, 609 S.E.2d 520 (2005).....	30, 32
<i>State v. Livingston</i> , 282 S.C. 1, 317 S.E.2d 129 (1984).....	14, 17, 25, 32
<i>State v. Mizzell</i> , 349 S.C. 326, 563 S.E.2d 315 (2002).....	14, 17, 26, 32
<i>State v. Sheppard</i> , 391 S.C. 415, 706 S.E.2d 16 (2011).....	32
<i>State v. Simpson</i> , 325, S.C. 37, 479 S.E.2d 57 (1996).....	22
<i>State v. Torrence</i> , 305 S.C. 45, 406 S.E.2d 315 (1991).....	22
<i>State v. White</i> , 382 S.C. 265, 676 S.E.2d 684 (2009).....	24
<i>United State v. Jones</i> , 918 F. Supp. 2d 1 (D.C. 2013).....	24
<i>United States v. Baker</i> , 496 Fed. App'x 201 (3d Cir. 2012).....	23
<i>United States v. Evans</i> , 892 F. Supp. 2d 949 (N.D.Ill. 2012).....	23
<i>Watson v. Ford Motor Co.</i> , 389 S.C. 434, 699 S.E.2d 169 (2010).....	passim

*Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) ..... 21

**Rules**

Rule 403, SCRE ..... 27, 28

Rule 404, SCRE ..... 29

Rule 602, SCRE ..... 14

Rule 609, SCRE ..... 27, 28, 30, 31

Rule 701, SCRE ..... 15, 22, 24

Rule 702, SCRE ..... 16, 23

### **APPELLANT'S STATEMENT OF ISSUES ON APPEAL**

- I. Did the trial court err in permitting AT&T's records custodian, James Dobbins, to testify to the location of cellular phones without qualifying him as an expert under Rule 702?
- II. Did the trial court err in permitting SLED agent, Megan Lukacs, to testify as to the location of cellular phones without properly qualifying her as an expert under Rule 702?
- III. Did the trial court err in its ruling regarding evidence of appellant's prior felony conviction under Rule 609 and Rule 403?

### **RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL**

- I. Whether the trial court erred in allowing AT&T's records custodian to testify as a lay witness regarding the information AT&T keeps on every customer where the testimony was within the witness's personal knowledge and experience and was not an expert opinion.
- II. Whether the trial court erred in allowing a SLED agent to testify as a lay witness where defense counsel did not object to her testimony at trial and where the agent testified to information that did not require highly specialized knowledge or training.
- III. Whether the trial court erred in admitting appellant's prior conviction after considering multiple factors to reach a ruling that was not unfairly prejudicial to appellant and the jury received a limiting instruction.

## STATEMENT OF THE CASE

An Horry County Grand Jury indicted appellant, Marquis Spencer McDonald, for murder and armed robbery. (R.\*). Appellant proceeded to a jury trial on October 6, 2014 and was represented by Gregory McCollum, Esquire. (Tr.p.1). Bradley C. Richardson, Esquire, and Travis W. Hyman, Esquire, of the Fifteenth Circuit Solicitor's Office represented the State. (Tr.p.1).

The jury found appellant guilty of both charges on October 9, 2014. (Tr.p.786, line 19-p.787, line 9). The Honorable Markley Dennis sentenced appellant to concurrent terms of forty-five (45) years' imprisonment for murder and thirty (30) years' imprisonment for armed robbery. (Tr.p.791, line 24-p.792, line 6).

This appeal follows.

## STATEMENT OF FACTS

A chaotic scene at an apartment complex near Coastal Carolina University after someone shot a student three times in the parking lot on February 26, 2013. (Tr.p.148, lines 1-8; p.160, line 9; p.610, lines 13-21). And a cell phone left behind that led investigators to the person who killed Anthony Liddell (Liddell). (Tr.p.419, line 11-p.420, line 4).

At trial, the State presented evidence that appellant killed Liddell after arranging to buy marijuana from him. Other students rushed to try and save Liddell's life, but he later died from his injuries. (Tr.p.157, lines 2-5; p.607, lines 11-14). Amanda McTaggart (McTaggart) was a freshman at Coastal Carolina at the time of the shooting, but transferred to a university in New Jersey after witnessing the murder. (Tr.p.182, lines 9-14; p.183, lines 11-16). McTaggart had just parked her car in front of a friend's apartment when she heard a bang. (Tr.p.186, lines 15-18; p.187, lines 6-20). At first, McTaggart thought two cars had been involved in a crash. (Tr.p.188, line 11-p.189, line 11). However, when she looked in the rearview mirror she saw two people struggling between a small, white SUV and a black car. (Tr.p.189, lines 17-20). McTaggart testified it looked like appellant was winning the fight and stated, "It was very aggressive." (Tr.p.192, line 22-p.193, line 9). McTaggart heard two more gunshots and testified she "froze up" in fear, worried "that the kid was going to come and shoot [her] too" because her car was still on and the shooter might see her taillights. (Tr.p.193, line 13-p.194, line 9). While McTaggart did not see the driver leave the scene, she heard the car speed away. (Tr.p.195, lines 9-11).

McTaggart testified she got out of her car and was going to call 911, but the victim stumbled toward her, asked for help, and then fell to the ground. (Tr.p.195, line 24-p.196, line 6). McTaggart ran over to the victim, put his head in her lap, and tried to comfort him, "telling

him to stay with me." (Tr.p.196, lines 8-9; p.197, lines 19-25). McTaggart yelled up at some people standing on a nearby balcony to call 911. (Tr.p.210, line 21-p.211, line 1). McTaggart testified people ran out of their apartments and one of her friends, who was a volunteer firefighter, tried to stop the victim's bleeding while they waited for an ambulance to arrive. (Tr.p.196, line 21-p.197, line 15).

Other students gave similar testimony. Infiniti Henderson (Henderson) was sitting near the balcony door inside her apartment when she heard a gunshot. (Tr.p.216, line 12-p.217, line 3; p.217, lines 19-25). After hearing two more shots, Henderson went out onto the balcony to see what was happening. (Tr.p.218, line 14-p.219, line 4; p.219, lines 16-20). She testified she saw a dark-colored car back out of a parking space, almost hit the victim, and take off. (Tr.p.220, lines 9-22). Henderson stated the victim stumbled back and she saw a woman get out of a car, ask if he was ok, and the victim collapsed and did not move. (Tr.p.221, line 24-p.222, line 2; p.225, lines 20-25; p.226, lines 1-7). Henderson called 911. (Tr.p.227, lines 3-9).

Janie Plyler (Plyler) was studying for an exam when she heard the gunshots and ran to her window to see what was going on. (Tr.p.237, line 23-p.238, line 6). Plyler testified she saw the victim standing at the rear of a dark-colored car parked near a white SUV and, as the driver backed up to leave, the victim jumped toward the car, but was thrown off as the driver pulled out. (Tr.p.239, lines 1-8; p.240, lines 6-15). Plyler stated during direct-examination, and confirmed on cross-examination, that the tires squealed as the car left and the driver "was trying to leave as fast as they could." (Tr.p.242, lines 15-18; p.244, line 23-p.245, line 11).

