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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-002531

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SC Court of Appeals

State of South Carolina, ... Respondent

v.

ANGELITA WRIGHT ..... Appellant.

APPELLANT'S FINAL BRIEF

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800
jcalloway@mcgowanhood.com

Robert M. Dudek
South Carolina Commission on Indigent Defense
PO Box 11433
Columbia, SC 29211-1589
(803) 734-1330
rdudek@sccid.sc.gov

Attorneys for Appellant

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court err in qualifying the State's cell phone mapping expert who had only one day's training in mapping software and could not map Appellant's phone at key moments on the day Decedent was killed?
2. Did the circuit court err in permitting the State's cell phone mapping expert to testify as a rebuttal witness to complete the testimony he offered in the State's case-in-chief and to address issues not covered in the Appellant's defense?
3. Did the circuit court's erroneous admission of cell phone mapping testimony prejudice Appellant where her defense was based in part on not being present at the crime scene?

STATEMENT OF THE CASE

Appellant Angelita Wright was indicted on charges of murder and leaving the scene of an accident resulting in death in violation of S.C. Code Ann. § 56-5-1210(A)(3) in connection with the death of Wright's estranged husband Brent Lee Tessnear. (R. pp. 573-74). Wright pled not guilty to both charges and was tried by a Spartanburg County jury before the Honorable R. Keith Kelly on November 27-30, 2017. Wright was represented by Suzanne White and Richard Whelchel of the Seventh Circuit Public Defender's office. The State was represented by Joel Kozak and Kinli Abee of the South Carolina Attorney General's office. On November 30, 2017, the jury returned a guilty verdict for murder and did not enter a verdict on the remaining charge. (R. pp. 562, 572). The Honorable R. Keith Kelly sentenced Wright to 30 years' imprisonment on that same date. (R. p. 566-70). Wright filed a notice of appeal that was timely served on December 11, 2017.

STATEMENT OF THE FACTS

Brent Lee Tessnear ("Decedent") was discovered dead on the side of a Cowpens, S.C. roadway just before 3 a.m. on December 27, 2015. (R. pp. 67-69). Medical examiners concluded Decedent was struck by a vehicle and died from blunt force trauma to his internal organs. (R. pp. 309-10). Brandon Blackwood confessed to the killing, but it was Appellant Angelita Wright, Decedent's estranged wife, who was tried and convicted for murder.

The night before Decedent's death, Wright and Blackwood were seen riding in a white pickup truck at various locations in Pacolet and Spartanburg, S.C. Blackwood testified he was driving the truck for some portions of the evening into the overnight hours. (R. p. 196; see also R. pp. 112, 263-64). During one stop at a relative's house, several witnesses saw Wright behind the wheel. (R. pp. 122, 126, 129, 138). She appeared angry with Decedent for a variety of issues in

their tumultuous relationship. She suspected Decedent was involved in an affair. (R. pp. 186, 293). She had also learned earlier in the day Decedent had sold Christmas presents purchased for the couple's children and used the proceeds to buy drugs. (R. pp. 155, 196). Additionally, Decedent had recently posted explicit photos of Wright on social media. (R. pp. 118, 120, 132, 138, 140, 186, 200).

Witnesses at the relative's house heard Wright tell Decedent by phone that she would kill him if the photos were not taken down within two minutes. (R. p. 140). At least one person at the house told jurors Wright's words were not meant as a serious threat. (R. p. 121, lines 15-16). As Wright continued to vent her frustration, Blackwood volunteered to kill Decedent. (R. p. 140, line 20). As the night continued, Wright and Blackwood made an attempt to confront Decedent but he was not home. (R. p. 156). They then traveled to a convenience store in Spartanburg, and Wright later met up with friends at her home in Pacolet. (R. p. 156-57). She was picked up from her home by a different friend (who was also Decedent's sister) at approximately 5 a.m. on December 27, 2015. (R. p. 266-69).

Three hours earlier (2 a.m.), Decedent was seen alive for the final time at a Cowpens' convenience store located a short distance from the crime scene. (R. p. 81-82). When a passerby reported Decedent's body almost an hour later, officers from the Cowpens Police Department and Spartanburg County Sheriff's Office opened an investigation. Police learned several people had previously threatened Decedent with harm including one whose threats were serious enough that he once drove to Decedent's house armed with a lead pipe. (R. pp. 87, 91, 294). When Wright was questioned about Decedent's death, she denied being at the crime scene and gave officers the names of the friends who were visiting her in Pacolet when Decedent died. (R. pp. 156-57).

