STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

SIDNEY ST. CLAIR MOORER,

Appellant.

Appellate Case No. 2019-001636

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. Because none of the jurors seated had knowledge of the case and the trial court remedied any danger of actual prejudice by virtue the clerk of court's relationship to the Victim, the trial court did not err in denying the request for a change of venue.

II. Because evidence shows Victim suddenly and unexpectedly disappeared after Appellant and his wife lured her to a remote boat landing near their house, the trial court did not err in denying the motion for directed verdict for kidnapping and conspiracy.

III. Because the trial court sustained both of Appellant's objections to the expert's conclusion and Appellant did not object once the expert established the requisite foundation for his opinion, the issue is not preserved for review. Further, the expert's testimony established that his process and his testimony was reliable and within the scope of his expertise.

STATEMENT OF THE CASE

Appellant Sidney Moorer was indicated for kidnapping and conspiracy to kidnap. His first trial ended in mistrial on June 20, 2016. His wife and alleged co-conspirator, Tammy Moorer, was tried and convicted for the same charges in October 2018. Her appeal is pending before this Court. Appellant was tried and convicted for obstruction of justice in August 2017, before the Honorable R. Markley Dennis, Jr. The charge arose, generally speaking, from the same set of facts as in the present case. See State v. Sidney Moorer, 2020-UP-198 (July 1, 2020); sentencing sheet: 2017-GS-23-1320. Appellant was then tried before Judge Dennis the second time for kidnapping and conspiracy on September 9-18, 2019. The jury found Appellant guilty as charged. Judge Dennis imposed concurrent sentences of thirty years' imprisonment for each charge.

STATEMENT OF FACTS

Jessica Adams, SLED's Missing Persons Information Coordinator, testified there were no signs of Heather Elvis (Victim) anywhere since 2013. Tr. pp. 1299-1302. Victim's car was found abandoned at a remote boat landing at 4:00 a.m. on December 18, 2013. Officer Casey Guskjewicz, while on patrol, found a dark-colored four-door Dodge Intrepid parked oddly arrived at Peachtree Landing. A license check and verified the vehicle was not stolen. Tr. pp. 409-11. Guskjewicz testified the landing was about three and a half miles from Appellant's residence. Tr. p. 418. Records indicated Guskjewicz called in the tag at 4:03 a.m. Tr. p. 402. Guskjewicz did not see any artifacts – keys, phone, or the like – by the vehicle. Tr. p. 403.

At the time of her disappearance, Heather Elvis (Victim), was a nineteen year-old working as a hostess at Tilted Kilt at the Beach location in Myrtle Beach. Jessica Cooke, a house manager at Tilted Kilt, described Victim as a good employee. She was dependable, liked to tell jokes, and the guests loved her. She was not the kind of employee that would not just show up for the work. However, she kept her phone with her all the time, needing "to know what was going on" like, in Cooke's estimation, a typical nineteen year-old. Tr. pp. 210-212.

Appellant Sidney Moorer performed contract maintenance work at Tilted Kilt, usually, after closing time. An affair developed between Appellant, in his mid-thirties, and Victim. This affair ended somewhere around mid to late October, 2013. Tr. pp. 212-17. Cooke testified Victim was sad for a while after the break-up, but started being her normal self, joking and regaining her good humor. Tr. p. 220. After the relationship ended, Victim started gaining weight. She went from an A-cup bra to a B, then C-cup bra. Tr. p. 219. Victim took a pregnancy test at work, which came

back with an error reading. Tr. p. 220.

Jodie Davenport, another Tilted Kilt employee, described Victim as reliable: she was seldom late and called ahead the few times she was running late for a shift. Tr. p. 248. Davenport testified the affair between Appellant and Victim started in the summer and lasted until the end of October. Victim was afraid of Tammy and referred to Tammy as a crazy bitch. Tr. pp. 250-51; p. 256. Davenport also noticed Victim began gaining weight, and was aware of the pregnancy test that resulted with an error message. Tr. pp. 251-52.

Dennis Hart, Sr., the Kitchen Manager at Titled Kilt, retained Appellant for kitchen maintenance, and most of the work was after hours. He was well-aware of the affair, Appellant was pretty open about it. Appellant abruptly ceased working at Tilted Kilt when the affair ended. Tr. p. 270-73. Hart called him to do some work, and during the conversation, Appellant called Victim a bitch and a slut, and accused Victim of spreading rumors she was pregnant. Appellant accused Victim of trying to ruin his family. Tammy Moorer was on speakerphone during this conversation. Hart described Victim as a responsible employee. Hart called Appellant when Victim went missing, and Appellant said he had not seen her since before he went on vacation with his family. Tr. pp. 273-77. Hart explained Victim was afraid of Tammy rather than Appellant. Tr. p. 287.

Ronald Witt was the custodian for the T-mobile records. Victim's phone number was 8152. Witt testified the last phone call appearing on Victim's phone records was on December 18, and the last phone number Victim called was 3175, later shown to be Appellant's phone. The last conversation was between the two numbers at 3:17 a.m. Tr. pp. 292-95. The phone records revealed at 1:35 a.m. on December 18, she received a call from 2462, later shown to be a payphone.

Going back to July, there was no prior record of contact between Victim's phone number and the payphone. Victim received the call and it lasted 4.83 minutes. She later attempted to call back the number ten times. Tr. pp. 294-96; p. 301; p. 313; see also pp. 745-48 (Sprint custodian outlines calls at 3:16 and 3:17, and series of calls from 3:38 to 3:41 from Victim's phone to Appellant's phone).

Witt then testified about the record of phone calls and texts between Victim and Appellant. There were 411 calls or texts in July 2013, and over five hundred each month from August thru October. However, this number dropped dramatically to only 64 calls or texts in November. In December, there are only six contacts, all on December 18 – the first contact between the two numbers since November 15. Tr. pp. 299-303. The last conversation between the two phones was at 3:17 a.m. on December 18, and lasted 4.15 minutes. Tr. p. 313.

Amanda Nigro from Frontier Communications testified the company maintained a payphone at 1929 Mr. Joe White Avenue in Myrtle Beach. A phone call was made from the payphone to 8152, Victims phone, at 1:33 a.m. on December 18, lasting four minutes and fifty seconds. Tr. pp. 513-18.

Stephano Schiraldi knew Victim casually from high school, but their first date was on the evening of December 17. They had dinner on the waterfront and he later taught her to drive a manual shift with his Ford Ranger in a parking lot. Schiraldi described her demeanor that night as chipper. They then went to his mother's apartment and watched a movie. Nothing romantic happened and afterwards, he drove her home and showed her to her apartment. They kissed and he left. They made plans at the time for a second date. Tr. pp. 318-29.

Schiraldi's mother, Pamela Shiraldi, testified she met Victim at her house. Her son and Victim watched a movie together. Victim seemed happy when her son took Victim home. Her son

arrived home sometime between 1:30 a.m. and 2:00 a.m. Tr. pp. 349-55.

Victim's roommate at the time she went missing was Brianna "Bri" Warrelmann (Bri). Bri testified she and Victim were best friends who lived together at River Oaks Apartments and worked together at Tilted Kilt. Victim moved in before Thanksgiving 2013. Victim was not seeing anyone else at the time and the affair with Appellant ended at the end of October 2013. Tr. pp. 361-66. About the time Victim moved in with Bri, Victim was back to her usual happy self. Victim was gaining weight and she thought she could be pregnant. Tr. p. 367. Bri was out of town when Victim called her at 1:44 a.m. on December 18. Victim was upset and hysterically crying. Bri testified, "The last thing I said to her was not to meet Sydney, go to sleep and we would talk about it in the morning." Tr. p. 385, lines 14-19. Victim was afraid of Tammy. Tr. pp. 391-92. Bri confirmed she did not leave a box for a pregnancy test in the waste can in the apartment. Tr. p. 402.

Officer Danny Furr became involved in the missing persons investigation and went to Tilted Kilt. He then called Appellant. During the conversation, Appellant claimed he had not spoken with Victim for about six weeks. He admitted Victim called him that night but he claimed he told her to leave him alone. Appellant admitted to a lapsed romantic relationship with Victim. Tr. p. 448-49.

Officer Casey Canterbury later spoke to Appellant at his house. Tr. pp. 483-84. Appellant claimed he last texted Victim on November 2, and he claimed he had not spoken with Victim since October. He did not tell Officer Canterbury that he spoke with Victim on a payphone. Tr. pp. 486-89; pp. 494-95. Appellant said Tammy took control of Appellant's phone after she discovered the affair. State's Exhibit 55 (time stamp 2:14:45 to 2:15:20 a.m.).

Jonathon Lee Martin was with HCPD at the time Victim went missing. He attained Victim's

cell phone records and records for the payphone. Martin testified the records showed a phone call from Victim's phone to Appellant's phone at 3:16 a.m., and a phone call from Victim's phone to Appellant's phone immediately afterwards lasting about four and a quarter minutes. Victim made four more calls to Appellant's phone for .03 minutes, indicating Appellant did not answer. This was the first time in December Victim called Appellant's phone. Martin also testified that records indicated prior to these calls, Victim attempted to call the payphone three times. Tr. pp. 524-29.

Officer Martin interviewed Appellant on December 20. Appellant denied, but later admitted, to making a phone call from the payphone to Victim. Tr. pp. 532-34. Appellant admitted he parked across the street from Kangaroo-Mart to use the payphone. Tr. p. 541. Appellant also claimed he went to Wal-Mart and met his wife so they could have sex. Tr. p. 536; p. 539. Even though Appellant previously said he and his wife were drinking that night, Appellant claimed the pregnancy test he bought at Wal-Mart was for his wife. Tr. p. 539. Appellant claimed he was with his wife the whole time that night. Tr. p. 544; State's Exhibit 1 (DVD of interview).

Lieutenant Roxanne Love secured footage from Wal-Mart showing Appellant arriving in a truck and entering Wal-Mart where he purchased a pregnancy test and a cigar. Tr. pp. 519-600. Appellant is wearing a burgundy shirt and light tan khaki cargo pants in the video. Tr. p. 601. He purchased the pregnancy test and cigar at 1:19 a.m. Tr. p. 602; State's Exhibit 60.

