STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

JUSTIN ANTONIO BUTLER,

Appellant.

Appellate Case No. 2016-001269

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

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

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The argument that the trial court erred in denying a motion to suppress based on defective search warrants under S.C. Code Ann. § 17-13-140 is barred from review as appellant conceded at trial search warrants were not necessary to obtain cell phone records; regardless, the totality of the circumstances demonstrates the warrants were not defective under South Carolina's general search warrant statute. Further, any error was harmless beyond a reasonable doubt where the records were cumulative to other evidence which established appellant's presence in South Carolina, including eyewitness testimony and appellant's own statements to the jury.

II. The trial court did not abuse its discretion in allowing a witness to testify as an expert in street culture and language where he did not allege appellant was a member of a gang or affiliated with anyone in a gang, the foundation information establishing the witness's expertise was not unduly prejudicial as it was accompanied by a limiting instruction explicitly informing the jury gang affiliation was not an issue at trial and appellant was not in a gang, and the expert's subsequent testimony helped the jury understand evidence presented at trial. Further, any error by the trial court was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

A Lexington County grand jury indicted appellant, Justin Antonio Butler, for murder, attempted murder, first-degree burglary, and possession of a weapon during the commission of a violent crime. (R.pp.698-709). Appellant proceeded to a jury trial on June 6, 2016, and was represented by James R. Snell and Johnson M. Snell. (R.p.1). D. Shawn Graham and Robert E. McNair of the Eleventh Circuit Solicitor's Office represented the State. (R.p.1).

On June 9, 2016, the jury found appellant guilty of all charges. (R.p.589, line 25-p.590, line 14). The Honorable R. Knox McMahon sentenced appellant to a term of fifty years for murder, a concurrent thirty years for attempted murder, a concurrent thirty years for burglary, and a consecutive five years for the weapons charge.[1] (R.p.599, line 17-p.600, line 11).

This appeal follows.

[1] Appellant is not currently incarcerated in the South Carolina Department of Corrections, but is in Alabama awaiting trial on an unrelated murder charge.

STATEMENT OF FACTS

A man was left bleeding in the dirt in Pelion while his younger brother lay dead nearby, shot in the head. (R.p.122, line 22-p.123, line 13; p.126, line 10-p.127, line 3; p.129, line 25-p.130, line 9; p.377, lines 12-14). Vonkeith Toland (Vonkeith) lived to tell the jury about the two men who traveled from Alabama and California to steal from him, and to describe the moments after being shot, crawling under his home to hide, and hearing the men ransacking the rooms inside. (R.p.112, lines 13-23; p.114, lines 1-9; p.123, lines 21-23; p.125, lines 9-23; p.127, lines 9-13; p.128, line 17-p.129, line 13; p.129, line 25-p.130, line 19).

Vonkeith testified he sold cars for a living at the time of the shooting and burglary.[2] (R.p.106, lines 11-24). Alonzo Walker (Zo) from California introduced Vonkeith and appellant, and the two men met three or four times prior to the deadly incident. (R.p.108, lines 14-24). Appellant, who Vonkeith only knew by his nickname of "Jonah," called Vonkeith from Alabama and wanted to know if Vonkeith had any cars for him to see. (R.p.107, line 20-p.108, line 13). Appellant and his co-defendant arrived at Vonkeith's mother's house on April 26, 2014, where several of Vonkeith's family members had gathered.[3] (R.p.112, lines 13-23; p.115, line 1-p.116, line 20).

Appellant, his co-defendant, Vonkeith, and Vonkeith's brother, Tycus Toland (Tycus), eventually went to Vonkeith's mobile home to look at a car. (R.p.106, lines 23-24; p.117, line 20-p.118, line 25). After a test drive, everyone stood around the car talking when the co-defendant "just reached on his side and instantly" shot Tycus "in the head." (R.p.120, line 22-

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[2] Vonkeith admitted he previously sold drugs and been arrested for trafficking cocaine, but denied he was doing so at the time of the incident. (R.p.107, lines 6-19; p.134, lines 5-18).

[3] Vonkeith also met the co-defendant through Zo, and knew the co-defendant also lived in California. (R.p.114, lines 1-9).

p.121, line 18; p.122, line 22-p.123, line 13; p.124, lines 5-9). Vonkeith testified:

> [My brother] couldn't even use his hands to knock it down it was so fast. It was unexpected. We never even would think that that's what was going on. These guys were acting like they wanted to buy a car just so they could get me alone.

(R.p.123, lines 19-23). Vonkeith stated appellant ran to his rental car to search for something, as Vonkeith backed away from the co-defendant who pointed a gun at him and said, "[Y]ou know what this is, you know what we coming for, we want it, you might as well give it up." (R.p.125, lines 9-23).

The co-defendant shot Vonkeith, and he fell and crawled away. (R.p.126, line 10-p.127, line 3). Vonkeith got behind his home, looked up, and saw appellant and his co-defendant both with guns pointed at him, threatening to kill him. (R.p.127, lines 9-13; p.128, lines 17-24). Vonkeith testified:

> [Appellant] asked me where the drugs and money are at. I mean I ain't got none. I was like – he was like man, I'm going to kill you if you don't tell me where to find them; I'm going to kill you. So finally I was like, well the money's in the house; you just got to go find it. My girlfriend hide it and he was like – and the other taller guy was like no, get up; you're going in the house with us and I was like man, you done shot me, I can't move; I can't go nowhere. And then finally he decided they both went to the back door and the [co-defendant] kicks the glass, sliding door glass and busts it out and then they enter the home.

