STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2018-001242

THE STATE,

Respondent,

vs.

TYRONE ANTHONY WALLACE, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ISAAC McDUFFIE STONE
Fourteenth Judicial Circuit Solicitor
P.O. Box 1880
Bluffton, South Carolina 29910
(843) 790-6194

ATTORNEYS FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in qualifying of a member of the solicitor's office as an expert in historical cell site analysis where the solicitor's employee lacked the knowledge, skill, experience, training or education necessary in order to render an opinion?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Was the trial court within its broad discretion to qualify the State's witness as an expert in historical cell site analysis wherein the record demonstrates the witness has received numerous trainings totaling 72 hours of education in the discipline from multiple sources, had evaluated more than 100 sets of phone records in performing the type of analysis offered at trial, and performs this work as his career discipline as the Director of the Fourteenth Circuit Intelligence Unit?

STATEMENT OF THE CASE

Appellant, Tyrone Wallace, Jr., was indicted by a Beaufort County Grand Jury for kidnapping and murder.(2015-GS-07-01907 & 2016-GS-07-00044). (R. pp. 591-96; indictments). He was represented by attorneys Trasi Campbell and Eric Staggs. (R. p. 59). Assistant Solicitors Mary C. Jones and Kimberly L. Smith represented the State at trial. The case was called to trial before the Honorable Carmen T. Mullen, and a jury, on June 18-22, 2018. (R. p. 58). The jury returned a guilty verdict for both charges against Appellant. (R. p. 522-523). Judge Mullen sentenced Appellant to twenty-five (25) years imprisonment for kidnapping and life imprisonment for the charge of murder. (R. p. 524). This appeal follows.

STANDARD OF REVIEW

"The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Id.* "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.* "There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is

beyond the scope of the jury's good judgment and common knowledge." *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997).

BRIEF ARGUMENT

The record demonstrates that Mr. Hightower was more than adequately qualified to serve as an expert in historical cell phone data and tracking. The record shows that Mr. Hightower had received numerous education courses in the field, amassing 72 hours of training in the discipline. Moreover, the record demonstrates that as Director of the Intelligence Unit for the Fourteenth Circuit, Mr. Hightower performs this type of analysis as the primary discipline of his career. Lastly, the record demonstrates that Mr. Hightower's extensive training and experience enables him to perform such analysis via software or by manual calculation. The court was well within its discretion to qualify Mr. Hightower to testify as an expert, and properly concluded that given the training and education presented, any dispute by the defense as to adequacy of the established experience would go to the weight of the evidence and not its admissibility. *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1997); *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 253–54, 487 S.E.2d 596, 598 (1997).

STATEMENT OF FACTS

The crime and evidence presented at trial

Andre Frazier aka "Dre" (hereinafter "Frazier") was good friends with Vermone Steve aka "Mony" (hereinafter "Victim"). The two were hanging out together with friends at Buffalo Wild Wings watching football on the afternoon of October 25, 2015. (R. p. 144-145). Victim decided to leave early and he and Frazier made plans to meet up again later at Victim's home after the game. (R. p. 145-146). When Frazier arrived at Victim's home that night, he saw Victim's parked car, but did not see Victim outside. He was instead met by co-defendant Varsheen Smith, (aka "Twiz") who was living with Victim at the time, and "Appellant". (R. p.

148; 150; 172-173; 317). After some initial greetings between them, Frazier confirmed that he had spoken with Victim recently. Twiz then lied to Frazier by informing him that Victim was inside the house. (R. p. 151). Frazier commented that Appellant was never threatened by Twiz and did not look nervous or scared. (R. p. 154; 170-172).

