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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2021-000332

THE STATE,

Respondent,

v.

TYRONE ANTHONY WALLACE, JR.,

Petitioner.

BRIEF OF RESPONDENT

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PETITIONER'S ISSUE PRESENTED

Did the Court of Appeals err in holding a member of the solicitor's office was qualified as an expert in historical cell site analysis where the solicitor's employee lacked the knowledge, skill, experience, training, or education necessary in order to render an opinion in the area?

RESPONDENT'S COUNTER ISSUE PRESENTED

Whether the South Carolina Court of Appeals properly upheld the trial court's decision to qualify the Director of the Fourteenth Circuit Solicitor's Office Intelligence Unit as a historical cell site analysis expert where the record demonstrates he had over 72 hours of education in the discipline, had evaluated more than 100 sets of phone records pursuant to the type of analysis presented at trial, and possessed the requisite knowledge, skill, experience, training, and education necessary to assist the trier of fact in understanding the historical cell site analysis evidence he presented at trial.

STATEMENT OF THE CASE

Petitioner Tyrone Anthony Wallace, Jr., was indicted by a Beaufort County Grand Jury for kidnapping and murder during the March 2016 Term. (2015-GS-07-01907 and 2016-GS-07-00044). (R. p. 591–96). He proceeded to trial by jury before the Honorable Carmen T. Mullen on June 18, 2018. He was found guilty of both charges on June 22, 2018. (R. p. 522–23). Assistant Solicitors Mary C. Jones, Esquire, and Kimberly L. Smith, Esquire, prosecuted the case for the State; attorneys Trasi Campbell, Esquire, and Eric Staggs, Esquire, represented Petitioner. (R. p. 2). Judge Mullen sentenced Petitioner to twenty-five years' imprisonment for kidnapping and life imprisonment for murder. (R. p. 523–24).

A timely notice of appeal was submitted and Appellate Defender Susan B. Hackett, Esquire, filed a Final Brief on Petitioner's behalf on December 9, 2019. The State likewise filed its Final Brief of Respondent on December 9, 2019. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Wallace*, 2021-UP-029 (Ct. App. 2021) (per curiam). Appellate Defense filed a Petition for Rehearing on February 11, 2021. The South Carolina Court of Appeals denied the Petition by Order dated March 2, 2021. A Petition for Writ of Certiorari was subsequently submitted on Petitioner's behalf on March 3, 2021. The State made its Return to the Petition for Writ of Certiorari on April 29, 2021, and Appellate Defense filed a Reply on May 19, 2021.

This Court granted certiorari on September 21, 2021. Appellate Defense filed their Brief of Petitioner on October 26, 2021. This Brief of Respondent now follows.

STATEMENT OF FACTS

The crimes and evidence presented at trial

Andre Frazier aka "Dre" (hereinafter "Frazier") was good friends with Vermone Steve aka "Mony" (hereinafter "Victim"). The two were hanging out together with friends watching football at Buffalo Wild Wings on the afternoon of October 25, 2015. (R. p. 144-145). Victim decided to leave early, but made plans with Frazier to meet up later at Victim's home after the game. (R. p. 145-146). When Frazier arrived at Victim's home that night, he saw Victim's parked car, but did not see Victim outside. He was instead met by co-defendant Varsheen Smith (aka "Twiz"), who was living with Victim at the time, and Petitioner. (R. p. 148; 150; 172-173; 317). After some initial greetings between them, Frazier confirmed he had spoken with Victim recently. Twiz then lied to Frazier by informing him that Victim was inside the house. (R. p. 151). Frazier commented that Petitioner was never threatened by Twiz and did not look nervous or scared. (R. p. 154; 170-172).

Both Twiz and Petitioner followed behind Frazier as he walked toward the house. The two men then jumped him and pushed him into the home. (R. p. 155-157). Frazier testified that Twiz pulled a gun during this altercation and pressed it to his stomach in the effort to force him into the home. (R. p. 157). At the instruction of Twiz, Petitioner rifled through Frazier's pockets. (R. p. 158). With Twiz holding the gun to Frazier's head, Petitioner then used Frazier's belt to tie Frazier's hands behind his back and forced a rag into Frazier's mouth. (R. p. 159-161). Due to police being in the area for an unrelated call, Frazier was ultimately released.[1] (R. p. 164-167; 293-294). Frazier testified that Petitioner was not afraid during the encounter and did not seem as if he

[1] The Record shows that the nearby police call that interrupted the kidnapping occurred at 7:31pm. (R. p. 294). Twiz instructed Frazier not to say anything to the police as they were exiting Victim's home. (R. p. 167).

was being forced to be there. (R. p. 169-170). Frazier testified that as he was leaving he heard Petitioner comment that he should steal Victim's car. (R. p. 170-171). Before leaving, Twiz told Frazier that Victim thought he was going to shoot him, so he ran away. (R. p. 168). Frazier testified that he spent the rest of the night and the next day trying to find or get in touch with Victim, but he was not able to do so. (R. p. 168-169).

