THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Perry H. Gravely, Circuit Judge

Appellate Case No. 2017-002539

The State,.....Respondent,

v.

John Michael Hughes.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The state indicted the Appellant, John Michael Hughes (hereinafter "Hughes") on charges of murder, possession of a weapon during a violent crime, and conspiracy in connection with the shooting death of John Ferrell (hereinafter "Ferrell"), which occurred on January 24, 2015. (R. pp. ___; indictments.) Ferrell was Hughes' son-in-law. (R. pp. ___; transcript p. 68 ln. 21-25, p. 595 ln. 21-23.) Hughes filed a written motion for a determination of his immunity from prosecution and dismissal of the charges under S.C. Code Ann. § 16-11-410, *et seq.*, the South Carolina Protection of Persons and Property Act (hereinafter "the Act"). Just before the commencement of the trial, the lower court held a hearing on the motion and denied it. (R. pp. ___; transcript pp. 37-171.)

The thrust of Hughes' testimony in that hearing was that Ferrell, who was estranged from Hughes' daughter, had come to Hughes' house on the night in question to discuss pending family court custody proceedings involving Ferrell's children (who are also Hughes' grandchildren), then left, or appeared to leave. (R. pp. ___; transcript p. 45 ln. 16 through p. 54 ln. 13.) Hughes testified that, a short time later, he heard some thumping noises on the outside of his house that were out of the ordinary and, fearing that someone might be trying to enter the home he shared with his wife, his daughter, his daughter's boyfriend, and his grandchildren, called to his family to call 911 and decided to go outside with his pistol and investigate the source of the noises. (R. pp. ___; transcript p. 55 ln. 1-25.) He testified that, once outside, in the dark, he saw someone at his kitchen window who appeared to be partly in and partly out of the window and that called out to the person, who dropped down from the window and

advanced toward Hughes, despite Hughes' admonitions to the person not to move and that the police were being called. (R. pp. ___; transcript p. 59 ln. 2 through p. 60 ln. 19.) Hughes fired his pistol at the person multiple times, and the person stopped moving. (R. pp. ___; transcript p. 60 ln. 20 through p. 61 ln. 20.) He called 911, and, because a 911 call had already been made, police officers arrived as he was on the phone with the 911 operator. (R. pp. ___; transcript p. 62 ln. 23 through p. 63 ln. 6.) Hughes testified that he was not aware that the person he had shot was his son-in-law until an officer shined a light on the dead person's face. (R. pp. ___; transcript p. 66 ln. 22 through p. 67 ln. 4, p. 94 ln. 1-4.)

During the hearing and during the trial, Hughes' counsel objected to the introduction of testimony and test results regarding the use of a substance called leuco crystal violet, often referred to in the hearing and trial by its acronym, LCV. (R. pp. ___; transcript p. 123 ln. 15 through p. 135 ln. 20, p. 298 ln. 18 through p. 311 ln. 13, p. 313 ln. 20 through p. 317 ln. 7, p. 318 ln. 21 through p. 319 ln. 19, p. 322 ln. 2 through p. 323 ln. 13.) In the motion hearing, one of the state's witnesses described LCV as "a reagent and a presumptive test. It reacts to hemoglobin in blood. When you get a positive result, it will turn a violet color when sprayed and it makes contact with the suspected blood." (R. p. ___; transcript p. 123 ln. 4-8.) Hughes' objections in this regard were focused on the lack of a proper foundation for testimony about the usage of LCV and its results in this case, failure to authenticate the accuracy of the LCV testing process used or the accuracy of the results in this case, that the witness offering such testimony during the immunity motion hearing was offering expert opinions without ever having been qualified as an expert witness, that qualification of that

