STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Howard P. King, Circuit Court Judge

Appellate Case No. 2015-002557

THE STATE,

Respondent,

v.

BRANDON J. BERRY,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

On July 29, 2014, law enforcement officers with the Richland County Sheriff's Department arrested Appellant Brandon Berry following a traffic stop and subsequent car and foot chase between Appellant and officers. Following an investigation, the Richland County Grand Jury indicted Appellant for attempted murder, attempted armed robbery, unlawful conduct toward a child, resisting arrest, and unlawful carrying of a pistol. On November 30, 2015, Appellant proceeded to a jury trial in the Richland County Court of General Sessions with the Honorable Howard P. King, circuit court judge, presiding. On December 4, 2015, the jury convicted Appellant as indicted. The trial court sentenced Appellant to concurrent terms of imprisonment of twenty years for attempted murder, twenty years for attempted armed robbery, one year for resisting arrest, one year for unlawful carrying of a pistol, and a consecutive term of five years of imprisonment for unlawful conduct towards a child, for an aggregate term of imprisonment of twenty-five years. Thereafter, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

In the early morning hours of July 29, 2014, Michael Keith was returning home from an evening of working two jobs—first as a promoter of "Knuckle Up," a local boxing event, and then as the host of an official after party for the event. (R. 143, 149). Keith, a lifelong resident of the Columbia area, worked a variety of jobs, including as a bus monitor for Richland 2 School District, an employee at a local shoe store, a disc jockey for a radio station, and a host and promoter at various local nightclubs and events. (R. 142, 148-49, 160-61). Keith was routinely paid in cash when hosting or promoting at events or clubs and therefore, often returned home late at night or early in the morning with large amounts of cash. (R. 148-50). Because of this, Keith had a heightened awareness of his surroundings when returning home from events and had a routine to ensure his safety. (R. 150).

In accordance with his routine, Keith backed his car into the parking lot of his apartment complex when returning home that morning. (R. 150). He exited his car and reached back into his car to retrieve a small bag. (R. 151). Keith then shut the car door and noticed a man dressed all in black, including in a black face mask, black shoes, and black clothing, standing behind him. (R. 151). The man pointed a gun at Keith and demanded Keith's car keys and money. (R. 151). Keith tried to joke with the masked man to ease the tension, but the man again demanded money and threatened to kill Keith if he did not comply by the time he finished counting down. (R. 151). The man started counting, and upon reaching zero, Keith tried to run away. (R. 151-52). The masked man chased Keith and the two ran around Keith's car in circles until the man jumped on top of the car. (R. 152). Keith threw a bottle of Minute Maid beverage at him and ran. (R. 152).

While Keith ran, the masked man fired his weapon in Keith's direction, narrowly missing him. (R. 152). Keith dropped to the ground and the man hovered over him, continuing to threaten him and demanding Keith's keys and money. (R. 152-53). The man tried to remove Keith's pants, and when Keith resisted, he shot Keith in the leg. (R. 153). The man then put the barrel of the gun against Keith's head. (R. 153). At that moment, Keith's girlfriend, awakened by the commotion, looked out the balcony and saw the man with a gun to Keith's head. (R. 144). She came out to the balcony and asked what was happening. (R. 144, 153-54). Keith yelled at her to go inside, and while the man was distracted, Keith punched him in the stomach. (R. 144, 153-54). The masked man fled, jumped over a fence, and got into a waiting car that sped off. (R. 178-79).

Keith and his girlfriend were able to get Keith into their apartment and called emergency services for assistance. (R. 146, 155-56). Several other neighbors also heard the commotion and shooting and called 911. (R. 177-82, 391, 446-47). Before medical care arrived, Keith and his girlfriend briefly spoke with responding officers and gave a description of the suspect. (R. 133-40). Keith was transported by ambulance to the hospital, where he underwent emergency surgery for his injuries, including a fractured tibia. (R. 146-47, 156, 172-76, 253-59).

