ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN DONELL RHODES,

APPELLANT

Appellate Case No. 2015-002605

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I. Did the court err by denying Appellant's motion to suppress his cellular telephone records obtained by law enforcement from Sprint in violation of his rights under the Fourth Amendment of the United States Constitution and his right to privacy under Art. one, Section 10 of the South Carolina Constitution where law enforcement obtained the records without a warrant and without properly complying with the federal Stored Communications Act?

II. Did the court abuse its discretion by admitting expert testimony concerning per call measurement data (PCMD), which is an estimate of the distance a cellular telephone is from a cell tower, to show Appellant's telephone was allegedly at or near the location where the murders occurred, when there was insufficient evidence of the reliability of this data?

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

I. Appellant's Constitutional right to privacy and protection against unreasonable searches and seizures were not violated because he had no expectation of privacy in location data collected by a third party, he had no expectation of privacy in a borrowed telephone, and he willingly relinquished the phone to law enforcement to aid in the investigation of the double murder. Further, law enforcement complied with the Federal Stored Communications Act when exigent circumstances justified the telephone company's voluntary disclosure of the historical cell cite data.

II. The trial court did not abuse its discretion in finding testimony about per call measurement data obtained from historical cell site location information records admissible, as have numerous state and federal jurisdictions, because the testimony was relevant and reliable in accordance with Rule 702, SCRE, and *State v. Council.*

RESPONDENT'S STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant, Jonathan Donnell Rhodes, in May of 2013 for burglary first degree, two counts of murder and possession of a weapon during the commission of a violent crime, and two counts of kidnapping and possession of a weapon during the commission of a violent crime. (R. pp. 598-600.) On November 30, 2015, Appellant's case was called to trial before the Honorable John C. Hayes. (R. p. 1.) Appellant was represented by Jake Erwin, Esquire and Stuart Sarratt, Esquire. (R. p. 1.) Solicitor W. Walter Wilkins and Assistant Solicitor Betty Strom represented the State. (R. p. 1.) At the conclusion of the five-day trial, the jury returned a verdict of guilty on all charges. (R. p. 1; pp. 583, line 15 – p. 584, line 12.) Judge Hayes sentenced Appellant to a concurrent two terms of life imprisonment for the two counts of murder, another concurrent term of life imprisonment for burglary, and four concurrent terms of five years' imprisonment for the weapons charges. Because Appellant received two life terms for murder, Judge Hayes did not sentence him on the kidnapping charges. (R. p. 585, line 16 – p. 586, line 1.) Thereafter, Appellant filed a timely notice of appeal.

RESPONDENT'S STATEMENT OF FACTS

Douglas Doughty was helping his father-in-law in the yard one October morning on Terramont Drive in Greenville, South Carolina, when his neighbors' housekeeper, Shirley Rogers, approached him and asked for help. (R. pp. 118-120.) Rogers worked for the Wells, who lived next door. (R. p. 120, lines 1-11.) Rogers led Doughty to the back of the Wells home and told him to look in a window. (R. pp. 120-124.) Doughty saw what appeared to be the foot of a man lying on the floor, so he pounded on the windows to get the attention of anyone in the home. (R. p. 124, lines 6-18.) Doughty tried the back doors to the house, but they were locked, so he went around to the front door, which was closed but unlocked. (R. p. 125, lines 5-20.) Doughty walked into the house and down a hallway, with Rogers following behind him, and found the body of Mr. Wells on the floor of his office. (R. p. 125, line 18 - p. 126, line 10.) Doughty realized he could not help the victim, so he told Rogers they needed to leave and call the police. (R. p. 126, lines 12-17.) Rogers asked about Mrs. Wells, and Doughty told her to wait outside while he looked through the house. (R. p. 126, lines 19-22.) Doughty found the body of Helen Wells in a bedroom at the end of the hall. (R. p. 126, line 23-p. 127, line 3.)

Law enforcement found two newspapers in the Wells' driveway. (R. p. 141, line 20 – p. 142, line 20.) A telephone resting on a chair by the front door had blood on it and the back of the phone had been removed. (R. p. 144, lines 3-7.) Bloody footprints left impressions at different angles on the carpet leading down the hallway. (R. p. 145, lines 1-4.) There was blood on the doors to the bedroom and office and on the light switch to the room. (R. p. 145, lines 5-12.) Investigators noted fabric impressions on the light switches, indicating someone touched the switch with hands covered in fabric. (R. p. 169, line 14- p. 170, line 2.) Gary Wells was found lying on his back with a pool of blood beneath his body and wounds to his abdomen, legs, hands,

and head. (R. p. 145, line 19 – p. 146, line 6.) Wells had a total of at least forty-four stab wounds or cuts to his body, with approximately half of those delivered anti-mortem and the rest post-mortem. (R. p. 246, lines 4-23.) The fatal wound was a three inch long incision that sliced through the femoral artery in Well's groin. (R. p. 247, lines 2-12.) He also had defensive injuries to his hands, including a wound between his fingers that sliced him nearly to the wrist. (R. p. 247, lines 13-21.) The contents of his wallet appeared to be strewn about the room, and on a chair nearby there were opened jewelry boxes and a bloody knife. (R. p. 146, lines 1-24.)

Across in hall in another bedroom lay the body of Helen Wells. The room was in disarray, with the bed pulled from the wall, the rug pushed aside, and a bloody knife lying on the floor. (R. p. 147, lines 2-21.) Mrs. Wells was lying on her side, with wounds to her leg, shoulder, and head. She also had gunshot wounds to her cheek, shoulder and right arm. (R. p. 148, lines 1-6.) She was shot at close range, but the wounds would not have been fatal. (R. p. 251, lines 4-20.) She also had seventy anti-mortem wounds, twenty-seven of which were lacerations, as if she was struck with a heavy cylindrical object. (R. p. 254, line 3 – p. 255, line 12.) The knife wounds were located on her thighs, hands, and torso, with the fatal wounds puncturing her lungs and liver. (R. p. 256, lines 3-25.) The autopsy would reveal eleven more stab wounds delivered to her face after she was dead. (R. p. 257, lines 15-24.) On the bed was a box containing banking items, such as a checkbook and deposit slips. (R. p. 148, lines 19-24.) A pillow near her body was so saturated with blood the original color of the pillow was undeterminable. (R. p. 149, lines 2-6.) Investigators found shell casings and a live .32 caliber round in the room, as well, and they were able to recover a projectile from the blood-spattered baseboard of the bedroom wall. (R. p. 150, line 15 – p. 155, line 1.) The bloody knives found near the bodies appeared to be from the same knife set found in the victims' kitchen. (R. p. 159, line 15 – p. 161, line 7.)