One of the first officers to respond to the scene testified "it was chaos" when he arrived at the apartment complex, and students were crying. (Tr.p.160, line 9; p.161, lines 9-14). The victim was face down on the ground and moaning, and a student was holding his head while

another person tried to stop the bleeding. (Tr.p.157, lines 2-5). Sergeant Bradford Ferrell (Ferrell) testified he walked to the area where witnesses told him the shooting happened, and he saw a cell phone on the ground with a cracked screen that looked like it had been dropped, and a bullet casing lying nearby. (Tr.p.147, line 22-p.148, line 6; p.155, lines 10-19). Witnesses told Ferrell that the person who shot Liddell got in a car and left. (Tr.p.156, lines 7-10). Agents with South Carolina Law Enforcement Division's (SLED) crime scene unit collected evidence from the parking lot. (Tr.p.264, lines 3-4; p.264, lines 12-15; p.266, lines 3-11; p.268, lines 3-11). The unit collected the cell phone, bullet casing, and a pack of cigarettes found on the ground. (Tr.p.286, line 15-p.287, line 23; p.291, lines 4-18). Moreover, agents found two bullets in the white SUV that had been parked near the shooter's dark-colored car at the time of the murder. (Tr.p.297, line 24-p.299, line 12).

At first, investigators thought the cell phone dropped at the scene belonged to the victim because of where it was found. (Tr.p.419, line 11-p.420, line 4; p.420, lines 17-23). However, once they got into the phone and obtained preliminary information, an agent recognized the man in some selfies as a confidential informant who worked with a drug enforcement unit that operated in Horry and Georgetown counties.<sup>1</sup> (Tr.p.425, line 24-p.426, line 14; p.461, lines 13-16). Once investigators realized the phone belonged to a likely suspect rather than the victim, they stopped looking at it and got a search warrant. (Tr.p.425, lines 15-24; p.468, line 25-p.469, line 15). After receiving the warrant, investigators got detailed information from the phone, including a list of contacts, text messages, additional pictures, and a call history. (Tr.p.469, lines

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<sup>1</sup> SLED sent the phone to Will Lynch (Lynch) who was part of the Fifteenth Circuit Drug Enforcement Unit. (Tr.p.461, lines 6-12; p.465, lines 11-17). Lynch testified appellant's "cell phone was in pretty bad shape" when he got it; however, once he charged the phone, he saw some selfies of a man he recognized as appellant, who had signed up to work as a confidential informant. (Tr.p.466, line 17-p.467, line 7; p.492, lines 1-8).

22-25; p.470, lines 11-19). The number attached to the cell phone belonged to appellant. (Tr.p.473, line 25-p.474, line 1).

Investigators subpoenaed subscriber information for various other numbers found in appellant's cell phone. (Tr.p.430, line 13-p.431, line 4). One of the phone numbers belonged to the victim and one of them belonged to Stephon McLain (McLain).<sup>2</sup> (Tr.p.427, lines 1-7; p.431, lines 5-17). Investigators put into chronological order the text messages and calls from appellant's phone to create a minute-by-minute timeline of the hours leading up to the deadly shooting. (Tr.p.471, lines 1-9; p.476, lines 2-11). Lynch testified there were text messages exchanged between appellant and McLain, and between appellant and the victim. (Tr.p.479, line 5-p.480, line 9; p.480, line 18-p.481, line 2; p.481, line 14-p.482, line 4). Lynch testified appellant and the victim set up the marijuana deal on February 25, 2013, the day before the murder, via text messages. (Tr.p.483, line 5-p.484, line 20). In a lengthy series of messages that Lynch read to the jury, the victim agreed to give appellant a discount because they were friends and they set a time to meet. (Tr.p.483, lines 14-21; p.484, lines 11-14). There were also phone calls made from appellant to the victim and from appellant to McLain and, at some point, the decision was made to wait until the following day to meet. (Tr.p.485, line 10-p.486, line 14).

On February 26, 2013, the day of the murder, appellant called the victim and McLain several times. (Tr.p.487, line 10-p.488, line 7). One of the last calls the victim received was from appellant. (Tr.p.488, lines 6-7). Based on the information from the cell phone, interviews with witnesses, and evidence found at the crime scene, investigators got an arrest warrant for appellant, charging him with murder, and began looking for him. (Tr.p.427, lines 17-23; p.428, lines 1-16; p.429, line 23-p.430, line 3).

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<sup>2</sup> McLain was also charged with murder in this case and later arrested in Ohio. (Tr.p.432, lines 15-17; p.433, line 14-p.434, line 13; p.566, line 7-p.567, line 22).

On March 1, 2013, appellant's uncle called investigators and said appellant wanted to turn himself in. (Tr.p.429, lines 4-15). SLED Lieutenant Roxanne Bethea (Bethea) and another officer took appellant into custody and drove him to Coastal Carolina's police department. (Tr.p.516, lines 22-24; p.517, lines 3-14; p.519, line 11-p.520, line 18). Bethea testified appellant "was very excited and wanted to talk and tell his story." (Tr.p.521, lines 15-16). Bethea "constantly had to tell [appellant], slow him up and tell him, you know, we didn't want him to discuss anything at this point because we need to read him his rights. And we were headed to [Coastal Carolina] where we could do that." (Tr.p.521, lines 16-20).

SLED Senior Special Agent James Johnson (Johnson) helped interview appellant, who was "very talkative and excited, kind of excited about telling the story." (Tr.p.525, lines 6-12; p.526, lines 16-23; p.533, lines 5-7; p.543, lines 3-7). Appellant waived his rights and told investigators he was willing to talk.<sup>3</sup> (Tr.p.535, lines 14-19; p.537, lines 1-6; p.538, lines 1-11; p.539, lines 1-16). During the interview, appellant admitted he set up the marijuana deal with Liddell, the victim. (Tr.p.540, lines 10-18). Appellant further admitted to being at the scene of the deadly shooting; however, contrary to the information gathered from the cell phone, appellant said McLain arrived with the victim. (Tr.p.441, line 22-p.442, line 9; p.540, lines 19-21). Appellant said McLain got into the front passenger seat, the victim got into the back seat, and the three were talking when McLain suddenly pulled out a gun. (Tr.p.540, line 21-p.541, line 9). Appellant claimed he and McLain were struggling over the gun when Liddell grabbed it and it fired.<sup>4</sup> (Tr.p.541, lines 9-13). Appellant told investigators he got out of the car to run, but

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<sup>3</sup> Following the interview, appellant wrote his statement which Johnson read to the jury at trial. (Tr.p.543, line 20-p.544, line 7; p.545, line 2-p.547, line 11).