(R.p.128, line 25-p.129, line 13). Vonkeith could hear the men going from room to room,[4] so he tried to call 911 on his cell phone, but the co-defendant walked outside and saw Vonkeith trying to call for help:

> [T]hen he started shooting me again and he shot me like maybe three or four times. I think that's when I got shot in the neck and

[4] A crime scene investigator testified the men ransacked every room. (R.p.33, lines 15-21). Several security cameras were set up outside, but the suspects took the recording equipment when they left. (R.p.33, line 22-p.34, line 7).

> just kind of like fell down and I just laid there like I was dead and he grabbed the phone out my hand and when he grabbed it I like picked my hand up with it and I just let my hand drop. I couldn't hold my hand up; I just let it drop and make him think that I was done and then he goes back in the house and I can hear them like ransacking the house even more.

(R.p.129, lines 14-p.130, line 9). Vonkeith testified he was scared the men would return and kill him, so he crawled under the mobile home and hid behind some concrete blocks.[5] (R.p.130, lines 10-19).

Appellant and his co-defendant eventually returned and Vonkeith heard appellant demand, "where he at," and Vonkeith saw them briefly look for him before they "sped off" in the rental car. (R.p.130, line 20-p.131, line 19). Vonkeith waited a few minutes, but could tell he was losing a lot of blood, so he crawled out and to the car to get a second cell phone to call for help. (R.p.131, line 21-p.132, line 20). While on the phone with 911, Vonkeith was not sure if he would survive, so he told the operator to contact Zo from California to get the real names of appellant and his co-defendant because Vonkeith only knew their nicknames and he wanted police to "know some type of way to find who did it." (R.p.132, line 21-p.133, line 7).

Sergeant Roy Mefford (Mefford) with the Lexington County Sheriff's Department testified Vonkeith's information to the 911 operator gave investigators a place to start looking for possible suspects.[6] (R.p.59, lines 17-18; p.64, line 13-p.65, line 15). Mefford looked for out-of-state phone numbers Vonkeith contacted around the time of the shooting. (R.p.65, line 16-p.67, line 1). Based on records from Vonkeith's cell phone and information from family members who

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[5] Investigators found five forty-caliber shell casings at the scene—one next to Tycus's body and four around the back of the mobile home where Vonkeith was found. (R.p.32, lines 6-21; p.127, lines 9-18).

[6] Following the shooting, Vonkeith was transported to the hospital and unable to communicate for several days. (R.p.40, lines 8-13; p.61, lines 17-22; p.86, line 22-p.87, line 11).

saw Vonkeith and Tycus with two unknown men in a rental car with an out-of-state license plate, Mefford testified he wanted to know where the owner of an area code "404" cell phone number was during the incident. (R.p.67, line 23-p.68, line 17). Mefford got a search warrant, reviewed the phone number's records, and determined the person who used the phone was involved in the shooting. (R.p.72, lines 4-22). To figure out who the phone belonged to, investigators called an out-of-state number the "404" user contacted and the woman who answered linked both that number and an area code "510" cell phone number to appellant, who lived in Muscle Shoals, Alabama and was the father of her child. (R.p.73, line 17-p.75, line 16; p.76, line 17-p.77, line 6; p.80, lines 18-23; p.198, lines 9-23). Further, an area code "707" cell phone number appellant contacted was later linked to the co-defendant. (R.p.82, line 20-p.83, line 23; p.85, lines 1-7). All of the cell phones were described at trial as prepaid accounts, or "burner phones," so the purchaser was not required to give a name or address when buying the phone. (R.p.166, lines 7-16; p.182, lines 17-20).

The investigation revealed appellant traveled by bus from Alabama to Atlanta, while his co-defendant flew from California to Atlanta and rented a car, and the men traveled together to South Carolina. (R.p.88, line 22-p.89, line 22; p.173, lines 3-15; p.175, lines 18-20; p.176, line 5-p.179, line 1; p.357, lines 11-22; p.359, line 23-p.360, line 19). Investigators in Lexington County contacted appellant on the "510" cell phone and he identified himself. (R.p.195, lines 24-25; p.196, lines 7-13; p.198, line 19-p.199, line 7). When asked, appellant said he had never been to South Carolina and he was in Alabama at the time of the shooting with his family who could verify his alibi. (R.p.199, lines 8-13; p.199, lines 18-20; p.200, lines 7-16).

Appellant admitted to the jury he was in South Carolina at the time of the murder, but attempted to explain his presence by testifying he was in the state to perform at music shows in

Greenwood. (R.p.422, lines 15-21). Appellant's stage name was "Jonah McCoy." (R.p.453, lines 23-24). Appellant testified his co-defendant participated in the shows. (R.p.422, line 22-p.423, line 5). Appellant stated it was his understanding Vonkeith traded cars for marijuana, and he texted his co-defendant to inform him he was taking drugs with him to help make up the full purchase price of a car. (R.p.420, line 21-p.421, line 5; p.424, line 12-p.425, line 4; p.426, lines 5-10).