witness as an expert during trial was improper, that the threshold requisites for the admission of expert testimony about this scientific test had not been met, that the test is merely presumptive, that the test is unreliable, and that the testifying witnesses did not know how the LCV substance they said they used was made, did not know whether it was made properly, and did not know whether it was past its expiration date. (R. pp. ___; transcript p. 123 ln. 15 through p. 135 ln. 20, p. 298 ln. 18 through p. 311 ln. 13, p. 313 ln. 20 through p. 317 ln. 7, p. 318 ln. 21 through p. 319 ln. 19, p. 322 ln. 2 through p. 323 ln. 13.) Essentially, the state's counter-argument was that law enforcement agencies throughout the country use LCV, so testimony about LCV testing and its results in this case should be admitted. (R. pp. __; transcript p. 125 ln. 18 through p. 126 ln. 8, p. 307 ln. 20 through p. 308 ln. 7.) The state argued that "the reliability of [LCV tests] is used uniformly by law enforcement agencies throughout the county, it's been used by the FBI since 1993." (R. p. __; transcript p. 307 ln. 21-24.) The trial court allowed the testimony, even during the immunity motion hearing, during which Robert Parker, the testifying officer, had not been qualified by the court as an expert witness. (R. pp. ___; transcript p. 126 ln. 10 through p. 135 ln. 20.) The trial court also allowed the admission of the state's exhibits 30 through 32 and 39 through 57, which are photographs that purported to show visually the results of the LCV tests (i.e., bluish-purple coloration of liquid), during the immunity hearing. (R. pp. ___; transcript p. 136 ln. 6 through p. 138 ln. 16; state's exhs. 30-32, 39-57.) The trial court admitted the photographs at trial, as well. (R. pp. ___; transcript p. 324 ln. 6 through p. 326 ln. 2; state's exhs. 30-32, 39-57.)

Hughes moved to suppress the introduction of data evidence (text messages and incoming/outgoing call data) seized from his cell phone pursuant to a search warrant. (R. pp. ___; Hughes' motion to suppress; warrant re: John Michael Hughes' cell phone; transcript p. 400 ln. 11 through p. 409 ln. 2, p. 415 ln. 24 through p. 417 ln. 18, p. 418 ln. 9 through p. 420 ln. 10.) The trial court denied the motion to suppress and admitted the data from Hughes' cell phone into evidence over Hughes' objection. (R. pp. ___; transcript p. 418 ln. 9 through p. 420 ln. 10, p. 425 ln. 2 through p. 426 ln. 2; state's exh. 83.)

Hughes also moved to exclude the admission of the recording from a 911 call made by Hughes' daughter, Jane Hughes, arguing that Jane's statements on the recording were inadmissible hearsay and that their admission would also violate Hughes' rights under the Confrontation Clause. (R. pp. ___; transcript p. 409 ln. 3 through p. 415 ln. 18.) The trial court ruled that Jane's statements on the 911 call recording were admissible, ruling that they fell within the excited utterance exception to the hearsay rule and that they came within an exception to the Confrontation Clause. (R. pp. ___; transcript p. 417 ln. 21 through p. 418 ln. 8.) Jane did not testify at trial. (R. pp. ___; transcript.) The recording of the 911 call was admitted, over Hughes' objection, and played for the jury. (R. pp. ___; transcript p. 559 ln. 1 through p. 560 ln. 2, p. 561 ln. 15-19.)

At the close of the state's case, Hughes moved for a directed verdict as to the charge of conspiracy. (R. pp. ___; transcript p. 587 ln. 18-25.) The trial court denied the motion. (R. pp. ___; transcript p. 588 ln. 1-5.)

Hughes testified at trial, consistently with his testimony in the immunity hearing. (R. pp. ___; transcript p. 545 ln. 22 through p. 636 ln. 3.)

Hughes sought a jury charge on the presumption of reasonable fear of death or great bodily injury under S.C. Code Ann. § 16-11-400 when the person against whom deadly force is used was in the process of unlawfully and forcibly entering a dwelling or residence. (R. pp. ___; transcript p. 637 ln. 11 through p. 638 ln. 15.) The trial court declined to give such a charge, on the basis that the use of deadly force occurred in Hughes' yard and not inside his house. (R. pp. ___; transcript p. 639 ln. 16-23.) At the time the trial court charged the jury, Hughes objected to the lack of this requested charge. (R. pp. ___; transcript p. 704 ln. 8-16.)

The jury returned a verdict for the state on all three indictments. (R. pp. ___; verdict form; transcript p. 706 ln. 8 through p. 707 ln. 4.) Renewing all of his previous objections, Hughes moved for a new trial, which the trial court denied. (R. pp. ___; transcript p. 715 ln. 17-19.) The court sentenced Hughes to prison terms on all three convictions. (R. pp. ___; sentencing sheets.)

This appeal followed.