<sup>4</sup> Johnson asked appellant to show him where everyone's hands were on the gun because "how in the world could the gun go off when both—all three of [them] had [their] hands on it and the

Liddell asked for help so appellant got back into the vehicle and punched McLain so hard that McLain fell out and onto the ground.<sup>5</sup> (Tr.p.541, lines 13-22). Appellant said he heard another gunshot as he was driving away, but he did not look back. (Tr.p.541, lines 22-25). Appellant also admitted he bought a new cell phone after realizing he lost his on the night of the incident. (Tr.p.547, lines 2-3; p.549, line 25-p.550, line 7).

Johnson testified appellant claimed he never met McLain before that night, and "insisted that he do a composite sketch of the person." (Tr.p.554, lines 15-20; p.555, lines 1-4). However, investigators determined appellant was lying. (Tr.p.442, lines 10-12). During the interview, appellant said he stopped at a convenience store prior to meeting the victim for the marijuana deal. (Tr.p.442, lines 14-17; p.556, lines 17-24). Surveillance video from the store showed appellant pull up in a vehicle, McLain get out of the passenger side, and both men walk into the store and later get back into the same car together. (Tr.p.442, line 18-p.443, line 19; p.556, line 25-p.557, line 8).

Appellant also admitted in his statement that he was driving his uncle's car on the night of the murder. (Tr.p.548, line 23-p.549, line 5). SLED agents who processed that car found blood inside it, near the center console. (Tr.p.323, lines 17-20; p.338, line 24-p.339, line 2; p.350, line 14-p.351, line 1). Agents also found a fired bullet inside, near a rear door, and found the victim's fingerprint on one of the car's windows. (Tr.p.340, lines 1-2; p.356, line 13-p.357, line 5; p.372, line 23-p.373, line 13; p.374, lines 3-13; p.375, lines 4-11). While SLED agent Randall Truss testified he could not "definitively" say whether appellant or McLain shot the victim, Truss

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slide couldn't go back. But he said it did." (Tr.p.550, lines 17-25).

<sup>5</sup> Appellant did not have any bruises on his hand, despite his claim that he hit McLain hard enough to knock him out of the car, while the door was closed. (Tr.p.542, lines 11-22; p.560, line 17-p.561, line 10).

testified all of the evidence recovered from the scene came from the driver's side of the car that appellant admitted he was driving, including the cell phone and bullet casing.<sup>6</sup> (Tr.p.415, lines 11-17; p.439, lines 15-19; p.439, line 25-p.441, line 15).

Appellant placed himself at the scene of the murder when he testified at trial, conceding he was there and driving his uncle's car. (Tr.p.690, line 21-p.691, line 5). Appellant admitted McLain was his cousin, the two were together on the night of the shooting, and that he initially lied to investigators about knowing McLain. (Tr.p.688, lines 4-11; p.688, line 18-p.689, line 3; p.689, lines 15-22). Appellant also admitted he lied to investigators about punching McLain. (Tr.p.689, lines 4-14). Appellant testified he had known Liddell for two years prior to the murder and bought marijuana from him multiple times. (Tr.p.689, line 23-p.690, line 20). However, appellant testified, this time, McLain and Liddell began arguing and McLain got angry. (Tr.p.694, lines 2-23). Appellant stated McLain pulled out a gun to show Liddell he could "just take [his] weed and [he could] not do nothing about it." (Tr.p.695, lines 16-21). Appellant testified McLain and Liddell fought over control of the gun, which fired and appellant "dove out of the car" and heard two more shots. (Tr.p.696, lines 8-20). Appellant stated Liddell finally let go of the gun and walked away, so appellant got back in the vehicle and left. (Tr.p.696, lines 20-22). Appellant admitted he lied to investigators about trying to grab the gun during the struggle, testifying he was "just trying to—just trying to put more to it, like I didn't—to show them that I didn't have nothing to do with it." (Tr.p.699, lines 14-23).

On cross-examination, the State showed appellant the cell phone found on the ground at the scene and appellant admitted the phone was his:

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<sup>6</sup> The trial court instructed the jury extensively on accomplice liability, stating the jury could find appellant guilty under the theory "the act of one is the act of all." (Tr.p.771, line 19-p.774, line 16).

Q: And you were the one that was texting with Anthony Liddell?

A: Yes, sir.

Q: State's No. 12, no doubt about it, that's your cell phone?

A: Yes, sir.

Q: And any records on that cell phone are yours?

A: Yes, sir.

Q: Any texts out from it are yours?

A: Yes, sir.

(Tr.p.708, lines 12-21; p.710, lines 13-18). Moreover, appellant later admitted he drove away from the apartment complex with the marijuana in his car, corroborating the State's theory that the victim was shot and killed during an armed robbery. (Tr.p.715, lines 22-23).

## ARGUMENTS

### I.

The trial court did not abuse its discretion in allowing AT&T's records custodian to testify as a lay witness about the location of cell towers.

#### Introduction

The trial court did not err in allowing AT&T's records custodian to testify as a lay witness because he testified to matters within his personal knowledge and experience and the subject matter was not beyond the ordinary knowledge of the jury. The custodian relayed to the jury general information about the data collected by AT&T, including the location of cell towers, which did not require the special knowledge of an expert. Any error by the court was harmless because appellant admitted at trial that he was at the murder scene.

#### How the Issue Was Raised

At trial, the State presented evidence, testimony, and appellant's statement to connect him to the deadly incident, including appellant's cell phone, found at the scene. (Tr.pp.419-20; pp.425-26; pp.473-74). Appellant placed himself at the apartment complex when he testified about the incident at trial. (Tr.pp.689-91; p.696). Appellant admitted during his testimony that the phone was his, and that he had called and sent text messages to both Liddell and Stephon McLain (McLain). (Tr.pp.690-91; p.696; p.708; p.710). Moreover, appellant admitted his cell phone was lying on the ground when he left the apartment complex, and told investigators he bought a new phone to replace the one he lost. (Tr.p.547; pp.549-50; p.700, lines 2-4).

To corroborate the details of appellant's statement, the State called James Dobbins (Dobbins) to testify as the business records custodian for AT&T. (Tr.p.249, lines 8-25). Dobbins explained AT&T's records for every customer indicate data usage, the general location

of a customer's phone when a call or text message originated, the number a customer contacted, the type of communication in which a customer engaged, as well as the date and time of the communication. (Tr.p.250, line 24-p.251, line13; p.256, lines 7-13). The records, maintained in the ordinary course of business, were "very accurate," stored electronically, and could be accessed when needed. (Tr.p.253, lines 20-25; p.257, lines 3-9).

Dobbins explained that when a customer used a cell phone, a signal from the phone communicated with nearby towers, which then transmitted the signal. (Tr.p.254, lines 1-13). Dobbins testified the signal went to the closest tower, which determined a customer's general location at the time a cell phone was used and, "if it's congested, it could go to a secondary tower or—and pass along the towers as you move from one location to another." (Tr.p.254, lines 14-25; p.255, lines 2-4). Defense counsel interrupted the testimony and the following exchange occurred:

[Defense Counsel]: Your Honor, I think the witness was presented as a, I think, a records custodian, I'm not sure. But it seems like if we're getting or trying to get some kind of expert testimony—

The Court: At this point, he's just a lay witness. Solicitor, just move on to what it is, and we don't need to go into that much detail—

[The State]: Yes, sir.