As the investigation continued, Blackwood directed officers' attention toward Wright by telling them she was driving the white pickup truck in Cowpens around the time of Decedent's death when she saw Decedent walking along the roadway and intentionally hit him despite Blackwood's protestations. (R. pp. 215-17). No other witnesses placed Wright at the crime scene in the hour (approximately 2-3 a.m.) before Decedent's body was discovered. Wright was arrested and charged with murder and leaving the scene of an accident resulting in death. The Seventh Circuit Solicitor, eventually replaced by the South Carolina Attorney General's office[1], prepared to try Wright with Blackwood as their key witness.

However, Blackwood's account of key events began to unravel in meetings with prosecutors and officers as Wright's trial date approached. Blackwood was near tears and confessed to driving the truck and killing Decedent. (R. p. 153). During an additional interview, Blackwood again contradicted his original statement implicating Wright. During a single session with investigators, Blackwood denied all involvement in Decedent's death, confessed to killing Decedent, confessed to the crime but insisted he was acting at Wright's direction, and admitted to killing Decedent but insisted it was an accident. (R. pp. 233-36). There was no consistency to Blackwood's statements. At some points he claimed to have been too drunk or sleepy on the night Decedent was killed to remember anything. (R. pp. 246-47). At others, Blackwood said he was not even sure Wright was in the truck when Decedent was killed. (R. p. 478). After officers read Blackwood his rights and implored him to tell the truth, Blackwood signed a confession and was charged with murdering Decedent. (R. p. 398).

[1] Wright's prosecution was transferred to the Attorney General's office due to two possible conflicts of interests. As a result of Blackwood's changing stories, an assistant solicitor became a witness for purposes of Wright's trial. Additionally, Blackwood's grandfather was a retired member of the Spartanburg County Sheriff's Office. (R. p. 370, lines 4-12).

Even so, the State chose to go forward with its case against Wright alone using Blackwood as its sole eyewitness. During his trial testimony, Blackwood implicated Wright fully and told jurors his multiple confessions were lies coerced by the police.[2] (R. pp. 215-17; 241). On cross-examination, Blackwood admitted he hoped his testimony against Wright would help him avoid a life sentence for the murder charge he still faced. (R. p. 255). To supplement Blackwood's dubious testimony, the State called Officer Brandon Letterman, who participated briefly in the crime scene investigation but focused mainly on gathering potentially incriminating data from Wright and Blackwood's cell phones. (R. pp. 344-358). Testifying during the State's case-in-chief, Letterman described for jurors how he photographed the contact list from Wright's phone and performed a forensic extraction of the device's data. (R. pp. 348-54).

During her defense, Wright called Tom Slovenski, a cell phone forensics and cell phone mapping expert who explained how cell phone use can be analyzed to approximate the phone owner's location. (R. pp. 411-17). Wright's phone was not equipped with GPS or other active tracking technology. However, when her phone made or received calls or texts, a "transaction" was noted on records obtained from her cell service provider. (R. p. 419). Each transaction identified which of the provider's strategically located towers transmitted the call or text. By mapping each transaction, Slovenski showed jurors Wright's approximate location at several important moments before and after Decedent was killed. Since Wright's phone did not receive or make any calls/texts between 2:18 – 3:08 a.m., there was no transactions to map during that time period. (R. p. 461). However, Slovenski's data did show that from December 26, 2015 at 11 p.m.

[2] Both the assistant solicitor and police investigator denied coercing or threatening Blackwood. (R. p. 380, lines 8-22; R. p. 392, lines 22-25).

to 5 a.m. the next morning, none of the transactions on Wright's phone corresponded with the cell tower that services the crime scene. (R. p. 443).