Detective Brian Wilson noted in the video from the Kangaroo Mart, an individual is seen walking through the empty parking lot of the Kangaroo Mart and uses the payphone for about five minutes before walking back in the direction from which he originally arrived. Detective Wilson confirmed this was the only individual to use the payphone between one and two a.m. The

individual is wearing a dark sweater and light colored pants. Tr. pp. 611-14. This person is using the payphone at about 1:30 a.m. The Walmart is located about a mile from the Kangaroo Mart. Tr. pp. 620-21. Officer Martin testified the incoming call from the payphone was at 1:35 a.m., and Victim's next phone call was to Bri at 1:44 a.m. Tr. p. 562; State's Exhibit 61.

Mike Melson, the CEO of Hawk Analytics, used software he designed to analyze the various cell phone records for Appellant, Tammy Moorer, and Victim. Tr. pp. 632-36. Analyzing these records, he performed what he referred to as a pattern-of-life analysis to determine the regular routines and changes to those routines for those phones. Melson explained, "Our phones are with us almost all the time and document what is normal for us." So Melson examines the patterns and usages of the phones, and looks for changes in patterns and examines why the patterns might change. Tr. p. 636, lines 2-9. Melson noted the records showed a lot of contact between Tammy and Appellant prior to the beginning of November as would be expected between a husband and wife. The records also indicate numerous contacts between Appellant and Victim's phone beginning in the summer months of 2013. Tr. pp. 644-64. It is during the early morning hours of November 2 that the records display some significant event. Appellant and Victim's phone are in contact with each other around 12:20 a.m. and then Tammy Moorer's phone contacts Victim's phone for the first time (going back to March) at 12:45 a.m., a call lasting 39 seconds, consistent with a conversation taking place. This was followed by two calls from Appellant's phone, and a seven second call from Tammy's phone to Victim's phone. Tr. p. 645-48. After that, some communication back and forth between Victim and Appellant's phone occurs, followed a few weeks later by a communication from Victim's phone to Appellant, and then followed by a month and a half with no communication

between these phones at all. Importantly, the daily communication between Appellant and Tammy's phone also ceased in November. Tr. pp. 649-50; State's Exhibit 64 (Melson's report).

On December 18, cell phone records indicate Appellant and Tammy's phones are together at 12:39 a.m. Tr. p. 662. Records are consistent with Appellant and Tammy being at Wal-Mart at 1:14 a.m., and Victim being at her residence at 1:35 a.m., the time of the payphone call. Tr. pp. 664-65. Then there are no records from either Appellant's phone or Tammy's phone afterwards until Victim calls Appellant's phone. The records show Victim trying to call the phone booth six times between 2:43 a.m. and 3:05 a.m. Tr. p. 668. At 3:16 a.m., Victim makes two phone calls to Appellant's phone, consistent with her being home and Appellant being home. Tr. pp. 668-69. The second call results in a four and a half minute conversation. Lastly, Victim calls Appellant's phone four times between 3:38 and 3:41 a.m. The reasonable area of coverage for these phone calls includes Peachtree Landing. Tr. pp. 670-71. All four of those calls are twenty-six seconds in duration, consistent with the phone calls going to Appellant's voice mail, and consistent with Appellant's phone being located at his residence. Tr. p. 671; p. 700; State's Exhibit 64.

Melson explained he sought GPS records from a Google history report and received no data because the data was deleted and the account closed on December 25th. Tr. pp. 718-19. Note during the interview with Officer Canterbury on December 20, Officer Canterbury asked Appellant if they were going to find out from GPS records for his phone if he went to the landing that night. State's Exhibit 55 (2:21:00 to 2:21:30 a.m.).

Jill Domogauer processed the Dodge Intrepid at Terry Elvis' house on December 20. The car was messy with bunches of clothes, groceries, and a carton of orange juice, but no signs of struggle.

Tr. pp. 757-65. She found nothing useful at Peachtree Landing. Tr. p. 767. Likewise, no signs of trouble were found at Victim's apartment. Tr. pp. 769-70. Importantly, she found an empty pregnancy test box in the bathroom wastebasket, but no applicator. Tr. p. 772.

Will Lynch extracted texts from both Appellant and Tammy's phones. Texts recovered from Appellant's phone disclose Appellant's affair with Victim being discovered by Tammy. Appellant's phone texts a response of "Who the fuck is this?" to Victim's query "What's Up?" Victim replies, "Nobody you need to worry about anymore." Later Victim asks, "When does Sidney get his phone back?" The individual answering claims to be Appellant, but replies, "No, I love family." An exchange between Appellant and Victim's phone ends with Victim sending a missive, "So that is why you are childishly texting me from your cheating husband's phone?" Tr. pp. 824-29.

In the early morning hours of December 16, a series of texts were sent from Appellant's phone in which the sender appears to be a female sexting a young male named Caleb. Later, Appellant's phone advises, "Dude, I think your Mother just called." The person using Appellant's phone advises, "I don't need your crazy mother hanging on me." Pictures of a young naked man were received on Appellant's phone. Tr. pp. 830-41.

Extractions from Tammy's phone include three texts at 4:37, 4:38, and 4:38 a.m. on December 18: Tammy's phone asks Appellant to bring her some pot stickers and orange juice. Appellant's reply is, "Yes ma'am" and Tammy's phone thanks him. This marks the resumption of contact between the phones for the first time since the affair was discovered. Appellant and Tammy are texting each other on December 21 about Christmas presents for the children – things are back to normal. Tr. pp. 846-49.

Lynch also testified about the calls from Victim to Appellant. A four-minute conversation occurred when Victim called Appellant's phone at 3:17 a.m. Then Victim made a series of calls to Appellant's phone that went to voice mail at 3:38, 3:39, 3:40 and 3:41 a.m. Tr. pp. 844-45; 851-53. So Appellant is on the phone at 3:17 a.m. and later at 4:37 a.m., but is not answering the phone at 3:38 to 3:41 a.m. when Victim was at the landing.

James Phillip Perry, an expert in cell phone forensics, examined a computer loaded with a program called Tenorshare for cell phone extraction, and he also found extracted cell phone texts. Tr. pp 878-883. This included texts deleted from Appellant's cell phone that further demonstrate Tammy's discovery of the affair. Tammy claims to have followed Appellant since 2012, and asks Victim, "Hey, Sweetie, you ready to meet the Mrs.? The kids want to meet you." Tr. p. 885, lines 4-17. The computer also documents a powering event on December 18. The phone was last used at 1:10 a.m. – just prior to the payphone call. It was shut off sometime after 1:10 a.m. and then powered back on at 3:03 a.m. Tr. p. 882; p. 888-89.

John Caulder executed a search warrant on the F-150 on December 27, 2013. Tr. pp. 894-97. Law enforcement found paperwork in the F-150 truck for work performed by Appellant from Sticky Fingers and other restaurants during November and December 2013, but no paperwork for any work that would have been performed during the early morning hours of December 18. Tr. pp. 1137-38.

Jimmy Gunter, the finance manager at Beach Ford, sold the Moorers a black 2014 Ford F-150 Limited with HID headlights on November 8, 2013. The HID headlights are much brighter than regular headlights. The day the Moorers bought the truck, he was in a regular conversation with Appellant when Tammy came in the room. The mood immediately changed, and Appellant became

submissive to Tammy, who took over the remainder of the time. Tr. pp. 910-14.

The truck had a navigation system with an SD card, which was necessary for the navigation system to work. Tr. pp. 915-18. Also, the truck had a Beach Ford license plate in the front at the time of sale. Gunter noted Appellant's F-150 in the Wal-Mart video (State's 60) bore the Beach Ford plate. However, the plate was not on the truck in State's exhibit 92, taken around December 28, 2013. Tr. pp. 924-26; see Tr. p. 896 (Caulder discussing photos).

Lindsey McGraw, an expert in computer forensics, examined the Sync2 card from the F-150. The first record is on November 8 at Beach Ford, followed by records depicting a trip in November out West. However, the SD card was detached and inoperable in the F-150 on December 18, at 12:07 a.m. Tr. p. 1206-10. McGraw noted when the SD card is detached, it will render an error message on the dashboard of the F-150. Tr. pp, 1210-14; see State's Exhibit 197.

Joyce Aland lived on Route 814 en route between the Moorers' residence and Peachtree Landing. She learned about the case and knew the surveillance cameras for her residence would capture any traffic passing by the early hours on December 18, so she contacted the police. Tr. pp. 932-42. Peachtree Landing is about five minutes from her house. Viewing the surveillance footage, she noted a vehicle passed by the house in one direction and returned roughly ten minutes later. The traffic by her house was mostly just residential traffic and not tourist traffic. Tr. pp. 943-46.

David Quandt is a co-owner of D&S Siteworks on Mill Pond Road, which is en route from Route 814 to Peachtree Landing. Tr. pp. 959-964. Law enforcement visited and subsequently attained footage from the business' surveillance cameras from early on December 18 showing a vehicle passing D&S Siteworks for the landing and returning shortly after. Tr. pp. 968-78.

Jeremy Leach from the South Carolina Highway Patrol MAIT examined surveillance footage and determined the vehicle passing by in the surveillance footage was a dark in color pickup truck with a toolbox. Leach ran a video recreation using several vehicles including the Moorers' F-150 truck in February 2014, driving it past both locations where the footage was originally captured. He would later assist Grant Fredericks with recreation video. Tr. pp. 991-999. Leach determined the make and model of the suspect vehicle was the same as the Moorers' truck. Tr. pp. 1001-02.

Grant Fredericks testified he has performed video analysis for thirty years. He has been qualified hundreds of times. He is the lead instructor for LEVA from 1998 to 2014. Fredericks was qualified **without objection** as an expert in forensic video analysis. Tr. pp. 1005-08. Fredericks prepared an embedded report showing his work. Tr. pp. 1023-24. Fredericks explained his analysis using the embedded report, showing his reverse projection analysis with various trucks and demonstrating the different headlight spreads among the tested vehicles. Tr. pp. 1025-54. He explained the various reasons headlight spread is different between vehicles, even of the same make and model, before concluding that the headlight spread of the suspect vehicle in the surveillance video matched the headlight spread of the Moorers' vehicle. Tr. pp. 1019-20.