After the crime scene was secured, investigators transported the on-scene witnesses to the law enforcement center to take their statements. (R. p. 258, lines 4-11.) While Rogers was being questioned, investigators learned she was currently under investigation of identity theft involving Helen and Gary Wells. (R. p. 194, lines 12-19.) That investigation had been initiated by Branch Banking & Trust bank (BB&T). At trial, employees from BB&T described the emotional confrontation between Mrs. Wells and Shirley Rogers when Rogers met Mrs. Wells at the bank days before the murder to discuss the fraudulent charges made to the Wells' account. (R. pp. 223-229.) Mrs. Wells asked Rogers how she could steal from them after they were good to her, and Rogers claimed she took the Wells' bankcard by mistake, saying she would pay the money back. (R. p. 230, lines 10-25.) Rogers began "yelling" at Mrs. Wells, and the branch banker asked Rogers to leave. (R. p. 234, lines 7-11.) BB&T's employees advised Mrs. Wells to refrain from any contact from Rogers and change the locks on her doors at her home. (R. p. 235, lines 11-14.)

Law enforcement quickly zeroed in on Rogers as the prime suspect, and began investigating Rogers' background and her known associates. (R. p. 195, lines 3-14.) Rogers' phone records revealed frequent contact around the period of the murders with one particular number registered to a Sprint serviced phone. (R. p. 196, lines 4-12; p. 331, lines 21-23.) When investigators called the number and asked the man who answered if he knew Shirley Rogers, the man denied knowing her and hung up on the investigator. They called back, and the call was transferred to a voice mail box in the name of "Really Real." (R. p. 329, line 19 – p. 330, line 19.) After calling other numbers associated with Rogers' phone, investigators learned from another friend of Shirley Rogers that the man known as Really Real was Rogers' boyfriend. (R. p. 331, lines 3-16.) Investigators then submitted to Sprint a records request for that cell phone

number, citing to a double homicide with a suspect still at large. (R. p. 331, lines 16-25; p. 596.) The records showed the phone was registered to Eric Cade, or Appellant's roommate at the time. (R. p. 196, lines 19-24; p. 331, lines 23-25.)

Eric Cade, who heard the police wanted to talk to him, appeared at the law enforcement center and asked to speak to one of the investigators assigned to the case. (R. p. 197, lines 6-11.) Appellant accompanied Cade to the meeting. (R. p. 197, lines 6-7.) Cade had a close relationship with Appellant; he allowed Appellant to live with him, added a cell phone to his plan for Appellant, and allowed Appellant use of his car while he was at work. (R. pp. 294-298.) On the evening before the murder, Appellant told Cade he was going to a friend's house to return something to her. After several hours, Cade began to worry and became upset because Appellant was not returning his calls or texts. (R. pp. 302-303.) Appellant returned to their apartment sometime around 3:00 am. (R. p. 306, lines 13-16.) Appellant told Cade he was with his friend Tyrone, whom Cade did not know. (R. p. 307, lines 1-11.) Appellant later changed his story and told Cade he was at his friend Brian's house, and then later changed his story again and said he went to Shirley Rogers' house and fell asleep, but he did not answer his phone because he left it in the car. At the time he told Cade he was with Rogers, Appellant was aware the police had information on the location of his phone from the cell towers. (R. p. 315, line 12 – p. 316, line 21.) Cade testified he voluntarily turned over his phone and car to the police for their investigation, but Police later obtained a warrant to search the contents of Cade's.[1] (R. p. 197, lines 12-21; p. 309, line 17 – p. 310, line 17.)

When investigators showed Cade pictures of Shirley Rogers exiting Mini Cooper at a TD Bank, Cade identified the car as his. (R. p. 312, line 14 – p. 313, line 6; State's Ex. 150.) Blood

[1] According to the testimony, the investigator actually received the cell phone from Appellant. In effect, both men consented to the search of the phone. (R. p. 197, lines 6-15.)

from Gary and Helen Wells was found on the center console, the interior passenger side door and driver's front seat of Cade's Mini Cooper. (R. p. 434, line 10 – p. 435, line 20; p. 437, lines 7-12; p. 441, lines 1-20; p. 469, lines 2-18.) Analysts found a trace amount of DNA from Jonathan Rhodes mixed in with the DNA of Helen and Gary Wells when they tested the swabs from the interior of the car. (R. pp. 472, line 3-p. 473, lines 10.)

Following Rhodes' arrest, he was detained at Perry Correctional Institution. Curtis McLeod was an inmate at Perry and working in the cafeteria with Rhodes. (R. pp. 490-499.) The men worked for approximately eight hour shifts preparing food and washing dishes. (R. p, 500, lines 1-25.) Rhodes told McLeod he was in a relationship with an older woman named Shirley who had a grudge against her former employers. (R. p. 502, lines 1-12.) Rhodes told McLeod he used his roommate's Mini Cooper and picked up Rogers and they went to the victims' house. (R. p. 503, lines 1-8.) McLeod said Rogers talked to the victims about trying to pay back the money she stole, but they were not interested in discussing it. (R. p. 504, lines 2-5.) McLeod recounted that Mrs. Wells asked Rogers how she could steal from them when they had been good to her. (R. p. 503, line 22-p. 504, line 5.) Rhodes hid from their view during the conversation so the Wells would not know Rogers brought a male with her. (R. p. 504, lines 6-11.) The argument escalated and they forced themselves inside. (R. p. 504, lines 12-18.) McLeod said Rhodes described how they separated the victims into different rooms. Rhodes and Rogers were armed with knives and a pearl handled .32 caliber gun and began cutting the victims. (R. p. 504, lines 15-23.) Rhodes described the violence as messy because there was a lot of blood everywhere. (R. p. 506, lines 1-4.) Rhodes also told McLeod they shot the female victim to make sure she was dead and then they stole jewelry, credit cards, and money. (R. p. 506, lines 11-15.) Rhodes and Rogers disposed of the gun, and then went to Rogers' house to clean up. (R. p. 506, lines 18-23.)

McLeod also testified Rhodes said his roommate needed his car back to go to work in the morning, so he continuously called Rhodes during the murders. (R. p. 507, line 20 – p. 508, line 9.) McLeod's testimony was consistent with the cell phone records, the testimony of Eric Cade, the testimony of the pathologist, and the crime scene photos.

ARGUMENT

I. Appellant's Constitutional right to privacy and protection against unreasonable searches and seizures were not violated because he had no expectation of privacy in location data collected by a third party, he had no expectation of privacy in a borrowed telephone, and he willingly relinquished the phone to law enforcement to aid in the investigation of the double murder. Further, law enforcement complied with the Federal Stored Communications Act when exigent circumstances justified the telephone company's voluntary disclosure of the historical cell cite data.

Investigators lawfully obtained historical cell site location information from Sprint in accordance with the Stored Communications Act. The information was collected by Sprint as part of its efforts to maintain and regulate its network. The information collected is voluntarily submitted to Sprint every time a user makes a call and is non-content in nature. In Appellant's case, the records belonged to Eric Cade as the subscriber to the cell phone. Appellant had no subjective or reasonable expectation of privacy in the information, and the investigators need not have sought a warrant to obtain it.