Appellant testified he and his co-defendant were at Vonkeith's home to look at a car, and he did not know about the plan to rob anyone. (R.p.432, lines 5-20). Appellant stated he got back from a test drive and went to the rental car to charge his cell phone while Vonkeith walked away to answer a call, when appellant heard a gunshot. (R.p.440, line 10-p.441, line 23). Appellant testified he saw Vonkeith run toward his brother and appellant's co-defendant, and appellant heard more shots. (R.p.442, lines 14-24). Appellant stated he took cover and stayed at the car, and his co-defendant eventually returned and they left. (R.p.445, lines 11-19; p.446, lines 15-19). Appellant did not ask his co-defendant what happened and his co-defendant did not tell him. (R.p.450, lines 12-18). Appellant testified he did not have a gun, and he admitted he lied to investigators about where he was during the shooting. (R.p.448, line 7-p.449, line 12; p.451, line 16-p.452, line 7).

The trial court charged the jury extensively, including instructions on the theory of accomplice liability and mere presence. (R.p.563, line 14-p.586, line 24). The jury ultimately found appellant guilty. (R.p.589, line 25-p.590, line 14).

ARGUMENTS

I.

The argument that the trial court erred in denying a motion to suppress based on defective search warrants under S.C. Code Ann. § 17-13-140 is barred from review as appellant conceded at trial search warrants were not necessary to obtain cell phone records; regardless, the totality of the circumstances demonstrates the warrants were not defective under South Carolina's general search warrant statute. Further, any error was harmless beyond a reasonable doubt where the records were cumulative to other evidence which established appellant's presence in South Carolina, including eyewitness testimony and appellant's own statements to the jury.

The argument that the trial court erred in admitting cell phone records because the search warrants used to obtain them did not comply with the jurisdictional requirements of S.C. Code Ann. § 17-13-140 is not properly before the Court. Appellant conceded at trial search warrants were not necessary to obtain the records and cannot now complain of any prejudice. Moreover, the totality of the circumstances demonstrates: (1) the affidavits attached to the warrants established probable cause supporting the search; (2) the cell phone records were for communications that either originated in or terminated in South Carolina; (3) the nature of the communications established jurisdiction; and, (4) while the records were held at out-of-state offices, the companies asked investigators to send the warrants to those out-of-state addresses and the State was, in good faith, complying with that request. The search warrants were validly issued under the statute and would not have given the trial court any reason to suppress the cell phone records.

How the Issue Was Raised

Prior to trial, defense counsel moved to suppress evidence from records obtained using search warrants issued by a magistrate judge in South Carolina, but sent to out-of-state entities,

and argued the warrants violated South Carolina Code § 17-13-140. (R.p.4, lines 6-19). The warrants were for records of cell phones linked to appellant, Vonkeith Toland (Vonkeith), Tycus Toland, appellant's co-defendant, and other individuals. (R.pp.601-92). The search warrants were faxed to subpoena compliance and records offices for Verizon Wireless in San Angelo, Texas and Bedminster, New Jersey, Sprint in Overland Park, Kansas, T-Mobile in Parsippany, New Jersey, AT&T and Cingular Wireless in West Palm Beach, Florida, and MetroPCS Wireless in Richardson, Texas. (R.pp.601-92). Counsel maintained the local judge did not have jurisdiction over the area where the "documents and records and other materials" being sought were located as the warrants indicated they were being sent out of state and there was "no exception in the enabling statutes or any other provision of South Carolina law providing for" the warrants validity. (R.p.4, line 20-p.5, line 4). Counsel argued the warrants were invalid on their face. (R.p.5, lines 5-13).

Defense counsel acknowledged cell phone companies voluntarily comply with similar records requests, but ask for documentation for their file. (R.p.5, lines 14-25). Counsel asserted investigators could have accomplished "the exact same thing" by simply issuing a letter asking for the records instead of using a search warrant. (R.p.6, lines 1-6). Counsel argued there was nothing in the warrant to put the recipient on notice that it had "no force or applicability of law and compliance is strictly voluntary." (R.p.6, lines 7-15). Counsel again asserted the search warrants were invalid and unenforceable, and all phone records should be suppressed. (R.p.6, line 16-p.7, line 1).

The State argued appellant did not have an expectation of privacy in the records from any of the cell phone companies. (R.p.7, lines 4-6). The State maintained once an individual purchased a phone, the company owned the phone's records and decided if they would be

released. (R.p.7, lines 6-12). The State indicated investigators provided search warrants to the phone companies because the companies asked for them, and further sent the documents to out-of-state offices as requested rather than serve them on local agents. (R.p.8, line 3-p.9, line 5). Importantly, the State argued appellant lacked standing because he was attempting to assert the privacy rights of others as: (1) appellant *never* admitted the two cell phones the State could link to appellant were actually his, and (2) all of the other numbers belonged to the victims, appellant's co-defendant, and other individuals linked to the investigation. (R.p.9, line 7-p.10, line 12).

Defense counsel maintained he was not arguing the motion pursuant to the Fourth Amendment or any privacy right, but was instead asserting the warrants had no legal validity because the magistrate had no authority under law to sign the documents. (R.p.10, line 24-p.11, line 8).