Lieutenant Peter Cestare assisted the missing persons investigation on December 20. He processed Victim's vehicle and later that day, went to the Moorers' residence. Right away Cestare noticed surveillance cameras on the house that seemed to be operable. Tr. pp. 1114-18. There was a black F-150 in the driveway with a Beach Ford tag. Cestare observed a pile of bags of cement and shotgun shells left out in the open, which struck Cestare as odd. Tr. p. 1121-22. Inside the house he observed a camera at the top of the stairs. Tr. p. 1125. Notably, Tammy let the detectives inside the

camper, but claimed she did not have keys to the truck, although it appeared she drove the truck home from the police station. Tr. p. 1168.

Jerry Scott Silver, the General Manager from Sam's Club in Myrtle Beach, testified records showed Appellant purchased a sixteen channel DVR surveillance system and a Hitachi 24" monitor on December 21, 2013. Tr. pp. 1248-51.

Law enforcement recovered surveillance footage from the Moorers' residence on December 22 showing Appellant and Tammy cleaning the F-150 extensively, even pressure washing the vehicle. The video shows Appellant taking rags used by Tammy and burning them in the yard. Tr. p. 1143-46; pp. 1149-53; p. 1177; State's Exhibit 192 (53:20-30; 54:30 – 56:00). Cestare confirmed he would not expect to find any DNA evidence if processing the truck afterwards. Tr. pp. 1150-53.

Jacob Melton was close friends with Appellant's son Christian and spent a lot of time at the Moorers' house, sometimes staying a week at a time. He testified the house had a working surveillance system. This surveillance system was upgraded at a later point. Tr. pp. 1358-60; pp. 1368-70; p. 1274. Melton noted he never saw bags of concrete piled in front of the camper before. Tr. pp. 1268-70.

Melton's mother, Laura Garlitz testified the Saturday before Victim went missing, the Moorers' came over to her house. Garlitz could tell Tammy was drinking and she asked to smoke marijuana with Garlitz, so they did. This was a one-time occurrence, they never smoked marijuana together before. Tr. pp. 1277-80.

Tammy's cousin, Donald Demarino, was at the Moorers' for a family gathering and was alone with Appellant when Appellant showed him a picture on his phone. Demarino testified this

was during either 2014 or 2015. Demarino testified Victim was in the picture and it was upsetting. Demarino testified Victim did not appear to have her freedom or be able to leave in the picture. Based on the picture, Demarino does not expect to ever see Victim again. Tr. pp. 1284-88.

The defense called Bruce Koenig, a member of the International Association of Identification and former head of audio/visual analysis at the FBI. However, his primary focus with the FBI was the audio side of analog analysis and he retired just as digital surveillance recordings became more prominent. He conducted forensic video analysis during his career, but this did not include reverse projection analysis. Tr. pp. 1326-33. While Koenig was at the FBI, the agents did not use headlight spread analysis and Koenig claimed "to his knowledge" it was not peer reviewed to the extent it could be said each vehicle had a unique headlight spread. Tr. pp. 1338-39. Koenig disagreed it could be scientifically proven that the suspect vehicle was Appellant's F-150 to the exclusion of all other vehicles. Tr. p. 1341. Koenig then claimed, in his view, the headlights did not match. Tr. p. 1345. Nonetheless, Koenig admitted, "I think he's probably correct saying that it is an F-150 Ford truck of that style." Tr. p. 1340, lines 22-25. Asked if he conducted his own analysis, Koenig admitted that Fredericks' analysis looked pretty methodical, so he did not repeat it. Tr. p. 1355.

Ashley Caison, Tammy's sister, testified she received a text on December 18 from Tammy at about 3:10 a.m. and she gathered the children to send next door around 3:15 a.m., at which time she saw both Tammy and Appellant. Her next contact with them was at 7:00 a.m. Tr. pp. 1362-65. Caison claimed they do not use a trash pick-up service and burned trash almost daily. Caison claimed the surveillance cameras were old and had not worked in years. Tr. pp. 1368-71. Caison explained the reason they were cleaning the F-150 on December 22 is she gave them an automobile

cleaning kit as an early Christmas present. She testified she did not go in the truck, but "from where I could see, nothing looked abnormal." Tr. pp. 1366-67.

The defense also recalled Detective Lynch, who extracted texts from a phone belonging to an individual by the name of Jerry Stevens. They depicted the twenty-year old Victim sending flirtatious texts to Stevens on December 16. There was no records of contact between Stevens' and Victim's phone on December 17 or December 18. Tr. pp. 1408-10; pp. 1420-22. Stevens testified in reply that he had no knowledge or involvement in Victim's disappearance. Steven admitted having sexual contact with Victim about two weeks before her disappearance. Tr. pp. 1424-33.

Lieutenant Kathman from the Horry County Police Department testified records failed to show the Moorers complained about being harassed in 2013, refuting an assertion that Appellant purchased the new surveillance system was because they were being harassed. Tr. pp. 1438-39.

ARGUMENT

I. Because none of the jurors seated had knowledge of the case and the trial court remedied any danger of actual prejudice by virtue the clerk of court's relationship to the Victim, the trial court did not err in denying the request for a change of venue.

Appellant argues the trial court erred in allowing the trial to proceed in Horry County because of "media saturation." However, none of the seated jurors had knowledge of the case. Appellant also argues separately that venue should have been transferred because the elected Clerk of Court, Renee Elvis, is the victim's aunt. However, as explained below, Judge Dennis provided a sufficient remedy to any danger of prejudice and Appellant failed to establish actual prejudice.

How the issue arose

Appellant's first trial for kidnapping ended in a mistrial on June 20, 2016, and Appellant

moved to change venue in July 2016. Judge Dennis issued an order granting a change of venue on October 27, 2016, noting questionnaires evidenced media saturation and only 13 out of approximately 100 potential jurors indicated they knew nothing about the case. Order Granting Change of Venue (October 27, 2016).

During a hearing on January 18, 2019, the State asked the trial court to revisit the issue. The State noted since the trial court's prior ruling on venue, Appellant's codefendant, Tammy Moorer, was tried and convicted in Horry County in October 2018. The State noted at that trial, Judge Culbertson asked the jury pool who saw or heard anything about the case and separated questioned jurors responding affirmatively. With that procedure, over forty remaining jurors indicated they could be fair and unbiased, so Tammy Moorer was able to receive a fair trial. January 18, 2019 transcript (V. Tr.) p. 40. Judge Dennis shared he reflected over the venue issue after he presided over Appellant's trial for obstruction of justice in Horry County. V. Tr. p. 42, lines 9-23. Defense counsel admitted he consented to venue in Horry County for the obstruction charge for "strategic reasons." V. Tr. pp. 43-44. Judge Dennis shared the following:

> My point is this, I changed it because of some things that obviously that happened shortly after that trial, and . . . I thought we would retry that case before we tried the obstruction case but that's, that's not my call. That's the solicitor's call, and I'm not finding fault with that. . . . So when that – when we tried it and we were able to get a jury, I mean, I thought, "Well, maybe things" – now we've had the time pass since then, ...

V. Tr. p. 43, line 19 – p. 44, line 4. Judge Dennis expressed confidence Appellant received a fair trial on the obstruction of justice trial in Horry County, with a fair and impartial jury. V. Tr. p. 43, line 17-21. The judge also noted issues with the availability of a term in Georgetown. Judge Dennis

advised jury selection in Horry County would involve individual voir dire. He ruled venue would stay Horry County. V. Tr. p. 47. Judge Dennis advised jury questionnaires should be sent for "a clearer picture of what pool we have to work with . . . ." He made clear, "We're going to take our time going through the jury pool methodically and, meticulously." V. Tr. p. 48, lines 3-17.

At trial

Prior to jury selection, Appellant moved again for a change of venue. Judge Dennis, in response to renewal of the motion noted that 173 jurors out of over three hundred jurors indicated they had no knowledge of the incident. Tr. p. 10. Judge Dennis indicated Appellant's motion continues until the jury is empaneled. Tr. pp. 10-11.

During jury selection, fifteen jurors were individually questioned, eleven based on their survey responses, that were exempted or dismissed, following conversations outside the hearing of other jurors: Tr. p. 14 (juror 460); p. 16 (j-722); pp. 24-25 (j-707); p. 31 (j-438); p. 55 (j-151); p. 58 (j. 23); p. 60 (j-131); pp. 60-62 (j-220); p. 64 (j-370); p. 65 (409); p. 67 (j-688); p. 83 (j-406, lived near 814); pp. 83-84 (j-48, told about case by neighbor); pp. 84-85 (j-385, discussed case since survey); pp. 90-91 (j-634, knows a lot about the case). Only four other jurors indicated they knew something about the case in the surveys. They all responded they could be fair and impartial: jurors 114 (Tr. p. 59, can be fair and impartial); 274 (Tr. pp. 62-63, can be fair to both sides); 329 (p. 63, can be fair and impartial); and 723 (p. 68, can base judgment on what is heard in the courtroom). None of those jurors were seated on the jury. Tr. pp. 95-105. Accordingly, the record reflects that none of the jurors seated were aware of the facts of the case before being selected.

Judge Dennis later stated the questionnaire "was extremely helpful" and expressed

satisfaction with the results of the process, sharing his view, "[F]or me, as a judge, I felt better about it after we saw the number of people that we had that were here to be selected. And, frankly, I think the jury is quite impressive, considering everything we were concerned about." Tr. p. 146, lines 2-7.

Standard of review and analysis of case law

"A motion to change venue is addressed to the sound discretion of the trial [court] and will not be disturbed on appeal absent an abuse of discretion." State v. Stanko, 402 S.C. 252, 276, 741 S.E.2d 708, 721 (2013) *overruled on other grounds by* State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The defendant carries the "burden to demonstrate actual juror prejudice" to warrant a change in venue. State v. Owens, 293 S.C. 161, 167, 359 S.E.2d 275, 278 (1987).