The Court: —on how it works at this point. Thank you.

[The State]: Yes, sir, Your Honor.

The Court: Thank you. I sustain the objection insofar as we're not—he's not been presented, and I assume you're not offering him as an expert witness?

[The State]: No, sir, Your Honor, no, sir.

The Court: All right.

(Tr.p.255, lines 7-22). Counsel did not raise any further objections during Dobbins's remaining testimony. Dobbins testified that every cell tower was identified by a number, and that AT&T's records showed the identification number associated with each tower and the corresponding "latitude and longitude" which indicated the center of the general area covered by each tower. (Tr.p.255, line 23-p.256, line 4).

Specific to this case, Dobbins testified he reviewed the cell phone records requested for two numbers—later determined to belong to appellant and the victim. (Tr.p.258, lines 19-25; p.262, lines 6-9; p.473, line 25-p.474, line 1; p.474, lines 8-11). The records were introduced into evidence, without objection, and Dobbins pointed out to the jury each column on the records and explained what each represented, including the column(s) with the: (1) cell tower identification number; (2) latitude and longitude of the tower associated with the identification number; (3) date of the call or text message and the phone number contacted; and, (4) time of the communication. (Tr.p.258, line 2-p.262, line 17).

Defense counsel did not cross-examine Dobbins. (Tr.p.263, lines 3-4).

#### Standard of Review for Arguments I, II, and III

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); see also *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (holding appellate courts

review errors of law only and are bound by the trial court's factual determinations unless they are clearly erroneous).

To warrant reversal based on the admission or exclusion of evidence, an appellant must prove both the error and that there is a reasonable probability the wrongly admitted or excluded evidence influenced jury's verdict. *See State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984) ("[W]here guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result."). An error is harmless beyond a reasonable doubt where a review of the entire record shows the error did not contribute to the verdict. *See State v. Mizzell*, 349 S.C. 326, 333-34, 563 S.E.2d 315, 318-19 (2002) (listing the factors of a harmless error analysis, including the importance of the witness's testimony in the State's case, whether the testimony was cumulative, the presence or absence of evidence corroborating the testimony of the witness on material points, the extent of cross-examination, and the overall strength of the State's case) (citations omitted).

#### Analysis

The trial court did not abuse its discretion in allowing Dobbins to testify as a lay witness without first qualifying him as an expert. Dobbins's testimony about cell phone signals communicating with nearby towers and the possibility of a signal moving from one tower to another based on the user's location was not opinion testimony. *See, e.g.*, Rule 602, SCRE (providing that a witness may testify to a matter if there is evidence to support a finding that he has personal knowledge of the matter). The statements were not conclusions Dobbins drew based on any specialized reasoning or assessment, and were not presented in the form of an opinion or inference. They were facts based on Dobbins's personal experience as an employee at

AT&T and proper lay witness testimony under Rule 701. *See* Rule 701, SCRE (providing that a lay witness may testify about matters rationally related to the witness's perception). Because the testimony was based on Dobbins's personal observations and knowledge, he did not need to be qualified as an expert. *See, e.g., State v. Douglas*, 380 S.C. 499, 502-03, 671 S.E.2d 606, 608-09 (2009) (finding that a witness need not be qualified as an expert in the field of forensic interviewing when the witness testified only as to her personal observations and as to her interview with the victim); *see also Divine v. Robbins*, 385 S.C. 23, 39, 683 S.E.2d 286, 294-95 (Ct. App. 2009) (finding a guardian ad litem's testimony in a child custody case, regarding the mother's behavior, was based on her personal interactions with the mother and did not require special knowledge or skill) (citing *Douglas*, 380 S.C. at 502-03, 671 S.E.2d at 608-09).

Appellant makes much of Dobbins's statement regarding a cell tower's "latitude and longitude." However, a careful reading of the record shows Dobbins was not testifying to the actual location of a user, but that individual towers have an actual, physical location. Further, Dobbins stated AT&T stored that location information electronically which Respondent submits is far from the technical testimony which would require a qualified expert. Such information was easily accessible to anyone who looked at AT&T's customer records and required minimal technical knowledge. *See* Rule 701 (providing that a lay witness can testify to matters that do not require special knowledge, skill, or training, but that may assist the jury's understanding of the witness's testimony); *cf. Watson v. Ford Motor Co.*, 389 S.C. 434, 445-46, 699 S.E.2d 169, 175 (2010) (explaining that expert testimony differs from that of a lay witness because an expert can give an opinion based on facts outside the witness's personal knowledge, and based on technical or specialized knowledge). Other jurisdictions have consistently found testimony that simply describes the information in a cell phone record, such as that given by Dobbins, is proper

lay testimony. *See Collins v. State*, 172 So. 3d 724, 743 (Miss. 2015) (holding that testimony that merely informs the jury as to the location of cell phone towers is proper lay testimony when it is based upon the personal observations of the witness); *Fleming v. State*, 179 So. 3d 1115, 1119 (Miss. 2015) (holding a witness crosses the line into expert testimony when he exceeds the information contained in phone records and provides specialized knowledge on how cell technology works); *Perez v. State*, 980 So. 2d 1126, 1131-32 (Fla. 3d Dist. Ct. App. 2008) (finding a cellular company's records custodian was not required to be qualified as an expert to testify regarding geographic coverage of a typical cell tower and factually explain the contents of phone records).

Dobbins provided only a brief and generic description of the role of cell phone towers consistent with information available to the general public. That cell phones send signals to towers, indicating a user's general location, does not qualify as testimony beyond the realm of common experience that would require the special knowledge of an expert witness. *See, e.g., Watson*, 389 S.C. at 446, 699 S.E.2d at 175 (stating that expert testimony is appropriate where the subject matter is beyond the ordinary knowledge of the jury). Dobbins merely pointed out to the jury what information AT&T collected, which included phone numbers called or texted, times and dates of communications, and the tower associated with the communication. The record shows Dobbins did not engage in any analysis, such as comparing factors which may affect a phone's ability to connect to a particular cell tower, which would require scientific, technical, or specialized knowledge. *See, e.g., Rule 702, SCRE* (providing that a witness may be qualified and testify as an expert if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence"). Dobbins's testimony was limited to the information found in AT&T's records, which were kept for every customer. Accordingly, the

trial court did not err in admitting Dobbins testimony.