While Keith was being treated, officers from the Richland County Sheriff's Department arrived and processed the scene. (R. 185-98). Officers collected two nine millimeter shell casings and documented the scene. (R. 190). Keith's car was towed to the Sheriff's Department forensic garage for processing, where investigators were able to lift numerous fingerprint and footprint impressions. (R. 199, 311-21). Investigators were later provided with a bullet that had punctured a neighbor's car during the incident. (R. 392-93)

Approximately six hours later, Richland County Sheriff's Deputy Brandon Pennington was patrolling the Broad River Road area of Columbia when he observed a vehicle with two occupants—driver Nickilous Wallace and passenger Appellant—without seatbelts fastened. (R. 217-19). Deputy Pennington activated his blue lights, initiated a traffic stop, and called dispatch to request back-up assistance. (R. 219). Deputy Pennington approached the vehicle and asked for Wallace and Appellant's driver's licenses; both Appellant and Wallace were visibly nervous and shaking. (R. 219-20). Additionally, Appellant's two-year-old daughter was unrestrained and freely moving around the backseat. (R. 222). Deputy Pennington took Wallace and Appellant's information and returned to his patrol car. (R. 220).

As Deputy Pennington checked for any outstanding warrants for Appellant and Wallace, Deputy Owens arrived to provide back-up support for Deputy Pennington. (R. 220). Deputy Owens spoke with Appellant and Wallace and similarly noted the extreme nervousness of both men. Deputy Owens also noticed possible marijuana residue and tweezers, which he recognized as a tool commonly used when smoking marijuana. (R. 233, 248, 289). Deputy Owen observed Appellant fidgeting with a black bag in the back seat. (R. 67). When Deputy Pennington returned to the car, he asked Wallace to step outside the vehicle and Wallace voluntarily exited the vehicle. (R. 220-21). Deputy Pennington asked for permission to search Wallace's person and the vehicle and Wallace gave consent. (R. 221). While Deputy Pennington was searching Wallace, Appellant moved from the passenger seat to the driver seat and fled into a nearby apartment complex with his two-year-old daughter still unrestrained in the backseat of the vehicle. (R. 221-222). Appellant drove a short distance before abandoning the car and fleeing on foot. (R. 222). During this commotion, Appellant's daughter was still in the vehicle, which Appellant did not place in park and which continued to move after he had exited. (R. 222).

Deputy Pennington pursued Appellant on foot throughout the apartment complex and was able to apprehend Appellant as he attempted to climb over a fence. (R. 222-23). Appellant resisted arrest and Deputy Pennington required assistance from several other officers to apprehend Appellant. (R. 228). During the foot pursuit, Appellant discarded two bags: a diaper bag containing a 9 millimeter Glock handgun and an additional bag containing two black masks, zip ties, gloves, and shirts. (R. 222, 229-31).

Appellant's girlfriend, Kayla, lived in the apartment complex where he fled and quickly arrived at the scene. (R. 268-70, 450-51). She tended to Appellant's daughter and called the child's mother, Lourisa Katio, to come retrieve the child. (R. 87, 268-70, 450-51). Katio immediately left work and arrived at the scene shortly thereafter. (R. 266-69). When Katio arrived, she spoke with Investigator Carwell from the Richland County Sheriff's Department. (R. 80-81). Investigator Carwell informed Katio that her daughter had been involved in a serious situation and that a loaded weapon was located in her daughter's diaper bag. (R. 80-81). Katio was upset about the dangerous conditions to which her child had been exposed, as well as the presence of Appellant's girlfriend. (R. 269-70, 451). Katio called several family members, including her stepfather and sister who arrived on the scene shortly thereafter to assist her. (R. 81, 96-97, 270).

Katio told Investigator Carwell that Appellant had come to her apartment that morning to watch their daughter while she was at work after spending the evening out with Wallace. (R. 19, 451). She told Investigator Carwell that Appellant did not live with her, but did spend some nights at her apartment. (R.20-21, 82-83, 90). Investigator Carwell indicated he was concerned about the child's welfare and wanted to inspect the living conditions before releasing the child to Katio. (R. 81, 87, 97, 276, 451). Katio agreed to let officers inspect her home and signed a

written "Consent to Search" document. (R. 84, 89-90, 272, 276, 451-52, 644). Katio then drove herself and her daughter back to her apartment followed by Investigator Carwell. (R. 21, 82).

