STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN ANTONIO BUTLER,

APPELLANT

APPELLATE CASE NO. 2016-001269

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge err in denying Appellant's motion to suppress evidence obtained through defective search warrants that failed to comply with S.C. Code Ann. § 17-13-140 because the warrants were issued by a South Carolina magistrate who did not have jurisdiction over the area where the property sought was located, namely telephone records stored out of state, and were served on out of state entities?

2.

Did the trial judge err by qualifying a state law enforcement witness as an expert in "street culture and language" and permitting him to testify concerning his extensive experience with street gangs and his interpretation of language allegedly used by Appellant because this evidence was unfairly prejudicial to Appellant in violation of Rule 403, SCRE, and suggested to the jury that Appellant was affiliated with or involved in a gang, which likely led the jury to convict Appellant on an improper basis, particularly where Appellant was convicted under the hand of one theory of accomplice liability?

STATEMENT OF THE CASE

A Lexington County Grand Jury indicated Appellant on June 1, 2015 for murder, attempted murder, first degree burglary, and possession of a firearm during the commission of a violent crime. R. *. His case was called to trial on June 6, 2016 before the Honorable R. Knox McMahon, and a jury. Tr. 1. Deputy Solicitor D. Shawn Graham and Assistant Solicitor Robert E. McNair, III represented the state, and James R. Snell and Johnson M. Snell represented Appellant. Tr. 1.

On June 9, 2016, the jury found Appellant guilty. Tr. 893, l. 18 – 894, l. 18. He was sentenced by Judge McMahon to fifty years' imprisonment for murder, thirty years concurrent for both attempted murder and first degree burglary, and five years consecutive for the weapons offense. Tr. 905, l. 17 – 906, l. 11.

This appeal follows.

STATEMENT OF THE FACTS

Appellant met VonKeith Toland through Alonzo Walker, a mutual friend. Tr. 666, ll. 1-23. VonKeith, who lived in Pelion, South Carolina, sold used cars. Tr. 294, ll. 11-20. Appellant knew Walker had purchased several cars from VonKeith before. Impressed with the quality of the vehicles Walker had purchased, Appellant was also interested in buying a car from VonKeith. Appellant met VonKeith on three occasions between December 2013 and April 2014 to look at cars VonKeith had for sale. Tr. 666, l. 24 – 668, l. 14; Tr. 295, l. 20 – 297, l. 19. These meetings were always when Appellant, who lived in Alabama, was in South Carolina to perform a show. Tr. 664, l. 24 – 665, l. 3. He was an artist, songwriter, and producer. Tr. 664, ll. 10-15.

On April 24, 2014, Appellant traveled to Greenwood, South Carolina to perform two shows with Terry McClure. Tr. 668, l. 15 – 669, l. 5. Appellant met McClure, who lives in California, in Atlanta, and the two rented a car and drove to Greenwood. Tr. 671, l. 21 – 672, l. 2. While he was in town, Appellant arranged to meet VonKeith to look at and possibly buy an Infiniti M45. Tr. 299, ll. 11-12; Tr. 672, ll. 5-17.

On April 26, 2014, Appellant and McClure met VonKeith at his mother's house in North. Tr. 672, ll. 20-23. VonKeith was familiar with McClure because McClure had accompanied Appellant a few months before when Appellant met VonKeith to look at a BMW. Tr. 300, l. 15 – 301, l. 1. Appellant and McClure followed VonKeith and his brother, Tycus Toland, from their mother's house to VonKeith's mobile home in Pelion, where the Infiniti was located. Tr. 675, l. 11 – 677, l. 16; Tr. 308, ll. 15-21. Once there, Appellant inspected the vehicle and then test drove the car. McClure and VonKeith rode with him while he drove the car. Tycus Toland stayed behind. Tr. 680, l. 9 – 681, l. 18; Tr. 308, l. 22 – 309, l. 18.