Investigator George Erdel testified that the 911 call for shots fired at Victim's address came through at 8:34pm on October 25, 2015. (R. p. 294). Victim's Greene Street residence was determined to be the location of the shooting. A single bullet was recovered from the wall of the residence. (R. p. 355-356). However, police were not able to locate any indication of blood spatter. (R. p. 337). Twenty-three (23) days later, on November 18, 2015, Victim's remains were found off of Pea Patch Road, on Saint Helena Island. (R. p. 181-182; 187-188; 263). The body had been set on fire with the use of a gasoline accelerant. (R. p. 192-196; 202).

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

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

Cook had previously given a recorded statement to law enforcement, which was played for the jury. (R. p. 211-215)

During his trial testimony Cook confirmed that he told the police the individuals that were in the group that night. The group included Petitioner, Twiz, Tayquan, and himself, and they all left from Tayquan's home. (R. p. 213). He testified that Petitioner drove the car to Pea Patch Road because he was the only one who knew where to go. (R. p. 214). Cook confirmed that he told authorities that they stopped the car in the open field, that Twiz and Petitioner popped the trunk, pulled a man out, and put him in the woods. (R. p. 214, lines 9 through p. 215, line 2). He also confirmed telling the authorities that Petitioner brought out a gas can and dumped the gas on the body. Cook then watched as the area went up in flames. (R. p. 214, line 15 through p. 215, line 7). Cook confirmed that he told authorities that they ultimately got the car stuck in the mud that night, and that Petitioner called a tow truck company to get them out. (R. p. 215, lines 3-7).

Cook also confirmed his statement to law enforcement that Petitioner stated he went over to rob Victim, but that Victim started yelling, so he shot him. (R. p. 215, line 8 through p. 216, line 5). He further confirmed that Petitioner told him that Victim was almost outside the side door of the home when he shot him and that he collected the shell casings after the shooting. (R. p. 216, lines 6-21). Cook further confirmed his statement to police that characterized Petitioner as being Twiz's "right-hand man." [3] (R. p. 217, lines 17-21). In corroboration of Petitioner being the

[3] Cook's testimony revealed that he was not being entirely truthful, as he attempted to exclude Petitioner as an individual in the car that drove to Pea Patch Road. (R. p. 211-215). He attempted to suggest that Petitioner had met them separately out in the field in a truck, and attempted to leave out the involvement of his friend Tayquan. (R. p. 218-219). Petitioner's own interview with police contradicted Cook's assertion that Petitioner arrived separately in a truck. (State's Exhibit 30B, at 29:50-34:20; at 56:12-59:10).

The State then introduced a letter written by Cook to Petitioner suggesting that he would not betray him. (R. p. 221-222). On cross-examination, counsel for Petitioner entered into evidence a letter from Mr. Cook seeking recantation of his statement to police, but only to the extent that he

shooter, the State also presented evidence of a confession in the form of Petitioner's jailhouse phone call with his mother, wherein reference to Victim's mother, he states: ". . . *and let her know I was the man who did this to her son.*" (State's Exhibit 43, at 8:20-8:40).

Forensic examination of the recovered bones and clothing found irregularities described as a "kind of circular defect that had some fractures extending out from it." This was consistent with a gunshot wound to Victim. (R. p. 411, line 1 through p. 413, line 21). Forensic evidence was also taken from Cook's black Suzuki. (R. p. 235). Rubber weather stripping from the car was taken and tested for DNA evidence. (R. p. 235-242). In comparison to the DNA sample taken from Victim's toothbrush, the results of the DNA testing of the weather stripping showed that there was a 1 in 69 trillion chance of randomly selecting a matching DNA profile from the population. (R. p. 246, lines 7-15). Cook and Twiz Smith were excluded from the DNA mixture recovered. (R. p. 246, lines 16-20). Petitioner could not be included, nor could he be excluded. (R. p. 246, line 24 through p. 247, line 12).