Once Katio let Investigator Carwell into the apartment, she identified the items in the apartment that belonged to Appellant, including black jeans in her bedroom closet, Nike shoes outside the closet, and a black zip tie similar to those found in Appellant's bag that Investigator Carwell seized; the jeans and shoes had reddish stains. (R. 21-24, 272-74, 454-57). Katio also gave a written statement describing Appellant's return to her apartment that morning and that the seized items belonged to Keith. (R. 23, 86-87, 270-71). Katio's grandmother, who was the only other person listed on her apartment lease, and other family members were at the home when Investigator Carwell searched the apartment. (R. 20, 83). Investigator Carwell did not find any weapons in the home and determined it was a safe environment for Katio's daughter. (R. 458).

Investigator Carwell requested rapid DNA testing on Appellant's jeans and shoes collected from Katio's apartment. (R. 359-61, 369-70, 547-61). DNA analysts from the Richland County Sheriff's Department DNA laboratory tested the items and established the reddish stain on both items was blood. (R. 351-52, 359-61, 369-70, 547-61). The blood sample on the shoes was too weak to determine a DNA profile, but the blood on the jeans matched Keith's DNA profile. (R. 359-61, 369-70, 547-61). Based on the results of the rapid DNA testing, Investigator Carwell obtained arrest warrants against Appellant. (R. 460-61).

Prior to trial, forensic examiners with the Richland Country Sheriff's Department forensics laboratory tested the projectiles and shell casings collected from the scene and concluded Appellant's weapon fired the shots. (R. 394-405). Latent print analysts with the Richland County Sheriff's Department also analyzed the various fingerprint and footprint

impressions taken from Keith's vehicle. (R. 315-18, 415-21). Appellant's shoes were consistent in shape, size, and design of impressions found on Keith's car. (R. 340).

While in pre-trial detention at the Alvin S. Glenn Detention Center, Appellant made numerous phone calls to his girlfriend, Kayla, implicating himself in the crime. (R. 427-55). Additionally, Appellant called Wallace using another inmate's personal identification code (presumably to disguise his identity) and advised Wallace not to testify for the State. (R. 427-55).

At the outset of trial, defense counsel moved to suppress the items seized from Katio's apartment on the grounds that Katio's consent to search was involuntary due to alleged threats to call DSS purportedly made by Investigator Carwell. The trial court conducted an in limine hearing on the matter. (R. 16). During the hearing, the State presented testimony from Investigator Carwell, Deputy Pennington, and Deputy Owens. Investigator Carwell testified he arrived at the scene of the traffic stop at approximately 11:30 a.m. after receiving a call from Deputy Owens. (R. 17). He testified Katio was already present when he arrived and he made contact with her. (R. 18-19). He testified Katio informed him that Appellant had been out the previous evening with Wallace and had returned to her home around 5 a.m. that morning. (R. 19). Investigator Carwell testified Katio told him she lived at the apartment with her daughter, but that her grandmother's name was on the lease. (R. 20). He testified Katio volunteered to let him search the apartment and signed a consent form memorializing her consent. (R. 19-21). He testified he did not make any threats or promises to obtain Katio's consent. (R. 21, 26). Investigator Carwell testified Katio drove herself and her daughter to her apartment and he followed behind in his vehicle. (R. 21). Once at the apartment, Katio let Investigator Carwell inside and remained in the apartment while he searched it. (R. 21). Investigator Carwell testified that Katio provided a three page written statement following the search. (R. 23).

Following Carwell's testimony, the State argued Appellant did not have a reasonable expectation of privacy in Katio's home and therefore could not challenge the warrantless search of the apartment. (R. 33). Defense counsel responded that Appellant had a child-in-common with Katio and often stayed at the apartment, kept personal belongings there and paid apartment-related bills. (R. 34). In support of these arguments, defense counsel presented testimony from Katio and her sister Destiny.