Both Twiz and Appellant followed behind Frazier as he walked toward the house. The two men then jumped him, and pushed him into the home. (R. p. 155-157). During the altercation Frazier testified that Twiz pulled a gun and pressed it to his stomach in the effort to force him into the home. (R. p. 157). At the instruction of Twiz, Appellant rifled through Frazier's pockets. (R. p. 158). With Twiz holding the gun to Frazier's head, Appellant then used Frazier's belt to tie Frazier's hands behind his back and forced a rag is into Frazier's mouth. (R. p. 159-161). Due to police being in the area for an unrelated call Frazier was ultimately released.[1] (R. p. 164-167; 293-294). Frazier testified that Appellant was not afraid during the encounter and did not seem as if he was being forced to be there. (R. p. 169-170). Frazier testified that as he was leaving, and seeing the cops had also left the area, Appellant jokingly explained that he might steal Victim's car. (R. p. 170-171). Before leaving Twiz told Frazier that Victim thought he was going to shoot him, so he ran away. (R. p. 168). Frazier testified that he spent the rest of the night and the next day trying to find or get in touch with Victim, but he was not able to do so. (R. p. 168-169).

Investigator George Erdel testified that the 911 call for shots fired at Victim's address came through at 8:34pm on October 25, 2015. (R. p. 294). Victim's residence on Greene Street was determined to be the location of the shooting. A single bullet was recovered from the wall of the residence. (R. p. 355-356). However, police were not able to locate any indication of blood

[1] Record shows that the nearby police call that interrupted the kidnapping occurred at 7:31pm. (R. p. 294).

spatter. (R. p. 337). Twenty-three (23) days later, on November 18, 20015, Victim's remains were found off of Pea Patch Road, on Saint Helena Island. (R. p. 181-182; 187-188; 263). The scene gave indication that area had been set on fire as a result of a gasoline accelerant. (R. p. 192-196; 202).

Dominique Cook (aka "Niko"), testified that he is currently incarcerated after having pled guilty to accessory after the fact for the murder of Victim. (R. p. 204-205). He confirmed that he had received no promises of leniency and in fact had pled guilty prior to discussions with the Solicitor in this matter. (R. p. 205). Mr. Cook testified that he first met Appellant on October 25, 2015, the night of the murder. Cook testified that he lived a couple of blocks from Greene Street, and that a friend of his, Tayquan Lampkin, needed to use his black Suzuki car and needed help handling some "dirt" late that night.[2] (R. p. 206-209). Cook met Appellant at Lampkin's house that night after agreeing to help; Appellant was alone when they met up with him. (R. p. 210). They ultimately went to Saint Helena Island, but Cook could not recall the name of the road. (R. p. 211). Mr. Cook had previously given a recorded statement to law enforcement, which was played for the jury. (R. p. 211-215)

During his trial testimony he confirmed that he told the police the individuals that were in the group that night. The group included Appellant, Twiz, Tayquan, and himself, and they all left from Tayquan's home. (R. p. 213). He testified that Appellant drove the car, because he was the only one who knew where to go. (R. p. 214). He then confirmed that he told authorities that they stopped the car in the open field, that Twiz and Appellant popped the trunk, pulled a man out of the trunk, and put him in the woods. (R. p. 214, lines 9 through p. 215, line 2). He also confirmed telling the authorities that Appellant brought out a gas can, dumped the gas, and then watched as

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[2] Cook later testified that he did not know what they needed help with specifically, but was told they had "just done some dirt". (R. p. 213).

the area went up in flames. (R. p. 214, line 15 through p. 215, line 7). Cook confirmed that he told authorities that they ultimately got the car stuck in the mud, and that Tyrone called a tow truck company to get them out. (R. p. 215, lines 3-7).

Cook also confirmed his statement to law enforcement that Appellant stated he went over to rob Victim, but that Victim started yelling, so he shot him. (R. p. 215, line 8 through p. 216, line 5). He further confirmed that Appellant told him that Victim was almost outside the side door of the home when he shot him and that he collected the shell casings after the shooting. (R. p. 216, lines 6-21). Cook further confirmed his statement to police that characterized Appellant as being Twiz's "right-hand man." (R. p. 217, lines 17-21).

Cook's testimony then revealed that he had not been completely truthful in his statements to the police, as he had attempted unsuccessfully to leave out his friend Tayquan, and that in fact Appellant had met them separately out in the field in a truck. (R. 218-219). However, he maintained that Appellant confessed to killing Victim, and that Appellant dumped the gasoline and set Victim's body on fire. (R. p. 219).