Certainly, use of voir dire examination to screen potential jurors prejudiced by pretrial publicity is a reasonable process to ensure a fair and impartial jury was selected. See State v. Thompson, 278 S.C. 1, 8, 292 S.E.2d 581, 585 (1982) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In Thompson, the trial judge denied the motion for change of venue, but allowed for the motion to be reraised after voir dire examination if an impartial panel was unobtainable. The judge concluded after extensive voir dire proceedings that an impartial jury was seated. The Supreme Court affirmed, concluding, "The record reveals that the trial judge took every precaution to insure the elimination of potential jurors that may have been prejudiced by the pretrial publicity, and the absence of prejudice on the part of those chosen to serve." Id. at 8-9, 292 S.E.2d at 585-86.

"When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed

absent extraordinary circumstances." State v. Caldwell, 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990). "Mere exposure to pretrial publicity does not automatically disqualify a prospective juror." Id. "When jurors have been exposed to such publicity, a denial of a change of venue is not error where jurors are found to have the ability to lay aside any impressions or opinions and render a verdict based on the evidence presented at trial.... It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity." Id. (internal citation omitted).

In Caldwell, *eleven* seated jurors and two alternate jurors were aware of media coverage of the murder for which Caldwell was on trial. The Supreme Court observed, "While a number of jurors were aware of the crime, those jurors expressed to the trial judge no doubt or reservation of their ability to impartially serve as a juror and to decide the matter solely on the evidence presented." Caldwell, 300 S.C. at 502, 388 S.E.2d at 821.

In State v. Patterson, 324 S.C. 5, 13-14, 482 S.E.2d 760, 764 (1997), the Supreme Court, citing Caldwell observed, "only seven" jurors seated knew something about the case. The trial judge disqualified six jurors who indicated they could not be impartial due to facts they knew about the case. The remaining jurors advised they could be objective and put aside any knowledge they had about the case. The Supreme Court found the trial judge did not abuse his discretion.

The Supreme Court found the trial judge erred in granting the State's motion to change venue in State v. Manning, 329 S.C. 1, 5, 495 S.E.2d 191, 192-93 (1997), despite the results of a survey of jurors showing fifty-three of the fifty-seven jurors "had knowledge of the case itself" and seven jurors were related to the defendant or trial witnesses. Jurors for the Dillon County charge were drawn from Lancaster County. As the Supreme Court noted, the defendant was previously tried in

Dillon County with Dillon County jurors, without the State claiming the jury selected was impartial.

The Supreme Court noted, "The moving party bears the burden of showing actual juror prejudice as a result of . . . publicity." Manning, 329 S.C. at 8, 495 S.E.2d at 194. "If a change of venue is sought on the basis of pretrial publicity, the general practice is to postpone ruling on that motion until the jury panel is voir dired." Id. "The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." Id. (citations and internal quotation marks removed). The Supreme Court found the trial judge erred in changing venue because no evidentiary facts supported finding actual prejudice to the State. Supporting the holding, the Supreme Court observed, "No evidence was presented indicating there were difficulties in seating a jury in the August 1993 trial or the August 1993 jury was unfair or partial to the appellant. [The judge's] decision was made almost seven months before the 1995 trial and the 1995 trial occurred 1 ½ years after the 1993 mistrial." Id. at 10, 495 S.E.2d at 195.

In the instant case, Judge Dennis, when reversing an earlier decision to change venue, took the precaution of sending prospective jurors questionnaires. More than half knew nothing about the case. Various jurors attesting they knew about the case were excused following voir dire. Only those indicating they could remain fair and impartial remained, and none of them were seated as jurors. Unlike Caldwell, where eleven of twelve jurors knew about the case, the record fails to reflect a single juror that was familiar with the case prior to serving on the jury.

Further, defense counsel's motion patently lacked merit. Defense counsel admitted consenting to venue for the obstruction trial as a matter of "trial strategy." V. Tr. pp. 43-44.

Obviously, defense counsel's strategy in the obstruction case was not to eschew a fair and impartial jury, and the instant case, defense counsel never argued the jury selected was incapable of being fair and impartial. Moreover, the retrial occurred more than three years since the mistrial, which allowed time for interest in the case to dissipate as in Manning. Accordingly, Appellant fails to establish actual prejudice from the denial of a change of venue.

Appellant attempts to show prejudice by reference to a promotional story in May 2020, announcing a true-crime program, which did not premier until May 27, 2020. The trial was in September 2019. See Br. of App. p. 4. Further, Appellant relies on Google Trends, arguing this Court should take judicial notice of Google Trends. Since Appellant did not present Judge Dennis with Google Trends data, Judge Dennis could not have erred in failing to take it into account. Further, Appellant claims the accuracy of Google's records of searches cannot reasonably be questioned. However, the information provided by Google Trends is not relevant or reliable in determining if a fair and impartial jury could be impaneled. First, Google bases its trend reports on sample data and warns: "Google Trends is not a scientific poll and shouldn't be confused with polling data."[1] Second, Google Trends does not provide a quantitative value, but a relative value. Every term will register a point value of 100 at its highest occurrence. The information does not indicate whether that highest point is 10 searches or 10,000. Additionally, the geographic comparisons are not based on raw numbers, but are weighted according to population of base of the different geographic areas.[2] Moreover, Appellant misrepresents the results, claiming the

[1] FAQ about Google Trends data (available at https://support.google.com/trends/answer/4365533?hl=en&ref_topic=6248052) (last visited February 2, 2021).

[2] See Lewis, Chris What Google Trends Teaches Us About When to Trust Data (Aug. 30, 2019)

overwhelming interest was from Myrtle Beach. However, the area specified in the results is the Myrtle Beach-Florence metropolitan area, extending beyond Horry County. In the end, Google Trends does not offer a reasonable substitute for the trial judge's careful examination of jurors with media exposure and his ability to discern whether a fair and impartial jury was actually empaneled; and it does not even qualify as information to which judicial notice may properly be taken. Masters v. Rodgers Development Group, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) ("Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. . . . Notice of 'facts' for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. . . . Finally, appellate courts, limited to the 'cold' record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge." (citations omitted)).

A separate issue raised is Appellant's contention on appeal that venue should have been changed because Victim's aunt is the elected clerk of court for Horry County. Initially, Appellant addressed this issue in a motion to reconsider Judge Dennis's January 2019 order returning venue to Horry County, suggesting "Given that an apparent conflict of interest and/or appearance of impropriety exists, the Defendant respectfully suggests the following solutions: (1) recuse the Horry County Clerk of Court, (2) Order that the Clerk of Court take no action regarding empaneling or excusing potential jurors without Court review and approval, or (3) return venue to Georgetown County." Motion to Reconsider Reversal of Order Changing Venue (filed June 28, 2019).

Appellant's counsel raised the issue following jury selection, admitting, "[S]o we're perfectly

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https://www.semrush.com/blog/what-google-trends-teaches-us-trust-data/ (last visited February 2,

clear, we haven't alleged any impropriety, bad intent, bad faith intent of the Clerk of Court . . . ." Tr. p. 143, lines 14-20. Appellant's counsel explained: "We initially addressed this in our motion to reconsider the venue issue, ... We offered a couple of different alternatives how to address the issue. But we said, listen, we would submit that this is, at least, a perceived conflict, and that you should not go forward on this ground." Tr. pp. 143-44.

Judge Dennis then explained his approach to the issue:

> I understand the essence of your position. Frankly, I asked the clerk – because she's very much involved with the proceeding, as she should be, she's in charge of the courthouse, but I asked her this morning to not be in the courtroom, to let her assistants handle it. If you recall – and I typically identify the clerk when I comment to the jury that so-and-so is a great clerk and does a good job – I never said her name today. That was intentional.

Tr. p. 144, lines 10-20. Judge Dennis acknowledged the Clerk of Court's name appeared on the jury summons. Tr. p. 145, lines 3-6.

Once Judge Dennis explained the actions he took, defense counsel made no further objection nor contend the remedial measures Judge Dennis had taken were insufficient. See State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (noting the conduct of a criminal trial is left largely to the sound discretion of the trial judge); see generally State v. Parris, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) (There is no issue for the appellate court to decide if a defendant receives the relief requested from the trial court).

While Appellant seemed concerned with the potential for conflict at trial, Appellant has not pointed to any actual prejudice from Clerk Elvis' name appearing on the summons. It is doubtful

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2020).

many potential jurors noticed the name of the clerk and not automatic that the jurors would assume a relationship between Victim and the clerk merely because they shared the last name. There is no evidence in the record any jurors were aware of the connection. Further, there is no indication that Clerk Elvis personally took any action or was involved in the empaneling or excusing of potential jurors. Notably, Appellant's defense counsel did not assert the jury selected was tainted by any actions by Clerk Elvis. Judge Dennis ensured Clerk Elvis did not interact or otherwise be present before the jury, or present in the courtroom. Therefore, her involvement, if any, was far too peripheral to weigh upon the jurors' minds.

Authorities Appellant relies on have little semblance to the present case. For instance, United States v. Kraus, 137 F.3d 447 (7th Cir. 1998) deals with the application of Rule 11, Fed.Rules Cr.Proc. In that case, the district judge rejected a plea bargain reached between the AUSA and the defendant. The AUSA asked the judge if there was any possibility of the parties reaching an agreement the district judge would accept. The essence of the district judge's reply was the proposed 121-month sentence was too low to accept. The next day the AUSA asked the district court room's clerk her opinion about a potential agreement with a cap of 151 months. The clerk remarked the revision appeared to have credence although she could not predict what the district judge would accept. The AUSA subsequently spoke with Kraus' attorney about the proposed offer and revealed she spoke with the room clerk, conveying the substance of the clerk's reaction to the cap. When Kraus' attorney discussed the revised offer with Kraus, Kraus asked why he did not negotiate a cap of 135 months (mid-range of the sentencing guidelines) and his attorney told him that based on the clerk's remarks, it was apparent the district judge would not accept a cap of less than 151 months.

The Seventh Circuit Court of Appeals reviewed whether Rule 11's prohibition on a trial court's participation in plea discussions was violated. Reviewing the district judge's remarks in conjunction with case law, the Seventh Circuit concluded: "[R]emarks directed to future or ongoing plea negotiations which suggest what will satisfy the court transform the court from an impartial arbiter to a participant in the plea negotiations." Id. at 455. The Seventh Circuit found the clerk's involvement, seemingly benign in purpose, compounded the problem, noting: "Judicial employees, whether they be law clerks, secretaries, or courtroom deputy clerks, enjoy access to a judge's innermost thoughts." Id. at 456. However, the Seventh Circuit found the problem was more than appearance, but one of effect as the clerk's involvement in the plea discussions influenced the subsequent negotiations [and defense counsel's advice]. The Seventh Circuit concluded the violation of Rule 11 was not harmless and "vacating a plea and sentence that may have been affected by such participation best serves the prophylactic purpose of the rule." Id. at 458.