Appellant and VonKeith's account of what occurred after the men returned differed. Appellant testified that after they returned from test driving the vehicle, the men got out and were all standing around the car. Tr. 683, ll. 3-10. Appellant walked to his rental car to plug in his phone because it had a low battery and he wanted to use the phone to determine how many miles the car averaged per year and approximately how much it was worth before making an offer. Tr. 683, l. 10 – 684, l. 18. While he was sitting in the rental car, he heard a gunshot. Tr. 685, l. 19 – 687, l. 20. When he looked up, he saw VonKeith running from the side of the house toward McClure who was still standing in the front yard near the Infiniti. Appellant did not see any shots fired, but he heard several more gunshots. Tr. 687, l. 21 – 688, l. 19. He heard a total of four to five gunshots. Tr. 692, ll. 20-22. He never saw Tycus Toland and did not know where he was located. Tr. 688, ll. 20-22.

Appellant "took cover" in the car. Tr. 691, ll. 11-19. He saw McClure and VonKeith run behind the house. Tr. 691, l. 20 – 692, l. 14. Appellant tried to start the car, but he realized that McClure had the keys. Tr. 691, ll. 11-19. After about two to three minutes, McClure returned to the car and the men left. Tr. 692, l. 15 – 693, l. 10. He did not ask McClure what happened and McClure did not tell him. Tr. 696, ll. 12-18.

Appellant testified that he never entered VonKeith's house. He also denied shooting VonKeith or Tycus Toland. Tr. 694, l. 19 – 695, l. 12.

VonKeith testified that when they returned from test driving the car, all four men were standing around the Infiniti. Appellant appeared to be inspecting the car and was looking under the hood. VonKeith claimed that all of a sudden, McClure "reached on his side and instantly" shot Tycus in the back of the head. Tr. 311, ll. 8-16. He said, "It was unexpected" and happened "so fast" Tycus "couldn't even use his hands to knock it [the gun] down." Tr. 311, ll. 17-20.

VonKeith admitted Appellant looked surprised by the shooting. Tr. 335, l. 19 – 337, l. 10. After McClure shot Tycus, VonKeith claimed Appellant ran to his car and appeared to be looking for something. McClure then pointed the gun at VonKeith and said, "[Y]ou know what this is, you know what we coming for, we want it, you might as well give it up . . . I know you got money; you might as well get it out." Tr. 313, l. 9 – 314, l. 3. VonKeith began backing away from McClure and tried to run. McClure shot him three times near the back of the house as he was fleeing. VonKeith fell to the ground and was "crawling still trying to get away." He claimed while he was on the ground, Appellant put a gun in his face and asked him "where the drugs and the money are at." McClure also had a gun pointed on VonKeith and threatened to kill him. Tr. 314, l. 10 – 317, l. 3.

VonKeith claimed he told the men there was money inside the house. McClure then kicked the back sliding glass door in and the men went inside the house. He could hear them "scrambling in the house tearing it up like, just looking for stuff." According to VonKeith, McClure came back outside while VonKeith was trying to dial 911. McClure said, "Oh, you got a phone" and shot him again three or four times. When McClure took the phone from VonKeith's hand, VonKeith said he "just let [his] hand drop" and "laid there like [he] was dead." McClure went back into the house. VonKeith crawled under the house while the men were inside. When they finally came back outside, Appellant said "where he at, where he at." McClure said, "I don't know" and then men ran back to their car and "sped off." Tr. 317, l. 3 – 319, l. 19.

VonKeith testified that he waited a few minutes and then crawled to his car and found a phone. He called 911. He told the operator that the suspects were associated with "Zo from California." Tr. 319, l. 21 – 321, l. 7. He was ultimately transported to the hospital where he

remained in a coma for at least ten days. Once he awoke, he identified both Appellant and McClure from photographic lineups as the men involved in the burglary and shooting. Tr. 272, l. 8 – 274, l. 11; Tr. 329, l. 3 – 331, l. 13; Tr. 416, l. 4 – 418, l. 22. Tycus Toland died at the scene from his injuries. Tr. 605, l. 21 – 609, l. 2.