STANDARDS OF REVIEW

Admission of evidence. A trial court's decision to admit or exclude evidence is reviewed on appeal under an abuse of discretion standard. State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813 (2001). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

Qualification of witness as expert. The abuse of discretion standard of review also applies to review of the qualification of a witness as an expert. Graves v. CAS Medical Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). Accordingly, the inquiry is whether the trial "court's rulings 'either lack evidentiary support or are controlled by an error of law.'" Id. (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

Immunity determination. An appellate court also reviews a determination as to immunity under an abuse of discretion standard, conducting the same inquiry into whether the trial court's decision lacks evidentiary support or is controlled by an error of law. State v. Manning, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016).

Suppression of evidence. In reviewing a challenge under the Fourth Amendment, such as a motion to suppress evidence, an appellate court must affirm if there is any evidence to support the ruling. State v. Anderson, 415 S.C. 441, 446, 783 S.E.2d 51, 54 (2016). Accordingly, the appellate court reviews the trial court for clear error and will affirm if there is any evidence to support the ruling. Id.

Directed verdict. "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955)). "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because

suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." Id. at 236.

Jury charges. "When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial." State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016).

ARGUMENT

The trial court committed several errors that are likely to have critically affected the outcome of Hughes' trial. Even in isolation, any one of them would provide sufficient grounds to reverse and remand. Taken together, they loudly call for this court to reverse and remand so that Hughes may receive a trial in which these errors do not occur; in other words, so that he may receive the trial to which he was entitled.

I. The trial court never should have allowed the testimony about the LCV testing nor admitted the related exhibits.

The testimony about the LCV testing and results, as well as the photographs related thereto, was evidence that was scientific in character. The officer who provided that testimony should never have been qualified as an expert, and the required foundation for the admission of the evidence was never laid. The trial court never should have allowed this testimony or admitted those exhibits. The testimony and exhibits were critical to the state's case, as the state relied on them heavily to paint a picture of a murder scene that differed markedly from Hughes' testimony about what occurred. As discussed below, the trial court's rulings in this regard either lack evidentiary support, are controlled by an error of law, or both. The admission of this evidence by the trial court requires reversal by this court.

a. The LCV testimony and photographs were scientific evidence.

The testimony and exhibits that the trial court about the workings of LCV and the results of LCV application in this case was, beyond any reasonable question, scientific evidence. Officer Robert Parker, the witness the state used to present this evidence, testified that LCV is "a reagent and a presumptive test. It reacts to hemoglobin in blood. When you get a positive result, it will turn a violet color when sprayed and it makes contact with the suspected blood." (R. p. ___; transcript p. 123 ln. 4-8.) When the evidence was offered at the immunity hearing, the assistant solicitor acknowledged (perhaps without meaning to) that the state was relying on the LCV testing results as scientific evidence, stating that that "the chemical itself" was what had "the testimonial value in this case[.]" (R. p. __; transcript p. 129 ln. 9-10.) Officer Parker testified that the LCV is used "for science purposes[.]" (R. pp. ___; transcript p. 131 ln. 17.)

The use of LCV is a scientific testing process that is used for the presumptive detection of hemoglobin by the user of LCV essentially conducting a scientific experiment designed to result in the creation of visual evidence of the presence of iron or other metals in liquid that is suspected to be blood. (R. pp. ___; transcript p. 123 ln. 4-8, p. 125 ln. 14-7.) Testimony about and the visual depiction of the results of LCV testing are scientific evidence under Rule 702, SCRE, just as are "DNA test results, blood spatter interpretation, and bite mark comparisons." State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991); accord State v. Council, 335 S.C. 1, 17-21, 515 S.E.2d 508 (1999) (results of mitochondrial DNA analysis are scientific evidence).

The LCV testimony and related exhibits that were admitted in this case were scientific evidence under Rule 702, SCRE. Accordingly, that state would have had to establish a number of things in order for them to be properly admitted.

b. Parker was not qualified to give expert testimony about LCV.

"Scientific evidence is admissible under Rule 702, SCRE," when "(1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable . . . ; and (4) the probative value of the evidence outweighs its prejudicial effect." State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001).

To qualify a witness to provide expert testimony, a court is required to determine, unless the witness' qualification is stipulated, that the witness has "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter[.]" Graves, 401 S.C. at 74 (quoting Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)).