The State then introduced a letter written by Cook to Appellant indicating that he would not betray Appellant, and Cook argued that he had no evidence that Appellant committed a murder. (R. p. 221-222). On cross-examination, counsel for Appellant entered into evidence a letter from Mr. Cook. The letter was read aloud by Cook as stating:

> I, Dominique Cook, would like to – would like to recant my previous statement made to investigators on December 2, 2015. Varsheen Smith [Twiz] was not in the car with Tayquan and Tyrone Wallace and myself. – was not in the car with Tayquan Lampkin, Tyrone Wallace, and myself on the night of October 25, 2015, when we went to Pea Patch Lane on Ladies Island, to dispose of the body of Vermone (Mony) Steve.
> I would also like to make known that on the same night that Tayquan Lampkin was intoxicated and was asleep in the car for the duration of the crime. he was supposed to be getting dropped off at

> a friend's house, but ended up having to help out when my car became stuck in the mud. I apologize for deceiving the investigators, and take full responsibility for my actions.

(R. p. 230, line 16 through p. 231, line 12). Cook testified on cross-examination that he had not been completely truthful with law enforcement during his first statement. However, on redirect he agreed that the only recantation of his prior statement was to remove Varsheen Smith (Twiz) from the events of that night. (R. p. 232, line 12 through p. 233, line 19).

Mr. Dylan Hightower, whom the trial court qualified as an expert in historical cell site analysis and tracking, testified that he performed an analysis on the records from Appellant's cell phone number ***-***-1096. (R. p. 256). His analysis showed that the cell tower and sector used by Appellant's phone on October 25th corresponded to the both the time and general location for which the murder took place. Specifically, between 8:08pm to 8:37pm, Tower 209, sector 3 was utilized by Appellant's phone, and the coverage of that specific tower and sector encompasses Victim's home at the Greene Street address. [3] (R. p. 263, line 10 through p. 264, line 25; p. 276, lines 18-20; p. 270, lines 8-22). During that time the phone records also indicate that Appellant's phone was in contact with Twiz's cellphone five (5) times. (R. p. 264). Between the times of 8:11pm and 10:22pm, Appellant's phone was in contact with Tayquan Lampkin's phone ten (10) times. (R. p. 264). Mr. Hightower further tracked the phone's tower and sector analysis throughout the night, demonstrating to the jury Appellant's various tower usages and their corresponding coverage areas on the map of Beaufort, including the location where Victim's remains were later found. Mr. Hightower also testified that another thirteen calls were

[3] Mr. Hightower testified that tower 209 is located a mere 326 yards from Victim's residence.

made between Appellant's phone and Tayquan Lampkin's phone during the night, ending in the early morning of October 26, 2015.[4] (R. p. 265).

Mr. Hightower's testimony did not articulate to the jury that Appellant's phone was located at any precise location at any particular time, but merely in the coverage areas for the tower and sector used at given times. Moreover, cross-examination demonstrated that the coverage areas of each sector could extend as much as eight to ten miles from the tower, especially given the rural area concerned. (R. p. 272, line 14 through p. 273, line 11).

Forensic examination of the recovered bones and clothing found irregularities and a "kind of circular defect that had some fractures extending out from it" that was consistent with a gunshot wound to Victim. (R. p. 411, line 1 through p. 413, line 21). Forensic evidence was also taken from Cook's black Suzuki. (R. p. 235). Rubber weather stripping from the car was taken and tested for DNA evidence. (R. p. 235-242). The results of the DNA testing showed, to likelihood of 1 in 69 trillion, that Victim's DNA was on the weather stripping. (R. p. 246, lines 7-15). Cook and Twiz Smith were excluded from the DNA mixture recovered. (R. p. 246, lines 16-20). Appellant could not be excluded. (R. p. 246, line 24 through p. 247, line 12).