In State v. Sullivan, 39 S.C. 400, 17 S.E. 865 (1893), Sullivan was charged with the murder of the Sheriff's half-brother. The Sheriff was present and participated in the drawing of the jury in that case, and the trial judge quashed the petit jury, opined that a fair and impartial jury could not be obtained in Greenville County under present conditions, and transferred venue to Anderson County. Sullivan then attacked jurisdiction for the trial in Anderson, appealed, and attained interlocutory review. The Supreme Court affirmed the transfer of venue, and the lead opinion primarily was concerned with the authority of the Greenville judge to change venue. The Supreme Court found that a trial judge under the State constitution has the authority to change venue when determining a fair and impartial jury cannot be obtained within the original county. Id. at 867-68. A concurring

opinion added that a proper case for changing venue was presented. Id. at 868.

Whereas Sullivan merely found a trial judge has authority to transfer venue and the judge in that case did not abuse its discretion, in the instant case, Judge Dennis did not abuse his discretion. There is no evidence in the record that the mere appearance of the Clerk of Court's name tainted the jury and further, the Clerk of Court was not involved in the drawing of the jury in the present case. Further, unlike Kraus, no conduct of the Clerk of Court occurred that could be interpreted as conveying Judge Dennis's inner thoughts to the jury. Quite simply, Judge Dennis did not abuse his discretion on the sole basis that the Clerk of Court was related to the victim in the present case.

II. Because evidence shows Victim suddenly and unexpectedly disappeared after Appellant and his wife lured her to a remote boat landing near their house, the trial court did not err in denying the motion for directed verdict for kidnapping and conspiracy.

Appellant argues the State failed to present sufficient proof to present the case to the jury. However, Appellant was angry Victim claimed she might be pregnant, he called her on the payphone and bought her pregnancy test, she called him at his house and travelled to a remote landing near his house she never visited before, then Appellant's F-150 travelled to the landing and back shortly before law enforcement found Victim's car abandoned. Victim was never heard from again, and Appellant and Tammy took several steps to hide their involvement afterwards, including deep-cleaning the F-150, complete with a burnpile for the rags. According to Appellant, Tammy was with him the whole night while these activities took place and remarkably, Appellant was allowed use of his phone for the first time the night Victim disappeared in time to receive a phone call from Victim.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight and the evidence should be reviewed in the light most favorable

to the State. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992). The United States Supreme Court noted the following:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in the original).

"This objective test is founded upon reasonableness[;] [a]ccordingly, in ruling on a directed verdict motion [when] the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Pearson, 415 S.C. 463, 473, 783 S.E.2d 802, 807 (2016) (quoting State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016)).

Appellant relies rather incorrectly on State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) and State v. Miller, 287 S.C. 280, 337 S.E.2d 883 (1985) to argue that the proper standard to judge a directed verdict motion in a case proven by circumstantial evidence is the requirement that "proof must point conclusively to the guilt of the accused and must be absolutely inconsistent with any other reasonable hypothesis. That is the evidence must produce a reasonable and moral certainty that the accused, and no one else, committed the crime." Br. of App. p. 19. In Schrock, the Supreme Court quoted State v. Manis, 214 S.C. 99, 51 S.E.2d 370, 371 (1949) as follows:

> Where it is undertaken by the prosecution in a criminal case to prove the guilt of the accused by circumstantial evidence, not only must the circumstances be proven, but they must point conclusively – that is, to a moral certainty – to the guilt of the accused; they must be wholly and in every particular perfectly consistent with each other, and they must further be absolutely inconsistent with any other reasonable hypothesis then the guilt of the accused.

Manis was overruled on this point by State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989). In Edwards, as in the present case, the appellant argued when a case is entirely circumstantial, guilt must be proven to the exclusion of every other reasonable hypothesis. The Edwards court noted the appellant relied on Manis, but found the appellant was arguing the standard a jury should use in its deliberations. Edwards then quoted State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955), which noted the distinction between the standard for jurors and the standard for a court to use in consideration of a motion for directed verdict, and held the court should "submit the case to the jury if there [is] any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." (emphasis removed). The Edwards court overruled Manis and "its progeny" to the extent those cases were inconsistent with the Edwards opinion. Obviously, Schrock counts as Manis's progeny in this regard.

The Supreme Court found it necessary again to make the distinction between how a jury should be instructed to judge circumstantial evidence and the standard a trial court should utilize when faced with a directed verdict motion in State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). Justice Hearn, who authored Bennett, also pointed to Littlejohn to underscore the two differing standards a jury and a trial court should use to judge a case relying on circumstantial evidence. Justice Hearn explained, "Therefore, although the jury must consider alternative hypotheses, the

court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. . . . Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Bennett, 415 S.C. at 237, 781 S.E.2d at 354.

As Bennett held, it ultimately comes down to the question of whether or not a reasonable juror could find proof beyond a reasonable doubt, regardless of whether evidence is classified as direct or circumstantial. The United States Supreme Court made the following observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1954). Our Supreme Court explained that in circumstantial evidence cases: "[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (citations and internal quotations omitted)); see also State v. Rogers, 405 S.C. 554, 571, 748 S.E.2d 265, 274 (Ct. App. 2013) ("The Supreme Court has consistently evaluated the circumstantial evidence in a case as a whole, not in isolation from other evidence.").

Kidnapping requires proof of an unlawful act that may take the form of seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away another person without authority of

law. State v. East, 353 S.C. 634, 578 S.E.2d 748 (Ct. App. 2003). Kidnapping is a continuous offense commencing when the victim is wrongly deprived of freedom and continuing until freedom is restored. State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999).

A "conspiracy" is "a combination or agreement between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410. "The gravamen of conspiracy is an agreement or combination." State v. Stuckey, 347 S.C. 484, 502, 556 S.E.2d 403, 412 (Ct. App. 2001). "However, a formal agreement is not necessary to establish a conspiracy, as the conspiracy may be proven by circumstantial evidence and the conduct of the parties." Id., at 502-03, 556 S.E.2d at 412 (internal quotations and citations omitted). "What is needed is proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged." Id., at 503, 556 S.E.2d at 412-13 (internal quotations, citations, and emphasis omitted). "Although the offense of conspiracy may be complete without proof of overt acts, such acts may nevertheless be shown, since from them an inference may be drawn as to the existence and object of the conspiracy. It sometimes happens that the conspiracy can be proved in no other way." State v. Condrey, 349 S.C. 184, 192, 562 S.E.2d 320, 323 (Ct. App. 2002) (internal quotations and citation omitted).

Corpus Delecti

Although not the main focus of Appellant's argument, Appellant insinuates a lack of proof a kidnapping occurred. When applied to a particular offense, corpus delicti means the specific crime has been committed. State v. Dodd, 354 S.C. 13, 17, 579 S.E.2d 331, 333 (Ct. App. 2003). In the present case, Victim remained missing for many years, the remaining question is if her disappearance

resulted from criminal agency. See State v. Williams, 321 S.C. 381, 384, 468 S.E.2d 656, 658 (1996) (In order for the State to establish corpus delicti of arson, it must provide evidence the burning was caused by some criminal agency).

In State v Hummell, 266 P.3d 269, 280-81 (Wash. Ct. App. 2012), the appellate court found sufficient evidence of corpus delicti for the charge of murder, although the alleged victim was never found, finding the logical conclusion from the evidence was she was deceased through criminal agency. The court noted the victim disappeared "suddenly and surprisingly" and was never heard from again. She missed a special birthday event for her daughter, she failed to complete a work assignment which was atypical for her, and she was close to her children and unlikely to abandon them. Evidence pointed to Hummell, the victim's husband, as the suspect, based on his behavior, including his theft of her pension and forging her signature after she disappeared, as well his motive related to their daughter recently reporting to the victim that Hummell molested her.

In State v. Owens, 291 S.C. 116, 118, 352 S.E.2d 474, 476 (1987), like the present case, the alleged kidnapping victim disappeared and was not found. The Supreme Court found corpus delicti was established because the victim remained missing at the time of trial, there were signs of a struggle at the victim's home, and a ransom note was received. See also State v. Weston, 367 S.C. 279, 293, 625 S.E.2d 641, 648-49 (2006) (even though State could not locate body "the state presented evidence that [victim] had an active social life, was active with friends, at bridge club, and regularly kept in touch with the apartment complex managers, her sister, and her friends. She was last seen . . . making a withdrawal from her bank account. She has not been seen nor heard from since. Under Owens, the state's presentation of the victim's habits, coupled with her mysterious

disappearance, and the fact that she has not been seen nor heard from since August 1998, are sufficient to establish the corpus delicti of murder").

In the present case, Victim was described as a reliable worker. Her car was abandoned without signs of struggle at a remote landing she never was known to visit. There were no signs of Victim in the years since her disappearance. Additionally, the State presented evidence Victim was restrained or in trouble in a photograph in Appellant's possession after Victim's disappearance. As in Hummell, Appellant had motive, believing Victim was ruining his family.

Motive

Indeed, the State presented ample evidence of motive. Evidence of motive is powerful evidence helping establish identity. "[T]he prosecution is permitted to prove the accused's motive to identify the accused as the perpetrator of the charged crime." Mitchell v. State, 865 P.2d 591, 596-97 (Wyo. 1993). "While intent accompanies the actus reus, the motive comes into play before the actus reus. The motive is a cause, and the actus reus is the effect." Id. at 597 (quoting Edward J. Imwinkelried, Uncharged Misconduct Evidence (1992 & Supp. 1993)). "That the defendant had a motive for that particular crime increases the inference of the defendant's identity. . . . It is ideal if the defendant is the only person with such a motive. . . . The courts assume that motive has strong probative value because a motive naturally leads to action." Id. (quoting Imwinkelried).