Finding no precedent in South Carolina, the trial court relied on an unpublished case from Michigan to rule evidence from the cell phone records was admissible. (R.p.11, line 15-p.16, line 17; p.18, lines 3-17). In *People v. Wilson*, 2013 WL 2360239 (Mich. Ct. App. May 30, 2013), the defendant argued counsel was ineffective in failing to move to suppress cell phone records obtained pursuant to search warrants issued by a magistrate in Michigan, but served on a carrier in Texas. *Id.* at *9. The defendant argued the records should have been suppressed because the magistrate lacked jurisdiction to issue warrants to an out-of-state entity. *Id.* The court in *Wilson* noted the Fourth Amendment protections, indicated police treated the records as protected by the Fourth Amendment and obtained a search warrant, and found the warrants were valid because the evidence involved records of communications that occurred locally, not in Texas. *Id.* at *9-10.

The trial court summarized *Wilson* and denied the motion to suppress based on its findings, stating, "These are just records held by a third-party out-of-state custodian. I don't think there's any expectation of privacy." (R.p.11, line 15-p.14, line 19; p.16, lines 11-17; p.18, lines 3-17).

Defense counsel never asked for a ruling based on his suppression motion as argued that the search warrants violated S.C. Code Ann. § 17-13-140 and were invalid "on their face." (R.pp.4-5).

At trial, investigators testified they obtained records for several cell phones using the search warrants, including numbers linked to appellant, his co-defendant, and the victims. (R.p.68, lines 8-17; p.72, lines 4-22; p.81, lines 9-18; p.82, line 20-p.83, line 8). Vonkeith confirmed during trial and to investigators appellant contacted him using the area code"404" number—both calling and texting him—before and after appellant arrived in South Carolina. (R.p.139, line 3-p.141, line 2). Without objection, screenshots of Vonkeith's cell phone were admitted into evidence which showed communications he had with appellant. (R.p.139, lines 3-14). A review of the cell phone records confirmed Vonkeith's testimony and revealed contacts between Vonkeith and appellant on the "404" cell phone. (R.p.196, lines 14-22; p.197, lines 4-8).

Records custodians from two cell phone providers testified at trial. Joseph Trawicki worked at Sprint and testified the records for the area code "510" number linked to appellant and the co-defendant's area code "707" number showed other numbers the users called or texted and cell tower locations, indicating the men were in the Columbia area around the time of the shooting. (R.p.158, lines 13-19; p.159, line 11-p.160, line 9; p.168, lines 12-25). Further, Karen Milbrodt from Verizon testified the "404" cell phone was purchased at a store in Muscle Shoals,

Alabama. (R.p.180, lines 3-7; p.180, lines 21-24; p.184, lines 2-6).

Michael Phipps (Phipps) worked in computer forensics with the Lexington County Sheriff's Department and testified he extracted information from the area code "510" cell phone after obtaining a search warrant. (R.p.306, lines 15-21; p.307, lines 6-18; p.309, lines 3-20; p.310, lines 6-22). Phipps also analyzed records from the area code "404" cell phone. (R.p.315, lines 1-13). Phipps stated appellant contacted his co-defendant seventeen times from the "510" number, while contact with the victim Vonkeith was found only on the "404" number. (R.p.317, line 22-p.318, line 9; p.321, line 21-p.322, line 3). Moreover, the "404" cell phone was only active from April 23, 2014, to April 26, 2014—the days leading up to and including the day of the murder. (R.p.328, line 6-p.331, line 19). Phipps showed the jury a map which indicated on the day of the shooting, the "510" phone and the phone connected to the co-defendant moved from Greenwood where the men were staying, into Lexington County, and back again. (R.p.370, line 12-p.372, line 22).

As previously noted, while appellant initially denied ever spending time in South Carolina, appellant placed himself at the scene of the murder when he told the jury he was there to look at a car and in the state to perform at music shows in Greenwood. (R.pp.199-200; p.422; p.433).

Analysis

Appellant Conceded at Trial Search Warrants Were Not Necessary

Appellant cannot demonstrate the prejudice necessary to entitle him to relief where he conceded the issue at trial. During the pre-trial hearing on his motion, defense counsel conceded search warrants were not necessary to obtain the cell phone records he was seeking to suppress. (R.pp.5-6). Counsel maintained wireless carriers voluntarily comply with similar records

requests, sometimes when receiving only a letter from investigators. (R.p.6). That search warrants were not necessary became the law of the case at trial with counsel's concession and any argument on appeal regarding the validity of the warrants pursuant to S.C. Code Ann. § 17-13-140 is barred from this Court's review. *See Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (providing a party cannot concede an issue at trial and then complain on appeal).

Probable Cause Supported the Search Warrants and They Did Not Violate the Statute

Regardless, the search warrants did not violate the statute. The wireless companies requested warrants and further asked that they be sent to their out-of-state offices, so the State was complying with that directive. (R.pp.8-9). The warrants were supported by probable cause and involved communications which either originated in or terminated in South Carolina, satisfying the requirements of our general search warrant statute. *See* S.C. Code Ann. § 17-13-140 (providing, in part, search warrants may be issued to search property tending to show a particular person committed a crime where affidavits establish probable cause and the magistrate has jurisdiction over the area where the property to be searched is located).