During its investigation, law enforcement obtained search warrants for various telephone records associated VonKeith Toland, Tycus Toland, Terry McClure, Appellant, and other unknown individuals. It was through these telephone records that investigators were able to identify Appellant and McClure as suspects. Portion of these records, including the content of test messages exchanged between Appellant and McClure, were admitted into evidence over Appellant's objection.

The jury ultimately found Appellant guilty of murder, attempted murder, first degree burglary, and possession of a firearm during the commission of a violent crime. Tr. 893, l. 18 – 894, l. 18.

ARGUMENT

1.

The trial judge erred in denying Appellant's motion to suppress evidence obtained through defective search warrants that failed to comply with S.C. Code Ann. § 17-13-140 because the warrants were issued by a South Carolina magistrate who did not have jurisdiction over the area where the property sought was located, namely telephone records stored out of state, and were served on out of state entities.

How the Issue was Presented Below

Appellant moved pretrial to suppress all evidence obtained through the use of search warrants issued by a local South Carolina magistrate who did not have jurisdiction over the area where the property sought was located as required by S.C. Code Ann. § 17-13-140. Tr. 144, l. 6 – 145, l. 4. These search warrants, fourteen in all, were for telephone records for Appellant, Terry McClure, VonKeith Toland, Tycus Toland, and other unidentified individuals whose telephone records were relevant to the investigation. See Court's Exhibit No. 1. These warrants were marked together as Court's Exhibit No. 1. The warrants were faxed by investigators with the Lexington County Sheriff's Department to the relevant subpoena compliance and records centers for Sprint in Overland Park, Kansas, Verizon Wireless in San Angelo, Texas, Verizon Wireless in Bedminster, New Jersey, T-Mobile in Parsippany, New Jersey, Cingular in West Palm Beach, Florida, AT&T in West Palm Beach, Florida, and MetroPCS Wireless in Richardson, Texas. See Court's Exhibit No. 1.

Counsel for Appellant argued that the search warrants included in Court's Exhibit No. 1 were invalid because they "were issued by a judge [who] does not have jurisdiction over the area [where] these documents and records and other materials were [located]. The warrants all

indicate on the[ir] face that they were being sent out of state, outside of the jurisdiction of the magistrate or of this court and there is no exception in the enabling statute or any other provision of South Carolina Law providing for . . . the validity of an out of state - - of a search warrant issued out of state." Tr. 144, l. 20 – 145, l. 4. Because the search warrants, which were issued by a local magistrate, sought to obtain records stored out of state from out of state entities, counsel asserted the warrants were invalid "on their face." Tr. 145, ll. 5-13.

The assistant solicitor claimed in response that Appellant had no expectation of privacy in any of the telephone records in order to challenge the various searches. His argument was based solely on the Fourth Amendment. In support of his argument that Appellant had no expectation of privacy in the records from two telephone numbers associated with Appellant, the solicitor cited Smith v. Maryland, 442 U.S. 735 (1979), which "states that an individual enjoys no Fourth Amendment protection of information he voluntarily turns over to a third party." He further argued Appellant had no expectation of privacy in telephone records associated with other individuals. Tr. 147, l. 4 – 150, l. 12.

After the solicitor's argument, counsel for Appellant made clear that he was not arguing under the Fourth Amendment or pursuant to any right to privacy, instead his argument was that the search warrants had "no legal validity" because they were issued by a local magistrate who did not have jurisdiction over the area were the property sought was located as required by § 17-13-140. Tr. 150, l. 24 – 151, l. 8.

Court's Ruling

Finding no precedent in South Carolina, the trial judge denied Appellant's motion to suppress based on an unpublished opinion from the Michigan Court of Appeals: People v. Wilson, 2013 WL 2360239 (Mich. Ct. App. 2013). In Wilson, the defendant argued his attorney

was ineffective for not moving to suppress telephone records which were obtained pursuant to two search warrants issued by a Michigan magistrate but served on a telephone provider in Texas. Id. The defendant argued the records should have been suppressed *under the Fourth Amendment* because the magistrate who issued the two search warrants lacked jurisdiction to issue warrants pertaining to an out of state party. Id. The Michigan Court of Appeals found the warrants were valid because even though they were served out of state, they solely concerned electronic communications that occurred within Michigan, not Texas. Id.