Parker, the witness through which the state elicited all of the testimony it offered about LCV had not "acquired the requisite knowledge and skill to qualify as an expert" about anything related to LCV. Id. He testified that he did not know how LCV is mixed, i.e., made. (R. pp. ___; transcript p. 314 ln. 20-22, p. 350 ln. 11-12.) Parker testified that he did not know what is in LCV, noting that it was his understanding that LCV is a mixture made from four parts, none of which he knew. (R. pp. ___; transcript p. 314 ln. 23 through p. 315 ln. 6, p. 349 ln. 23 through p. 350 ln. 10.) He testified that he did not "understand the chemical properties of LCB and how it works[,]" saying "No, sir. I just know the reaction." (R. p. ___; transcript p. 350 ln. 13-15.) He was not familiar with how long LCV takes to expire. (R. pp. ___; transcript p. 351 ln. 23

through p. 352 ln. 21.) He did not know the number of cases in which he had used LCV. (R. p. ___; transcript p. 315 ln. 7-9.) His minimal two-session "training" in LCV appears to have consisted of spraying it on pigs' blood. (R. pp. __; transcript p. 130 ln. 13-24, p. 314 ln. 6-19, p. 315 ln. 23 through p. 316 ln. 13.) His training on LCV did not include any instruction on quality control procedures designed to ensure that LCV works properly. (R. p. ___; transcript p. 316 ln. 14 through p. 317 ln. 3.) To use the phasing from a cross-examination question by Hughes' trial counsel, "basically, somebody told [Parker] if it turns blue, it's suspected blood[.]" (R. p. ___; transcript p. 350 ln. 16-17.)

That is not sufficient to establish Parker's qualification to testify as to this scientific evidence. If anything, Parker's testimony readily establishes that he had *not* "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter" of LCV testing. Graves, 401 S.C. at 74. It was error for the court to qualify him during the trial to provide expert testimony to the jury. (R. p. 317 ln. 5-6.)

As also discussed further below, it is of note that the court committed a related, important, and equally prejudicial, but different error with regard to allowing Parker to provide scientific testimony about LCV in the pre-trial immunity hearing. There, the court allowed this testimony, over Hughes' objection, without ever being asked by the state to qualify Parker as an expert witness, much less ever actually doing so. (R. pp. ___; transcript p. 126 ln. 10 through p. 135 ln. 20.) In the immunity hearing, the trial court never made any determination about whether Parker had the "knowledge and skill to qualify as an expert" at all. Graves, 401 S.C. at 74.

Parker should never have been allowed to give the testimony he did about LCV.

c. The LCV testing results were not authenticated.

"It is black letter law that evidence must be authenticated or identified in order to be admissible." State v. Brown, Op. No. 27836 (S.C. Sup. Ct. filed Aug. 29, 2018) (Shearouse Adv. Sh. No. 35 at 63, 70). In order for the proponent of evidence of the result of "a process or system used to produce" that result to authenticate it under Rule 901(b)(9), SCRE, the proponent must "present '[e]vidence describing [the] process or system used to produce'" the result and "'showing that the process or system produces an accurate result[.]'" Brown, (Shearouse Adv. Sh. No. 35 at 70, 72) (quoting Rule 901(b)(9), SCRE).

Parker's testimony did not establish this, and nothing else offered by the state did, either. As discussed above, Parker's understanding of LCV and how it works was limited at best. He did not provide evidence that described the LCV process, as he did not know how it works. He testified that LCV is merely a presumptive test that does from time to time produce false positives. (R. pp. ___; transcript p. 123 ln. 5, p. 125 ln. 12-17, p. 301 ln. 13-14, p. 304 ln. 1-3, p. 350 ln. 23-25.) In the immunity hearing, reminding the court that an LCV test "is just a presumptive" test, Parker pointed out that presumptive results of an LCV test involved in this case were later determined not even to be blood at all. (R. p. __; transcript p. 127 ln. 10-13.)

In Brown, what was at issue was the authentication of Global Positioning System (GPS) records. Brown, (Shearouse Adv. Sh. No. 35 at 67-69). The Supreme Court determined that "the testimony of [the officer] failed to authenticate [those records] because it shed no light on the accuracy of the GPS records[,]" rejecting the state's argument that the officer's testimony to the effect that GPS evidence is routinely

used in court proceedings was sufficient to authenticate the evidence. Id. at 71. The Court observed that the "general acceptance of GPS technology does not however, translate to the State getting a pass from making a minimum showing that the GPS records it seeks to introduce into evidence are accurate." Id.