After Wright rested her case, the State attempted to recall Letterman as a rebuttal witness. (R. p. 482). Despite his earlier testimony on Wright's cell phone, the State argued Letterman was now stepping into a different role as a cell phone extraction and cell phone mapping expert. (R. p. 487). However, Letterman had not actually conducted an extraction of Wright's phone and admitted he could not map key texts from Wright's phone during the crucial 2 a.m. hour. (R. p. 497, line 13-21; R. p. 498, lines 12-14) (did not perform extraction on either phone); R. p. 499, lines 6-10 (never seen extraction data for Blackwood's phone). Letterman also admitted he had never before been qualified as an expert in cell phone mapping and had used the mapping software for only three months. (R. p. 484, lines 10-11; 486, lines 3-7). His only training for operating the mapping software was a one day class. (R. p. 485, lines 22-24). He had not published any articles or obtained any certifications related to cell phone mapping. (R. p. 486, lines 8-13). Wright's counsel asserted a timely objection to Letterman's qualifications that the circuit court overruled. (R. p. 487, lines 9-17; 488, lines 5-7). Wright's counsel also timely objected to Letterman being called as a reply expert, given his previous testimony on Wright's cell phone. (R. p. 487, lines 9-17). The circuit court overruled this objection as well. (R. p. 488, lines 12-17). After being qualified as an expert, Letterman was immediately asked a series of questions about Blackwood's cell phone records, an issue that was not part of Slovenski's analysis. (R. pp. 488-89).

On November 30, 2017, the jury returned a guilty verdict against Wright on the murder charge and did not reach the charge for leaving the scene of the accident resulting in death. (R. p. 562; R. p. 572). The circuit court sentenced Wright to 30 years' imprisonment. (R. pp. 569-70). This appeal followed.

STANDARD OF REVIEW

South Carolina law grants circuit courts discretion when considering a proposed expert's qualifications or the scope of evidence offered during the rebuttal stage of a criminal trial. Watson v. Ford Motor Co., 389 S.C. 434, 447, 699 S.E.2d 169 (2010) (citing Fields v. J. Haynes Waters Builders, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008)); State v. Huckabee, 388 S.C. 232, 240, 694 S.E.2d 781, 785 (Ct. App. 2010); State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983). A circuit court's rulings on these evidence admissibility issues are reviewed for an abuse of discretion. An abuse of discretion occurs when the circuit court's ruling was either controlled by an error of law or based on unsupported factual conclusions. State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2009). An evidence admissibility error may lead to reversal and a new trial where the appellant was prejudiced by improperly admitted evidence. State v. Garris, 394 S.C. 336, 350, 714 S.E.2d 888, 896 (Ct. App. 2011).

ARGUMENT

No disinterested person saw who killed Decedent during the early morning hours of December 27, 2015, in Cowpens, S.C. Two people were charged with Decedent's murder and one of them (Brandon Blackwood) confessed to the crime on multiple occasions. Yet, the State held off prosecuting Blackwood and focused its efforts on Appellant Angelita Wright, Decedent's estranged wife. Blackwood testified against Wright—now claiming she was the killer—but his history of lies and incentive to divert suspicion presented substantial credibility problems the State hoped to remedy by creating a circumstantial timeline of Wright's movements on the night Decedent was killed. Since none of the State's witnesses placed Wright at the crime scene in the

hour before Decedent's body was discovered, the State tried to make its case with location data garnered from Wright's cell phone.

However, unlike Wright's cell phone mapping expert (Tom Slovenski), the State's witness (Brandon Letterman) had never before been qualified as an expert in this field, had only one day of training on cell phone mapping software, and was unable to map Wright's phone for crucial portions of the night in question. Moreover, even though Letterman had testified during the State's case-in-chief regarding Wright's phone data, the State held back his cell phone mapping opinions for reply and then delved into issues that did not rebut or refute Slovenski's testimony. In sum, the circuit court abused its discretion in admitting Letterman's testimony both because he was not qualified to state opinions on cell phone mapping and because the testimony Letterman offered exceeded the scope of permissible rebuttal evidence.

1. The Circuit Court Erred in Qualifying Letterman as a Cell Phone Mapping Expert.

Brandon Letterman was admitted as an expert on cell phone extraction and cell phone mapping (R. p. 488, lines 5-7) even though he admitted he had not performed extractions on Wright or Blackwood's phones and admitted he was unable to map key text messages sent during the crucial hours before Decedent's body was discovered. (R. p. 497, line 13-21; R. p. 498, lines 12-14 (did not perform extraction on either phone); R. p. 499, lines 6-10 (never seen extraction data for Blackwood's phone). This ruling violates the governing legal standards for expert qualifications, and the circuit court abused its discretion in admitting Letterman's testimony.