Katio testified she received a call from Appellant's girlfriend Kayla that her daughter was with the police and she needed to come to get her. (R. 79, 87). She testified she immediately left work and drove to the scene. (R. 80). She testified she spoke with Investigator Carwell, who informed her that her daughter had been involved in a serious situation and a gun was found in her diaper bag. (R. 81, 89). She testified Investigator Carwell told her he needed to ensure that her daughter lived in a safe place before she could leave with her daughter or he would call DSS. (R. 81). Katio testified she called her sister and stepfather, who came to the scene. (R. 81). She testified Investigator Carwell asked where she lived, if Appellant lived with her, and if Appellant kept anything at her apartment. (R. 81). She testified Investigator Carwell told her that she could take her daughter once she established the home was safe. (R. 81). Katio testified she responded that she was willing to let officers inspect her home because she had nothing to hide. (R. 81, 83-84, 89-90). Katio testified Investigator Carwell let her drive herself and her daughter to the apartment. (R. 81-82).

Katio testified that Appellant "sometimes" stayed at her apartment depending upon their relationship status, which fluctuated. (R. 88, 93). Katio testified Appellant spent the evening and early morning of the shooting out with Wallace and did not return to her apartment until approximately 5 a.m. that morning. (R. 86-87). She testified Appellant occasionally had a key to

her apartment, but did not specify if he had one on the day of his arrest. (R. 82). She testified Appellant kept some personal items in her house, but was not on the lease. (R. 82-83, 89). She testified Appellant had his friends over to the apartment on rare occasions, but it was not a regular occurrence. (R. 92-93). Katio testified Investigator Carwell looked for additional weapons at the apartment and the search took approximately fifteen minutes. (R. 83-84). She stressed multiple times she was willing to let officers search her home. (R. 84, 89-90).

Katio's sister Destiny also testified at the hearing. She testified Appellant did not live at her sister's apartment, but would stay there depending on the status of their relationship. (R. 96). She testified Appellant helped pay bills "when he could." (R. 96). She testified she came to the scene to assist her sister, whom she described as "very frantic." (R. 97). Destiny testified law enforcement told Katio she would not get her daughter back unless she consented to a search of her apartment. (R. 97). She testified her sister calmed down significantly when she arrived on scene. (R. 100-01).

Thereafter, following the witnesses' testimony, the State argued Appellant did not reside at the apartment and did not have a reasonable expectation of privacy there. (R. 105-08). Furthermore, the State argued Katio voluntarily gave law enforcement consent to search the apartment. (R. 105-08). In response, defense counsel argued the incriminating evidence discovered in Katio's apartment should be suppressed because Katio's consent to search was coerced by threats of DSS involvement. In support of that contention, defense counsel asserted Appellant had a reasonable expectation of privacy in Katio's home and Katio's consent was involuntary. (R. 108-15).

After taking the matter under advisement and holding a recess, the trial court denied Appellant's motion to suppress. Specifically, the trial court found Appellant had no reasonable

expectation of privacy in Katio's apartment. (R. 116-17). Furthermore, the trial court found Appellant's argument that Katio's consent was due to coercion from law enforcement to be without merit, specifically finding the testimony of Katio and her sister was not credible as to purported threats of DSS involvement. (R. 117-18). In summation, the trial court noted it found "[Katio's] consent was freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child. Based on the above, the motion to suppress the evidence seized from the Defendant's apartment is denied." (R. 118).

Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (R. 609-13). Following the verdict, the trial court sentenced Appellant to an aggregate twenty-five year term of imprisonment.

ARGUMENT

The trial court committed no error in denying Appellant's suppression motion where Appellant had no reasonable expectation of privacy in Katio's apartment and Katio voluntarily consented to a search of her apartment.