The state made similar argument here, which the trial court appears to have accepted. (R. pp. __; transcript p. 125 ln. 18 through p. 126 ln. 8, p. 307 ln. 20 through p. 308 ln. 7.) That argument is just as wrong here as it was in Brown. There are differences between this case and Brown; however, they are not helpful to the state. Here, unlike in Brown, the state's evidence actually demonstrated the *inaccuracy* of LCV testing. (R. pp. ___; transcript p. 123 ln. 5, p. 125 ln. 12-17, p. 127 ln. 10-13, p. 301 ln. 13-14, p. 304 ln. 1-3, p. 350 ln. 23-25.)

The state failed to authenticate the LCV testing results, and it was error for the court to admit testimony about them and photographic depictions of them.

d. The required foundation for admission of this evidence was never laid.

"Scientific evidence is admissible under Rule 702, SCRE," when "(1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable . . . ; and (4) the probative value of the evidence outweighs its prejudicial effect." Jones, 343 S.C. at 572. The following factors are used to determine the reliability of scientific testimony: "(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." Graves, 401 S.C. at 74 (quoting Council, 335 S.C. at 19).

The LCV evidence admitted in this case does not pass this test. As discussed above, Parker should never have been deemed qualified as an expert, and, as also discussed above, Parker's testimony established that LCV testing is an inaccurate and unreliable mere presumptive test. (R. pp. ___; transcript p. 123 ln. 5, p. 125 ln. 12-17, p. 127 ln. 10-13, p. 301 ln. 13-14, p. 304 ln. 1-3, p. 350 ln. 23-25.)

The unreliability of the LCV evidence admitted in this case, as well as its underlying science, is further borne out by an examination of the record vis-à-vis the four factors used in determining the reliability of scientific evidence. No evidence of peer review of LCV testing or scientific publications concerning it was ever adduced in the immunity hearing or at trial, and Parker testified that he was not aware of any and had not reviewed any. (R. p. ___; transcript p. 308 ln. 13-19.) The closest that any testimony came to describing the prior application of LCV testing to the type of evidence involved in this case was Parker's general assertion that LCV testing is used by "other" law enforcement agencies in this country, including the Federal Bureau of Investigation, to look for suspected blood. (R. p. __; transcript p. 125 ln. 2-4, p. 302 ln. 9-21.) The closest that the record comes to indicating quality control procedures used to ensure reliability is Parker's vague assertion that "we do keep it refrigerated because once it's mixed, it only lasts a few months before it expires." (R. p. __; transcript p. 308 ln. 20-25.) Parker did not know how many months LCV is good before it expires and did not know whether the LCV used in this case was properly mixed or whether it had expired. (R. pp. ___; transcript p. 309 ln. 1 through p. 310 ln. 10.) No evidence at all was adduced about "the consistency of the method with recognized

scientific laws and procedures." Graves, 401 S.C. at 74 (quoting Council, 335 S.C. at 19).

Further, the state's argument to the effect that the LCV evidence was reliable because it is used by other law enforcement agencies and has been admitted in other court proceedings (R. pp. __; transcript p. 125 ln. 18 through p. 126 ln. 8, p. 307 ln. 20 through p. 308 ln. 7) holds no more water with respect to reliability than the testimony about GPS records' use in other proceedings held about authenticity in Brown. (Shearouse Adv. Sh. No. 35 at 71.)

In light of all of this, the LCV evidence admitted in the immunity hearing and at Hughes' trial had very little probative value and did nothing or next to nothing to assist the trier of fact in making an *accurate* determination of what occurred. Given that the state offered this evidence to say that the LCV testing showed the presence of blood in places inconsistent with Hughes' account of what happened, a major plank in the state's case, the evidence was highly and unfairly prejudicial.