How the Issue Was Presented at Trial

During the pre-trial motions, the defense asked for a hearing on the admissibility of expert opinion testimony pursuant to S. C. Rule of Evidence 702. (R. p. 2, lines 23-25.) Following extensive questioning of both the state's expert and a defense expert on the reliability of historical cell site location information (discussed more thoroughly in the following section), the defense made an additional motion to exclude the cell site information as a violation of the

Fourth Amendment and the South Carolina Constitution's right to privacy. (R. pp. 4-89; p. 100, line 25 – p. 101, line 5.) The defense cited to the district court's holding in *United States v. Graham*, 796 F.3d 332 (4th Cir.[2]) and *State v. Drayton*, 411 S.C. 533, and noted the then status of *Graham* following its first hearing in the Fourth Circuit. (R. p. 101, line 11 – p. 102, line 15.) The defense also argued the sheriff's department violated the Stored Communications Act by obtaining the records without a good faith belief of exigent circumstances involving danger of death or serious physical injury to any person requiring the disclosure of the records. (R. p. 103, lines 6-13.)

The State responded that the data was obtained by a request from law enforcement pursuant to a criminal investigation as a business record. (R. p. 102, line 19 – p. 103, line 5.) Secondly, the solicitor pointed out that the cell phone was held in the name of Appellant's roommate, Eric Cade, so Appellant had no expectation of privacy. (R. p. 103, lines 6-13.)

The following morning, the trial court ruled on the two motions, finding the expert opinion testimony reliable under the *Council*[3] factors (see discussion in Issue II) and finding Appellant had no expectation of privacy in his cell phone location data in accordance with relevant federal case law and the S.C. Court of Appeals holding in *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (2015). (R. pp. 107-110.)

Later, just before the State called the Sprint custodian of records to the stand to offer the historical cell site location information into evidence, the defense again moved to suppress the records under the Fourth Amendment and the South Carolina Constitution, Article 1, section 10. (R. p. 267, line 25 – p. 308, line 4.) The defense conceded Sprint voluntarily provided the

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[2] Full citation is *United States v. Graham*, 796 F.3d 332 (4th Cir.), reh'g en banc granted, 624 F. App'x 75 (4th Cir. 2015), and adhered to in part on reh'g en banc, 824 F.3d 421 (4th Cir. 2016)
[3] *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

records to local law enforcement, but again argued no exigent circumstances existed to warrant the disclosure. According to Appellant, because a SLED profile suggested the attacks were personal, the killer did not present a broader danger to anyone else. (R. p. 269, lines 1-25.) Appellant argued the government manipulated the cell phone company to act at their behest, triggering the Fourth Amendment. (R. p. 271, lines 3-11.)

The trial judge observed that the SLED profile was not controlling of the investigation and law enforcement was not bound by the opinion the attack was localized to Mr. and Mrs. Wells. (R. p. 272, lines 6-11.) The solicitor argued the assertion that the cell phone acted as an agent of law enforcement and disclosed its customer's records was not applicable to the facts of this case, in which the owner of the cell phone, Eric Cade, had the contractual relationship with the provider. (R. p. 273, lines 1-4.) The defense countered that the Appellant had a right to privacy in his location, but "not a right to privacy in the phone itself." (R. p. 273, lines 12-17.) Further, Appellant argued the four days of records requested by law enforcement triggered Fourth Amendment protection because of the length of the surveillance period. (R. p. 273, line 18 – p. 274, line 21.)

The trial court found Appellant's argument he had a privacy interest in his location on the public streets unpersuasive. As to the privacy interest in the customer records, the trial court found that interest belonged to Eric Cade, the owner of the cell phone. (R. p. 275, lines 10-25.) Because Appellant had no ownership interest in the cell phone, the trial court found them admissible. (R. p. 275, line 24 – p. 276, line 1.)

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41,

625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "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) (citation omitted). When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error. *State v. Missouri*, 361 S.C. 107, 603 S.E.2d 594 (2004); *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct.App. 2005).

Analysis

The growth of electronic communications has stimulated Congress to enact statutes that provide both access to information heretofore unavailable for law enforcement purposes and, at the same time, protect users of such communication services from intrusion that Congress deems unwarranted. *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 306 (3d Cir. 2010). The Stored Communications Act (SCA) was enacted to protect the privacy of users of electronic communications by criminalizing the unauthorized access of the contents and transactional records of stored wire and electronic communications, while providing an avenue for law enforcement entities to compel a provider of electronic communication services to disclose the contents and records of electronic communications. Pub.L. No. 99–508, 100 Stat. 1848, 1868 (codified at 18 U.S.C. §§ 2701–2711).

The SCA generally prohibits disclosure of the contents of any communications stored electronically except as provided in the Act. A court order is required, absent an applicable exception, to compel disclosure of such information. *See, e.g.*, 18 U.S.C. § 2703(d) (permitting the Government to obtain a court order based on a showing of "specific and articulable facts," though not requiring probable cause, for the release of such information). However, the SCA specifically allows a service provider to voluntarily disclose customer records, including historical cell site location information (CSLI) "to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." 18 U.S.C. § 2702(c)(4). Appellant acknowledges law enforcement obtained the location data on the basis of § 2702 but argues no such emergency or exigent circumstances were present in this case. Instead, he claims law enforcement should have obtained a court order for the records pursuant to § 2703. The failure to do so, Appellant alleges, constituted a violation of his rights under the Fourth Amendment and his right to privacy under the State Constitution. (FBOA at p. 9.)

The Fourth Amendment prohibits unreasonable search and seizure, and requires evidence seized in violation of the Amendment be excluded from trial. *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting *Horton v. California*, 496 U.S. 128, 133 (1990)). "A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004).

Appellant's argument he has a reasonable and subjective expectation of privacy in the CSLI is without merit for several reasons. First, as the trial court properly found, Appellant lacked a subjective expectation of privacy in the location data of a cell phone because he was not the lawful subscriber to Sprint. Indeed, this particular basis for argument was waived by Appellant during arguments at the hearing to suppress the records.[4] Prior to the admission of the records, Appellant made no argument he sought to protect his privacy in the control and operation of the cell phone itself. For example, Appellant did not argue he paid the cell phone bill, he was the exclusive user of the phone, or he protected the phone with a passcode. There was no testimony concerning how long Appellant was entitled to use the phone or the nature of the limitations of its use from Eric Cade. Instead, Appellant claimed a privacy interest in his location, not in his ownership or control of the cell phone. However, the records at issue did not track Appellant's movements. The records do not identify Appellant's movements or location; instead, the records chart the approximate relational distance between a cell tower and Eric Cade's cell phone. Indeed, Appellant's argument he maintains an expectation of privacy in his location data requiring suppression of the records is inapposite to his claim at trial that the cell phone pings do not actually reflect his physical location. After all, Appellant's defense at trial was that the cell phone was at the murder scene while he was asleep on the other side of town. Appellant must concede his right to privacy in his movements has no bearing on Sprint's right to privacy in their historical cell site location information.