Investigators did not initially have a name for the owner of the area code "404" cell phone, having found the number in Vonkeith Toland's phone, but knew the person was likely involved in the deadly shooting. The affidavit in support of the first search warrant, dated April 28, 2014, was an attempt to determine subscriber information, as well as numbers contacted, cell tower locations, and some data, and reads:

> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUTH IS ON THE SUBJECT PREMISES
>
> On April 26, 2014 at 1624 hours, the Lexington County Communication Center received a 911 call in reference to a shooting incident at the residence of [ ], Pelion, SC. Upon arrival,

> Deputies found Tycus Toland a deceased Black male with an apparent gunshot wound in front of a vehicle, in the front yard of the residence. Also in the yard, was Vonkeith Toland who was transported by EMS with gunshot wounds as well. Tycus Toland and Vonkeith Toland, the two Black males that suffered gunshot wounds, were said to be selling a vehicle and were meeting the unknown individuals when the shooting occurred. In the initial securing of the residence, Deputies observed video cameras affixed to and around the residence. It is known that calls were made to the victim from this number leading up to the incident. This Search Warrant is to locate any and all evidence surrounding the circumstances of the shooting.

(R.pp.615-18). Witnesses, not the records obtained from Verizon, linked appellant to the cell phone. Investigators issued a second search warrant, hoping to obtain payment information to further connect appellant to the phone. The affidavit in support of the warrant dated April 30, 2014, reads:

> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES
>
> On 04-26-2014 at 1624 hrs the Lexington County Communications Center received a 911 call in reference to a shooting incident at [ ] Pelion, SC. Upon arrival, deputies found Tycus Toland deceased, with an apparent gunshot wound in the front yard of the residence. Vonkeith Toland was also located at that residence and transported by EMS with gunshot wounds. During the course of the investigation it was discovered that V. Toland lives at this address and had a vehicle for sale there. He and his brother, T. Toland, were going there with two unidentified subjects to show them the vehicle for sale. These individuals are believed to have committed the shooting. Witnesses indicate that V. Toland had telephone contact with the suspect(s) prior to them arriving. Phone records of the victim, V. Toland, indicate he had several conversations with an individual at phone number 404-***-****. This number is believed to be associated with Justin Antonio Butler. These records are needed to verify Butler's association to this phone by purchase and payment information.

(R.pp.610-13). As previously stated, the "404" number was a prepaid phone, and Verizon could not provide any subscriber information for the phone and appellant never admitted the phone was

his.

Using a totality of the circumstances review, as mandated by our Supreme Court, it is clear the search warrants were properly issued. *See State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) ("When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances."). The warrants were supported by an affidavit establishing probable cause for the search, including specific facts learned from the investigation and why deputies believed appellant committed the crime. Further, while the records were held at the carrier's out-of-state offices, the records were for communications that either originated in or terminated in South Carolina and the companies asked that the warrants be sent to those addresses and the State was complying with that request. The magistrate had jurisdiction over the property. *See Wilson*, 2013 WL 2360239 at *9-10 (finding valid warrants issued in Michigan but served on a Texas wireless carrier where the evidence involved records of communications that occurred locally); *see generally State v. Drayton*, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (2015) (per curiam) (finding, in view of totality of circumstances, the affidavits in support of the warrants for historical cell site location data established probable cause for the search). Accordingly, the search warrants did not violate the statute.

Appellant Had No Expectation of Privacy in the Cell Phone Records and No Standing to Challenge Their Admission

While not dispositive or the issue raised on appeal, appellant also argues the trial court ruling on the motion pursuant to a Fourth Amendment analysis was error. Respondent maintains the lower court properly admitted the cell phone records as appellant had no standing to challenge their admissibility and no expectation of privacy in the documents. The evidence took the form of business records created and maintained by wireless providers which included phone numbers contacted, cell tower locations, and purchase information. Such records do not

implicate the Fourth Amendment.

As a threshold matter, appellant did not have standing to challenge the records he sought to suppress. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980) (discussing the facts considered in a standing analysis). The records for the area code "404" cell phone had no subscriber information or name associated with it as it was a prepaid phone, or "burner phone." (R.pp.183-84). The area code "510" cell phone was registered under the name "John McCoy" and was also a prepaid phone. (R.pp.169-70). In his motion to suppress, appellant *never* acknowledged the phones were his, or that he was using them at the relevant times. In addition, the other cell phones at issue were linked to appellant's co-defendant and other people connected to the investigation, and were not appellant's phones. Appellant's choice to disavow ownership of the cell phones makes it all the more important for this Court to enforce traditional rules governing the assertion of Fourth Amendment standing, as the trial court did in its ruling. Appellant chose to distance himself from the phone with no subscriber information and from the one registered under the name "John McCoy." Appellant should not then be allowed to later assert any privacy right in third-party records pertaining to the phones.

Turning to the privacy issue, the Fourth Amendment to the United States Constitution demands "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. South Carolina's constitution recognizes the same right, in nearly identical language. S.C. Const. art. I, § 10.