Appellant was arrested and over the course of three interviews with law enforcement ultimately admitted to his participation in kidnapping. A phone call he made to his mother while incarcerated recorded him telling his mother: "Let her know I was the man who did this to her son." (State's Exhibit #s: 43; 22-A & 22-B; 30-A & 30-B; and 40-A & 40-B)

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[4] Testimony offered during the pre-trial motion hearing demonstrated that Mr. Hightower performed the same analysis in both a software automation as well as a manual calculation as a means of assuring the accuracy of his findings. Both methods produced matching results in this case. (R. p. 49, line 16 through p. 51, line 21).

THE ISSUE AS IT WAS PRESENTED AT TRIAL

Defense counsel made a pre-trial motion in limine to suppress the State's historic cell site analysis and location testimony concerning Appellant's cell phone. Defense counsel argued that the State's witness, Mr. Dylan Hightower, was not adequately qualified to serve as an expert in the field of historical cell site analysis and therefore the evidence could not be properly admitted in the absence of a qualified expert witness. Judge Mullen took the matter up in an extensive pre-trial hearing.

The State conceded during the hearing that Mr. Hightower had never before been qualified as an expert. (R. p., 3; 6). However, the State argued that Mr. Hightower's education and experience in the field would be more than adequate to qualify him as an expert. In support, the State also provided the trial court with the resume of an expert who had recently been qualified in the field who had comparable qualifications to Mr. Hightower's. (R. p. 7, lines 1-9).

In consideration of the motion, Judge Mullen required considerable testimony on a number of matters so as to evaluate the arguments of counsel. Judge Mullen required testimony regarding 1) the expertise the State sought to have Mr. Hightower qualified for; 2) the basis of his expertise, including any education and training he has received in the desired discipline; 3) what certification or testing accompanied his training; and 4) a full proffer of the anticipated trial testimony to ensure that the content of Mr. Hightower's testimony did not exceed the expertise qualification requested by the State. (R. p. 4, line 20 through p. 6, line 9; p. 12, line 19 through p. 13, line 21; p. 15, lines 2-17; p. 17, line 10-23; p. 24, lines 17-25; p. 24, line 21 through p. 27, line 3; p. 37, line 1-6).

The testimony offered during hearing to address these inquiries demonstrated the following:

The Requested Expertise

The State sought to have Mr. Hightower qualified as an expert in historical cell phone data. The State explained that Appellant's phone records had been acquired through Verizon and they included call detail logs as well as location services. (R. p. 5, lines 9-25). In reference to existing case law, the trial court distinguished between "historical cell phone data" which would allow him to merely "interpret what the cell phone records say", but does not necessarily allow him to testify to location services. The court instructed that if the State wished to have Mr. Hightower testify regarding the tracking of a cell phone based on the "pinging" record, such testimony would require specific qualification as well. (R. p. 26, line 5 through p. 27, line 4). The court acknowledged that such testimony cannot be put forth through a lay person anymore. (R. p. 27, lines 5-14). The State indicated that it understood and sought to have Mr. Hightower qualified to testify as to tracking as well. (R. p. 27, lines 5-14).

Training and Experience

The State conceded that Mr. Hightower had never before been qualified as an expert in court. (R. p. 3, lines 12-20). The Solicitor explained that they desired to address the matter as a pretrial motion for that reason. The Solicitor also offered to the court, by way of comparison, a previously qualified expert who possessed a similar resume to Mr. Hightower. (R. p. 7, lines 1-9). Following this discussion, Judge Mullen heard testimony from Mr. Hightower regarding the basis of his qualifications.

At the time of trial, Mr. Hightower testified that he was currently serving as the director of the Intelligence Unit for the Fourteenth Circuit Solicitor's Office, and their team provides both investigative intelligence and digital forensics examination. (R. p. 9, lines 15-23). He testified that his role within the Unit is to conduct historical cell phone analysis for the actual records that are provided from cell service providers. (R. p. 10, lines 1-4). He explained that his job is to take the call detail records, analyze these records, and perform a geo spacial mapping with the

information provided. He testified that in order to perform this job he has taken special classes so as to obtain the proper knowledge and skill for the job. (R. p. 10, lines 23-25).