*Harmless Error*

Even if the Court were to find the trial court abused its discretion, any error in admitting Dobbins's testimony regarding cell tower locations was harmless because the jury considered substantial corroborating evidence properly admitted at trial. *See Livingston*, 282 S.C. at 6, 317 S.E.2d at 132 (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the verdict). Dobbins's testimony could not be used to improperly place appellant at the scene of the murder where appellant himself testified he was there, he acknowledged at trial that the cell phone belonged to him, and admitted he left the scene with the marijuana in his car. Further, investigators saw the phone in the parking lot and a drug enforcement agent who analyzed the phone recognized appellant in some selfies as a confidential informant. The jury also heard a lengthy series of text message in which appellant and the victim set up the marijuana deal, as well as evidence of phone calls between appellant and the victim, and appellant and McLain. *See Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318 (holding factors of a harmless error analysis include whether the testimony is cumulative, the presence of evidence corroborating the testimony, and the importance of the testimony to the State's case); *see also State v. Ford*, 454 S.W.3d 407, 415 (Mo. 2015) (analyzing the admission of cell phone location data through lay testimony and holding, despite trial court error, there was no "miscarriage of justice" because of the substantial evidence of guilt presented by the State). Accordingly, Dobbins's testimony detailing the information contained in AT&T's records did not substantially affect the verdict and any error in admitting it was harmless.

## II.

Appellant's argument that the trial court erred in allowing SLED agent Megan Lukacs to testify as a lay witness is not preserved.

### Introduction

Defense counsel specifically told the trial court he was not objecting to Lukacs's testimony, and this issue is not preserved. Additionally, the maps created by the agent did not require specialized skill, training, or analysis to complete as Lukacs testified she took factual information readily available in cell phone records, including cell tower locations and the times of texts and calls, and input the data into a computer program which mapped the communications. Any error by the court was harmless because appellant admitted at trial that he was at the murder scene and Lukacs's testimony was cumulative to other competent evidence presented at trial.

### How the Issue Was Raised

To corroborate appellant's statements that he was at the scene and that the phone was his, as well as agent Will Lynch's (Lynch) testimony that he put into chronological order communications from appellant's phone, the State called SLED agent Megan Lukacs (Lukacs) to testify about how she utilized cell phone data. (Tr.p.650, lines 20-23; p.651, lines 1-4). Lukacs first testified about her general duties. She stated investigators would send call records to her, which included cell tower coordinates, she imported the information from the records into a computer program, and the program then "mapped" the calls. (Tr.p.652, line 12-p.653, line 1). As Lukacs began her testimony specific to this case, defense counsel asked the court:

[Defense Counsel]: Your Honor, I have a, I don't know if it's an objection, but it's a clarification. I'm not quite sure how this works, I don't know if she's testifying as an expert, or is this something that any of us can do?

The Court: Well, I don't know if it—she hasn't been asked or qualified yet, so I'll allow the question. Until that point, we assume that she's testifying—until it is offered, that any of her testimony would have to be a 701 opinion, and she certainly can render a 701 opinion.

[Defense Counsel]: Okay.

The Court: All right. Proceed.

(Tr.p.655, lines 3-15). Lukacs continued to testify that she was asked to assist with this case and given the cell phone records for appellant, the victim, and Stephon McLain (McLain). (Tr.p.655, line 18-p.657, line 5). Investigators requested Lukacs map the calls from the phones for a narrow time frame—from 6:30 p.m. to 8:30 p.m. on February 26, 2013, the evening of the murder. (Tr.p.658, lines 14-17). Lukacs imported the records into the computer program, input the specific time frame, and mapped the calls to plot the progression of the phones belonging to appellant, McLain, and the victim. (Tr.p.657, line 9-p.658, line 3). Lukacs then compared the cell phone records provided by investigators to the maps the program generated to ensure the maps accurately reflected the call logs and tower locations, and one of her colleagues subsequently reviewed the maps. (Tr.p.658, lines 4-9; p.659, lines 17-24).

As the State prepared to introduce the maps, defense counsel again asked for clarification and specifically stated he was not objecting to the evidence:

[Defense Counsel]: I'm just for clarification, is this coming in as expert testimony?

The Court: It's coming in, she prepared a document based on some data. There's nothing more than a spreadsheet really. Somebody puts data on a sheet.

[Defense Counsel]: Okay.

The Court: I mean, she doesn't have to be an expert, you and I could do that.

[Defense Counsel]: That's my thing, I've tried to do it.

The Court: I'm just saying, if we know where the towers are and these records, from what I understand all of these records to be, is simply taking the data and putting it on a—putting it on a map. I mean, I'm not trying to belittle what she does, but it doesn't require an expert. This is simply something she requires some training and experience, she's testified to that.

So if it is an expert, it's similar to bloodhound expert, it's not required to peer review. Somebody checked her work, that wasn't peer review, they just checked her work. But the objection is noted and overruled.

[Defense Counsel]: I was not necessarily objecting.

(Tr.p.660, line 21-p.661, line 19). After a brief comment to the jury regarding the discussion, the court stated, "No objection. State's 38 is admitted without objection." (Tr.p.661, line 20-p.662, line 4). The other two map exhibits, State's 39 and 40, were also admitted without objection. (Tr.p.662, line 22-p.663, line 5).

Without further requests for clarification from defense counsel, Lukacs testified the maps indicated appellant's cell phone moved between towers near the incident location around the time of the shooting. (Tr.p.663, line 9-p.664, line 24). Records from McLain's cell phone indicated its signal moved toward the murder scene and then away on the evening of February 26, 2013. (Tr.p.664, line 25-p.666, line 18). In addition, the map showed the victim's cell phone was sending a signal to a tower near the apartment complex for most of the night, and then switched to the same tower as McLain's phone after the murder, which was not near the shooting scene. (Tr.p.666, line 19-p.668, line 14). Lukacs testified the maps only indicated the general area in which the cell phones were used, and she could not give the exact location for the users or determine who actually used the phones. (Tr.p.668, line 22-p.669, line 13).

Defense counsel did not cross-examine Lukacs. (Tr.p.669, lines 16-17).

## Analysis

### *Issue Preservation*

Respondent submits appellant's argument that the trial court erred in admitting Lukacs's testimony without qualifying her as an expert is procedurally barred as the record shows defense counsel told the court he was not objecting to her statements. Counsel twice asked for clarification as to the nature of Lukacs's testimony; however, counsel did not specifically object on the ground that Lukacs must be qualified as an expert prior to testifying about her utilization of the cell phone data. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)) (holding an objection must be made with sufficient specificity to allow the trial court to understand the nature of the argument being advocated by the party making the objection). As Lukacs began her testimony about the data she imported when assisting with this case, counsel stated, "I have a, I don't know if it's an objection, but it's a clarification" and never specifically objected following the trial court's statement that Lukacs could render a Rule 701 opinion. (Tr.p.655). A few minutes later, counsel again asked for clarification as to the nature of Lukacs's testimony, the court stated the witness was not testifying to a matter in which she was required to be an expert but that "the objection is noted and overruled," to which counsel replied, "I was not necessarily objecting." (Tr.pp.660-61). The court then admitted the map evidence "without objection" and counsel did not inform the court he had, in fact, objected, nor did he raise any further concerns regarding Lukacs's continuing testimony. (Tr.pp.661-62).