After summarizing Wilson, the trial judge denied the motion to suppress based on its holding. He also ruled Appellant had no expectation of privacy to challenge the searches. Tr. 156, ll. 11-17.

Discussion

The Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution require warrants be issued only "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; S.C. Const. Art. 1, § 10. "This is a minimum standard, and state legislatures are free to enact stricter requirements for the issuance of search warrants." State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) (citing State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)).

S.C. Code Ann. § 17-13-140 is the "general search warrant statute" in South Carolina. State v. Covert, 382 S.C. 205, 209, 675 S.E.2d 70, 743 (2009). This statute contains requirements different from those mandated by the Fourth Amendment and Article I, Section 10 of the South Carolina Constitution, and is in some ways stricter than the federal and state constitutions. Covert, 382 S.C. at 209, 675 S.E.2d at 743 (citing McKnight, 291 S.C. 110, 352

S.E.2d 471). Consequently, a search warrant that would survive constitutional scrutiny may still be defective under § 17-13-140. McKnight, 291 S.C. 110, 352 S.E.2d 471.

The South Carolina General Assembly enacted a requirement that search warrants may only be issued by a magistrate "having jurisdiction over the area where the property sought is located." S.C. Code Ann. § 17-13-140. The statute states in relevant part:

> Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State **having jurisdiction over the area where the property sought is located,** may issue a search warrant . . .

S.C. Code Ann. § 17-13-140 (emphasis added).

As argued below, the magistrate who issued the various search warrants in this case for telephone records associated with Appellant, Terry McClure, VonKeith Toland, Tycus Toland, and other unnamed individuals did not have jurisdiction over the area where the telephone records were located and stored. Consequently, the search warrants were defective because they failed to comply with § 17-13-140. This defect was apparent from the face of the warrants. The evidence obtained as a result of these invalid warrants should have been suppressed by the trial judge.

Our Supreme Court has previously held search warrants were defective for failing to comply with this statute and suppressed the evidence obtained as a result of the invalid warrants.

In McKnight, police officers appeared before a magistrate to obtain a warrant, but did not complete an affidavit in support thereof. Our Supreme Court held the warrant was defective because the officers failed to comply with the affidavit requirement of § 17-13-140. McKnight, 291 S.C. at 113, 352 S.E.2d at 473; See S.C. Code Ann. § 17-13-140 (requiring search warrants be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant."). Even though the officers were sworn and gave oral testimony to the magistrate, the

Court held a search warrant affidavit which is itself insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony, but sworn oral testimony alone does not satisfy the statute. McKnight, 291 S.C. at 113, 352 S.E.2d at 473. The Court found the mandatory requirement of an affidavit lacking, thereby requiring suppression. Id. at 113-114, 352 S.E.2d at 473.

In Covert, law enforcement officers obtained and served a search warrant on September 26, 2002. The warrant was signed by the magistrate and dated September 28, 2002. However, the accompanying two page affidavit was signed by the magistrate on both pages and both signatures were dated September 26, 2002. Covert, 382 S.C. at 207, 675 S.E.2d at 741. Our Supreme Court held the warrant was invalid due to the absence of the magistrate's signature at the time the warrant was served. Id. at 208, 675 S.E.2d at 742. The Court concluded that under South Carolina law an unsigned warrant is not a warrant, and is not capable of being issued within the meaning of § 17-13-140. Id. at 210, 675 S.E.2d at 743.

In Herring, a SLED agent faxed a search warrant to a magistrate and the magistrate swore the agent over the telephone. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). Based on the language of § 17-13-140 that commands a warrant "be issued only upon affidavit sworn to before the magistrate," Herring argued the warrant was invalid because the statute requires the affiant appear before the magistrate *in person*. Our Supreme Court disagreed. The Court held the language does not state an affidavit must be sworn in person. It only requires the affidavit be sworn. Emphasizing that the agent who prepared the warrant was sworn over the telephone by the magistrate, the Court held this procedure complied with the literal terms of the statute and there was no defect in the warrant. Id.