In the present case, motive is well-established. Appellant's affair with Victim abruptly ended upon Tammy's discovery of the affair. Then contact ended with Victim. Appellant was aware Victim thought she might be pregnant. Meanwhile, Tammy was punishing Appellant by using Appellant's phone for sexually oriented texts with a male roughly Victim's age in the immediate

days before Victim's disappearance. Appellant had the motive to make Victim disappear to appease Tammy and avoid the negative consequences for Appellant as a result of Victim's possible pregnancy. Suddenly, concomitantly with Victim's disappearance, Appellant was on good terms with Tammy again, their phones were in contact for the first time in weeks within an hour of Victim's disappearance, and they texted each other over plans for Christmas a couple of days later.

Identity

In the instant case, Appellant claims that directed verdict should have been granted because the evidence fails to show Appellant and Victim "ever crossed paths" the night Victim went missing. A case Appellant cites, State v. Miller, 287 S.C. 280, 337 S.E.2d 883 (1985) addresses the argument Appellant attempts to make. In Miller, the defendant relied on Schrock to argue directed verdict should have been granted because like Schrock, no evidence placed the defendant at the scene of the murder. The Supreme Court disagreed, explaining, "Schrock, however, is distinguishable, standing for the simple proposition that a conviction will not stand where there is a complete absence of any competent evidence. Schrock will not be interpreted to impossibly increase the State's burden regarding cases relying solely on circumstantial evidence." Id. at 283-84, 337 S.E.2d at 885.

"[A] directed verdict is not required merely because the State cannot conclusively show the defendant was at the crime scene at the relevant time." State v. Bratschi, 413 S.C. 97, 107, 775 S.E.2d 39, 45 (Ct. App. 2015) (quoting State v. Rogers, 405 S.C. 554, 568, 748 S.E.2d 265, 273 (Ct. App. 2013)). For instance, in Bratschi, the defendant argued the prosecution failed to show how, when, or where the victim was killed. Bratschi, 413 at 106, 775 S.E.2d at 44. This Court, in the Bratschi opinion, noted ample evidence of motive and quoted authority holding motive may be "a

circumstance bearing on the accused as the perpetrator of the crime." Id. at 112-13, 775 S.E.2d at 47-48 (quoting State v. Thomas, 159 S.C. 76, 80-81, 156 S.E. 169, 171 (1930)).

In the present case, evidence of Appellant's guilt is established from numerous pieces of evidence:

(1) The State provided ample evidence that Appellant was engaged in an affair with Victim, Victim was pregnant at the time of her disappearance, Appellant was unhappy about the pregnancy, and Tammy remained angry about the affair. The motive to kidnap Victim and make her disappear was to appease Tammy.

(2) Appellant called Victim from a payphone at approximately 1:30 a.m., even though he had a working cell phone. Appellant initially denied making the call from the payphone. He admitted Tammy was with him, but offered no explanation why he did not use his phone or her phone to place the phone call. Appellant admitted he parked across the street even though footage shows plenty of parking space immediately by the payphone. Victim later attempted several times to call the payphone.

(3) Despite having no contact with Victim during the month of December, suddenly Sidney called her on the payphone at 1:35 a.m. After she attempted to call the payphone, she called him at 3:17 a.m. in the morning, the first time the phones were in contact with each other since November. Victim tried to call Appellant at 3:37 a.m. to 3:41 a.m., the last time the phone was ever used.

(4) Victim travelled to Peachtree landing, only minutes away from Appellant's house in Socastee. Evidence indicated she never went to this landing before this night. There was no other explanation as to why Victim would leave her Myrtle Beach apartment to drive to a remote boat landing in Socastee at 3 a.m. She disappeared forever by 4 a.m.

(5) Appellant purchased a pregnancy test and a cigar shortly before making the phone call from the payphone, which was close to the Wal-Mart. A reasonable juror could believe this pregnancy test was for Victim.

(6) Based on the empty box found in her apartment, it appears Victim also took a pregnancy test, although the applicator was never recovered.

(7) Surveillance footage from two different cameras established that an F-150 Limited Edition with HID headlights travelled down Route 814 and Mill Pond Road, which are areas en route between the landing and Appellant's residence. The time was approximately the time Victim arrived at the landing and immediately prior to law enforcement finding the vehicle parked at the landing. Lack of evidence of a struggle is consistent with Victim voluntarily leaving the scene with the driver of the F-150. The State's expert testified that the head light spread pattern matched Appellant's F-150.

(8) Expert testimony establish that Appellant's phone was powered on at approximately 3:00 a.m. on December 18. It was powered off sometime after 1:10 a.m., coinciding with Appellant's use of the payphone at around 1:30 a.m.

(9) There was no contact between Appellant and Tammy's phone for most of November until coincidently, shortly after Victim would go missing. They texted each other at 4:38 a.m. for the first time since November. By the next evening, Appellant and Tammy were texting about Christmas shopping for their children after the complete absence of any regular husband-wife contact, which coincides with the subject of their conflict disappearing. A reasonable juror could believe Appellant received his phone back because the Moorers' knew Victim was no longer a threat to the marriage.

(10) Appellant purchased a new surveillance camera system on December 21 after law enforcement observed the cameras during a visit to the Moorers' on December 20. Testimony establishes the surveillance system was functional at the time of Victim's disappearance.

(11) Footage from the new system shows Appellant and Tammy deep-cleaning the new F-150 purchased only in November and putting rags used to clean the vehicle immediately in a burn pile.

(12) Potentially incriminating texts between Appellant's phone and Victim's phone were deleted, but captured on the Moorers' home computer, indicating an attempt to hide the animus between Tammy and Victim.

(13) Appellant initially claimed to not have recent contact with Victim and denied making the payphone call, even commenting he did not know there were still payphones, but later admitted making the payphone call at 1:35 a.m. after having sex with his wife

(14) Appellant claimed Tammy was trying to get pregnant, however, Tammy was drinking and smoking marijuana the weekend prior to Victim's disappearance.

(15) The SD chip which records navigational and GPS information for the F-150 was removed on December 18 at 12:07 a.m., which would prevent a record of the F-150's movements.

(16) An account was closed around December 25 for Appellant's phone that might have shown GPS records for the phone, and potentially show Appellant's whereabouts that night.

(17) The Beach Ford plate shown on the vehicle at the time of the visit to Wal-Mart was removed at the time law enforcement seized the vehicle in late December.

(18) Appellant's phone was located at the residence at around 3 a.m., which put Appellant within range of the boat landing and provided opportunity for him to pick up Victim at the boat landing at the time she disappeared and the F-150 was seen passing surveillance cameras en route to the landing and back.

(19) Demarino testified Appellant showed him a photograph after Victim went missing showing Victim in a distressed state, unable to move of her own freewill. This demonstrates consciousness of guilt on Appellant's part.

Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether

it is sufficient to submit to the jury." State v. Rogers, 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct. App. 2013). In the present case, Victim went missing from a remote landing only minutes away from Appellant's residence after Appellant initiated contact with Victim. Appellant's F-150 went to this remote landing at the time Victim went missing and the photograph he displayed to a relative reflects his knowledge and involvement. As for conspiracy, Tammy was with him when the SD card was disengaged, and when he made the payphone call. She was present for the 3:17 phone call that immediately proceeded Victim's trip to the landing. Tammy and Appellant were texting each other nearly immediately after Victim disappeared, breaking a weeks' long draught of contact between their phones. They purchased a new surveillance system and made a burn pile for the rags after she deep-cleaned the F-150. Accordingly, a reasonable juror could find that Appellant was responsible for Victim's sudden disappearance and find him guilty of kidnapping, and he conspired with Tammy to complete the kidnapping. Therefore, sufficient evidence supports the denial of directed verdict.

III. Because the trial court sustained both of Appellant's objections to the expert's conclusion and Appellant did not object once the expert established the requisite foundation for his opinion, the issue is not preserved for review. Further, the expert's testimony established that his process and his testimony was reliable and within the scope of his expertise.

Appellant argues the trial court erred in allowing Grant Fredericks to testify each vehicle has a unique headlight spread pattern and the suspect vehicle in the surveillance footage matched Appellant's F-150. While Appellant claims his objection was overruled, in actuality, both times Appellant objected, the objection was sustained for want of further foundation. Once the foundation was established, Appellant never interposed an objection. Further, the record is replete with evidence establishing the efficacy of Fredericks' opinion and the reliability of headlight spread analysis to identify a particular vehicle.

How the issue arose

A hearing was held on April 18, 2016, three years before trial, before Judge Dennis on Sydney Moorer's motion in limine in which Appellant ultimately agreed Grant Fredericks was qualified to testify but took issue with part of Fredericks' conclusion.

Grant Fredericks testified he has performed forensic video analysis for over thirty-two years. Fredericks formerly was the head of the Vancouver, British Columbia, police department's forensic video unit. Since 1994, Fredericks has been a lead instructor for the Law Enforcement and Emergency Services Video Association (LEVA), teaching throughout North America, the United Kingdom, and Asia. Fredericks is a contract instructor for the FBI, and is a certified forensic video analyst and member of the International Association for Identification (IAI). Fredericks has testified regularly since 1994 and testified over 150 times in the last 10-12 years in courts in the United States and internationally. April 2016 transcript (M. Tr.) pp. 10-11.

As a lead instructor for LEVA – the preeminent organization for training forensic video analysts – Fredericks personally instructed between two and three thousand video analysts. His coursework includes teaching principles of reverse projection photogrammetry for video analysis. M. Tr. p. 11-12. Fredericks published in various industry publications and co-authored a best practices guideline for the use of compression in digital video environments. Fredericks co-authored a Best Practices and Standards for LEVA and its members. His work on these publications was peer-reviewed. Fredericks explained certification as a forensic video analyst requires 188 hours of coursework with recertification every three years. The final part of certification requires submission and defense of a case report before a committee of peers. M. Tr. pp. 14-17.

Fredericks explained forensic video analysis encompasses a number of subdisciplines including photographic video comparison and reverse projection photogrammetry. Other subdisciplines include macroblock analysis, speed estimation, and color correction. Fredericks has utilized reverse projection since 1984. Photographic video comparison is a primary area of his work since around 1997-98. M. Tr. pp. 22-23. Fredericks won the Vollmer award, which is an IAI award for excellence in forensic techniques. Tr. p. 28.