"The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). To claim protection under the Fourth Amendment, a person must show they have a legitimate expectation of privacy in the place searched. *State v. Missouri*, 361 S.C.

107, 112, 603 S.E.2d 594, 596 (2004). Neither our appellate courts nor the United State Supreme Court has held an individual has a reasonable expectation of privacy in third-party records which permit the government to deduce location information. Under the third-party doctrine, an individual has no legitimate expectation of privacy in information he voluntarily turns over to a third party. *United States v. Graham*, 824 F.3d 421, 424-25 (4th Cir. 2016) (en banc) (citing *Smith v. Maryland*, 442 U.S. 735 (1979) (telephone records of landline calls); *United States v. Miller*, 425 U.S. 435 (1976) (banks' business records)). The Supreme Court reasoned, by "revealing his affairs to another," a person "takes the risk . . . that the information will be conveyed by that person to the Government." *Graham*, 824 F.3d at 427 (citing *Miller*, 425 U.S. at 443). The Fourth Amendment does not protect information voluntarily disclosed to a third party because even a subjective expectation of privacy in such information is not reasonable. *Graham*, 824 F.3d at 427 (citing *Smith*, 442 U.S. at 743).

Here, appellant essentially objects to the fact that investigators could infer from cell phone records he was in South Carolina and at the scene of the shooting. Law enforcement regularly deduces facts about a person's movements from information from third parties, such as interviews with witnesses or credit card receipts. In this case, the inferences came from cell tower location data generated each time a phone number was contacted, either through a phone call or text, and appellant assumed the risk that the carrier would disclose this information to the government. *See Graham*, 824 F.3d at 427-28 (discussing the type of general location information a user discloses to a third-party wireless carrier during the "ordinary course" of cell phone ownership) (citations omitted). Cell phone users voluntarily convey their general location when they communicate using their devices, and carriers collect that information in the ordinary course of business. Merely because information about a person can be inferred from records in

the possession of third parties does not make the acquisition of it a Fourth Amendment search. Appellant had no expectation of privacy in the business records of the wireless carriers and the trial court correctly ruled to admit the evidence.

Therefore, while respondent submits the issue is barred from review because it was conceded at trial, the record demonstrates the trial court properly admitted the cell phone records and search warrants were properly issued.

Harmless Error

Any possible error in admitting the cell phone records was harmless beyond a reasonable doubt as other evidence conclusively established appellant's guilt. Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985); *see also State v. Baccus*, 367 S.C. 41, 55-56, 625 S.E.2d 216, 223-24 (2006) (employing a harmless error analysis in the case of a defective search warrant). No definite rule of law governs the finding of harmless error; rather, the error's materiality and prejudicial character must be determined from its relationship to the entire case. *Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151; *see also State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (listing the factors of a harmless error analysis, including the importance of the witness's testimony, whether the testimony was cumulative, the extent of cross-examination, and the overall strength of the State's case) (citation omitted).

The records were cumulative to other evidence that established appellant's presence in South Carolina and at the scene of the deadly shooting, including appellant's own testimony. Vonkeith Toland (Vonkeith) confirmed to investigators and during trial appellant contacted him using the area code "404" number before and after appellant arrived in South Carolina. (R.pp.139-141). Vonkeith testified he sent his address to appellant via text. (R.pp.116-17).

Without objection, screenshots of Vonkeith's cell phone were admitted into evidence which showed calls and texts with appellant. (R.p.139).

Vonkeith further testified appellant and his co-defendant were at his mother's house, and then went to his home to look at a car. (R.p.112; pp.115-16). Vonkeith also told the jury about his memory of the day of his brother's murder and being shot himself, and about appellant and his co-defendant threatening to kill him and ransacking his home. (R.pp.126-31). Vonkeith identified appellant in a photo lineup prior to trial and again in the courtroom, and testified he was "[a] hundred percent" certain he recognized appellant as one of the two men involved in the incident. (R.p.141, line 3-p.143, line 18).

In addition, Vonkeith's family members also recognized appellant and could identify him. A cousin saw appellant and his co-defendant on the day of the murder and identified appellant in a photo line-up and later in court. (R.p.241, lines 12-16; p.243, lines 2-6; p.243, lines 12-16; p.246, lines 1-3; p.246, line 19-p.247, line 10; p.247, line 20-p.248, line 9). Vonkeith's sister was at her mother's home on the day of the shooting and saw appellant, and knew Alonzo from California was a friend of her brother's, so she looked on his Instagram page for a picture and found one to give to investigators to help them identify appellant. (R.p.220, lines 7-9; p.220, line 22-p.221, line 17; p.222, lines 4-17; p.225, line 7-p.226, line 2; p.231, line 10-13; p.232, line 9-p.234, line 2).

Finally, appellant admitted he was in South Carolina at the time of the murder, but testified he was in the state to perform music shows. (R.p.422). Appellant's version of events to the jury was he was at Vonkeith's home to look at a car, but he did not know about any robbery plan and did not shoot anyone. (R.p.432; pp.440-42; pp.448-49). The jury ultimately did not believe appellant as it found him guilty of all indicted charges.

In light of the other evidence establishing appellant's presence at the scene and his involvement in the crime, it is clear the jury would have returned a guilty verdict even if the cell phone records had not been admitted at trial. Therefore, while respondent submits the trial court's ruling was not an abuse of discretion, any alleged error was harmless beyond a reasonable doubt.