Appellant contends the trial court erred by denying his motion to suppress the items seized from Katio's apartment. In support of that contention, Appellant maintains the trial court erred in finding he lacked the requisite reasonable expectation of privacy in Katio's apartment to challenge the warrantless search of the residence when in denying the suppression motion. He further maintains the trial court abused its discretion in finding Katio's consent to search her residence was voluntary when officers threatened to remove her daughter from the home if she did not consent and prove she could provide a safe home. However, the trial court properly denied Appellant's suppression motion because Appellant had no legitimate expectation of privacy in Katio's apartment. Additionally, even Appellant had the requisite reasonable expectation of privacy in Katio's apartment, the trial court properly determined Katio's consent to search was voluntarily given. Accordingly, Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is **any** evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial court's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460

(2002). However, the appellate court **must** affirm the trial court if there is any evidence supporting the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005); see also State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (" 'When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.' " (citation omitted)). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial court. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009); see Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459 ("In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge's ultimate determination de novo but, rather, would apply a deferential standard of review.").

ANALYSIS

A. Propriety of the Trial Court's Finding Appellant Lacked a Reasonable Expectation of Privacy to Challenge the Search of Katio's apartment

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. For purposes of the Fourth Amendment, a search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Likewise, a seizure occurs when there is some meaningful interference with an individual's possessory interest in property or with the individual's freedom of movement. Id.; see Terry v. Ohio, 392 U.S. 1, 16, n. 16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

Importantly, before a criminal defendant can challenge the propriety of a search or seizure, the defendant seeking to raise such a challenge must establish that his own personal Fourth Amendment rights were violated by that search or seizure in order to be entitled to the

benefits of the exclusionary rule. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987); see Rakas v. Illinois, 439 U.S. 128, 132, n. 1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."). That is true because rights protected by the Fourth Amendment are personal rights and cannot be vicariously asserted. Alderman v. United States, 394 U.S. 165, 174 (1969).

Significantly, "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas, 439 U.S. at 143 (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A legitimate expectation of privacy is both subjective and objective in nature. State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). In order to establish a legitimate expectation of privacy, an individual must show: (1) the individual had a subjective expectation that the area searched would remain free from intrusion; and (2) the individual's subjective expectation is one that society recognizes as reasonable. Id.; see Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990) (instructing a subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable).

"[T]he Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy or unless the government commits a common-law trespass for the purpose of obtaining information." State v. Brown, 414 S.C. 14, 23, 776 S.E.2d 917, 922 (Ct. App. 2015) (quoting State v. Robinson, 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014) (internal citations omitted)). In Robinson, our Supreme Court set forth factors courts may consider when determining whether the criminal defendant met his burden of proving a reasonable expectation

of privacy in the property that was searched, as required to prove a violation of his Fourth Amendment rights, such as:

> a) whether the defendant owned the home or had property rights to it;
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> b) whether he was an overnight guest at the home;
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> c) whether he kept a change of clothes at the home;
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> d) whether he had a key to the home;
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> e) whether he had dominion and control over the home and could exclude others from the home;
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> f) how long he had known the owner of the home;
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> g) how long he had been at the home;
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> h) whether he attempted to keep his activities in the home private;
>
> i) whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment;
>
> j) whether he alleged a proprietary or possessory interest in the premises and property seized (even if only at a motion to suppress, where that admission cannot be used against him to determine his guilt); and
>
> k) whether he paid rent at the home.

Robinson, 410 S.C. at 528-30, 765 S.E.2d at 569-70 (internal citations omitted).

During a motion to suppress, the State bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement, including consent. State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). "However, the criminal defendant retains the burden to establish that he is asserting his own Fourth Amendment rights, rather than vicariously asserting the rights of others; therefore, the defendant bears the burden to demonstrate that he had an actual and reasonable expectation of

privacy in the place illegally searched." Robinson, 410 S.C. at 530, 765 S.E.2d at 570 (citing Rakas, 439 U.S. at 130 n. 1, 99 S.Ct. 421).