II. The court should have granted the motion to suppress the cell phone records.

Hughes moved to suppress the introduction of data evidence (text messages and incoming/outgoing call data) seized from his cell phone pursuant to a search warrant Hughes argued was defective because the warrant stated only that the subscribing affiant believed that pertinent evidence would be found on *Ferrell's* cell phone. (R. pp. ___; Hughes' motion to suppress; warrant re: John Michael Hughes' cell phone; transcript p. 400 ln. 11 through p. 409 ln. 2, p. 415 ln. 24 through p. 417 ln. 18, p. 418 ln. 9 through p. 420 ln. 10.) The trial court denied the motion to suppress and, over Hughes' objection, admitted the data from Hughes' cell phone into evidence anyway.

(R. pp. ___; transcript p. 418 ln. 9 through p. 420 ln. 10, p. 425 ln. 2 through p. 426 ln. 2; state's exh. 83.)

The following passage from a recent opinion by our Supreme Court sheds light on why Hughes's position on the motion to suppress was correct:

> "The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Evidence seized in violation of the Fourth Amendment must be excluded from trial." State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). A search or seizure is reasonable under the Fourth Amendment when it is authorized by a warrant that is supported by probable cause. State v. Kinloch, 410 S.C. 612, 616, 767 S.E.2d 153, 155 (2014).
>
> In South Carolina, search warrants shall be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (2014). Probable cause determinations are evaluated under a totality-of-the-circumstances test in which:
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> > The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
>
> Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "[A] warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge. However, independent verification by law enforcement officers cures any defect." State v. 192 Coin-Operated Video Game Machs., 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000). "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). Sworn oral

> testimony is permissible to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 292, 494 S.E.2d 801, 803 (1997).
>
> "A reviewing court should give great deference to a magistrate's determination of probable cause." Id. at 290, 494 S.E.2d at 802. "The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).
>
> Dill challenges the veracity of the statements included in the search warrant affidavit. However, without questioning the veracity of those statements, we find Sergeant Moody's affidavit and oral testimony before the magistrate were insufficient for the magistrate to conclude there was a fair probability that evidence of Dill's manufacturing of methamphetamine would be found at his residence. The affidavit, as written, conveys only that the informant informed law enforcement he saw "numerous items that are used in the manufacture of methamphetamine." The affidavit does not relate what those items were, nor does the affidavit relate what was being done with the items. It simply relates there were unnamed items that can be used in the manufacture of methamphetamine. Also, the affidavit, as written, supplies no information supporting the initial mere conclusory assertion that there was "an active methamphetamine lab ... in operation." In particular, the affidavit does not relate who gave Moody this crucial information. Sergeant Moody's oral testimony to the magistrate did not provide any information as to the source of the information that an active lab was in operation; therefore, there was nothing presented to the magistrate to support a finding of probable cause that there was an active lab in operation.

State v. Dill, 423 S.C. 534, 542-43, 816 S.E.2d 557, 562 (2018).

In light of Dill, the facts of this case concerning the warrant and the search of Hughes' cell phone do not even present a close question as to whether the warrant and the search were valid; they were not. See id. No evidence of any supplemental oral

statements to the magistrate in obtaining this warrant was offered at all. Accordingly, all we have is what is contained in the warrant: that law enforcement wanted to search Hughes' cell phone data, not because any law enforcement officer believed Hughes' cell phone data might contain any evidence of a crime, but because *someone else's* cell phone was believed to contain evidence of a crime. (R. pp. ___; warrant re: Hughes' cell phone.) The affidavit supporting the warrant does not even contain a mere conclusory statement to the effect the Hughes' phone might contain evidence related to a crime, much less information that would have supported such a statement. (R. pp. ___; warrant re: Hughes' cell phone.) "In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, *but whether it is reasonable to believe that the items to be seized will be found in the place to be searched.*" State v. Thompson, 419 S.C. 250, 256, 797 S.E.2d 716, 719 (2017) (emphasis in original). The search warrant involved here was not supported by anything shown to the magistrate that tended to show that it was reasonable to believe that evidence related to a crime would be found in Hughes' cell phone data. Nothing established the grounds for the warrant, and it was simply defective. S.C. Code Ann. § 17-13-140.

Accepting the state's argument, the trial court ruled that the inevitable discovery rule allowed the state to present the cell phone data anyway. (R. p. ___; transcript p. 419 ln. 8-21.) The state's argument, however, lacked factual material in the record to support it. It seems that the court simply accepted the factual statements of the state's counsel as being true. Indeed, counsel for the state made it abundantly clear that the state had no intention of adducing any evidence to support the facts that it claimed

supported its inevitable discovery position. (R. p. ___; transcript p. 406 ln. 20-24.) The state made it plain that "we would not be introducing those other records in the trial. We are just relying on that to establish that there was, in fact, another avenue to get these records, that it was inevitable." (R. p. ___; transcript p. 406 ln. 20-24.) The record indicates that at no point was any of the factual material that the state contended supported its assertion of inevitable discovery ever presented to the trial court, in any way.