II.

The trial court did not abuse its discretion in allowing a witness to testify as an expert in street culture and language where he did not allege appellant was a member of a gang or affiliated with anyone in a gang, the foundation information establishing the witness's expertise was not unduly prejudicial as it was accompanied by a limiting instruction explicitly informing the jury gang affiliation was not an issue at trial and appellant was not in a gang, and the expert's subsequent testimony helped the jury understand evidence presented at trial. Further, any error by the trial court was harmless beyond a reasonable doubt.

The trial court properly allowed a State's witness to establish his expertise in street culture and language where his knowledge helped the jury understand particular words appellant used in text communications. The witness's testimony regarding his experience obtained during years as a gang investigator was not unduly prejudicial where neither the expert nor the State ever alleged appellant was a member of a gang or was affiliated with anyone in a gang. Further, the trial court gave limiting instructions to the jury prior to and after the expert's testimony explaining to the jury gang affiliation was not an issue at trial and could not be considered during deliberations, and specifically stating appellant was not alleged to be involved in a gang. Any possible prejudice was cured by the instructions, which defense counsel did not object to either time they were given.

How the Issue Was Raised

Prior to *voir dire* of the State's expert on street culture and language, the solicitor indicated that while much of the witness's experience came from working with gangs, the State was not making any claims appellant was affiliated with gangs or that the crime was gang-related, but instead it was utilizing the expert to help the jury understand some of the words used in text messages. (R.p.381, lines 9-25; p.382, lines 16-20). Defense counsel objected, arguing the word "gang" itself was prejudicial, as was "street culture," and the State could avoid

prejudice by using the word "slang." (R.p.382, lines 4-14). The trial court found the witness would have to use the word "gang" to lay the foundation for his expertise, but the court would give the jury a limiting instruction to explain any reference to "gangs" should not be associated with appellant, was not at issue in the trial, and could not be discussed by the jury. (R.p.382, line 21-p.383, line 15).

Brian Zwolak (Zwolak) testified he was a gang instructor at the South Carolina Criminal Justice Academy. (R.p.386, line 22-p.387, line 4). He previously worked with the gang unit at the Columbia Police Department and the Midlands Gang Task Force. (R.p.387, line 9-p.388, line 19). Zwolak also went through his training in street culture and language, and was offered as an expert, subject to a renewed objection by defense counsel. (R.p.388, line 20-p.391, line 22). Prior to qualifying Zwolak as an expert, the court told the jury:

> Ladies and gentlemen of the jury panel, again normally a person cannot give opinion testimony. Normally when a person testifies they must testify as to what they saw, heard, sensed by smell or something of that nature. However, there is an exception when someone is qualified because of education, experience, or training, they are permitted to give their opinions in certain areas if the court qualifies them that way.
>
> This witness will be qualified in the area of street culture and language to give opinion testimony in that area. That does not mean that you must accept the opinion, but it is evidence for you, the jury, to use in any way you deem appropriate.
>
> Additionally, ladies and gentlemen, I'm going to give you what is known as the limit[ing] instruction concerning this testimony: As you heard, the officer's background and history and training, you hear the word gang many, many, many times and, of course, that word can be a buzz word in and of itself. There is no association, no association whatsoever between this defendant, Mr. Butler and membership in or association with any gang whatsoever. The – the issue about whether or not Mr. Butler is a member of, or associated with any member of a gang is not relevant to the trial of this case, and that particular issue is not an issue.

> And that area of gangs should not even be discussed, Mr. Foreman, by you or any of the ladies and gentlemen in the jury room at the time of your deliberations.
>
> I'm allowing this evidence solely for the purposes of interpreting street culture and language and as you all know, being American Citizens of Lexington, South Carolina, people are tried based on evidence, not whatever their status may be. They're not tried because of a label whatsoever. Even if they were, Mr. Butler does not have that label whatsoever.
>
> So it's street culture and language and you give it the weight and the value, whichever you deem appropriate, during your deliberations and your determinations of the facts and in this case and no other purpose whatsoever.

(R.p.391, line 23-p.393, line 12).

The trial continued without any objection to the sufficiency of the limiting instruction.

Zwolak then testified he reviewed some text messages sent to and from the area code "404" cell phone in the days before the murder. (R.p.393, line 18-p.394, line 6). Zwolak stated an incoming text to the number on April 23, 2014 asked, "Who's this?" and the response was "Jonah," which was appellant's nickname, and appellant confirmed the "404" number was his. (R.p.108, lines 9-13; p.395, line 24-p.396, line 7; p.396, line 22-p.397, line 5). Then, appellant texted with his co-defendant and firmed up their travel plans, before appellant told his co-defendant, "I got hammy with me" which Zwolak explained meant appellant would take a gun with him from Alabama. (R.p.397, line 6-p.399, line 20). On April 24, 2014, two days before the shooting, a friend texted appellant and asked him, "Are you going to need a hamma to fix that or no?" which Zwolak testified was a second reference to a gun, and appellant responded, "Most likely." (R.p.403, lines 16-24; p.405, lines 5-8). Finally, there were text messages on April 25, 2014 from Vonkeith Toland to appellant with an address, setting up a time to look at the car. (R.p.405, lines 9-19).