In summary, Mr. Hightower testified that he graduated from the University of South Carolina in 2010 with a Bachelor of Arts in Sociology. Following graduation, he obtained an internship with SLED, and then ultimately obtained a position with the Fourteenth Circuit Solicitor's Office. (R. p. 11, lines 2-7). As initial training, Mr. Hightower explained that the Solicitor arranged for him to participate in the four-week SLED Certified Intelligence Criminal Analyst course, an on-the-job training with SLED in basic criminal intelligence analysis. He testified that this four week course had a broad curriculum, and covered everything from locating individuals, use of various software and databases for obtaining information, as well as the basic knowledge of cell phone forensics and cellular analysis. (R. p. 11, lines 7-19; p. 32, lines 21-25). Mr. Hightower then explained that he obtained more in-depth training in the field of cellular analysis by attending a one-week course with SLED called "PenLink" that instructs participants on how to read cellular records, how to map those records, how to use their software, how to import the records and then use the software to perform the analysis. (R. p. 11, line 23 through p. 12, line 5). In addition to that course, in 2014, Mr. Hightower took a two-day course called "Fundamentals of Call Detail Records Analysis." He testified that the class dealt primarily with manual search and analysis of cellular records, without the use of separate software. He informed the court that the class teaches you how to read the records in its cell format, how to map them, as well as instruction on how tower sectors work. (R. p. 12, lines 7-16). Mr. Hightower next informed the court that he also took a one-day course on mobile forensics as a cellular forensic operation in Myrtle Beach, South Carolina. Lastly, Mr. Hightower informed the court that approximately one month before trial he most recently took a "FBI Cell Site Analysis Course"

which he noted was a two-day course in historical cell site analysis. (R. p. 14, lines 12-21; p. 33, lines 19-25).

In addition to these numerous trainings Mr. Hightower has taken thus far in his career, he is also required to take an online training course once per year in order to stay updated on the frequent changes in technology with cellular devices. He explained that he is a member of the National Domestic Communications Assistance Center, and that those trainings are offered to him through his membership. (R. p. 15). He testified that he had taken one of these courses each year for the previous seven years prior to trial, and these classes likewise include sector and tower analysis. (R. p. 14, line 18 through p. 16, line 17). At the questioning of Judge Mullen, Mr. Hightower testified that in total he had received 72 hours of training courses. (R. p. 24, lines 11-24). Regarding experience, Mr. Hightower testified that he had reviewed and analyzed between 100 and 120 different sets of cellular records. (R. p. 29, line 24 through p. 30, line 1).

Certification and Testing

At the questioning of the court, Mr. Hightower testified that he received a certification in each of his classes he attended. (R. p. 13, lines 16-21; p. 12, line 19 through p. 13, line 9; p. 14, lines 12-21;). He confirmed for the court that as part of these classes the instructors test and certify his work. (R. p. 12, line 18 through p. 13, line 11). He further explained that tests, which he referred to as "student practicals" are given to the whole class. (R. p. 13, lines 16-23). Mr. Hightower testified during cross-examination that he also sought further review from his instructors during the courses to ensure his work was accurate. (R. p. 29, lines 2-6).

In response to his testimony that he receives certifications from each of the courses he attends, the court asked what exactly Mr. Hightower becomes certified in as a result. Mr. Hightower explained that these classes certify him in an "understanding of how to read records, as well as an understanding of how cell site towers work, as well as sectors. All entities of call

detail records is what you learn as a result of taking these classes." (R. p. 14, line 22 through p. 15, line 6). At the request of the court and defense counsel, Mr. Hightower provided to the court his physical certificates from the courses discussed during hearing. (R. p. 25, line 7 through p. 26, line 5); (Court Exhibit 8).