In the present case, the trial court properly determined Appellant had no reasonable expectation of privacy in Katio's apartment after considering the proper factors as required under Robinson. (R. 116-18). In reaching its determination, the trial court noted evidence and testimony presented established the lease was not in Appellant's name, he only spent the night occasionally, most of his belongings were not in the bedroom, Katio had primary dominion and control over the apartment, Appellant did not pay rent, Appellant did not participate in domestic activities in the home, Appellant had no proprietary or possessory interest in the apartment, and Appellant did not attempt to keep his activities in the home private. (R. 116-17). This ruling is supported by evidence in the record, and therefore, and must be affirmed on appellate review.

A review of the factors set forth by the Supreme Court in Robinson establishes there is evidence to support the trial court's ruling. The evidence presented during the suppression hearing established Appellant had no property rights to the home. He was occasionally an overnight guest at the home, but crucially, did not spend the night prior to the search at the home. Appellant presented no testimony that he kept a change of clothing at the time. While there was testimony that Appellant did occasionally have a key to Katio's apartment, it is unclear whether Appellant had a key to the apartment at the time of the search. Additionally, Katio's testimony established that Appellant rarely had guests over to the apartment. There is no evidence that Appellant engaged in typical domestic activities in the home or paid rent at the time of the search. While Appellant and Katio had previously been in a tumultuous relationship for five years, the record establishes Appellant had another girlfriend at the time of the search and Katio was aware of this relationship. Perhaps Appellant had previously had a reasonable expectation of

privacy at Katio's apartment in the past, but he did not satisfy his burden of establishing one at the time of the search.

Despite the evidence and testimony in the record to support the trial court's determination that Appellant did not have a reasonable expectation of privacy in Katio's home, Appellant asserts he was an overnight guest and therefore shared the privacy of the apartment with Katio. However, it is important to noted that Appellant did **not** spend the evening at Katio's apartment, but rather, was at the home until approximately 9 or 10 p.m. in the evening and did not return to the home until 5 or 6 a.m. the next morning to watch his daughter when Katio went to work.

Appellant could not properly challenge the propriety of the search of Katio's apartment in light of the fact he had no expectation of privacy in the apartment. See Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) ("Petitioner, of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse."); McKnight, 291 S.C. at 114, 352 S.E.2d at 473 ("One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated."). Therefore, Appellant could not properly object to the admission of the incriminating evidence discovered during the search of Katio's apartment, and the trial court properly denied Appellant's suppression motion. See United States v. Salvucci, 448 U.S. 83, 85 (1980) ("[D]efendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."); Rakas, 439 U.S. at 134 ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search or a third person's premises or property has not had any of his Fourth Amendment rights infringed."). Appellant's convictions should be affirmed.

B. Propriety of the Trial Court's Finding Katio's Consent to Search was Voluntary

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. For purposes of the Fourth Amendment, a search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." Jacobsen, 466 U.S. at 113. Generally speaking, any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." Kentucky v. King, 563 U.S. 452, 462 (2011).

South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view exception; (6) the consent exception; and (7) the abandonment exception. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Pursuant to the various accepted exceptions to the warrant requirement, a warrantless search or seizure will generally withstand constitutional scrutiny so long as the circumstances establish the existence of an exception along with the existence of probable cause. State v. Bultron, 318 S.C. 323, 331-332, 457 S.E.2d 616, 621 (Ct. App. 1995).

One of the recognized exceptions to the warrant requirement is the consent exception. See Birchfield v. North Dakota, __ U.S. __, 136 S. Ct. 2160, 2185 (2016) ("It is well established that a search is reasonable when the subject consents[.]"). Pursuant to the consent exception, an officer can validly conduct a warrantless search of a constitutionally-protected area when he or