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[4] The United States Supreme Court has expressly rejected the application of an analysis based on the standing doctrine; instead, the analysis is based on substantive Fourth Amendment law. *Rakas v. Illinois*, 439 U.S. 128, 140, (1978). The use of the term "standing" has created confusion in this context, and therefore "standing" is no longer appropriate to "connote the legitimate expectation of privacy in the evidence seized or the premises searched." *United States v. Bouffard*, 917 F.2d 673, 675 (1st Cir.1990).

Second, investigators properly obtained the CSLI because Sprint voluntarily disclosed the information pursuant 18 U.S.C. § 2702 after investigators submitted a form documenting the need for the information for an investigation of a double homicide. (R. p. 596.) Contrary to Appellant's assertion he posed no threat to anyone other than Gary and Helen Wells, at the time law enforcement requested the records from Sprint, police suspected, but did not know, the extent of Shirley's Rogers' involvement in the gruesome murders of two elderly resident of Greenville County. From the sheer brutality of the scene, the disparate injuries to the two victims, and the locations of the bodies in different rooms of the house, law enforcement reasonably determined more than one individual was likely responsible for the crimes. While Shirley Rogers may have had a particularized grudge against the victims, her accomplice certainly did not. Appellant's assertion the killer posed no threat to anyone else in the community downplays the scope of the senseless violence of the crime against the Wells. Appellant has made no showing the application for the records pursuant to §2702 was in bad faith and, in fact, acknowledges investigators referred to the investigation of a double homicide as the basis for the request. Therefore, the request for Sprint's voluntary disclosure of the records was not in contravention of the SCA, as Appellant alleges. *See, e.g., U.S. v. Takai,* 943 F.Supp.2d 1315 (D.Utah 2013) (Police's tracking of suspect's cellphone through location data was permissible where detective identified defendant as prime suspect in robbery and violent shooting of clerk in face at point blank range earlier that day and reasonably believed that additional robbery might be imminent).

Turning to the second prong of the *Missouri* test, Appellant has no privacy interest in the historical CSLI because society does not recognize this interest as reasonable. The Fourth Amendment regulates the government's ability to obtain evidence *from* a person. It does not

restrict the government from obtaining evidence *about* a person. *See Katz v. United States*, 389 U.S. 347, 350 (1967) ("[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"). Thus, It was unnecessary for the State to obtain a search warrant in order to acquire either the personal subscriber information related to Appellant's phone or the cell site location records from Sprint because the CSLI did not belong to Appellant, was not maintained for his benefit, and was not stored in a place in which Appellant a reasonable expectation of privacy. A customer has no reasonable expectation of privacy in a business's records of services it provided. *See United States v. Miller*, 425 U.S. 435, 440 (1976) ("[T]he documents subpoenaed here are not respondent's 'private papers.'. . .[R]espondent can assert neither ownership nor possession . . . [of the] business records of the banks."). As Justice Marshall wrote for the Court in *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984):

> It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.

Accordingly, when the government seeks information from a business that has acquired transactional information from a customer, the fact that the information pertains to a customer does not permit the customer to object to its production.

The United States Supreme Court "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 1624 (1976)[5] (holding that there was

[5] The Court in *Miller* rejected a Fourth Amendment challenge to a third-party subpoena for bank records. The Court explained that the bank's records "are not respondent's 'private papers.' "

no reasonable expectation of privacy in bank records superseded by statute). It is clear that Appellant did not have a reasonable expectation of privacy in the subscriber information for his cell phone or the numbers dialed and the origin of calls received on it, as opposed to the contents of any conversation(s). *Smith v. Maryland*, 442 U.S. 735, 741-43 (1979) (telephone users generally had no subjective expectation of privacy in dialed telephone numbers).

In *Smith*, the telephone company installed a pen register, at the request of the police, to record the telephone numbers dialed from the petitioner's telephone. In rejecting the petitioner's challenge to the warrantless use of the pen register, the Court expressly distinguished collecting telephone numbers dialed from a listening device used to record "the *contents* of communications." 442 U.S. at 741(emphasis in original). The Court held telephone users generally had no subjective expectation of privacy in dialed telephone numbers. "[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.* at 742.[6]

Instead, they are "the business records of the banks," in which a customer "can assert neither ownership nor possession." *Id.* at 440. The records "pertain to transactions to which the bank was itself a party." *Id.* at 441, 96 S.Ct. at 1623. In rejecting the defendant's challenge to the subpoena, the Court held "that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* at 443.The Court found that the mandatory record-keeping requirement of the Act did not create a Fourth Amendment interest in bank records "where none existed before" because the records contained "only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.* at 441-42.

[6] The Court expressly distinguished collecting the listening device such as that used in *Katz v. U.S.*, 389 U.S. 347 (1967). As in *Smith*, the contents of the "communications" were not disclosed by the obtaining of the location data in this case.

Moreover, the Court held any subjective expectation the petitioner may have harbored "is not one that society is prepared to recognize as reasonable." *Id.* at 743 (internal quotation marks omitted).[7] Both the Supreme Court and lower federal courts have applied this same principle in a variety of contexts. *See, e.g., Hoffa v. United States*, 385 U.S. 293, 302 (1966) (confidential statements made in the presence of an informant); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) (financial and other records in the hands of third-party businesses); *United States v. White*, 401 U.S. 745, 752-54 (1971) (electronic surveillance of conversations between defendant and informant, by means of radio transmitter concealed on the person of the informant). *See also Donaldson v. United States*, 400 U.S. 517, 522-23 (1971) (taxpayer was not entitled to intervene in proceeding to enforce summons for his employment records, where "what is sought here by the Internal Revenue Service . . . is the production of Acme's records and not the records of the taxpayer"); *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010) (defendant's ISP subscriber information that included the "physical address" of the defendant and IP addresses of websites); *Reporters Committee for Freedom of Press v. AT&T*, 593 F.2d 1030, 1043 (D.C. Cir. 1978) (rejecting Fourth Amendment challenge to subpoena for telephone billing records and holding that when an individual transacts business with others, "he leaves behind, as evidence of his activity, the records and recollections of others. He cannot expect that these activities are his private affair"); *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation"); *United States v. Forrester*, 512

[7] The Court added "[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," and the Court held that the user "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business." *Id.* at 743-44.

F.3d 500, 510 (9th Cir. 2008) (email users have no reasonable expectation of privacy in to/from addresses of their messages or in IP addresses of websites visited).

The societal expectation of privacy in location information transmitted to a cell phone carrier is a novel issue in South Carolina. In *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 245 (2015), the South Carolina Court of Appeals held the defendant did not have a reasonable expectation of privacy in his historical cell site location records, citing the SCA's requirement of only "specific and articulable facts" necessary for the issuance of the court order and guidance of the federal courts on this issue. *Drayton*, at 547-548, 769 S.E.2d at 262. As in this case, Drayton also argued protection under the State Constitution's right to privacy, "which our supreme court in *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001), interpreted as 'offering a higher level of privacy protection than the [Federal] Fourth Amendment.'" *Drayton*, at 548, 769 S.E.2d at 262. The court reasoned, however, Drayton had no enhanced reasonable expectation of privacy in the CSLI because he voluntarily contracted with the cellular provider, thereby conveying his location data to the provider who created the records in the ordinary course of business. *Id.* at 549, 769 S.E.2d at 263. In 2015, the South Carolina Supreme Court vacated the Court of Appeals' holding on the privacy interest in historical cell site location data, finding the lower court reached the issue in error because the supporting affidavits offered to obtain the order established probable cause for the search. *State v. Drayton*, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (2015).