Letterman was offered as a reply expert, and the admission of his testimony is governed by Rule 702, SCRE. Expert testimony admissibility depends on satisfaction of a three-prong test as determined by the trial judge. To be admitted, the "trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." State v.

Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). Even if this test is satisfied, the testimony may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, etc. Wilson v. Rivers, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004) (citing Rule 403, SCRE). This three-prong analysis is a threshold test and may not be circumvented by simply arguing defects in an expert's testimony go to weight and not admissibility. Watson v. Ford Motor Co., 389 S.C. 434, 447, 699 S.E.2d 169, 175 (2010).

Letterman was admitted over Wright's objection to his qualifications. (R. p. 487, lines 9-17). The qualifications test consists of two parts: (1) whether the proposed expert has "sufficient" qualifications; and (2) whether the proposed expert's testimony will be reliable. State v. Chavis, 412 S.C. 101, 106-07, 771 S.E.2d 336, 339 (2015) (citing State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009)). From South Carolina appellate court opinions considering the "sufficient" qualification component, three important principles emerge.

First, while there is no qualitative or quantitative blueprint for determining when a proposed expert knows enough, the "sufficiency" standard is a substantive threshold requirement not met by de minimis experience, knowledge, or training. State v. Andrews, Op. No. 5575 (S.C. Ct. App. filed July 18, 2018) (Shearouse Adv. Sh. No. 29 at 34-35). It is not enough that the proponent offers any suggestion of the proposed expert's knowledge. Courts must make a "broad," searching inquiry to determine whether the witness has the requisite "**level of skill or knowledge**." Fields, 376 S.C. at 556, 658 S.E.2d at 86 (emphasis added). A proposed expert must know enough to effectively guide the jury on a disputed issue and should not be cloaked with the credibility-wielding "expert" designation without first demonstrating substantial knowledge. State v. Henry, 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1997); State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) (it is an inescapable fact that jurors have a tendency to attach more

significance to the testimony of experts"); Watson, 389 S.C. at 449, 699 S.E.2d at 176 (holding that courts "should be cautious in conferring an expert label" on witnesses due to "excessive or undue weight" jurors may afford their testimony). Arguments that the expert's alleged deficiencies affect only weight and not admissibility may be raised only after the expert is closely vetted for the quantity and quality of his qualifications. White, 382 S.C. at 274, 676 S.E.2d at 689.

Second, the qualification standard is "relative," meaning the manner by which a person acquires expert qualifications varies from one field to another. Watson, 389 S.C. at 447, 699 S.E.2d at 175 (citing Wilson, 357 S.C. at 452, 593 S.E.2d at 605). Accordingly, it is useful to consider how admitted experts obtained their qualifications in the field when determining whether the proposed witness has sufficient qualifications to be labeled an expert. Third, qualifications should not be evaluated at a high level of generality. A witness who intends to offer opinions on a specific issue within his profession must demonstrate his expertise on that issue and not just his profession more generally. Watson, 389 S.C. at 447-48, 699 S.E.2d at 176. For example, a witness's general engineering experience and knowledge will not qualify him to offer conclusions on the engineering of a particular automobile component with which he has no experience. Id.; see also Walker v. The Bluffs Apartments, 324 S.C. 350, 477 S.E.2d 472, 473 (Ct. App. 1996) (finding licensed builder and building inspector not qualified to testify on architect's conduct because proposed witness had never constructed a structure and had no issue-specific training); State v. Priester, 301 S.C. 165, 168, 391 S.E.2d 227 (1990) (finding witness qualified to testify regarding defendant's blood-alcohol concentration was not qualified to testify on effect of alcohol quantity on behavior because witness "had no training whatsoever" in that area).

This Court recently applied these principles to exclude a police officer's proposed expert testimony. Andrews, Op. No. 5575 (S.C. Ct. App. filed July 18, 2018) (Shearouse Adv. Sh. No.