Respondent submits defense counsel's statement that he "was not necessarily objecting" waived appellant's right to now raise the argument that the trial court erred in admitting Lukacs's testimony without first qualifying her as an expert. *See Byers*, 392 S.C. at 444, 710 S.E.2d at 58

(citing *State v. Simpson*, 325, S.C. 37, 42, 479 S.E.2d 57, 60 (1996)) (holding an objection to the admission of evidence must be made at the time the evidence is presented in order to be preserved for appellate review). The State was entitled to present a counterargument to the court had counsel demonstrated an intent to object on the ground that Lukacs must be qualified as an expert before continuing to testify. *State v. Torrence*, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (stating the rationale behind the contemporaneous objection rule is to enable the trial court to make a reasoned decision by developing issues by way of argument, both for or against a legal proposition). The record shows the State was not given such an opportunity as counsel's statement effectively ended the discussion of the matter, counsel never specifically objected on this ground, and counsel failed to subsequently challenge Lukacs's continuing testimony. Accordingly, this issue is not preserved for appellant review and not properly before the Court.

#### *Merits Analysis*

Notwithstanding the above discussion, respondent submits the trial court did not abuse its discretion in allowing Lukacs to testify as a lay witness. The threshold question to any Rule 702 analysis is whether the witness is testifying to a subject matter beyond the ordinary knowledge of the jury which would require an expert to explain the matter to the trier of fact. *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. Lukacs's testimony did not amount to an expert opinion and was not so specialized or technical to subject it to a Rule 702 analysis. To create the maps, Lukacs utilized software that was marketed to law enforcement agencies across the country and required little more than identification of the various locations she intended to plot. *See* Rule 701 (providing that lay witnesses may testify to inferences rationally based on the perception of the witness). Lukacs input the cell tower sites by latitude and longitude, as disclosed by AT&T and T-Mobile pursuant to subpoenas for the information. (Tr.pp.655-57). She further imported the

time of each text or phone call during a narrow timeframe to plot the progression of the cell phones belonging to appellant, McLain, and the victim on the night of the murder, also disclosed by the cell phone companies in their records. (Tr.pp.657-58). The minimal technical knowledge or skill required to complete the task was not so "specialized" as to constitute a matter of expertise within the meaning of Rule 702. *See* Rule 702 (providing that a witness may be qualified and testify as an expert if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence").

Once the maps were created, Lukacs simply reviewed the cell phone records and compared them to the maps to make sure the maps accurately reflected the tower and time information contained in the subpoenaed records. (Tr.pp.658-59). Lukacs's knowledge that she testified to at trial was readily accessible to any ordinary person. *Cf. Watson*, 389 S.C. at 446, 699 S.E.2d at 175 (stating that expert testimony is appropriate where the subject matter is beyond the ordinary knowledge of the jury). Notably, federal courts that have considered this issue have found witnesses need not be an expert to take information provided by a cell phone company, such as tower coordinates, and transfer it onto a map as the witness is simply creating a visual aid to help the jury understand the information. *See United States v. Baker*, 496 Fed. App'x 201, 204 (3d Cir. 2012) (finding a federal agent's testimony as to his use of computer mapping software to create map of defendant's general location from cell phone records did not involve expert testimony); *United States v. Evans*, 892 F. Supp. 2d 949, 953 (N.D.Ill. 2012) (finding creation of a map plotting cell towers utilized by a defendant's phone does not require specialized knowledge and is admissible through lay opinion testimony); *see also Burnside v. State*, 352 P.3d 627, 636 (Nev. 2015) (holding the State was not required to notice as an expert witness a detective who made a map of cell phone sites that handled calls from cell phones registered to

the defendant). To the extent appellant argues the trial court erred in failing to determine the reliability of cell phone location mapping technology, respondent notes multiple courts have rejected that argument.<sup>7</sup> See *Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1204 n. 5 (8th Cir. 2015) (rejecting a challenge to the reliability of cell phone mapping technology); *United State v. Jones*, 918 F. Supp. 2d 1, 6-7 (D.C. 2013) (finding the reliability of cell phone mapping is so well-established that a *Daubert*<sup>8</sup> hearing was not necessary).

Importantly, Lukacs acknowledged that she could not give a precise location of an individual user as the records only indicated a general area of use based on the location of the cell towers, and the State did not attempt to use Lukacs's testimony to pinpoint appellant's exact location around the time of the murder. (Tr.pp.668-69). This is another indication that Lukacs simply input already available data into software to create the maps, she did not engage in any specialized analysis of the data,<sup>9</sup> and the conclusions she drew were not based on any specialized reasoning. See Rule 701 (providing that a lay witness can testify to matters that do not require special knowledge, skill, or training, but that may assist the jury's understanding of the witness's

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<sup>7</sup> In addition, the record demonstrates the trial court did not acknowledge Lukacs's statements constituted expert testimony nor did the court engage in an incomplete Rule 702 analysis as appellant asserts. The court specifically stated "it doesn't require an expert" to create the maps Lukacs was using. (Tr.p.661). The court further stated, even assuming it was expert testimony, it was not scientific, but similar to bloodhound, experience-based evidence. (Tr.p.661); see also *State v. White*, 382 S.C. 265, 269-71, 676 S.E.2d 684, 686-87 (2009) (holding a trial court retains its gatekeeping role for admission of nonscientific, or evidence based, expert testimony). Regardless, as argued above, the court was not required to conduct a Rule 702 analysis to assess the reliability of the testimony as defense counsel told the court he was not objecting to her statements, leaving the issue unpreserved.

<sup>8</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>9</sup> As noted by the Missouri Supreme Court, such analysis requires broad inferences be made of a cell phone's ability to connect to towers, which depends on a multitude of factors such as weather and geography, and would require an expert who had specialized experience in the field of cellular communications. *State v. Blurton*, 484 S.W.3d 758, 771 (Mo. 2016). Lukacs did not have such experience and testified her job only required her to input already available data.

testimony); *cf. Watson*, 389 S.C. at 445-46, 699 S.E.2d at 175 (explaining that expert testimony differs from that of a lay witness because an expert can give an opinion based on facts outside the witness's personal knowledge, and based on technical or specialized knowledge). Lukacs's testimony was proper lay witness testimony under Rules 602 and 701, and her testimony regarding the maps she developed aided the jury in its understanding of her testimony and did not overstep the bounds of Rule 701. *See, e.g., Douglas*, 380 S.C. at 502, 671 S.E.2d at 608 (determining that a forensic interviewer could testify as a lay witness to her utilization of an established method to build rapport with the child victim, and that she established the opinion the victim needed to undergo a medical exam); *see also Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 81 (3d Cir. 2009) ("When a lay witness has particularized knowledge by virtue of her experience, she may testify—even if the subject matter is specialized or technical—because the testimony is based upon a layperson's personal knowledge rather than on specialized knowledge within the scope of Rule 702."). Our case law does not support the contention that lay witness testimony oversteps the bounds of Rule 701 where the witness delves into the reason for her determination. Accordingly, the trial court did not abuse its discretion in admitting Lukacs's testimony.