she receives consent from an individual with authority or apparent authority to grant such consent and the consent is provided freely and voluntarily. See State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008) (holding warrantless searches and seizures are constitutionally permissible when conducted under the authority of **voluntary** consent); see also State v. Laux, 344 S.C. 374, 377, 544 S.E.2d 276, 277 (2001) (recognizing consent may be valid if the person granting consent reasonably appeared to have the apparent authority to grant the consent). "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003) (citing State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct.App.2001); State v. Dorce, 320 S.C. 480, 465 S.E.2d 772 (Ct.App.1995); see also Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (existence of consent is determined from totality of circumstances)). Factors to consider when determining whether consent was validly provided include the characteristics of the individual providing consent, which include the individual's age, maturity, education, intelligence, and experience, and the conditions under which the consent was granted, which include the conduct of the officer asking for consent, the number of officers present, and the duration of the encounter. United States v. Boone, 245 F.3d 352, 361-362 (4th Cir. 2001). Significantly, the State bears the burden of establishing the voluntariness of consent, and the issue of whether consent was freely and voluntarily given is a question of fact to be determined from the totality of the circumstances. Boone, 245 F.3d at 361-362; Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Harris, 277 S.C. 274, 286 S.E.2d 137 (1982); Wallace, 269 S.C. at 550, 238 S.E.2d at 676; Brannon, 347 S.C. at

89-90, 552 S.E.2d at 775; Dorce, 320 S.C. at 482, 465 S.E.2d at 773; see also Palacio, 333 S.C. at 514, 511 S.E.2d at 66 (on motion to suppress, State has burden of proving validity of consent).

The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial court and a trial court's "conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion." Mattison, 352 S.C. at 584-85, 575 S.E.2d at 856 (internal citations omitted).

In Appellant's case, Katio provided verbal **and** written consent to search her apartment after Investigator Carwell expressed concerns over the safety of Katio's daughter. Investigator Carwell's concerns over Katio's ability to provide a safe environment for her daughter were valid and understandable—the two-year-old girl was found unrestrained in a vehicle, the girl then was a passenger during a car chase (while still unrestrained), and a loaded weapon was found in her diaper bag. Katio testified numerous times that while her daughter's safety was her paramount concern, she had no problem with officers searching her home. The trial court specifically found the testimony from Katio and her sister that Investigator Carwell threatened to take her daughter into DSS custody if she refused to consent to a search **not** credible. The trial court concluded "[Katio's] consent was freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child." (R. 118). These findings are supported by the record and do not amount to an abuse of discretion. The trial court properly determined Katio's consent to search was voluntarily given and denied Appellant's motion to suppress. See State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007) ("Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."); State v. Saltz, 346 S.C. 114,

136, 551 S.E.2d 240, 252 (2001) ("When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence."); State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998) ("The trial judge's determination of the voluntariness will not be disturbed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law."). Appellant's convictions should be affirmed. [1]

[1] Moreover, even assuming the admission of the seized evidence was somehow improper, its admission was entirely harmless because the other evidence presented during trial, which included Appellant's flight from law enforcement with his two-year-old daughter unrestrained in the backseat less than six hours after the attack on Keith, ballistic evidence matching Appellant's hidden gun to projectiles found at the scene, similarities between Appellant's footwear and impressions taken from Keith's car, testimony establishing the bag Appellant discarded was filled with masks, zip ties, and gloves, and the phone calls Appellant made from pre-trial detention that implicated him in the shooting, all which overwhelmingly established Appellant was, in fact, the masked man who shot and attempted to rob Keith. See State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) ("[Thompson]'s accomplice testified, subject to cross examination, against [Thompson] at trial and identified him in court. In light of the accomplice's damaging testimony and other corroborative evidence linking [Thompson] to the crime, the improper in-court identification by the clerk was merely cumulative to independent and overwhelming evidence of guilt."); see also State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); cf. State v. Jenkins, 412 S.C. 643, 652, 773 S.E.2d 906, 910 (2015) ("Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found [Jenkins] guilty.").

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment and conviction of the lower court.

Respectfully submitted,

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November 14, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Howard P. King, Circuit Court Judge

Appellate Case No. 2015-002557

THE STATE,

Respondent,

v.

BRANDON J. BERRY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

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

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense - Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.

This 14th day of November, 2016.

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November 14, 2016

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RE: State v. Brandon J. Berry – Appellate Case No. 2015-002557

Dear Ms. Caudy:

I am enclosing two copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
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MHJ/kc

Enclosures

cc: The Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services