In the Fourth Circuit, the Maryland case of *U.S. v. Graham* has undergone its own evolution. The district court found the defendants did not have a legitimate expectation of privacy in historical CSLI after police obtained the records by court order pursuant to the Stored Communications Act. *United States v. Graham*, 846 F. Supp. 2d 384, 386 (D. Md. 2012). In its

application to the court, the government said the records sought would aid in an ongoing criminal investigation of recent robberies of two fast food restaurants. The government sought to link the defendants with the prior robberies by identifying the location of cellular towers accessed by the defendants' phones during the relevant time periods. *Id.* Following its first hearing, the Fourth Circuit Court of Appeals affirmed the convictions but overruled the district court, finding the government's inspection of CSLI was a search for Fourth Amendment purposes. *Graham*, 796 F.3d 332 (4th Cir. 2015). The United States petitioned the court for rehearing *en banc*, which was granted, and the *en banc* Court then affirmed the decision of the district court, finding the non-content information obtained by a third party distinct from protected contents of communications information, and stating:

> The landscape would be different "if our Fourth Amendment jurisprudence cease [d] to treat secrecy as a prerequisite for privacy." Id. But unless and until the Supreme Court so holds, we are bound by the contours of the third-party doctrine as articulated by the Court. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (reversing the Second Circuit but noting that it had correctly applied then-governing law, explaining that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls" (internal quotation marks, alteration, and citation omitted)). Applying the third-party doctrine, consistent with controlling precedent, we can only conclude that the Fourth Amendment did not protect Sprint/Nextel's records of Defendants' CSLI.

United States v. Graham, 824 F.3d 421, 433, 437–38 (4th Cir. 2016).

The *Graham* holding and the South Carolina Court of Appeals' decision in *State v. Drayton*[8] are consistent with the overwhelming majority of cases to consider the issue. *E.g., In re United States for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *In re Cell Tower Records Under 18 U.S.C. 2703(D)*, 90 F.Supp.3d 673 (S.D.Tex. 2015); *United States v. Skinner*,

[8] *State v. Drayton*, 411 S.C. 533, 547-50, 769 S.E.2d 254, 262-63 (Ct. App. 2015)

690 F.3d 772, 777-78 (6th Cir. 2012); *United States v. Davis*, 785 F.3d 498, 513 (11th Cir., May 05, 2015) (en banc); *In re Applications of the United States for Orders Pursuant to Title 18, U.S. Code Section 2703(d)*, 509 F.Supp.2d 76, 81 (D. Mass. 2007) (no Fourth Amendment interest in prospective cell-site data).[9] The Fourth Amendment simply does not prohibit the government from obtaining business records that reveal sensitive information. Bank records, credit card records, and telephone records can reveal sensitive information *about* a suspect, but obtaining them from a third party is not a search *of* that suspect.

Further, South Carolina's Constitutional protection against unreasonable invasions of privacy does not apply to prevent law enforcement from obtaining CSLI, The privacy invasion from a §2702 voluntary disclosure of CSLI is minimal. First, unlike the GPS data from a tracking device installed by the government, cell site records are already known to the phone company, thereby diminishing any privacy interest in the records. *See Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) (identifying diminished privacy expectation as a relevant factor). Second, the generalized location information at issue here did not reveal highly private or sensitive information. Third, the statute's privacy protections requiring a showing of an emergency otherwise guard against improper acquisition or distribution of CSLI. *See King*, 133 S. Ct. at 1979-80 (considering statutory protections). The government can obtain cell site records either upon voluntary disclosure by a third party in limited circumstances or pursuant to a judicially-issued court order based on "specific and articulable facts" that the records "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2702 (c)(4) and § 2703(d). Moreover,

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[9] *See also United States v. Dye*, 2011 WL 1595255, *9 (N.D. Ohio April 27, 2011) (denying motion to suppress historical cell-site data); *United States v. Velasquez*, 2010 WL 4286276, *5 (N.D. Cal. Oct. 22, 2010) (same); *United States v. Benford*, 2010 WL 1266507, *3 (N.D. Ind. Mar. 26, 2010); *United States v. Suarez-Blanca*, 2008 WL 4200156, *8-*11 (N.D. Ga. Mar. 26, 2008) (same); *Mitchell v. State*, 25 So.3d 632, 635 (Fla. Dist. Ct. App. 2009) (same).

the statute prohibits willful improper disclosures of records obtained pursuant to § 2703(d), subjecting offenders to civil liability and administrative discipline. *See* 18 U.S.C. § 2707(a), (d), (g). These features minimize any privacy invasion.

By contrast, the government has a strong interest in obtaining CSLI. "Historical cell tower location records are routinely used to investigate the full gamut of state and federal crimes, including child abductions, bombings, kidnappings, murders, robberies, sex offenses, and terrorism-related offenses." *United States v. Davis*, 785 F.3d at 518. Moreover,

> [s]uch evidence is particularly valuable during the early stages of an investigation, when the police lack probable cause and are confronted with multiple suspects. In such cases, §2703(d) orders -- like other forms of compulsory process not subject to the search warrant procedure -- help to build probable cause against the guilty, deflect suspicion from the innocent, aid in the search for truth, and judiciously allocate scarce investigative resources.

Id. Obtaining CSLI records via voluntary disclosure or court order thus serve "compelling" societal interests in "promptly apprehending criminals," "preventing them from committing future offenses," and "vindicating the rights of innocent suspects." *Id.* In sum, "a traditional balancing of interests amply supports the reasonableness" of obtaining CSLI pursuant to the Stored Communications Act. *Id.* at 518.

Appellant cites *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001), *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015), and *State v. Weaver*, 374 S.C. 313, 649 S.E.2d 479 (2007),[10] for the proposition the State Constitutional right to privacy guarantees a heightened protection than the Fourth Amendment. (FBOA at p. 11.) However, all three of these cases concern a privacy interest in the defendant's home, automobile, or possession, or in other words, their

[10] Notably, in *Weaver*, the Justice Pleicones points out in his concurrence the defendant had no expectation of privacy in an automobile that he borrowed but did not belong to him. *State v. Weaver*, 374 S.C. 313, 326, 649 S.E.2d 479, 485 (2007).

"persons, houses, papers, and effects." *See* S.C. Const. Art. 1 §10. The cases are not applicable to the collection of data by a third party in the ordinary course of business, nor do they distinguish between content information, such as evidence inside a purse, automobile, or house, and non-content information, such as the size and color of the purse, the location of the automobile in the yard, and the address of the house on the particular street. Further, these cases have even less applicability to the case at hand. Appellant, who was not the owner of the phone, certainly had no heightened right to privacy in the non-content, third-party-collected transmittal information voluntarily disclosed by Sprint to aid in the investigation of a gruesome double homicide.