The State also produced video interviews that Petitioner conducted with law enforcement officers. Petitioner's explanation as to his involvement in these crimes was an evolving one that slowly revealed more and more of his participation in these crimes. For purposes of this appeal, Petitioner's interviews, *at a minimum,* conclusively revealed that he was:

> *1) present and assisted Twiz in the kidnapping of Mr. Frazier at approximately 7:30pm at Victim's Greene Street address* (State's Exhibit 30A, at 41:40-42:30; at 1:12:50-1:14:00);

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inculpated Twiz and Tayquan. (R. p. 230, line 16 through p. 231, line 12). Cook testified on cross-examination that he had not been completely truthful with law enforcement during his first statement. However, on redirect he agreed that the only recantation of his prior statement was to remove Varsheen Smith (Twiz) from the events of that night and suggest Tayquan was passed out in the backseat; Petitioner's confession to killing Victim and setting the body on fire was not recanted. (R. p. 232, line 12 through p. 233, line 19).

2) witnessed Victim's murder take place at the Greene Street address [4] (State's Exhibit 30B, at 24:45-28:45); and

3) was present at the Pea Patch Road area when Victim's body was dumped and burned. (State's Exhibit 30B, at 37:30-39:20; at 56:12-59:10).

Petitioner's interview confirmed his precise location at various points during the night. The State also put forth historical cell site analysis of expert witness Dylan Hightower to discuss Petitioner's phone activity on the night in question. It also demonstrated Petitioner's *general* location at various points based upon the tower/sector use records from Petitioner's phone.

THE ISSUE AS IT WAS PRESENTED AT TRIAL

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

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

[4] Other evidence, such as Mr. Cook's testimony and Petitioner's jailhouse phone call demonstrated to the jury that Petitioner killed Victim himself.

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

The Specified Expertise

The State sought to have Mr. Hightower qualified as an expert in historical cell phone data. The State explained that Petitioner's phone records had been acquired through Verizon and they included call detail logs as well as location services. (R. p. 5, lines 9-25). In reference to evolving case law on the subject, the trial court distinguished between "historical cell phone data" which would allow him to merely "interpret what the cell phone records say", but does not necessarily allow him to testify to location services. The court instructed that if the State wished to have Mr. Hightower testify regarding the tracking of a cell phone based on the "pinging" record, such testimony would require specific qualification as well. (R. p. 26, line 5 through p. 27, line 4). The court acknowledged that such testimony cannot be put forth through a lay person anymore. (R. p. 27, lines 5-14). The State indicated that it understood and sought to have Mr. Hightower qualified to testify as to the tracking analysis as well. (R. p. 26, line 18 through p. 27, line 14).

Training and Experience

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

At the time of trial, Mr. Hightower testified that he was currently serving as the Director of the Intelligence Unit for the Fourteenth Circuit Solicitor's Office, and their team provides both investigative intelligence and digital forensics examinations. (R. p. 9, lines 15-23). He testified

that his role within the Unit is to conduct historical cell phone analysis for the actual records that are provided from cell service providers. (R. p. 10, lines 1-4). He explained that his job is to take the call detail records, analyze these records, and perform geo spacial mapping with the information provided. He testified that in order to perform this analysis he has taken special classes so as to obtain the proper knowledge and skill for the job. (R. p. 10, lines 23-25).

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

court that approximately one month before trial he had most recently taken the "FBI Cell Site Analysis Course" which he noted was a two-day course in historical cell site analysis. (R. p. 14, lines 12-21; p. 33, lines 19-25).

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

In addition to the 72 hours of training he has received, Mr. Hightower testified that his specific role with the Solicitor's office is to perform historical cell cite analysis of the records that are obtained by the office. (R. p. 9, line 15 through p. 10, line 17). Additional voir dire also revealed that he does not perform his analysis role solely for the 14th Circuit Solicitor's Office, but has also assisted local agencies throughout the 14th Circuit as well as federal agencies. (R. p. 253, lines 13-18). In his seven year career of training and experience performing historical cell site analysis, Mr. Hightower testified that he had thus far reviewed and analyzed between 100 and 120 different sets of cellular records.[5] (R. p. 29, line 24 through p. 30, line 1).