29 at 34-35). In Andrews, the defendant in a manslaughter prosecution asserted self-defense but gave police different accounts of the fatal encounter in the hours and days after his arrest. Id. at 28. The defendant proffered testimony from a police investigator who concluded the defendant's inculpatory statements in interrogations shortly after his arrest were not reliable because he had not yet had time to mentally process rapidly-changing events. Id. This court affirmed the circuit judge's exclusion of the investigator's testimony. Id. at 34. The circuit court found that, while the investigator had attended a class on the proper procedure for interviewing a shooter after a fatal incident, "his one-week course was insufficient qualification." Id. at 28. This Court agreed, holding that the class did not show sufficient qualification especially since it contained only one day of training on cognitive interviews. Id. at 35. Andrews also refused to consider the investigator's proposed qualifications in general terms. While he had twenty years' general law enforcement experience, the investigator had not proven his expertise on the specific issue he was called to address. Id. The same was true for the investigator's week-long class. That class did not show sufficient qualification for the proffered testimony because it covered the danger of inaccurate interrogation statements in a different context (officer-involved shootings) and the only arguably qualifying portion of the class lasted just one day. Id.

Letterman did not have substantially more knowledge, training, or experience than the proposed expert excluded in Andrews. The heart of Letterman's testimony was cell phone mapping, a skill for which Letterman had received just one day's training. (R. p. 485, lines 22-24). Just like the Andrews' witness, Letterman had never before been qualified as an expert on either cell phone extraction or mapping. (R. p. 486, lines 3-7). Letterman further testified that he had been using cell phone mapping software for just 3 months. (R. p. 484, lines 9-11). Letterman's dearth of qualifications is especially stark when considering the types of qualifications available

in the cell phone mapping field. A cell phone mapper can study in the university setting to stay up to date as technology changes, publish articles on the proper methods or the latest techniques, and obtain a certification from the mapping software manufacturer. Letterman did none of these things. (R. pp. 412-16).[3] While Wright is not suggesting a side-by-side comparison of Letterman's career path to that of the defense expert, Slovenski's credentials are useful for demonstrating the types of qualifications a person may pursue to obtain expertise in this challenging and evolving technological field. Letterman obtained no cell phone mapping certifications, authored no academic or industry-circulated publications in this discipline, and began using the software just three months earlier after one day of training. (R. pp. 485-87).

Letterman's testimony also failed to satisfy the second component of Chavis's qualification test as he failed to demonstrate his testimony would be reliable. 412 S.C. at 106-07, 771 S.E.2d at 339. The State bore the burden of showing Letterman possessed the learning, skill, or practical experience to provide opinion testimony and to show his testimony was reliable. State v. Myers, 301 S.C. 251, 255-56, 391 S.E.2d 551 (1990). However, while Letterman offered conclusions on Wright's locations during the critical hours before Decedent's body was discovered (R. pp. 495-96), he never explained how he reached those conclusions or why his methodology was reliable.[4] In fact, Letterman admitted he was unable to map a series of text messages sent during the critical 2 a.m. hour on the night Decedent was killed. (R. p. 497, line 13-21). Letterman did not explain to the jury why these critical text messages and their crucial location data could not be obtained from

[3] Letterman testified that he was certified in one cell phone extraction program (Cellebrite) but did not testify to any certification in the cell phone mapping software he used (GeoTime). (R. p. 484, lines 12-19).

[4] This stands in sharp contrast to Slovenski's testimony in which he explained how cell phone towers are placed, how data from the towers is captured, and how those data points are processed into a visual representation of the phone's movements over time. (R. pp. 417-43).

the mapping software he utilized. Letterman did not seem to know why. (R. p. 497, lines 16-18) (telling jurors the texts could not be mapped "for whatever reason").

This testimony further demonstrates Letterman lacked "sufficient" qualifications and that he failed to meet Rule 702's reliability standard. His inability to map key data is unsurprising given his minimal training and limited experience with the mapping software. His inability to explain why the data could not be mapped reflects on the reliability of Letterman's methods. Cf. Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 76-78, 735 S.E.2d 650, 656-57 (2012) (affirming exclusion of purported software experts who offered no explanation for how allegedly defective device's software failed).

In sum, by failing to conduct the broad qualification examination Fields demands and by failing to ensure Letterman demonstrated "sufficient" qualifications as discussed in Chavis and applied in Andrews, the circuit court misapplied the Rule 702, SCRE standard and improperly admitted Letterman's cell phone mapping testimony.