In sum, a search warrant was not required for police to obtain the subscriber information for Eric Cade's cell phone; the numbers dialed and the origin of calls received on it; or the historical CSLI records because Appellant did not have either a subjective or a reasonable expectation of privacy in this information. Further, investigators complied with the Stored Communications Act when the requested the records from Sprint to aid in their investigation of a brutal double homicide. Appellant's argument Jonathan Rhodes, who helped viciously murder this couple because his girlfriend held a grudge, was not a threat to anyone else is ludicrous. Appellant has not and cannot present this Court with any sound reason to find the trial court abused its discretion in finding the CSLI admissible under the facts of this case.

II. The trial court did not abuse its discretion in finding testimony about per call measurement data obtained from historical cell site location information records admissible, as have numerous state and federal jurisdictions, because the testimony was relevant and reliable in accordance with Rule 702, SCRE, and *State v. Council.*[11]

The per call measurement data is a limited portion of cell site location information provided by the cell phone carriers that approximates the distance of the phone from the tower receiving the signal based on the time required for the transmission of the data and a speed of light calculation. With respect to Appellant's case, that information was presented as an arc on certain slides of his Power Point presentation. The trial court, in keeping with numerous state and federal courts, determined the information met the required standards for reliability set forth in *State v. Council* and Rule 702, SCRE. Because Appellant cannot show the trial court abused its discretion in so admitting this testimony, any error in its admission was harmless beyond a reasonable doubt.

How the Issue Was Presented at Trial

At the pre-trial motions hearing, the State called Special Agent Richard Fennern with the FBI's Cellular Analysis Survey Team (CAST) to testify about the analysis of CSLI. (R. p. 4, lines 11-25.) Fennern had been employed by the FBI since 2009, and had a bachelor's degree in accounting and a two-year criminal justice degree. (R. p. 5, lines 1-8.) At the time of trial, the FBI had forty-two members of CAST working in the field of historical cellular record analysis. (R. p. 6, lines 6-21.) Fennern said the data may give a generalized location of where the cell phone is in relation to the cell towers, and well as where the phone been historically. (R. p. 7, lines 2-17.) As part of their training in analyzing this information, Fennern took a three day

[11] *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

course to learn how to plot the information obtained from the companies and a two week training course to learn how a cellphone network operates. (R. p. 8, lines 1-15.) Fennern then took another weeklong course on how to interpret anomalies in the data received then went through a selection process with all the major cell phone provider in which they met with the engineers who explained their networks and how the records are created. (R. p. 8, line 16 – p. 9, line 4.) Fennern additionally received more radio frequency training with engineers and continuously attends annual and semi-annual training to stay current with any updates to the provider networks. (R. p. 9, lines 5-11.) Fennern has worked on hundreds of cases in which he has analyzed cell phone data and views these records every day. (T. p. 9, lines 12-20.) As part of his training, Fennern is certified to use the diagnostic equipment used by the cell providers to test their network. CAST uses these tools to validate their mapping of a sector in which a phone is located. (R. p. 9, line 21 – p. 10, line 8.) Fennern has verified his finding through GPS monitoring, as well. (R. p. 10, lines 9-16.)

Fennern created a power point presentation of the numbers, dates, times, and cell towers relevant to the phone during the specified period surrounding the murders. (State's Ex. 103; R. p. 15, lines 1-22.) He also created maps of the towers and the projected range where the cell signal originated. (State's Ex. 103.) The FBI has access to the cell tower locations utilized by the cell providers via a website for law enforcement where the providers update their tower information as needed. (R. p. 18, line 20 – p. 19, line 13.) Agents use a mapping software to import the tower information and chart the towers used during a certain time. (R. p. 19, lines 15-18.)

Because the cell tower has a triangular antenna at the top, with each side covering a one hundred twenty degree sector, CAST can identify not only which cell tower received a signal, or ping, from a cell phone, but also from what direction the signal was received. (State's Ex. 103 at

3-4; R. p. 20, lines 11-21.) Once CAST has the call detail records for a particular number, the records will identify a specific cell tower and direction from which the signal was received, within a one hundred twenty degree sector. (State's Ex. 103 at 9; R. p. 21, line14 – p. 22, line 10.) Fennern can distinguish between calls and texts from the information contained in the records, as well as whether a call was incoming, outgoing, or routed to voicemail. (R. p. 23, lines 8-24; p. 24, line 10 – p. 25, line 12.) Fennern explained that a cell network has the ability to transfer a call from one tower to the next, depending on which tower has the clearest and strongest signal. (R. p. 26, line 16 – p. 27, line 3.) Sprint provides additional information called the per call measurement data (PCMD), which approximates the distance between the cell phone and the tower when the signal is received. (R. p. 27, lines 6-15.) In his PowerPoint demonstration, the PCMD is indicated by the arc. (State's Ex. 103 at 13, 15.) Sprint keeps this information within its engineering department to study its network capacity and to know where the phones are being used within its network for planning decisions. (R. p. 27, lines 17-21.) The PCMD is, in part, a measurement in nanoseconds how long it takes the radio frequency to go to the cell phone and return to the tower. Using that time and combined with the speed of light calculation, engineers can calculate the distance of the phone from the tower in miles. (R. p. 29, lines 8-14.) With that calculation, there is a margin of error, or variance, of approximately two hundred forty four meters. (R. p. 29, lines 15-19.) The variation can result from obstacles blocking the signal or interference from another signal. (R. p. 30, line 6 – p. 31, line 8.) Fennern testified in his experience, that variance has never resulted in a geographical difference of a few blocks. (R. p. 31, lines 18-21.) He explained that if the interference or blockage were too great, then the call would not go through. (R. p. 32, lines 6-16.)

PCMD also incorporates latitude and longitude, but Fennern explained that although Sprint provides that information, they cannot explain all the factors that affect that calculation. Fennern testified his analysis does not include consideration of latitude and longitude because the information is not accurate. (R. p. 32, line 17 – p. 33, line 22.)

Fennern's Power Point presentation included maps with v- shaped sectors indicating the coverage areas for relevant cell phone pings during the period surrounding the murders. (*See* State's Ex. 103 at 9-14.) The wedges showed the direction of the energy projected from the tower. (R. p. 38, lines 3-8.) The solicitor noted that other witnesses would corroborate the testimony of Agent Fennern by testifying of their location during the time of the cell phone pings. (R. p. 38, line 22 – p. 39, line 7.) Throughout his testimony, Fennern referred to the coverage area as being "consistent" with a call made from a particular location. (R. p. 44, lines 11-13; pp. 44-51.) Fennern also testified the CAST unit has a peer review process in place to verify the accuracy of their analysis before they appear in court. (R. p. 71, lines 8-16.) The particular analysis prepared by Fennern was accordingly reviewed by his team and verified as accurate. (R. p. 71, lines 17-21.)