Following cross-examination, the trial court gave the jury a second limiting instruction, reminding them:

> Again, ladies and gentlemen, I'm going to revisit and reiterate my limit[ing] instructions to you. You give the testimony the weight and value you deem fit and appropriate. However, this has no association with Mr. Butler and gang activity, being a member of a gang or associated with any individual that is a member of a gang. He is solely an expert that's testified as to street culture and language and if you use it all, you use it solely for that purpose.
>
> And I will tell you further and completely when I instruct you on the law at the end of the case, that you do not have to accept the opinion or the basis of an opinion of any expert, even though it may be uncontroverted. You and you alone are the sole judges of the facts. Thank you.

(R.p.409, lines 6-19).

Defense counsel did not object to the sufficiency of the limiting instruction.

Standard of Review

The conduct of a criminal trial is left largely to the discretion of the trial court, and the appellate courts will not interfere unless the rights of a defendant were prejudiced. *State v. Bridges*, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Accordingly, this Court reviews errors of law only and is bound by the trial court's factual findings unless they were clearly erroneous. *Baccus*, 367 S.C. at 48, 625 S.E.2d at 220.

Analysis

Foundation Testimony of Expert's Experience Was Not Unduly Prejudicial

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. However, relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."). "Unfair prejudice means

an undue tendency to suggest [a] decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009).

Appellate courts review Rule 403 balancing determinations pursuant to an abuse discretion standard and give great deference to the trial court's decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004). A trial court's determination in regard to the comparative probative value and prejudicial effect of evidence should only be reversed in rare circumstances. *State v. Stephens*, 398 S.C. 314, 319, 728 S.E.2d 68, 71 (Ct. App. 2012).

Here, the background information establishing the expert's foundational knowledge of street culture and language was not unduly prejudicial. While the witness's experience was obtained during years as a gang investigator and courses about gangs, neither the State nor its expert ever alleged during trial appellant was a member of a gang or affiliated with anyone in a gang. The foundation information provided during *voir dire* was not itself evidence, but simply established the expert's qualifications. The expert's testimony during direct examination was limited to helping the jury understand particular words appellant used in text messages to his co-defendant and a friend and was not unfairly prejudicial under either case law or Rule 403. *See* Rule 403 (providing relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value); *Wiles*, 383 S.C. at 158, 679 S.E.2d at 176 (explaining unfair prejudice meant a tendency to suggest a decision on an improper basis). Further, the trial court gave lengthy and specific limiting instructions to the jury prior to and after the expert's testimony explaining to the jury gang affiliation was not an issue at trial and could not be considered by jurors during deliberations, and explicitly stating appellant was not alleged to be involved in a gang. Any possible prejudice was cured by the instructions, which defense counsel did not object to at the time they were given. *See Myers*, 359 S.C. at 48, 596 S.E.2d at 492 (holding

appellate courts give great deference to a trial court's decision regarding Rule 403 balancing determinations).

The State's expert provided context to the jury. His testimony helped jurors understand that when appellant used the word "hammy" or "hamma" in two texts, in the expert's opinion and experience, it meant he was bringing a gun with him from Alabama. (R.pp.397-99; p.403; p.405). When appellant testified, he claimed the term referred to a drug combination of cough syrup, marijuana, and a pain pill. (R.p.424, lines 2-11).

The expert never asserted appellant was affiliated with any gang, and the trial court was careful to give two thorough limiting instructions to the jury. Therefore, the testimony during *voir dire* was not unfairly prejudicial, and court did not err in allowing the witness to testify as an expert in street culture and language to help the jury better understand the evidence.

Harmless Error

Even if the Court were to find an abuse of discretion, any error was harmless beyond a reasonable doubt. As previously noted, the State presented a strong case against appellant. The jury heard evidence from Vonkeith Toland (Vonkeith), who knew appellant from multiple previous meetings, about appellant texting and calling him to set up a time to meet to look at a car. (R.pp.107-08; pp.117-18). Vonkeith also testified about seeing his brother's murder, being shot himself, and both appellant and his co-defendant threatening him with guns. (R.pp.120-31). Finally, investigators testified about connecting appellant to the crime, and the efforts by the suspects to cover-up their involvement by using burner phones and taking surveillance camera recording equipment when they left Vonkeith's home. (R.pp.33-34; pp.65-68; pp.72-77; p.80; p.198; p.166; p.182). The preliminary information from the State's expert during *voir dire* establishing his qualifications could not have reasonably impacted the jury's verdict. *See Mizzell*,

349 S.C. at 333, 563 S.E.2d at 318-19 (listing the factors of a harmless error analysis, including the importance of the witness's testimony, the extent of cross-examination, and the overall strength of the State's case).

Therefore, while respondent submits the trial court's ruling was not error, any alleged error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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February 20, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

JUSTIN ANTONIO BUTLER,

Appellant.

Appellate Case No. 2016-001269

CERTIFICATE OF COMPLIANCE

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

This 20th day of February, 2018.

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ATTORNEY FOR RESPONDENT

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CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Lara M. Caudy, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 20th day of February, 2018.

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