2. Letterman's Testimony Exceeded the Scope of Permissible Rebuttal Evidence.

Wright also objected to Letterman's testimony as going beyond the scope of permissible rebuttal evidence. (R. p. 487, lines 9-17; R. p. 488, lines 12-17). The circuit court overruled the objection and admitted the testimony ruling Letterman was a fact witness during his testimony in the State's case-in-chief and was being properly offered for a different purpose when testifying as an expert on reply. (R. p. 488, lines 15-17). This ruling misconstrued the facts and failed to properly apply the limited scope of rebuttal evidence.

In a criminal trial, the State may offer evidence after the defense rests its case, and the circuit court has discretion to admit additional testimony. However, that discretion must be exercised within the legal restrictions on the scope of rebuttal evidence. Reply evidence must be

limited to matters raised by the defense. State v. Garris, 394 S.C. 336, 350, 714 S.E.2d 888, 896 (Ct. App. 2011). A reply witness's testimony must "rebut" or "refute" what a defense witness said. State v. Durden, 264 S.C. 86, 90, 212 S.E.2d 587, 589 (1975). It is not enough that a proposed reply witness will address the same general subject matter as a defense witness. Nor is the restrictive scope of rebuttal evidence strictly a relevancy consideration. Even if proposed reply testimony is relevant, it cannot be admitted unless it strictly tracks the specific issues covered by the defense. Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 438 438 319 S.E.2d 695, 700 (1984). Limiting reply is a matter of trial fairness designed to prevent the state from holding back key evidence until a time when the defense lacks an effective opportunity to respond. Durden, 264 S.C. at 90, 212 S.E.2d at 589 (suggesting proposed reply testimony may be excluded when it goes beyond opponent's presentation and serves as a "surprise"); McGaha v. Mosley, 283 S.C. 268, 277, 322 S.E.2d 461, 466 (Ct. App. 1984). Moreover, reply evidence is limited to demand proper trial planning. The State may not use reply as a means of completing its case-in-chief. State v. Huckabee, 388 S.C. 232, 240, 694 S.E.2d 781, 785 (Ct. App. 2010) (citing State v. Farrow, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998)).

Recently, this Court applied these principles to reverse the admission of expert testimony as rebuttal evidence. State v. Prather, 422 S.C. 96, 810 S.E.2d 419 (Ct. App. 2017) (cert granted Aug. 3, 2018). Prather considered a defendant's conviction on murder and armed robbery charges where the circuit court admitted expert testimony on reply from a crime scene analyst. The analyst, a SLED criminal profiler, was purportedly offered to rebut the defendant's testimony denying involvement in the crime and claiming he was not present at the scene when the crime was committed. Id. at 102, 810 S.E.2d at 421-22. However, the expert was allowed to offer "broad expert testimony" including opinions on the perpetrator's motivations as indicated by the

placement of various objects discovered at the crime scene. Id. at 106-07, 810 S.E.2d at 426. This Court held the expert's testimony was improper reply evidence for two reasons. First, the expert did not rebut or refute the defendant's testimony because he went beyond the issues the defendant actually discussed. Id. at 107, 810 S.E.2d at 425. Second, the testimony was improper because the State was not permitted in reply to go beyond issues already in evidence in an effort to complete its case-in-chief. Id. at 106, 810 S.E.2d at 424.

Letterman should have been excluded for the same reasons. His purported expert testimony could only have been offered in reply to Slovenski, Wright's cell phone mapping expert. But, Letterman did not limit his testimony to issues Slovenski discussed. Immediately after the circuit court qualified him as an expert, Letterman began testifying about a forensic evaluation of Blackwood's phone even though Slovenski's testimony focused exclusively on mapping Wright's phone. Compare (R. p. 428, lines 5-13) with (R. p. 488-89, 494, lines 9-11). Just as in Prather, the State was improperly using rebuttal as an opportunity to complete its case-in-chief. Rebuttal was actually the second time Letterman testified in Wright's trial. Comparing his two direct examinations further demonstrates his reply testimony was the State attempting to tie up loose ends in its case and not a true rebuttal of specific issues Wright raised in her defense.