On cross-examination, Fennern was asked about the disclaimer on the front of the report from Sprint indicating Sprint does not guarantee the accuracy of the location information in the records. (R. p. 67, lines 17-20.) Fennern noted he did not use the inaccurate information (latitude and longitude) in his analysis and testified the disclaimer likely resulted from representatives from the phone company being asked to testify about specific latitude and longitude points in the data provided. (R. p. 68, lines 1-9.) When defense counsel asked about a communication from Sprint advising law enforcement they could not testify to the accuracy of the PCMD, Fennern

pointed out that the communication was with the subpoena compliance officer, not an actual engineer. (R. p. 69, line 12 – p. 70, line 17.)

Appellant called Thomas Slovenski, owner of Cellular Forensics, a private business located in Greenville, South Carolina. (R. p. 72, lines 11-13.) Slovenski worked for various police agencies before establishing his own private investigations firm, later specializing in cellular phone and spyware forensics. (R. p. 73, lines 13-20.) Because of his status as a private citizen, he is not allowed to attend the same training with the engineers at the telecom companies as the FBI agents in the CAST unit. (R. p. 75, lines 15-23.) Slovenski testified he preaches verification, or, corroboration of the data by another means. (R. p. 77, line 22 – p. 78, line 8.) Because Fennern's analysis reviewed historical data from the night of the murders, Slovenski claimed his results could not be verified because officers could not "go back and see, oh, here's the phone. It matched up with my reading." (R. p. 78, line 9 -p. 79, line 8.) Slovensky testified the only way to confirm the results was with an eyewitness or video camera. (R. p. 79, lines 14-19.) Slovenski acknowledged he had not had the opportunity to work with PCMD as a member of law enforcement, with access to the same training and engineers with the cell phone companies. (R. p. 82, lines 1-24.)

Following the testimony, Appellant argued the PCMD indicating the distance from the tower to a particular area (the arc) should not be admitted because it lacked reliability. Defense counsel summarized the position with the following:

> And as you've heard, the argument's fairly simple, Sprint creates the records. Agent Fennern interprets those records. And Sprint says the records are not accurate and, therefore, they are not reliable.

(R. p. 91, lines 12-23.)

The solicitor pointed to the forty-six members of the FBI's CAST unit that use their extensive training to peer review each other's work. CAST members have testified over eight hundred times across the country and in various courts. (R. p. 93, line 20 – p. 94, line 2.) The solicitor argued the FBI's training and expertise in the area allowed the CAST unit to interpret the data accurately within a specified range and using only the reliable data from the PCMD. (R. p. 94, lines 11-23.) The three calls made in a reasonably short period of time (10:45, 11:02 and 11:02) corroborated the accuracy of the data because the three calls charted within the same sector. (R. p. 94, line 24 – p. 95, line 10.) Further, Agent Fennern testified he examined cell phone data almost every day with the methods employed by the CAST unit since its inception in 2005. (R. p. 95, lines 7-17.)

The Court ruled the evidence was admissible, finding the analysis was sufficiently peer reviewed by the CAST unit, that the analysis had been previously used in hundreds of cases prior to Appellant's and that Agent Fennern has testified in twenty cases prior, that the certification and training process ensured adequate quality controls and procedures, and that the application of mathematical formulas to the data provided was consistent with scientific laws and procedures. (R. pp. 95 – 98.) The court found the disclaimer language used by Sprint was not probative of the data's reliability. (R. p. 98, lines 9-15.)

Analysis

In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson v. Ford Motor Co*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he

"need not be a specialist in the particular branch of the field." *Id.* Finally, the substance of the testimony must be reliable. *Id.* In the case before the court, neither the State nor the defense seriously disputed whether the subject matter of historical cell site information was beyond the ordinary knowledge of the jury or whether Agent Fennern would qualify in as an expert in the field of CSLI analysis. Appellant does not challenge the reliability of the cell tower and sector information, which indicates which tower received the signal and from what direction the signal originated. Instead, Appellant only challenges the reliability of the PCMD (the arc), which was used to calculate the approximate distance between the cell tower and the cell phone. (FBOA at p. 22.)

While a challenge to an opinion's reliability generally goes to weight and not admissibility, the trial court acts as a gatekeeper in vetting its reliability and deeming the testimony admissible. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in *State v.Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). Under *Council*, the court must consider the following: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Id.* at 19, 515 S.E.2d at 517.

The trial court correctly identified this standard, and specifically applied the *Council* factors to the testimony given at the pretrial hearing. (R. pp. 106- 110.) A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *State v.* White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). Appellant cannot show the trial court abused his discretion in

finding the expert testimony admissible, particularly when the court's decision comports with numerous state and federal jurisdictions reaching the same conclusion.

With particularity, Appellant objects to the testimony concerning the per call measurement data (PCMD). Appellant argues the data is unreliable because the service provider cannot guarantee the accuracy of the data and will not disclose how it is determined. (IBOA at p. 28.). He also argues "it is impossible to determine the quality control procedures used by Sprint to ensure the reliability of PCMD or the consistency of the method with recognized scientific laws and procedures." (IBOA at p. 28.) Appellant's argument fails for several reasons.

First, Agent Fennern testified how he determined the direction of the v- shaped sectors based on the shape of the antennas on the cell tower and accounting for a deviation of approximately one hundred twenty degrees on either side. (State's Ex 103 at 3-4.) The records obtained pursuant to the voluntary disclosure specify the cell tower and sector the cell phone connected to at the beginning and end of each call. Additionally, the service providers release lists of their cell towers to law enforcement and maintain an updated website, which includes the location of the cell towers, with GPS coordinates for each tower, and the specifications for each of the sectors of the towers. By combining these resources, Agent Fennern plotted on a map the location of the precise cell tower and sector that the phones connected to for each phone call and the direction and width (i.e., 120°) of each sector. (State's Ex 103 at 9-11.) Agent Fennern, as well as the other members of the CAST unit, obtain extensive training in their field and have access to the principle engineers at the service providers to better understand their networks. Fennern explained that his analysis is subject to the peer review of his fellow team members before he testifies about a case, and the members of CAST have testified over 800 times in courts throughout the country. Agent Fennern also testified CAST has validated the location of a phone

after a specific event by doing a drive test to ensure the accuracy of their analysis. (R. p. 9, lines 21-25.) Fennern has also compared his results to GPS coordinates in instances in which a defendant would be wearing an ankle bracelet, for example. (R. p. 10, lines 9-16.) Moreover, any data CAST deemed unreliable, such as latitude and longitude, is excluded from his calculations. Clearly CAST utilizes various quality control procedures to ensure the accuracy and reliability of its data. Thus, the first and third *Council* factors are satisfied.