Arguments of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). Arguments of counsel were all that supported the state's contention of inevitable discovery and were the only thing on which the trial court relied to base its ruling on the motion to suppress. This was error. In light of the state's use of the cell phone records to attempt to show Hughes' involvement in a conspiracy to murder Ferrell, their admission at trial was prejudicial error that requires reversal.

III. The trial court erred in allowing the state to play the 911 recording.

The trial court ruled that Jane's statements on the 911 call recording were admissible, concluding that the statements fell within the excited utterance exception to the hearsay rule. (R. pp. ___; transcript p. 417 ln. 21-24.) This determination lacks evidentiary or legal support, and, accordingly, reversal is required in light of the prejudicial effect of this evidence on the trial.

> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The general rule is that hearsay is not admissible. Rule 802, SCRE. There are, however, numerous exceptions to this rule, such as the excited utterance exception. The rules of evidence define excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

State v. Ladner, 373 S.C. 103, 644 S.E.2d 684, 690-91 (2007).

The trial court ruled that Jane's statements on the 911 recording fell within the excited utterance exception to the hearsay rule. The statements do not meet the elements of this hearsay exception.

> [T]here are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. The excited utterance exception is based on the rationale that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception[.]

Id. at 691 (internal citations and quotation marks omitted).

The state's contention was not that Jane's process of reflective thought was suspended during the 911 call, i.e., that she was "excited" as contemplated by this hearsay exception, but, rather that Jane made statements of half-truths to the 911 operator and made statements (which she did not think the 911 operator could hear but which were still captured on the recording) indicative of a conspiracy to murder Ferrell. (R. pp. __; transcript p. 413 ln. 25 through p. 414 ln. 6.) As Hughes argued, though, if

Jane had the presence of mind to *lie* to the 911 operator and to direct actions in furtherance of a murder or conspiracy to commit one, then her statements on the 911 recording were "fundamentally different from the off-the-cuff, volunteered responses to law enforcement that the Court has allowed under the excited utterance exception." State v. Washington, 379 S.C. 120, 665 S.E.2d 602, 604 (2008). The state's contention about this evidence, and the way it argued this evidence, was that the events surrounding Ferrell's death did *not* have the effect of suspending Jane's process of reflective thought. (R. p. ___; transcript p. 658 ln. 4-24.) This statement did not fall under the excited utterance exception to the hearsay rule.

The state's alternative position was that Jane's statements fell under the co-conspirator statement exclusion from the definition of hearsay, found in Rule 801(d)(2)(E), SCRE. Nowhere in the record, however, is there any evidence (save perhaps this 911 recording itself, were one to view it very favorably to the state) that tends to show Jane's involvement in any conspiracy. Our courts "allow admission of a co-conspirator's statement only where there is evidence of the conspiracy *independent* of the statement sought to be admitted." State v. Gilchrist, 342 S.C. 369, 372, 536 S.E.2d 868 (2000) (emphasis in original). The state tried, but failed, to get testimony in the record that it hoped would establish such a conspiracy. (R. pp. ___; transcript p. 486 ln. 11 through p. 488 ln. 23.)

The admission of the 911 recording was reversible error.

IV. The trial court should have directed a verdict on the conspiracy charge.

> A conspiracy is "a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or

> unlawful means an object that is neither criminal nor unlawful. The essence of a conspiracy is the agreement."

State v. Sims, 387 S.C. 557, 694 S.E.2d 9, 13 (2010) (quotation marks omitted).

At the close of the state's case, Hughes moved for a directed verdict on conspiracy charge. (R. pp. ___; transcript p. 587 ln. 18-25.) The trial court denied the motion. (R. pp. ___; transcript p. 588 ln. 1-5.) This is surprising. There was no evidence adduced of Hughes' involvement in a conspiracy to murder Ferrell (or no evidence that ought to have been admitted). Further, the trial judge himself questioned whether the state had adduced any evidence of Hughes' involvement in such a conspiracy, *and the state agreed that no such evidence had been adduced*, saying, "Well, no. Not him." (R. pp. ___; transcript p. 487 ln. 22 through p. 488 ln. 2.)