[5] Mr. Hightower's trial testimony adjusted that estimate to be 100 to 110 sets of cellular records. (R. p. 252, lines 17-23).

Certification and Testing

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

In response to the testimony that Mr. Hightower received certifications from each of the courses he attends, the court asked what exactly Mr. Hightower becomes certified in as a result. Mr. Hightower explained that these classes certify him in an "understanding of how to read records, as well as an understanding of how cell site towers work, as well as sectors. All entities of call detail records is what you learn as a result of taking these classes." (R. p. 14, line 22 through p. 15, line 6). At the request of the court and defense counsel, Mr. Hightower provided to the court his physical certificates from the various courses discussed during the hearing. (R. p. 25, line 7 through p. 26, line 5); (R. p. 578-589).

Proffer of Mr. Hightower's Testimony

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

Mr. Hightower testified that he received phone records for Verizon number ***-***-1096, belonging to Petitioner. (R. p. 37, line 24 through p. 38, line 6). Those records contained various

data, including but not limited to: incoming and outgoing phone calls, call durations, the towers utilized for each call, and the sector (or side) of the tower utilized for each call. (R. p. 38, line 13 through p. 39, line 11). Mr. Hightower then explained the mechanics of the sector usage and that none of the data provided is an estimation or assumption on his part. (R. p. 39, line 13 through p. 40, line 6). He testified that his procedure is to first speak with the investigating officer to determine the timeframe in which analysis is required; in this case the time frame extended from October 25, 2015, at 7pm until October 26, 2015, at 5am. (R. p. 40, lines 7-16). He testified that in proceeding with his analysis he created a report so as to provide a more easily comprehended format of Verizon's raw data. (R. p. 40, lines 17-25). Mr. Hightower then created a map using his analyst software to provide visual representation of the data. This included the tower and sectors used by Petitioner during the timeframe in question, along with relevant locations on Greene Street and the burned remains discovered off of Patch Road. (R. p. 41, line 20 through p. 42, line 10).

Mr. Hightower then explained the various elements of the map, demonstrating that use of Petitioner's phone corresponds to the various tower/sectors utilized, and what area those tower/sectors cover. Specifically, between 7:11pm and 8:37pm, Mr. Hightower noted that the Petitioner's phone utilized Tower 209 (sector 3)[6], which services the area encompassing the Greene Street location where the incident occurred.[7] Tower 209, sector 3, was then used between 10:55pm and 11:05pm. (R. p. 43, lines 18-21). Mr. Hightower then noted that Tower 298, sector

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

[7] Mr. Hightower testified that the tower itself is located just 327 yards away from the relevant location, so as to demonstrate the proximity this tower has to the area in question. (R. p. 46, lines 18-24). Though Mr. Hightower was careful to note that proximity is not specifically the determining factor for tower/sector usage, as it is instead based upon the tower's signal strength. (R. p. 47, line 22 through p. 49, line 10).

3, which services the area where Victim's remains were found, was utilized by Petitioner's phone from October 26, 2016, at 12:34am until 2:29am. (R. p. 43, line 24 through p. 44, lines 7). This tower was calculated to be 2.67 miles from the actual tower itself, and well within the range of that tower. (R. p. 45, lines 13-25). Mr. Hightower's proffered testimony also included discussion of the various phone calls made by Petitioner's phone to the phones of Tayquan and Twiz. (R. p. 46, line 19 through p. 47, line 7). Mr. Hightower also testified that Petitioner's phone made an outgoing call to ***-***-8698, which belongs to Palmetto Towing.[8] (R. p. 44, lines 15-24).

Mr. Hightower's testimony also demonstrated that the strength of the tower, not its proximity, is what dictates which tower a phone "pings off of". He testified that if a tower were to be overloaded, then the phone would bounce to the next available tower. Defense counsel's cross-examination confirmed this aspect of tower usage. (R. p. 47, line 22 through p. 49, line 10). However, Mr. Hightower testified that Petitioner's continuous two-and-a-half hour use of the same Tower 298 is indicative that the tower was not overloaded during that time frame. (R. p. 46, lines 1-15). Mr. Hightower's testimony also included discussion about the software he uses, and that he is not personally responsible for writing or managing that software, but as a safeguard, he also conducts a manual analysis of the data to confirm the accuracy of his results.[9] (R. p. 49, line 16 through p. 51, line 11). In this case, *both the software and the manual calculation produced matching results.* (R. p. 51, lines 18-21).