The circuit court distinguished Letterman's two trips to the witness stand by concluding the first was strictly as a fact witness and the second was for the distinct purpose of offering expert opinions. (R. p. 488, lines 15-17). Arguing in favor of Letterman's admission, the State noted Letterman had changed positions after the initial investigation and now served in the distinct role as cell phone forensic analyst. (R. p. 487, lines 19-23). However, Letterman did not partition his testimony as the State suggested. See (R. pp. 350-51) (showing parties' dispute as to whether Letterman's cell phone testimony was veering into expert opinions). His original testimony

touched on observations from the crime scene including the location of Wright's driver's license in the truck (R. pp. 346-47), but the bulk of the questions he received concerned cell phone evidence he collected and analyzed. (R. pp. 348-54).

Letterman specifically discussed a cell phone extraction performed on Wright's phone including his use of the Cellebrite computer program, the same software Letterman cited on reply in describing his alleged expertise. (R. p. 349, lines 8-12; R. p. 484, lines 4-11). Therefore, Letterman's second round of testimony was not a true rebuttal, but rather an effort to supplement his earlier statements with more detail the State either neglected to cover or chose to leave out from his original testimony. As Prather demonstrates, the reply stage of a trial is not meant as a supplement for issues that could or should have been covered earlier. 422 S.C. at 106, 810 S.E.2d at 424 (citing State v. McDowell, 272 S.C. 203, 206-07, 249 S.E.2d 916, 917 (1978) (describing the scope of rebuttal evidence in terms of whether it was "[]necessary" to discuss the issue in the proponent's case-in-chief)). Allowing the State to knowingly hold portions of Letterman's testimony back for reply would also present fundamental fairness questions implicating Wright's due process rights. See State v. Beaty, ___ S.C. ___, 813 S.E.2d 502, 511-12 (2018) (discussing "sandbagging" by state in closing argument) (citing Bailey v. State, 440 A.2d 997 (Del. 1982) (due process offended when State permitted to "sandbag" by making perfunctory opening statement and then argue in full in reply, thereby depriving defendant the opportunity to counter State's arguments)); State v. Hughes, 419 S.C. 149, 161, 796 S.E.2d 174, 181 (Ct. App. 2017) (discussing earlier Supreme Court ruling in Beaty along with its citations to Bailey and concluding "the supreme court agreed in part with Beaty's due process concern").

In sum, while the rebuttal stage of a trial serves an important function, a party should not be allowed to use it to gain the rhetorical advantage with the jury of both primacy and recency by

artificially partitioning a key witness's testimony. Both for this reason and because Letterman's reply did not rebut or refute what came before him, the circuit court abused its discretion in allowing the State to recall Letterman as a reply witness.

3. Wright was Prejudiced by the Evidence Improperly Admitted Against Her.

Errors in qualifying a proposed expert and in admitting an improper reply witness should lead to a new trial if the disputed evidence prejudiced the defendant. Garris, 394 S.C. at 350, 714 S.E.2d at 896. In the criminal context, prejudice is determined through a harmless error analysis with an error deemed harmless only if the Court finds "beyond a reasonable doubt the trial error did not contribute to the guilty verdict." State v. Tapp, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012). Harmless error is at its core an analysis of the materiality and prejudicial character of wrongfully admitted evidence. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (citing State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). Qualifying Letterman as an expert and permitting him to testify on reply were not harmless errors because Letterman was the sole expert the State offered, and his testimony concerned a crucial issue in the State's case against Wright.

Harmless error typically applies when the circuit court's mistake related to merely cumulative evidence or an issue insignificant to the jury's verdict. Beaty, 813 S.E.2d at 512 (finding no prejudice where error related to "relatively insignificant" issue); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) (admission of improper evidence is harmless where it is merely cumulative to other evidence). The State's cell phone mapping testimony is neither. The jury was asked to resolve two critical factual disputes—(1) whether Wright was present at the crime scene; and (2) if so, whether Wright or Blackwood was driving the truck that struck Decedent. Wright told police she was not at the scene and pointed to alibi witnesses to support her

claim. (R. pp. 154-57). In contrast, the State called Blackwood and relied on cell phone data to suggest Wright was at the scene. Since it was directly related to a crucial disputed fact, the improperly admitted evidence was not harmless error beyond a reasonable doubt. See State v. Ellis, 345 S.C. 175, 177-78, 547 S.E.2d 490, 491 (2001)) ("An officer's improper opinion which goes to the heart of the case is not harmless").