#### *Harmless Error*

Even if the Court were to find the trial court abused its broad scope of discretion, any error in admitting Lukacs's testimony was harmless because appellant's guilt was established by other competent evidence at trial. *See Livingston*, 282 S.C. at 6, 317 S.E.2d at 132 (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the result at trial). While Lukacs used maps to aid the jury in understanding her testimony, much of it was

cumulative to Lynch's testimony. Lynch put into chronological order the communications from appellant's phone to create a timeline of the hours leading up to the murder. Lynch read to the jury a lengthy series of text messages between appellant and the victim setting up the drug deal, and detailed for the jury the dates and times of other texts and phone calls between appellant and the victim, and appellant and McLain. (Tr.p.471; p.476; pp.479-86). Additionally, Lukacs's testimony corroborated appellant's admission on the stand that the phone found at the scene was his, any records from it were his, and that he was at the murder scene. (Tr.pp.690-91; p.708; p.710).

Appellant's conviction stemmed from the testimony of multiple witnesses and investigators, his own statement to police and those made at trial, and the corroboration of those details through evidence and the cell phone records of appellant, McLain, and the victim. *See Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318 (holding factors of a harmless error analysis include whether the testimony is cumulative, the presence of evidence corroborating the testimony, and the importance of the testimony to the State's case). Accordingly, Lukacs's testimony regarding her review of cell phone records and maps of cell tower locations did not substantially affect the verdict and any error in admitting it was harmless.

### III.

The trial court did not abuse its discretion in admitting appellant's prior conviction.

#### Introduction

The trial court did not err in admitting appellant's prior conviction where the court limited the introduction to simply "a prior felony conviction" and did not allow either party to name the specific charge. The court balanced multiple factors to limit the prejudice to appellant, and gave the jury a limiting instruction that the conviction was to be used for impeachment only. Any error admitting the evidence was harmless because appellant himself damaged his credibility by admitting he lied multiple times to investigators.

#### How the Issue Was Raised

Prior to appellant's testimony, defense counsel informed the trial court he spoke to appellant about the possibility of a previous conviction being used to impeach him. (Tr.p.674, line 22-p.675, line 13). Counsel stated appellant had a 2010 conviction for assault and battery of a high and aggravated nature (ABHAN). (Tr.p.675, lines 13-19). While acknowledging the conviction was for a charge punishable by imprisonment of more than one year, counsel argued ABHAN was "so closely related to [a murder] charge" that the prejudicial effect outweighed the probative value. (Tr.p.675, line 20-p.676, line 8). Counsel further asserted ABHAN was not a crime of dishonesty, to which the court replied, "No question, no question." (Tr.p.676, lines 8-16). Thereafter, the court stated, "there's no question" that the prior ABHAN conviction falls under Rule 609(a)(1), SCRE,<sup>10</sup> which required that he conduct a Rule 403, SCRE<sup>11</sup> analysis to

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<sup>10</sup> The rule provides, for purposes of attacking the credibility of a witness:

[E]vidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was

determine if "the probative value outweigh[ed] the prejudice." (Tr.p.676, lines 17-22).

The trial court weighed the probative value of admitting the prior conviction and ruled it was too prejudicial to name the specific charge, but that it was admissible to simply state that appellant had a prior conviction:

First of all, it's 403 analysis, obviously [appellant's] credibility is a critical aspect of this. So there's no question it has probative value as to that aspect.

So from the standpoint of it, and the rule recognizes the right to bring it out for the purposes of impeachment, solely for that purpose.

...

And in that regard, I would agree with you, assault and battery of a high and aggravated nature is very closely connected with the crime of murder. So I would allow the solicitor to ask him a question, have you been convicted of a felony, and were you convicted of a felony in whatever the year is. And that's really the extent that he can ask it. He can't go into details, he can't do anything else.

I think that balances the concern with respect to inferences to be drawn from the crime itself, and I think it protects him from undue prejudice on that respect. But I think the State's entitled to ask him about it for purposes of challenging his credibility. So I will allow it with that restriction.

(Tr. p.676, line 22-p.677, line 1; p.677, line 12-p.678, line 11). The court also cautioned defense

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punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

Rule 609(a)(1).

<sup>11</sup> The rule requires a trial court to exclude otherwise relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403.

counsel that discussing the sentence that appellant received would open the door for the State to cross-examine appellant on the specifics of the prior crime because it would "be fundamentally unfair if I allow you to talk about probation and how old [appellant was] and not allow the State to talk about the nature of the crime." (Tr.p.681, line 16-p.682, line 24).

As appellant's testimony began, defense counsel asked him, "Do you have one prior felony conviction?" to which appellant replied, "Yes, sir." (Tr.p.688, lines 13-15). Appellant then testified in detail about the instant crime and advanced his assertion that, while he was at the scene and participated in the marijuana deal, he did not plan to rob the victim and did not shoot him. (Tr.pp.686-716). Appellant's past conviction was not raised again and the State did not cross-examine him on it.

Importantly, and as the trial court noted it would do, the court gave a limiting instruction to the jury explaining that the prior conviction could only be considered for impeachment purposes:

Also you've heard testimony in this case of a prior conviction of a witness. That is testimony that may be considered by you in evaluating the credibility of that witness. You would consider it the same as any other factors that you would use to evaluate the witness and may only consider it for the purpose of evaluating credibility. And the fact that a person has a prior conviction does not make his testimony not credible nor does it make it credible. It's just another factor that you must decide in determining the credibility of that particular witness.

(Tr.p.765, line 20-p.766, line 5).

#### Analysis

#### *No Prejudice*

Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show he acted "in conformity therewith." Rule 404(b), SCRE. Evidence

of other crimes may be admissible to impeach a defendant's credibility. For prior convictions less than ten years old,<sup>12</sup> Rule 609(a)(1) provides a two-part test determine whether a defendant's prior convictions can be used to impeach him: (1) the conviction must have been punishable by death or imprisonment in excess of one year, and (2) the trial court must determine that the probative value of admitting the evidence outweighs its prejudicial effect to the accused. Rule 609(a)(1). Prior convictions for the same or similar crimes, in particular, can be highly prejudicial; therefore, the court must determine, in its discretion, whether to admit the evidence after weighing the probative value against the prior convictions' prejudicial effect. *Green v. State*, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). To make that determination, our Supreme Court has noted the trial court should consider the following factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and, (5) the centrality of the credibility issue. *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).<sup>13</sup>

Here, respondent acknowledges the trial court stated it must do a Rule 403 analysis, which requires exclusion of evidence if the probative value is **substantially outweighed** by the danger of unfair prejudice, when the proper determination was if the probative value of admitting

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<sup>12</sup> Rule 609(b), SCRE, establishes a presumption against the admissibility of remote convictions, i.e., those more than ten years old, for impeachment unless the trial court expressly finds the probative value of the conviction "substantially outweighs" its prejudicial effect. *State v. Johnson*, 363 S.C. 53, 57, 609 S.E.2d 520, 522 (2005). Here, appellant's prior conviction occurred in 2010 and he was tried in 2014. Accordingly, the admission of the conviction is governed by Rule 609(a)(1).