Proffer of Mr. Hightower's Testimony

In an abundance of caution, Judge Mullen requested that Mr. Hightower's anticipated testimony at trial be fully proffered. Specifically, Judge Mullen noted that her interest was to determine exactly how accurate a location tracking Mr. Hightower intended to provide. (R. p. 19, line 11 through p. 20, line 14; p. 36, lines 1-6). In summary, Mr. Hightower's proffered testimony is as follows:

Mr. Hightower testified that he received phone records for Verizon number ***-***-1096, belonging to Appellant. (R. p. 37, line 24 through p. 38, line 6). Those records contained various data including but not limited to: incoming and outgoing phone calls, call durations, the towers utilized for each call, and the sector (or side) of the tower utilized for each call. (R. p. 38, line 13 through p. 39, line 11). Mr. Hightower then explained the mechanics of the sector usage and that none of the data provided is an estimation or assumption on his part. (R. p. 39, line 13 through p. 40, line 6). He testified that his procedure is to first speak with the investigating officer to determine the timeframe in which analysis is required; in this case the time frame extended from October 25, 2015, at 7pm until October 26, 2015, at 5am. (R. p. 40, lines 7-16). He testified that in proceeding with his analysis he created a report so as to provide a more easily comprehended format of Verizon's raw data. (R. p. 40, lines 17-25). Mr. Hightower then created a map using his analyst software to provide visual representation of the data which included the tower and sectors used by Appellant during the timeframe in question along with relevant

locations on Greene Street, and the burned remains discovered off of Pea Patch Road on Saint Helena Island. (R. p. 41, line 20 through p. 42, line 10).

Mr. Hightower then explained the various elements of the map, demonstrating that use of Appellant's phone corresponds to the various tower/sectors utilized, and what area those tower/sectors cover. Specifically, between 7:11pm and 8:37pm, Mr. Hightower noted that the Appellant's phone utilized Tower 209 (sector 3)[5], which services the area encompassing the Greene Street location where the incident occurred.[6] Tower 209, sector 3, was then used between 10:55pm and 11:05pm. (R. p. 43, lines 18-21). Mr. Hightower then noted that Tower 298, sector 3, which services the area that includes the location where Victim's remains were found, was utilized by Appellant's phone from October 26, 2016, at 12:34am until 2:29am. (R. p. 43, line 24 through p. 44, lines 7). This tower was calculated to be 2.67 miles from the actual tower itself, and well within the range of that tower. (R. p. 45, lines 13-25). Mr. Hightower's proffered testimony also included discussion of the various phone calls made by Appellant's phone to the phones of Tayquan and Twiz. (R. p. 46, line 19 through p. 47, line 7). Mr. Hightower also testified that Appellant's phone made an outgoing call to ***-***-8698, which belongs to Palmetto Towing.[7] (R. p. 44, lines 15-24).

Mr. Hightower's testimony also demonstrated that the strength of the tower, not its proximity, is what dictates which tower a phone "pings off of". He testified that if a tower were

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[5] Mr. Hightower inadvertently failed to specify the sector number during this explanation. However, in comparable review to the testimony at trial it is clear that the testimony concerns Tower 209, Sector 3. (R. p. 254, lines 1-4).

[6] Mr. Hightower testified that the tower itself is located just 327 yards away from the relevant location, so as to demonstrate the proximity this tower has to the area in question. (R. p. 46, lines 18-24).

[7] This testimony is consistent with the state's witnesses testifying that a tow truck was needed to help get the car unstuck from the mud that night.

to be overloaded, then the phone would bounce to the next closest tower. Defense counsel's cross-examination confirmed this aspect of tower usage. (R. p. 47, line 22 through p. 49, line 10). However, Mr. Hightower testified that Appellant's continuous two-and-a-half hour use of the same Tower 298 is indicative that the tower was not overloaded during that time frame. (R. p. 46, lines 1-15). Mr. Hightower's testimony also included discussion about the software he uses, and that he is not personally responsible for writing or managing that software, but as a safeguard, he also conducts a manual analysis of the data to corroborate the accuracy of his results.[8] (R. p. 49, line 16 through p. 51, line 11). In this case, both the software and the manual calculation produced matching results. (R. p. 51, lines 18-21).