Fredericks described reverse projection as "the process of overlaying contemporary images of a scene with historic images of a scene in order to make observations . . . or obtain measurements." M. Tr. p. 31, line 25 – p. 32, line 11. Appellant asked Fredericks whether reverse projection was different than headlight spread pattern analysis and Fredericks answered:

> No, it's exactly the same. It's – headlight spread pattern analysis is just the examination of the reflection of light off of the object. In this case, it's – we're just looking at one feature of reverse projection. So, the vehicle is – reflects light back into the camera. The forward facing illumination of the light pattern from the headlights, fog lamps, whatever it is, reflect light to the camera. That's just one feature. . . . [I]f I were examining dents, then I would describe a depth comparison. If I were examining mud spatter . . . on the side of the vehicle, I would describe mud spatter. It's all part of reverse projection, photographic video comparison. In this case, there was an illumination of light in front of the car that could be contrast[ed] and compared, so I described that as headlight spread pattern because it's compartmentalizing all of the features of reverse projection and photographic comparison.

M. Tr. p. 33, line 12 – p. 34, line 2. Fredericks noted thousands of different types of headlights exist that distribute different beams. Even consecutive model years of the same make will distribute different beams because the headlight component changes. "So it's part of the process, okay, that people in my industry consider very importantly in doing comparison work." M. Tr. p. 36, lines 2-

20. Fredericks noted a large number of publications analyze changing headlight spread pattern from vehicle to vehicle, including the Highway Transportation Safety Authority Administration. M. Tr. pp. 36-37. Kineticorp published a peer-reviewed magazine in the traffic accident reconstruction field that discusses changes in headlight spread pattern and the measurement of that change. M. Tr. p. 38, lines 11-18. Fredericks has provided expert testimony on the comparison of headlight spread pattern analysis at least half a dozen times. M. Tr. p. 39, lines 22-24. At this juncture, Judge Dennis found the topic was beyond the ordinary knowledge of jurors, and Fredericks was qualified by his training, background, and experience to offer an opinion, leaving the remaining issue of the breadth of Frederick's opinion that would be allowed. M. Tr. p. 41, lines 7-19.

Fredericks explained some of the methodology in examining the surveillance video:

> I went back to the scene. I employed images from the original camera, recorded through the original digital video recording system, under the same lighting conditions, the same environmental conditions. And then I used a forensic tool that's commonly used in my field to overlay the images to compare and contrast to the light. I also conducted a number of tests on reflective areas of the vehicle by covering over those areas and uncovering them so I could properly identify where reflection was coming from. . . . [F]or instance, a tool box in the vehicle, place the tool box, remove the tool box, study the reflection differences. I also used over a dozen other vehicles of different makes and models but similar in appearance and vehicles of the same class, both in manufacturer and make to compare the reflections. . . .

M. Tr. p. 43, lines 9-23. Fredericks conducted an analysis to determine the class and characteristics of the questioned vehicle. The process involved calibrating the camera perspective with the historic camera perspective, under similar lighting conditions and similar environmental conditions. The vehicles tested were placed into the known position of the historic vehicle for purposes of reverse

projection, with inch by inch precise placement. M. Tr. pp. 45-46.

The known truck – the Moorers' truck – was a Ford F-150 Limited. Fredericks tested twelve other king-cab type trucks of varying makes and models for the purpose of comparing and contrasting from the questioned vehicle. Based on the brightness or luminance, some colors were eliminated, and Fredericks determined the questioned vehicle was dark in color. Fredericks also determined, through comparison and contrast, that the questioned vehicle was a four-door truck with a tool box. Additionally, using photographic video comparison and reverse projection, including analysis of the headlight spread pattern, Frederick determined the questioned vehicle had HID headlights. Fredericks agreed with the prosecutor he used the same technique or science to compare the headlights as he did to determine the questioned vehicle had a toolbox and was a four-door vehicle. He used this science to determine the class and characteristics of the questioned truck and made his determination it was the Moorers' vehicle through the totality of his analysis and not just the headlight spread. M. Tr. pp. 47-52.

Fredericks utilizes the ACE-VR methodology, which stands for analyze, compare, evaluate, verify, and report. It has been the standard in the field for decades. M. Tr. p. 54. Fredericks explained headlight analysis is just one component of reverse projection and photographic video comparison. Other examples include an analysis of a vehicle's bumper, mud spatter analysis, and analysis of bumper stickers. M. Tr. p. 58, lines 5-20. Fredericks explained the quality control procedures he utilized included the use of multiple kinds of vehicles for analysis, having his work peer reviewed, and following the ACE-VR methodology. M. Tr. p. 63, lines 17-22. Fredericks' report was peer reviewed by George Reis, a certified forensic video examiner with the International

Association for Identification. Reis has worked in the forensic video field since the 1990s and is one of the leading instructors in his field in the world. Fredericks' detailed report was roughly fifty to sixty pages in text, detailing each step, plus had hundreds of images for comparison. So the entire process was capable of being peer-reviewed. Reis sent correspondence to Fredericks in the form of an e-mail summarizing his peer-review of Frederick's report and indicating he agreed with the methodology and the results. Reis found the headlight pattern analysis was an appropriate analysis. M. Tr. pp. 64-67; State's Exhibit No. 7.

Specifically, Reis advised:

> I have reviewed your report of June 4, 2015 on "State vs Sydney Moorer and Tammy Moorer." The report is very thorough and written in a manner that explains your methodology, the foundations for headlight spread pattern comparison as a part of vehicle comparison, and the justification for your conclusion. The concept of any forensic comparison – from natural objects such as fingerprints and footprints to manmade objects from bullets, tires and tool marks are all based on these same criteria. I agree with your methodology and find your illustrations show the similarities and differences from different vehicles quite well. It does appear that some of the frames show quite a bit of resolution for this type of comparison. **The premise of the uniqueness of headlight spread patterns is well stated and illustrated.**

State's Exhibit No. 7. Fredericks concluded the questioned vehicle in the video surveillance taken on 814 and at D&S Siteworks was the Moorers' vehicle. M. Tr. p. 75. He advised he has provided this opinion in other cases and been allowed to testify to that in all the cases where that was the opinion he had to render. M. Tr. pp. 78-79.

Appellant called their expert witness, Bruce Koenig, who admitted when he was with the FBI, they did video comparisons matching questioned vehicles to known vehicles through reverse

projection and photographic video comparison, and it has been done for a long time. M. Tr. p. 105, lines 15-25. Koenig attested Fredericks does excellent work. M. Tr. p. 108, lines 10-17. For the most part, Koenig did not have any issues with Fredericks' report. He felt Fredericks did a thorough job in the rear projection analysis and his comparisons. M. Tr. p. 108, lines 18-24. **Koenig agreed with Fredericks' conclusion as to the class of vehicle for the questioned vehicle.** Koenig only disagreed that a conclusion could be made that the known vehicle could be an absolute match with the questioned vehicle, arguing the view that each vehicle has a unique headlight spread pattern has not been adequately tested. M. Tr. pp. 109-10.

At the conclusion of the hearing, Appellant indicated he did not object to Fredericks' qualifications or his conclusions as to the class of vehicle for the questioned vehicle. However, Appellant objected to the conclusion that no two vehicles projected the same headlight pattern. M. Tr. pp. 126-28. Responding to the Moorers' argument that Fredericks should not be allowed to say each vehicle has a unique headlight spread pattern, Judge Dennis noted: "He's saying in his experience, and . . . that to me is the distinction here. He's testifying from his personal experience in analyzing, he's never encountered that." M. Tr. p. 129, lines 15-24. Judge Dennis ruled:

> At the time of trial, we will have heard his testimony in full and then from the standpoint, if the solicitor asks that question, we can excuse the jury and we can go into it and have further hearing concerning Mr. Fredericks testimony in that vein. But from the standpoint of his testifying to the methodology, it's clearly – and I find nothing either from anybody's testimony, nothing that I've done on my independent research that says this is not a recognized standard for identification and he's gone through it methodically.

M. Tr. p. 130, lines 5-14. Judge Dennis noted aspects of the testimony presented issues of fact for a jury, but Fredericks was qualified to testify. M. Tr. p. 130, lines 14-24. Judge Dennis further

cautioned while he was inclined to allow the full extent of Fredericks' opinion, the scope of the opinion still needed to be addressed at the time of trial. M. Tr. p. 130, line 24 – p. 131, line 7.

At trial: Judge Dennis does not allow a running objection/sustains Appellant's objections

At trial, while the jury was out of the courtroom, defense counsel advised Judge Dennis that the defense did not anticipate objecting to Grant Fredericks' qualifications but wanted to make a running objection to some of Fredericks' conclusions and opinions. Judge Dennis did not allow a running objection, explaining, "The qualifications, when we render an opinion, when you qualify him, he's entitled to render an opinion. The extent and the breadth of that opinion is limited to his qualifications, and therein lies where it will be challenged." Judge Dennis advised defense counsel he would need to interpose an objection, then he would hear the challenge outside the jury's presence. Tr. p. 985, lines 6-19.

Judge Dennis explained further:

> I think my statement at the time – and you made it in your opening statement, and I remember that, my reaction was similar to yours – is that they are the same as fingerprints, I don't think that's scientific. . . . [W]hen I read his report, he said in my experience I've never seen lights that differ. That's totally different. . . . [H]e's not saying categorically there is no such thing . . . he's saying from his personal experiences, which he's entitled to do that. There is a distinction there, as far as I'm concerned.

Tr. p. 986, lines 6-21. Judge Dennis reiterated defense counsel would need to interpose a specific objection. Tr. p. 987, line 23 – p. 988, line 1.

Fredericks testified before the jury as to his qualifications and defense counsel did not conduct voir dire or object to Fredericks' qualifications. Fredericks runs Forensic Video Solutions and teaches forensic video analysis in various parts of North America and the world.

Fredericks has examined video for thirty years and has been qualified to testify hundreds of times throughout North America, Britain, and New Zealand. He has taught at the FBI National Academy and is a lead instructor for LEVA. He taught a course that included video comparison and reverse projection of historic images to compare objects such as vehicles. Tr. pp. 1004-08. Fredericks agreed with defense counsel during cross-examination that he adhered to the scientific method. Tr. p. 1076, lines 9-12.