Concerning the second Council factor, the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous state and federal courts. *See, e.g.*, *People v. Fountain*, 62 N.E.3d 1107, 1124 (Il App. (2nd) 2016) ("the use of cell phone location records to determine the general location of a cell phone is not 'new' or 'novel' and has been widely accepted as reliable by numerous courts throughout the nation"); *People v. Powell*, 2015 WL 9590347 (Il App (5th) 2016) ("[t]his methodology has consistently been deemed reliable and has been widely accepted by numerous courts"); *Stevenson v. State*, 112 A.3d 959, 968 (Md.Ct.Spec.App.2015) (holding that the circuit court properly declined to conduct a *Frye* hearing into the use of call detail records to determine the time and location of defendant's cell phone's connection to particular cell towers and noting the technique's reliability and wide acceptance by numerous courts); *United States v. Schaffer*, 439 Fed.Appx. 344, 347 (5th Cir.2011) (concluding that the field of "historical cell site analysis" was "neither untested nor unestablished"); *United States v. Dean*, 2012 WL 6568229, at 5 (N.D.Ill. Dec. 14, 2012) (finding that expert testimony relating to cell site records was reliable and would assist the trier of fact to determine a fact at issue, and noting that "such testimony is generally accepted in the Seventh Circuit"); *United States v. Fama*, 2012 WL 6102700, at 3 (E.D.N.Y. Dec. 10, 2012) (noting that "[n]umerous federal courts have found similar testimony reliable and admissible"

(internal quotation marks omitted)). Further, Agent Fennern had extensive experience in this well-established field, and the methodology used by the CAST unit has had extensive prior application in state and federal courts. *United States v. Jones*, 918 F. Supp. 2d 1, 5 (D.D.C. 2013).

Lastly, as the Court noted, the method utilized by Agent Fennern and the CAST unit relies on numeric formulas calculated by the software in mapping out the sectors. The method required no engineering expertise, instead relying on knowledge of radio frequencies and math. Thus, the method of charting the PCMD, particularly as performed by Agent Fennern and the CAST unit, is based upon recognized scientific laws and procedures.

Overall, Agent Fennern's testimony relating to the location of the cell towers, the sectors used for each call, and the general location where the cell phones must have been when they connected to each tower, are the product of reliable principles and methods. Fennern's analysis demonstrates that he reliably applied that methodology to the facts of this case, and thus his testimony meets the reliability standards required under Rule 702, SCRE, and *Council.* Moreover, to the extent Agent Fennern's testimony relies on assumptions about the strength of the signal from a given cell tower or obstacles causing delay in frequency transmission, any challenges to those assumptions go to the weight of his testimony, not its reliability. The mere existence of factors affecting cell signal strength that the expert may not have taken into account goes to the weight of the expert's testimony and is properly the subject of cross-examination, but does not render the fundamental methodology of cell site analysis unreliable. *See, e.g., Berkeley Elec. Co-op, Inc. v. S.C. Pub. Serv. Comm'n,* 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991) (Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value.); *King v. Burlington N. Santa Fe Ry. Co.*, 762 N.W.2d

24, 44 (2009) ("Once the expert has established that he or she reliably assessed the data, the weight of the expert's conclusion is an issue for the jury to resolve.") Thus, the trial court did not abuse its discretion in finding the testimony reliable and therefore admissible.

Harmless Error Analysis

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." *State v. Commander*, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996) (citing *Chapman v. California*, 386 U.S. 18 (1967)). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Chavis*, 412 S.C. 101, 109–10, 771 S.E.2d 336, 340 (2015). The factors for consideration in any harmless error analysis include:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecutions' case.

Delaware v. Van Ardsall, 475 U.S. 673, 684 (1986).

In Appellant's case, the remaining evidence of his guilt conclusively proved Appellant acted in concert with his girlfriend Shirley Rogers when they confronted Gary and Helen Wells

at their home and murdered them. Notwithstanding Agent Fennern's testimony concerning the historical cell location information, including the per call measurement data, the jury considered the following evidence presented at trial:

1) The nature of crime scene, giving rise to the inference of two killers, specifically
   a) the number of wounds and brutality of the crime (R. p. 597);
   b) the disparate wounds on the victims (R. pp 246-256);
   c) the disparate locations of the victims when each was murdered (R. pp. 125-126);
2) The development of Shirley Rogers as culprit with motive and Rhodes as her only likely accomplice, proven by the following:
   a) the victims' blood in mini cooper (R. pp. 434-472);
   b) pictures of two of them in mini cooper (State's Ex 150)
   c) the photographs, calls, and texts to each other surrounding the time of the murders (State's Exhibit 103, State's Ex. 93);
   d) the nature of their romantic relationship (State's Ex. 93);
3) The testimony of Eric Cade about Appellant's unavailability the night of the murder and his changing story about his whereabouts that night; and (R. pp. 294-312);
4) Most importantly, the testimony of jailhouse informant Curtis McLeod, who corroborated:
   a) the vehicle driven to the scene of the murder (R. p. 503);
   b) the words spoken by the victims to Rogers before she and Rhodes forced them back inside (R. pp. 503-504);
   c) the separation of the victims into two bedrooms (R. pp. 504-505);

d) the wounds to the victims inflicted by knives and, specifically, a .32 caliber gun (R. pp. 504-506); and

e) the description of the items stolen, i.e., jewelry and bank cards. (R. p. 506, lines 11-17.)

When considering the totality of the evidence presented by the State, the admission of the CSLI, if the Court were to find error, could not have affected the outcome of the trial and was harmless beyond a reasonable doubt. The defense explained the presence of the phone near the Wells home by suggesting Appellant left the phone in the car, which was then driven by Shirley Rogers when she murdered Gary and Helen Wells. This defense similarly explained the victims' blood in the Mini Cooper. The CSLI placed Appellant's **belongings** near the scene of the crime, and perhaps could have been a plausible explanation. However, the sheer brutality of the crime scene and the informant's testimony corroborating the evidence placed Appellant **physically** at the scene. Given the amount of circumstantial evidence linking Appellant to the murders, any testimony concerning the location of his cell phone is unnecessary to reach the same conclusion. *State v. Brockmeyer*, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013) ("Because the improper admission of hearsay constitutes reversible error only when it results in prejudice, it is our view [defendant] has failed to show he was prejudiced, and thus, has failed to show reversible error.") As a result, any error in Agent Fennern's testimony on the CSLI proves harmless. Should this Court find the CSLI is admissible but the PCMD is not, the harmless error analysis favors the State even more. The arc indicated by the PCMD certainly gives rise to the inference of Appellant's guilt. On the other hand, the v-shaped sectors reflecting the location of the pinged cell towers (which are not challenged in Appellant's Issue II) also chart Appellant's approximate location on the night of the murders (See State's Ex. 103 at 17-19.)

Thus, even if the Court were to determine the trial court abused its discretion in admitting all or part of the historical cell site location information, Appellant's guilt is clear from the all the other State's evidence proving conclusively that Appellant aided his girlfriend in the murder Helen and Gary Wells.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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May 8, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

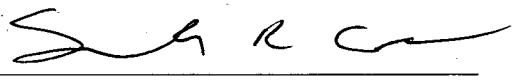
JONATHAN D. RHODES,

APPELLANT

Appellate Case No. 2015-002605

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent, complies with Rule 211(b), SCACR, and the August 13, 2007, Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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