Ruling of the Trial Court

Judge Mullen took the matter under advisement until trial when the requested training certificates were provided by Mr. Hightower. (R. p. 69-70). After these certificates were provided prior to the beginning of trial, defense counsel renewed their objection that Mr. Hightower was not qualified to serve as an expert. In addition to their general argument, counsel argued that the notation at the bottom of the FBI CAST certificate denotes that completion of the course does not constitute qualification as an expert witness. (R. p. 69, lines 1-12). The State argued in response that notwithstanding the disclaimer at the bottom of one of the certificates provided, the collective experience and training as a whole is sufficient to qualify Mr. Hightower as an expert witness for "historical cell phone analysis and tracking." (R. p. 69, line 13 through p. 70, line 3).

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[8] Part of Appellant's Brief appears to argue against the accuracy or reliability of the historical cell phone data evidence in general, as well as the accuracy of Mr. Hightower's testimony. These arguments are not preserved for review (See Final Brief of Appellate at pg. 18), nor encompassed in the issue presented. See 208(b)(1)(B), SCACR.

Judge Mullen noted that across the country this issue has been somewhat divided. Judge Mullen ruled that the cell tower historical data and information does require an expert witness, and that a lay witness cannot understand what the calls show, nor the triangulation based on the tower locations. (R. p. 70, lines 4-17). She then concludes that "Mr. Hightower has shown enough education, certainly, and experience and training in this triangulation technology." (R. p. 70, lines 17-20). Moreover, the court specifically noted that given the record, any dispute as to the adequacy of Mr. Hightower's qualifications would go to the question of "weight, and not admissibility", and articulated that the jury is free to accept or reject the testimony. Judge Mullen also stated on the record that she would provide defense counsel with an opportunity to address the witness's resume as to this technology. (R. p. 70, line 21 through p.71, line 2).

At trial, the State brought to the jury's attention the various trainings and experience that Mr. Hightower had undertaken in the field of historical cell site analysis and tracking. (R. p. 249-253). Defense counsel conducted a voir dire and highlighted Mr. Hightower's lack of previous qualifications as an expert, and had Mr. Hightower read aloud the disclaimer at the bottom of one of his certificates. (R. p. 253-255). Judge Mullen then qualified Mr. Hightower as an expert and instructed the jury that they are, as previously instructed, permitted to reject, accept, and give weight to the testimony as they see fit. (R. p. 255, line 24 through p. 256, line 7).

ARGUMENT

Our Supreme Court has thoroughly established the threshold for qualification of witnesses at trial, and likewise has solidified the standard in which a trial court's decision can be reviewed on appeal. It is within the sound discretion of the trial court to admit or exclude

testimony from an expert witness, and only a prejudicial abuse of that discretion resulting from an error of law or a factual conclusion lacking evidentiary support will suffice as grounds for reversal. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). The record here fully supports the ruling of the trial court in qualifying Mr. Hightower as an expert witness.

As our case law demonstrates, the standard for establishing an expert witness is not a bright-line test and is likewise not a standard for which substantial expectations are placed. Instead, our courts have found that "to be competent as an expert, a witness must have acquired by reason of study or experience, or both, such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 700–01 (Ct. App. 1995), overruled on other grounds by *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). There is also no precise requirement concerning how the relied upon knowledge or skill of a potential expert is acquired, nor is there a requisite standard for the class or profession of the expert. *Honea v. Prior*, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988). "There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997). If the proposed witness can satisfy this standard then dispute to the inadequacy of the witness's qualifications are a question of weight, not admissibility. *Id.*

The record in this matter speaks plainly to this issue. Mr. Hightower's voir dire testimony during pre-trial hearings demonstrated that he has taken 72 hours of course study specific to the field of historic cell site analysis and tracking, which included peer-reviewed and tested

performance for the certifications acquired from each course. (R. p. 24, line 17-24; p. 13-15). He further testified that he takes continuing education class in the field yearly, and that his career as the director of the Intelligence Unit for the Fourteenth Circuit Solicitor's Office is specifically geared toward performing historical cell phone analysis of cellular records and performing a geo spacial mapping with the information provided. (R. p. 9, line 15 through p. 10, line 4). The analysis he provided at trial is his job with the Fourteenth Circuit and would include innumerable hours of experience. In stark contrast to Appellant's argument that Mr. Hightower has very little experience conducting this analysis, Mr. Hightower testified that he has performed this work for between 100 and 120 sets of records, and has done so using both specific software and manual calculation. (R. p. 30, line 1).