Like in McKnight and Covert, this Court should hold the search warrants in this case marked together as Court's Exhibit No. 1 were invalid because the South Carolina magistrate who issued the warrants did not have jurisdiction over the area were the property sought was located as required by § 17-13-140. Again, the police sought telephone records stored out of state by out of state entities. The warrants were faxed to these out of state entities by investigators with the Lexington County Sheriff's Department. The South Carolina magistrate did not have jurisdiction in Texas, Florida, New Jersey, and Kansas where these various records were located. Consequently, the warrants were defective for failing to comply with the jurisdictional requirement of § 17-13-140 and the evidence obtained should have been suppressed. See McKnight, 291 S.C. at 113, 352 S.E.2d at 473 (When . . . the State is unable to demonstrate a good faith attempt to comply with the statute [§ 17-13-140], exclusion is the proper remedy.").

Standing

The trial judge's finding that Appellant did not have an expectation of privacy in the telephone records or standing to challenge the search warrants marked as Court's Exhibit No. 1 was error.

"The Fourth Amendment to the United States Constitution guarantees to individuals the right to be free from unreasonable searches and seizures. One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated." McKnight, 291 S.C. at 114, 352 S.E.2d at 473 (citing United States v. Salvucci, 448 U.S. 83 (1980)) (emphasis in original). "The defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search." Id. (citing United

States v. Salvucci, 448 U.S. 83 (1980), Rawlings v. Kentucky, 448 U.S. 98 (1980, and Combs v. United States, 408 U.S. 224 (1972)).

"On the other hand, the rights afforded by Section 17-13-140 are not dependent upon a showing of an expectation of privacy in the searched premises." Id. at 115, 352 S.E.2d at 474. "Therefore, one contesting the legality of a search because of a defect under Section 17-13-140 need only show that the State is attempting to introduce the evidence against him." Id.

If Appellant had argued the various search warrants marked as Court's Exhibit No. 1 were invalid on constitutional grounds, he would have had to show he had an expectation of privacy in the records sought. However, Appellant argued the search warrants were invalid based on the stricter statutory requirements found in § 17-13-140. Therefore, Appellant unquestionably had standing to object to the validity of the search warrants because the state attempted to, and later successfully, introduced the evidence against him at trial. The judge erred by ruling Appellant had no expectation of privacy or standing to challenge the searches.

Good Faith Exception

In McKnight, our Supreme Court emphasized that the good faith exception to the exclusionary rule adopted by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984) only applies when a search warrant is defective on Fourth Amendment grounds, not on the basis of a statutory violation. McKnight, 291 S.C. at 114, 352 S.E.2d at 473. However, the Court did not decide whether evidence seized pursuant to a search warrant that is defective under § 17-13-140 may be admitted when the officers who execute the search act with objectively reasonable reliance on a warrant ultimately found to be invalid. Id. The Court noted that even if it were to adopt a good faith exception akin to Leon for violations of § 17-13-140, the exception would not have applied in McKnight because the officers were aware of the

defective in the warrant (the lack of a sworn affidavit) when they executed the search, negating any argument of good faith. Id.

Over two decades later, our Supreme Court recognized that there is a good faith exception to § 17-13-140's requirements where the officers make a good faith attempt to comply with the statute's *affidavit procedures*." Herring, 387 S.C. at 215, 692 S.E.2d at 497 (quoting Covert, 382 S.C. 205, 675 S.E.2d 740) (emphasis added). In Herring, the Supreme Court held the officers made a good faith attempt to comply with the affidavit procedures due to the surrounding circumstances: "It was 4:00 in the morning, and SLED agents were attempting to obtain a warrant to investigate a shooting by Richland County Sheriff's deputies of a prominent Columbia attorney." Id. at 216, 692 S.E.2d at 497.