Moreover, Blackwood's testimony placing Wright at the scene does not render the cell phone mapping evidence merely cumulative. Blackwood's testimony presented unique credibility problems leading a reasonable juror to disregard his testimony in full. He told the jury Wright drove the truck over Decedent knowing who he was and intending to harm him. (R. pp. 215-17). However, Blackwood previously told police he was behind the wheel and he hit Decedent. (R. p. 222, lines 22-23). He made these confessions in signed written statements after receiving Miranda warnings. (R. p. 397, line 14 – p. 398, line 20). In the course of a single interview, Blackwood denied all involvement in Decedent's death, then confessed to the crime, then acknowledged driving but claimed Wright threatened him, and finally denied remembering anything that happened. (R. pp. 233-36). Blackwood drank heavily on the night Decedent was killed and told a friend days later that he did not remember the incident at all. (R. pp. 246-47). At one point, Blackwood admitted he was not even sure Wright was in the truck around the time of Decedent's death. (R. p. 478, lines 2-7). Blackwood's substantial credibility issues were matched by his potential bias. He too had been charged with Decedent's murder and admitted to jurors he hoped testimony implicating Wright could spare him a long prison sentence. (R. p. 255, lines 4-11).

A reasonable juror could easily conclude Blackwood's self-interested, constantly shifting account of Decedent's death had no evidentiary value and that, as a result, circumstantial evidence like cell phone data was all the more important for determining Wright's guilt or innocence. In

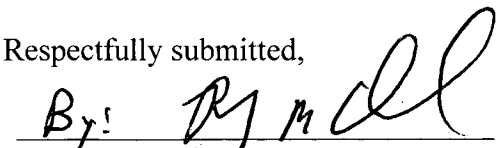
fact, at least two other courts have rejected harmless error arguments for cell phone mapping testimony in cases where the defendant's presence at the crime scene was contested. Collins v. State, 172 So.3d 724, 744 (Miss. 2015) (finding police officer who was improperly permitted to provide cell phone location testimony was "obviously" not harmless error in part because police officers holds the public trust); Wilder v. State, 991 A.2d 172, 200 (Md. 2010) (finding mapping evidence had "compelling" role in trial's outcome).

For these reasons, neither of the circuit court's errors should be dismissed as harmless. Prather held admitting improper reply evidence was prejudicial in a case like this one where the defendant denied being at the crime scene and the improperly admitted evidence suggested the defendant was actually there. 422 S.C. at 108-09, 810 S.E.2d at 425. Similarly, the circuit court's error in qualifying Letterman as an expert was prejudicial because, regardless of how they are charged by a circuit court, jurors tend to lend more credibility to testimony offered by a witness the court has labeled an expert. Kromah, 401 S.C. at 357, 737 S.E.2d at 499; Watson, 389 S.C. at 449, 699 S.E.2d at 176.

CONCLUSION

For all these reasons, Wright respectfully request the Court reverse her murder conviction and remand for a new trial. The circuit court abused its discretion by admitting a purported expert who lacked proper qualification and who was improperly offered as a rebuttal witness. These errors substantially prejudiced Wright's defense because they relate directly to key factual issues presented to the jury.

Respectfully submitted,

By: 

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive

Rock Hill, South Carolina 29732
803-327-7800
jcalloway@mcgowanhood.com

Robert M. Dudek
S.C Commission on Indigent Defense
PO Box 11433
Columbia, SC 29211-1433
rdudek@sccid.sc.gov

Attorneys for Appellant

Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-002531

State of South Carolina, ... Respondent

v.

Angelita Nicole Wright, ... Appellant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211, SCACR, Appellant's counsel certifies that the Appellant's Brief and Reply Brief comply with Rule 211(b), SCACR.

Respectfully submitted,

By: JM mcll

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
803-327-7800
jcalloway@mcgowanhood.com

Robert M. Dudek
S.C Commission on Indigent Defense
PO Box 11433
Columbia, SC 29211-1433
rdudek@sccid.sc.gov

Attorneys for Appellant

Columbia, South Carolina
August 15, 2019