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[8] This testimony is consistent with Mr. Cook's testimony that Petitioner called a tow truck to help get the car unstuck from the mud that night.

[9] Part of Petitioner's Brief appears to argue against the accuracy or reliability of the historical cell phone data evidence in general, as well as the accuracy of Mr. Hightower's testimony. These arguments are not preserved for review (See Brief of Petitioner, p. 18-19), nor encompassed in the issue presented. See 208(b)(1)(B), SCACR.

Ruling of the Trial Court

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

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

At trial, the State brought to the jury's attention the various trainings and experience that Mr. Hightower had undertaken in the field of historical cell site analysis and tracking. (R. p. 249-

253). Defense counsel conducted a voir dire and highlighted Mr. Hightower's lack of previous qualifications as an expert, and had Mr. Hightower read aloud the disclaimer at the bottom of the CAST certificate. (R. p. 253-255). Judge Mullen then qualified Mr. Hightower as an expert and instructed the jury that they are permitted to reject, accept, and give weight to the testimony as they see fit. (R. p. 255, line 24 through p. 256, line 7). Mr. Hightower's testimony before the jury was equivalent to the testimony proffered during the pretrial motion hearing.

STANDARD OF REVIEW

"For a court to find a witness competent to testify as an expert, the witness must be better qualified than the jury to form an opinion on the particular subject of the testimony." *Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 487 S.E.2d 596 (1997). "The decision to admit or exclude testimony from an expert witness rests within the sound discretion of the trial court." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *State v. Caldwell*, 283 S.C. 350, 352, 322 S.E.2d 662, 663 (1984). The trial court's decision to admit or deny expert testimony will not be reversed on appeal absent a prejudicial abuse of discretion. *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support. *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000). "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005).

An abuse of discretion must have resulted from an error of law or a factual conclusion that lacked evidentiary support. *Id.* "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Id.* "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling *and the resulting prejudice*, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.* (emphasis added). "There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the

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

ARGUMENT

The Court of Appeals properly upheld the trial court's decision to qualify Mr. Hightower as a historical cell site analysis expert. The record demonstrated he possessed extensive training and experience in the precise type of analysis offered at trial, and there can be no basis for prejudice in light of Petitioner confessing to his presence at the various locations of the crimes.

The issue before this Court is whether Dylan Hightower had received sufficient training, experience, or education in the field of historical cell site analysis so as to qualify as an expert witness under SCRE 702. The trial court found that he had. The Court of Appeals found no abuse of discretion in that ruling, and there is likewise no error on the part of the Court of Appeals in its affirmance. However, Petitioner insists that Mr. Hightower was not qualified to testify as an expert because he had never before been qualified as an expert, did not possess sufficient training and experience, and because one of the certificates from his numerous training courses contained a disclaimer that that particular course did not independently qualify someone to serve as an expert in historical cell site analysis. The existing case law governing the qualification of expert witnesses is immensely thorough, and collectively, it leaves Petitioner with no footing in which to sufficiently support his arguments for reversal. Mr. Hightower's collective experience, training, and education in the specific area of historical cell site analysis well exceeded the requirements set forth for qualification as an expert witness. Petitioner's arguments provide neither a legal nor a factual basis demonstrating error in this matter, and Petitioner's confessions to being present at the pertinent locations of the crimes negate any potential prejudice that could be alleged from Mr. Hightower's testimony. The Court of Appeals decision should therefore be affirmed.

a. Petitioner's arguments do not present a legal basis for reversal

Over recent years, South Carolina courts have come to conclude that historical cell site location information and analysis (often referred to as "CSLI") is a technical skill that requires expert testimony under Rule 702 in order to be admissible at trial. See *State v. Warner*, 430 S.C. 76, 89, 842 S.E.2d 361, 367 (Ct. App. 2020), reh'g denied (May 28, 2020), cert. granted (Jan. 22, 2021). Rule 702 sets forth that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." SCRE 702. The law concerning the threshold for expert witness qualification is not based upon any particular mandatory qualifications. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008) Instead, "[t]o be competent as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified *than the jury* to form an opinion on the particular subject of his testimony." *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 (emphasis added). It is a cumulative analysis that considers the totality of the proposed expert's exposure and familiarity with the subject matter in question. *Honea v. Prior*, 295 S.C. 526, 369 S.E.2d 846 (Ct.App.1988) (noting that there is no precise requirement concerning how knowledge or skill must be acquired so as to qualify as an expert); *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004)("The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject."). "For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony." *Ellis v. Davidson*, 358 S.C. 509, 525, 595 S.E.2d 817, 825 (Ct. App. 2004) (citing *Mizell*, 351 S.C. at 406, 570 S.E.2d at 183). Pursuant to this standard, "the

admission or exclusion of expert testimony is a matter within the sound discretion of the trial court." *Id.*