Assuming the Supreme Court would extend this good faith exception to the statutory requirement that the issuing magistrate have "jurisdiction over the area where the property sought is located," it would not apply in this case. Here, the officers were clearly aware that the records sought were located out of state and held by out of state entities, and that a local South Carolina magistrate did not have jurisdiction to issue the warrants. This is evidenced by the fact that investigators with the Lexington County Sheriff's Department worked with officers from the Florence Police Department in Alabama to obtain a search warrant from an Alabama magistrate to search Appellant's residence in Alabama. See Court's Exhibit No. 2. Based on these actions, it is obvious that the Lexington County investigators were aware that a South Carolina magistrate could not issue a search warrant for a residence or property located out of state. Therefore, the good faith exception, if held to extend to the jurisdiction requirement of § 17-13-140, would not apply in this case.

The trial judge erred in denying Appellant's motion to suppress. Respectfully, this Court should hold the search warrants marked as Court's Exhibit No. 1 were invalid and suppress the evidence obtained as a result.

2.

The trial judge erred by qualifying a state law enforcement witness as an expert in "street culture and language" and permitting him to testify concerning his extensive experience with street gangs and his interpretation of language allegedly used by Appellant because this evidence was unfairly prejudicial to Appellant in violation of Rule 403, SCRE, and suggested to the jury that Appellant was affiliated with or involved in a gang, which likely led the jury to convict Appellant on an improper basis, particularly where Appellant was convicted under the hand of one theory of accomplice liability.

How the Issue was Presented Below

The state's last witness was Brian Zwolak. Before Zwolak testified, the assistant solicitor informed the judge that the state sought to have Zwolak qualified as an expert in "street culture and language" to give his opinion concerning language used by Appellant and others in text messages that were admitted into evidence. The solicitor explained that Zwolak's "experience comes from working intelligence with gangs and interviewing gang members and looking at social media for gang members and people related to gangs." He continued, "I'm concerned about during the voir dire of qualifying him as an expert, if . . . the defense is going to claim that's prejudicial." Tr. 610, ll. 9-21; Tr. 611, ll. 16-20.

Defense counsel objected to the qualification of Brian Zwolak as an expert in "street culture and language" and any use of the word gang. Counsel argued that any reference to a gang or "street language" would be unfairly prejudicial. He suggested use of the term "slang" would be generic enough to remove any unfair prejudice to Appellant. Tr. 611, ll. 4-14.

Emphasizing that the state must lay a foundation to qualify its expert, the trial judge ruled the state could elicit the witness' "qualifications full and complete." However, subject to

Appellant's objection, the judge stated he would give the jury a limiting instruction concerning how it could consider the evidence. Tr. 611, l. 21 – 613, l. 23.

Zwolak ultimately testified that he was "a gang instructor" at the Criminal Justice Academy. His law enforcement career started in 2007 when he was hired by the City of Columbia Police Department. He was hired as a patrol officer and "worked a lot of street crime cases." After two years "on the street," he was moved to investigations were he "interviewed multiple individuals both involved in gangs and not involved in gangs." In 2011, he was promoted to the "Gang Unit." As an investigator with the "Gang Unit," Zwolak "did intel on street gangs," "worked violent crime cases and gathered intel on documented gang members," and "assisted patrol in all the other aspects of the Columbia Police Department when it came to organized crime and street gangs." Tr. 630, l. 22 – 632, l. 9.

Before he left the Columbia Police Department in June 2015, Zwolak helped establish the "Midlands Gang Task Force in Richland County." In June 2015, he began working for the Criminal Justice Academy "when a position opened up to teach on street gang." He has taught classes called Criminal Street Gang Investigations, Criminal Gang Overview for Law Enforcement, and Gang Documentation, among other related courses. Tr. 633, l. 24 – 634, l. 19.

Additionally, Zwolak testified he has extensive formal training in "gang or street culture and language." For example, He attended the Criminal Gang Overview for Law Enforcement at the Criminal Justice Academy before he became employed there, as well as Law Enforcement Response to Gangs in the Community and Graffiti Recognition. He completed the "Basic Gang School" and later the "Advanced Criminal Gang Investigations and Interview" class in Meridian, Mississippi. He has also attended the World Gangs of the Low Country Training Conference in

South Carolina and "taken the Gang Investigations and Prosecution Techniques that was put on by the Federal Government." Tr. 632, l. 20 – 633, l. 9.