Fredericks described forensic video analysis as the examination, comparison, and evaluation of video, which now chiefly concerns digital media rather than analog media which was the primary form until around 2001. Comparison work is accomplished through the use of reverse projection and may include, in addition to headlight analysis, the identification of vehicles or clothing. Tr. pp. 1009-10. Fredericks compared the Moorers' F-150, the known vehicle, to the questioned vehicle depicted in the surveillance taken from 814 and from Mill Pond Road. Fredericks explained he has undertaken this kind of analysis many times. Fredericks explained the methodology is the same whether making the analysis for vehicles, individuals, or other items. Tr. p. 1012.

Fredericks was asked what he did to analyze the known vehicle and the suspect vehicle. He testified:

> At that time, I did an examination of video images that were provided to me of a questioned vehicle. There were two sets of locations where the vehicle was depicted, and I made observations about the vehicle, including the headlight spread pattern. **That is one thing that is quite unique to a vehicle, including the headlight spread pattern.** That is one thing that is quite unique to a vehicle, and if there is enough resolution, if there is enough reliability in the edge pattern, that an examination and an evaluation of the headlight spread pattern can be made, then I may proceed to say this is fit for the purpose of doing that comparison.

Tr. pp. 1014, lines 7-17. There was no objection to the testimony. Fredericks answered the prosecution's next three questions and then the prosecution asked, with the intent for Fredericks to afterwards explain his conclusion, whether Appellant's F-150 matched the questioned vehicle in the 814 surveillance footage. Judge Dennis promptly instructed the witness to not answer the question, which allowed defense counsel to lodge an objection "that this completely goes outside the expertise of the witness." Tr. p. 1015, lines 3-12. Judge Dennis sustained the objection and made the prosecution rephrase the question as to whether a "determination" was made rather than a "match." With the rephrased question posed, Fredericks confirmed he was able to make a determination and confirmed the follow up question as to whether he was prepared to show how he came to the determination. Tr. p. 1015, lines 18-25. The prosecution asked what the determination Fredericks came to but defense counsel objected and Judge Dennis sustained the objection, requiring foundation as to whether the opinion "meets the test first, before he renders an opinion." Tr. p. 1016, lines 1-8.

Fredericks explained:

> The methodology is to compare and contrast all of the features of a questioned object, in this case a vehicle to a known vehicle. That evaluation and comparison is normally done through what is called "reverse projection." It is where we go back to the scene, we project the historic images of the object car driving by each of the areas, over on top of a contemporary view.

Tr. p. 1016, lines 12-19. This involved reposition of the known object in precisely the same position on the roadway under the same lighting conditions. Then Fredericks analyzes the reflection of the vehicles, comparing the reflection from the bumper, headlights or taillights, and other reflective features. This includes the disbursement of the headlight pattern over the roadway. Tr. pp. 1016-17.

Fredericks explained:

> **[T]here is significant research, studies and publications establishing that Headlight spread pattern is unique from vehicle to vehicle.** Vehicles of the same class, make, model, year, there are a lot of reasons why – which we'll probably get into – that establishes that the diffusion of the light, the angle of the headlight on the ground, the reflection off of the highway can be compared to establish the uniqueness of a vehicle. That is part of the reverse projection, all of which is just evaluating the reflection of light. And so that is the methodology. That would establish that a vehicle could be the same or cannot be eliminated; it might be the same.

Tr. p. 1017, lines 11-24. Even vehicles of the same class, make, model, and year may have some difference, and if there is no difference, could emit a different headlight pattern. Fredericks noted vehicles from different classes offer different headlight spread patterns because of differences in structure. Tr. p. 1018.

Without objection, Fredericks explained, "So that examination was done, and they were both identical in physical characteristics in reflection off of the vehicle, including unique features that were visible in the back of the vehicle, to the headlight spread pattern. They were all identical." Tr. p. 1019, lines 6-15. Fredericks was asked if in his experience, whether vehicles of the same make, model, and year exhibit different headlight spread patterns. And Fredericks answered, "In all of the examinations I've done, all of the tests that I've written – the tests I've read, the studies and publications that I've read and tests from peers, my peers, with enough resolution, no vehicle shares the same headlight spread pattern." Tr. p. 1019, lines 19-23. Fredericks again confirmed in his experience and his studies in his field, every vehicle has a unique headlight spread analysis. He then confirmed the headlight spread pattern of the Moorers' F-150 matched the suspect vehicle. Tr. pp. 1019-20. This testimony was all provided without objection. Fredericks continued to provide

testimony explaining the process which he utilized, all without objection. Tr. pp 1021-56.

On cross-examination, Fredericks confirmed that use of headlight spread analysis to "identify one individual vehicle to the exclusion of all others is generally accepted in the field." Tr. p. 1078, lines 5-14. The term is defined by LEVA in its glossary. Tr. p. 1078, lines 21-25. Defense counsel asked if the discipline is published in any textbooks "or things of that nature." Fredericks answered that the U.S. Department of Transportation published a document entitled Sensitivity Analysis of Headlight Perimeters Affecting Visibility and Glare in 2008 that offered a series of explanations and testing to show "why headlight spread pattern was different from vehicle to vehicle." Tr. p. 1094, lines 2-14. Fredericks explained another article defining headlight spread pattern analysis that discussed "a number of observations, including a description of high intensity discharge" or HID lights, and "how they are different from one another and the circumstances by which they would be different." The article further explains, "[W]hy one headlight from one vehicle of the same make and model would be different from another, because of humidity inside the lens, because of wear and tear on the roadway and because of the canting of the light for traffic." Tr. p. 1094, line 20 – p. 1095, line 14. A sheriff's deputy conducted a study with 60 brand new Crown Vics, that all had different headlight spreads right off the assembly line. Tr. p. 1095, lines 15-21. Fredericks offered to detail further studies, but beaten, defense counsel declined. Tr. p. 1096, lines 4-6.

Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011); Rule 702 SCRE. "Expert testimony may be used to help the jury to determine a fact

in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

In United States v. Quinn, 18 F.3d 1461, 1464-65 (9th Cir. 1994), the Ninth Circuit Court of Appeals found the district court did not err in allowing an expert in photogrammetry to testify to the approximate height of the bank robber shown on surveillance video without holding a Daubert hearing. The Court of Appeals found no error and observed the district court "concluded that the process used by [the expert] was nothing more than a series of computer assisted calculations that did not involve any novel or questionable scientific techniques." Id. at 1465.

In United States v. Wells, 879 F.3d 900, 933 (9th Cir. 2018), an expert in Honda vehicles was allowed to testify he was 70 percent certain a vehicle depicted in a blurry vehicle was a Honda CR-V after his initial analysis determined a CR-V was one of three possible models depicted in the video and photogrammetric analysis eliminated the other two Honda models.

Sagely stated is an unpublished opinion by the North Dakota District Court, United States v. Rodriguez, 2006 WL 8438025 (D. N.D. s/July 26, 2006), the district court addressed a challenge to the video analyst's methods of reverse projection measurement. The expert staged three poles of varying height, videotaped the placement of the poles, and overlay an image of the perpetrator shown in the original video overtop the videos with the three poles to determine the perpetrator was approximately 5'6" tall. The district court found the expert testimony admissible, noting, "Even to

the lay person, this methodology is logical." Id. at 2.

In the present case, Fredericks' methodology was likewise logical, and as in Quinn, did not involve any novel or questionable scientific techniques. It relied on the familiar ACE-V method and Fredericks' work was presented to the jury for its own evaluation. Further, he explained the uniqueness of headlight spreads between vehicles of the same make and model based on information he gained from experience, literature, and study.

A comparison to the facts found in Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) demonstrates the soundness of Fredericks' testimony. In that case, the Supreme Court found a witness qualified as an expert failed to meet the reliability requirements of Rule 702 to testify as to causation by a cruise control design and also offer an alternative design for the cruise control system. The Supreme Court observed it was questionable whether the witness was qualified and further: (1) he never tested his theory, (2) it was never peer reviewed, (3) he never published his theory, and (4) while noting general acceptance of a scientific principle in the community was not required for admissibility, the Supreme Court noted that the expert's theory was rejected in the community. Id. at 451-52, 699 S.E.2d at 178.

In contrast to Watson, Fredericks' theory of uniqueness was tested, his work on the instant case was peer reviewed, Fredericks cited and discussed publications that supported his theory, and the theory was not rejected, but accepted based on Fredericks' testimony at trial. Therefore, the trial court did not abuse its discretion in allowing the testimony.

Last, but not least, the issue is not preserved. Both Appellant's objections were sustained, and he never raised the objection that the opinion was not reliable, and failed to provide further

objection once the prosecution provided foundation for Fredericks' opinion and then asked him to offer his ultimate opinion. See State v. George, 323 S.C. 496, 510-11, 476 S.E.2d 903, 911-12 (1996). (Finding, an issue is not preserved for appellate review if the objecting party accepts the trial court's ruling and does not contemporaneously make an additional objection to the sufficiency of the relief provided); State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) (An appellant's "failure to request a more explicit ruling constitutes a waiver to any objection to the judge's general ruling.").

CONCLUSION

For the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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February 19, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable R. Markley Dennis Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

SIDNEY ST. CLAIR MOORER,

Appellant.

Case No. 2019-001636

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant via electronic mail to the address listed by counsel in AIS addressed to his attorney of record, Taylor D. Gillam, Esquire, S.C. Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 19th day of February, 2021.

Shana Montgomery

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From: Shana Montgomery
Sent: Friday, February 19, 2021 3:06 PM
To: Allgire, Mary; Gilliam, Taylor
Cc: Shana Montgomery; David Spencer; William Blitch
Subject: MOORER Sidney - Appellate Case No. 2019-001636 ; IBOR (02495452.PDF;1).PDF
Attachments: 02495452.PDF

Good Afternoon,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter along with the proof of service for State v. Sidney St. Clair Moorer (2019-001636) Please confirm receipt. This Initial Brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. Please don't hesitate to contact our office should you have any questions or concerns.
Thank You.

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