The trial court should have directed a verdict as to the conspiracy charge, and the court should reverse the trial court and do so.

V. The trial court erred in failing to charge the jury on the presumption of reasonable fear of death or great bodily injury.

The trial court declined to charge the jury on the presumption established in S.C. Code Ann. § 16-11-440 that a person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when that person is in a place he has a right to be and the person against whom he uses deadly force is in the process of unlawfully and forcibly entering a dwelling, residence, or occupied vehicle. (R. pp. ___; transcript p. 637 ln. 14 through p. 638 ln. 23; request to charge re: presumption of reasonable fear.) The trial court's remarks on this, while not entirely clear about the court's reasoning, appear to indicate this was done because

Hughes was not inside the walls of his home at the time of the shooting. (R. p. __; transcript p. 638 ln. 16-23.)

It was prejudicial error not to charge the jury with this presumption. The requested charge correctly set forth the law of this state. S.C. Code Ann. § 16-11-440. The fact that Hughes was in the curtilage of his home rather than inside is of no moment, as the act, and thus the presumption in S.C. Code Ann. § 16-11-440, applies with equal force when the person using deadly force is in the curtilage of his home as it does when he is inside its walls. See State v. Scott, Op. No. 27834 (S.C. Sup. Ct. filed Aug. 29, 2018) (Shearouse Adv. Sh. No. 35 at 31, 35-36).

VI. The immunity hearing was irretrievably flawed, and Hughes is entitled to another immunity hearing.

There is no specific manner set by the Act or case law interpreting it for how a hearing is to be conducted to determine whether a defendant is immune under the Act from prosecution. State v. Manning, 418 S.C. at 43. That does not mean, however, that trial court may dispense with basic principles of law in conducting such a hearing. Respectfully to the trial court, that happened here.

First, as discussed above, the trial court allowed Parker to give scientific opinion testimony, over Hughes' objection, without Parker being qualified as an expert. (R. pp. ___; transcript p. 126 ln. 10 through p. 135 ln. 20.) That was not a harmless error; as also discussed above, Parker was not actually qualified to give such testimony. As also discussed above, the trial court should not have allowed in any of the LCV evidence.

Second, the trial court appears to have made an assumption that was not supported by the evidence adduced at the immunity hearing: that there was "all this

physical evidence that just absolutely shows that [Hughes'] story could not be possible[.]" (R. p. __; transcript 167 ln. 4-6.) The closest that anything came to that was the improperly admitted LCV evidence, and even it did not show that. The trial court concluded something from the evidence that the evidence did not show.

Third, the trial court was apparently operating under the assumption that the Act does not apply when a person is in the curtilage of his home. (R. p. __; transcript p. 638 ln. 16-23.) That is an incorrect assumption, as discussed above. See Scott, (Shearouse Adv. Sh. No. 35 at 35-36).

"The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to 'harmless error' analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy analysis by harmless error standards." LaSalle Bank Nat'l. Ass'n. v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009) (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. When a proceeding is structurally defective, nothing but reversal can cure such a defect. See id.

The trial court erred structurally in the manner in which it conducted the immunity hearing, as aforesaid, and also erred in the evidence it allowed to presented at that hearing. Hughes is entitled to a new, properly conducted hearing to determine whether he has immunity under the Act..

CONCLUSION

This court should reverse the denial of the directed verdict on the conspiracy charge outright. This court should reverse and remand the remaining issues for a new

immunity hearing and, should the murder and weapon possession charges still be pending at the conclusion of that hearing, a new trial on those charges.

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December 14, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Perry H. Gravely, Circuit Judge

Appellate Case No. 2017-002539

The State,.....Respondent,

v.

John Michael Hughes.....Appellant.

PROOF OF SERVICE

I certify that I served the foregoing brief by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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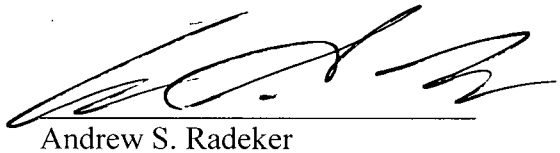

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