Secondly, defense counsel's focus on the FBI CAST certification disclaimer is misplaced. The disclaimer of the FBI Cast Certificate cannot account for Mr. Hightower's experiences and additional trainings. Appellant's argument that the State relied primarily upon this single specified qualification as the basis for Mr. Hightower's expertise is likewise misplaced. The State's argument was consistent throughout the record that Mr. Hightower's various trainings and experience qualify him as an expert, despite this being his first such qualification. The State even provided a comparable resume of previously qualified expert to demonstrate the adequacy of Mr. Hightower's experience and training. (R. p. 5; 7; R. p. 69).

Appellant relies upon *McDill* as its basis in support, but *McDill* is easily and variously distinguishable from the facts of this case. In *McDill* the court of appeals took issue with the lack of technique accompanying the measurements needed for the opinion. *McDill v. Mark's Auto Sales, Inc.*, 367 S.C. 486, 491, 626 S.E.2d 52, 55 (Ct. App. 2006). In contrast, Mr. Hightower made clear that the data is provided to him and is not altered, and the tower sectors

operate in a specified and predictable manner. Similarly, the officer in *McDill* was not part of the highway patrol's team responsible for accident reconstruction. *Id.* at 55. In contrast, Mr. Hightower serves the Fourteenth Circuit specifically as Director of the Intelligence Unit and is personally responsible for performing the requested historical cell phone data analysis and geo mapping conducted by the Unit. Lastly, in *McDill* the court of appeals expressed concern that the police officer testifying as a reconstruction expert might lend itself to a flood of police officers being qualified to perform the same expert testimony. *Id.* In contrast, Mr. Hightower's job is specific to the cellular analysis and geo mapping evidence he provided in his testimony at trial; his expertise is not a marginal aspect of a dissimilar occupation. This case bears no resemblance to *McDill* in fact or logic.

The sound basis of the trial court's discretionary ruling in his matter is on full display given the degree to which Mr. Hightower was examined prior to ruling upon his expertise, and the sensitivity shown by the court as to complexity of the testimony. Judge Mullen showed exceptional understanding as to the nuances in which this type of testimony can be offered, as sometimes it is simply regurgitation of call records between phones, and other times the testimony can venture into tracking the location of the phone itself. She exercised extreme caution and thoroughly examined Mr. Hightower as to his qualification to discuss a mapping of the Appellant's phone based on the towers and sectors it utilized on the night of the murder. The trial court also ensured that the entirety of Mr. Hightower's testimony was proffered to ensure that his testimony did not overstep the bounds of his expertise. Additionally, the trial court was correct in concluding that once qualified, any dispute as to the adequacy of the expert's knowledge would go to the weight of the evidence and not its admissibility. *State v. Henry,* 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1997). In so concluding, the court gave defense

counsel ample opportunity to conduct its own voir dire before the jury and address any perceived short-comings in Mr. Hightower's resume.

Given the thorough voir dire record and proferred testimony of Mr. Hightower, the trial court was fully within her discretion to qualify Mr. Hightower as an expert. There can be no showing of a factual or legal error that would support a finding of abuse of discretion. Moreover, Appellant cannot demonstrate prejudice in the admission of Mr. Hightower's testimony, in light of this record. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). Appellant cannot show such a possibility on this record, especially in light of the testimony from Frazier and Cook, and Appellant's own recorded statement from the jail. As such, the ruling of the trial court should be affirmed as there is neither an abuse of discretion nor prejudice to support reversal.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ISAAC McDUFFIE STONE
Fourteenth Judicial Circuit Solicitor

W. JOSEPH MAYE
Assistant Attorney General

By: _____
W. Joseph Maye

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

December 9, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2018-001242

THE STATE,

Respondent,

vs.

TYRONE ANTHONY WALLACE, JR.,

Appellant.

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 9th day of December, 2019.

W. JOSEPH MAYE
Assistant Attorney General

ATTORNEY FOR RESPONDENT