Lastly, Zwolak is a member of the South Carolina Gang Investigator's Association. Tr. 633, ll. 13-14.

During the course of voir dire concerning Zwolak's qualifications, the word gang or gangs was mentioned *at least thirty five times*. When the state moved to qualify Zwolak as an expert in "street culture and language," defense counsel renewed his objection. Subject to Appellant's objection, the judge qualified Zwolak as an expert and gave a limiting instruction, which stated in part:

> Additionally, ladies and gentlemen, I'm going to give you what is known as the limited instruction concerning this testimony. As you heard, the officer's background and history and training, you heard the word gang many, many, many times and, of course, that word can be a buzz word in and of itself. There is no association, no association whatsoever between this defendant, Mr. Butler, and membership in or association with any gang whatsoever. The issue about whether or not Mr. Butler is a member of, or associated with any member of a gang is not relevant to the trial of this case, and that particular issue is not an issue.
>
> And the area of gangs should not even be discussed, Mr. Foreman, by you or any of the ladies and gentlemen in the jury room at the time of your deliberations.
>
> I'm allowing this evidence solely for the purpose of interpreting street culture and language and as you all know, being American Citizens of Lexington County, South Carolina, people are tried based on the evidence, not whatever their status may be. They're not tried because of a label whatsoever. Even if they were, Mr. Butler does not have that label whatsoever.

Tr. 636, l. 11 – 637, l. 12.

Zwolak ultimately testified regarding his interpretation of language used by Appellant, McClure, and others in text messages that were admitted into evidence as State's Exhibit No. 66 over Appellant's objection. For example, Zwolak opined that the word "hammy" or "hamma" allegedly used by Appellant referred to a firearm. Tr. 643, ll. 2-18; Tr. 647, l. 16 – 649, l. 8. He

maintained that the word "nickel" allegedly used by Appellant could refer to a firearm or a quantity of drugs. Tr. 641, ll. 9-12. He also claimed the term "a blood" allegedly used by Appellant in a conversation with McClure "normally . . . would refer to a gang member." Tr. 642, l. 21 – 643, l. 1.

Discussion

The trial judge erred by qualifying Zwolak as an expert in "street culture and language" and allowing him to testify, without any limitation whatsoever, concerning his extensive experience and training related to gangs and his interpretation of language allegedly used by Appellant because this evidence was unfairly prejudicial to Appellant in violation of Rule 403, SCRE. The evidence elicited during *voir dire* before Zwolak was qualified as an expert, particularly the repeated use of the word gang, along with Zwolak's testimony interpreting language allegedly used by Appellant, suggested to the jury that Appellant was affiliated with or involved in a gang and likely led the jury to convict Appellant on an improper basis.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (quoting State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct.App.1998)) (alternation in original) (internal quotation marks omitted).

There was no evidence besides Zwolak's testimony that Appellant or McClure were affiliated with a gang. Consequently, Zwolak's testimony was highly prejudicial to Appellant, particularly where Appellant was convicted under the hand of one is the hand of all theory of accomplice liability and testified in his own defense. Appellant's credibility before the jury was crucial because he testified that he was merely present at VonKeith's house when the burglary

and shooting occurred. Zwolak's testimony concerning gangs, which the jury could only have interpreted as meaning Appellant was likely affiliated with a gang, would have undermined his character and credibility. This prejudicial testimony likely led the jury to convict Appellant on an improper basis.

Because any probative value of Zwolak's testimony was substantially outweighed by the danger of unfair prejudice to Appellant, the trial judge should have excluded or severely limited his testimony. Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN ANTONIO BUTLER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served upon Justin Antonio Butler, at Lauderdale County Jail, 653 S. Seminary St, Florence, AL 35630, this 12th day of July, 2017.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of July, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.