<sup>13</sup> While *Colf* involved the admission of prior convictions more than ten years old under Rule 609(b), our courts have implicitly recognized the value of the factors in making a similar determination under Rule 609(a)(1). *See, e.g., Green*, 338 S.C. at 433-34, 527 S.E.2d at 101 (discussing the issue in a PCR case and approving the use of the *Colf* factors in the context of a Rule 609(a)(1) analysis).

the evidence **outweighed** its prejudicial effect. *See* Rule 609(a)(1), *supra*. However, the record does not indicate the court's analysis was unduly prejudicial to appellant. First, the record shows the court properly considered the *Colf* factors. The court specifically balanced the conviction with the centrality of appellant's credibility, the importance of appellant's testimony to the theory of his defense, as well as the nature of the underlying offense of ABHAN and its similarity to murder. (Tr.pp.677-78); *see also Colf*, 337 S.C. at 627, 525 S.E.2d at 248 (listing the factors a trial court should consider to determine whether to admit the fact of a prior conviction). The court's analysis was partly in appellant's favor because it ultimately ruled the nature of the underlying offense was inadmissible because it was too prejudicial, while allowing the fact of appellant's single felony conviction to be admitted. *See Green*, 338 S.C. at 433, 527 S.E.2d at 101 (holding that prior convictions for similar crimes are particularly prejudicial and a trial court must determine whether to admit the evidence after conducting the required balancing test). Second, the court's ruling that counsel could not discuss the sentence appellant received further demonstrated its concern about the potential for prejudice to appellant as the court stated, if counsel referenced the sentence, it opened the door for the State to bring up the nature of the past offense. Third, the conviction was mentioned only once by defense counsel, likely in an effort to lessen its impact on appellant's credibility, and was not raised again by counsel or by the State during its cross-examination of appellant. Fourth, the court properly gave a limiting instruction to the jury explaining appellant's past conviction could only be considered for impeachment purposes. Finally, counsel failed to bring the court's alleged erroneous analysis to its attention before proceeding with appellant's testimony which prevented the court from correcting any error before the trial continued.<sup>14</sup> Accordingly, the trial court did not abuse its discretion in admitting

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<sup>14</sup> Appellant argues the trial court's admission of the evidence was plain error. However, our

appellant's prior conviction.

*Harmless Error*

Regardless, even if the Court were to find the trial court abused its discretion, any error in admitting the prior conviction was harmless because appellant's guilt was established by other evidence at trial which was more damaging to appellant's credibility than the introduction of the prior conviction. *See Livingston*, 282 S.C. at 6, 317 S.E.2d at 132 (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the result at trial). Investigators proved appellant lied to them about his relationship with Stephon McLain through surveillance video which showed the two of them together prior to the murder and the video was introduced to the jury. (Tr.pp.442-43; pp.554-57). Appellant himself admitted to the jury that he lied multiple times to investigators, including when he told them he tried to grab the gun during the struggle to make it look like he "didn't have nothing to do with it." (Tr.pp.688-89; p.699). Additionally, the other evidence implicating appellant in the crime was extensive. The evidence included testimony from multiple witnesses and investigators, appellant's statement to police, and the corroboration of those details through evidence such as bullets and bullet casings, cell phone records, a selfie from the phone found at the scene which indicated it belonged to appellant, and text messages read to the jury. *See Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318 (holding factors of a harmless error analysis include whether the testimony is cumulative, the presence of evidence corroborating the testimony, and the importance of the testimony to the

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appellate courts have routinely held the plain error rule does not apply in South Carolina state courts. *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (citations omitted). Instead, a party must make a specific and contemporaneous objection to preserve an issue for appellate review. *Johnson*, 363 S.C. at 58, 609 S.E.2d at 523. Accordingly, respondent submits this argument fails because our courts do not recognize the rule and because defense counsel's failure to object to the court's analysis regarding the prior conviction waived the issue.

State's case). Accordingly, the single mention of appellant's past conviction did not substantially affect the verdict and any alleged error in admitting it was harmless.<sup>15</sup>

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<sup>15</sup> Appellant also argues the cumulative effect of the trial court's evidentiary errors resulted in substantial prejudice to appellant. However, this argument is not properly before the Court because defense counsel did not raise the cumulative error doctrine to the trial court and did not argue appellant was entitled to a new trial based on the doctrine. Rather, counsel simply stated, "Your Honor, at this time on behalf of the defendant, I would make a motion for a new trial." (Tr.p.788, lines 8-10). Accordingly, respondent submits the argument is not preserved for appellant review. *See State v. Beekman*, 405 S.C. 225, 236, 746 S.C.2d 483, 489 (Ct. App. 2013), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2016) (finding the cumulative error doctrine must be specifically raised to the trial court to be preserved for review).

Regardless, the argument is without merit because, as discussed above, the trial court did not err in his rulings. Respondent submits appellant failed to demonstrate to this Court that the admissions adversely affected his right to a fair trial. *See State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (holding an appellant must demonstrate more than error to qualify reversal pursuant to the cumulative error doctrine; rather, he must also show the errors adversely affected his right to a fair trial). Accordingly, respondent submits the cumulative error doctrine is not applicable to this appeal.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 21, 2016.

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from Horry County  
Markley Dennis, Circuit Court Judge

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**RECEIVED**  
JUL 21 2016  
SC Court of Appeals

THE STATE,

Respondent,

v.

MARQUIS SPENCER MCDONALD,

Appellant.

Appellate Case No. 2014-002181

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**CERTIFICATE OF SERVICE**

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I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, addressed to his attorneys of record: Nicholas Daniel Mermiges, Esq., Law Offices of Nick Mermiges, LLC, 1720 Main Street, Suite 202, Columbia, South Carolina 29201; and to Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 21<sup>st</sup> day of July, 2016.

  
\_\_\_\_\_  
SHERRIE BUTTERBAUGH

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ATTORNEY FOR RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

July 21, 2016

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**SC Court of Appeals**

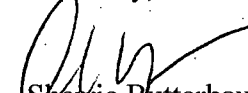
The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: *The State v. Marquis McDonald*  
Appeal from Horry County  
Appellate Case No. 2014-002181

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

  
Sherrie Butterbaugh,  
Assistant Attorney General

SB/dmd

Enclosures

cc: Nicholas D. Mermiges, Esq. (w/two copies of encls.)  
Robert M. Dudek, Esq. (w/two copies of encls.)  
The Honorable Jimmy A. Richardson, III, Solicitor 15<sup>th</sup> Judicial Circuit  
(w/copy of encls.)  
Trisha Allen, Victim Services (w/copy of encls.)