In addition to these general applications of the law, this Court has likewise set forth specific maxims that directly address the arguments set forth by Petitioner, and render those arguments legally insufficient. "An expert is not limited to any class of persons acting professionally," nor is a witness's licensure or certification a prerequisite for expert qualification. *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598; *Fields,* 376 S.C. at 555–56, 658 S.E.2d at 86. Also, "[t]he number of times a court has qualified a witness as an expert . . . will almost never be relevant to the trial court's Rule 702 task." *Warner*, 430 S.C. at 87, 842 S.E.2d at 366. Lastly, [d]efects in an expert witness's education and experience go to the weight, rather than the admissibility of the expert's testimony. *Gooding,* 326 S.C. at 253, 487 S.E.2d at 598.

The recitation of law above demonstrates that Petitioner's primary arguments are facially insufficient to serve as a legal basis for reversal of the trial court's decision to qualify Mr. Hightower. Regarding the topic of Mr. Hightower's course certifications, there is no standard within the rule that a proposed witness must take certain classes that bestow upon him the classification of a qualified expert witness. Indeed, *no such system exists other than the judgment of the trial court*. Nor is it reasonable to argue that a certification disclaimer *from a single training course* somehow prevents that witness from becoming a qualified expert at trial based upon his collective training and experience. In fact, the lack of certification or licensing is not an automatically disqualifying factor for expert qualification. *Fields,* 376 S.C. at 555–56, 658 S.E.2d at 86 (citing to *Baggerly v. CSX Transportation, Inc.,* 370 S.C. 362, 635 S.E.2d 97 (2006), and noting that since there are a variety of ways in which a person can become sufficiently skilled and knowledgeable in a field, adherence to licensing requirements as a prerequisite for expert

qualification is "arguably inconsistent with Rule 702's operational framework for expert testimony."); *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 162 (4th Cir. 2012), as amended (May 9, 2012) (In applying the identical federal rule, the Fourth Circuit noted that a court should consider the full range of the proposed expert's experience and training, not just his professional qualifications.). In this same vein of thought, neither Petitioner's arguments nor the record on appeal establish as fact that there is some board, bar, or administrative body that oversees licensure and certification for individuals performing historical cell site analysis. Petitioner's arguments appear to improperly demand a level of professional bureaucracy that has not even been shown to exist in Mr. Hightower's field. See *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 (expert witness qualification is not limited to the class of persons acting professionally.)

Petitioner relies upon *State v. Ellis,* 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) and *McDill v. Mark's Auto Sales, Inc.,* 367 S.C. 486, 491, 626 S.E.2d 52, 55 (Ct. App. 2006) in support of his arguments. However, neither case has applicability to the argument that Mr. Hightower did not have sufficient training and experience to satisfy Rule 702.

Ellis involved an expert qualified in the areas of crime scene processing and fingerprint identification. This Court found that such a qualification was appropriate, but that the witness exceeded the scope of that expertise in offering additional opinion testimony in the area of crime scene reconstruction and whether the defendant acted in self-defense. *Id.* In contrast, there is no argument suggesting Mr. Hightower's testimony exceeded the scope of the expertise for which he was qualified. Judge Mullen was careful to delineate the specific area of historical cell site analysis for location tracking from the more simple discipline of explanation of cell phone records. (R. p. 26, line 5 through p. 27, line 3). The trial court concluded that Mr. Hightower was qualified to

testify as to tower/sector location tracking analysis and Mr. Hightower testified accordingly. *Ellis* lends no support to Petitioner's arguments.

McDill likewise fails to offer support of Petitioner's argument. In *McDill*, this Court adhered to the stringent "abuse of discretion" standard in not overturning the trial court's decision to deny expert witness qualification to a proposed accident reconstruction witness. In *McDill*, it was undisputed that the proposed expert had some training in the field in question, but of most concern was the lack of "methodology" used by the proposed expert in his analysis, not the "sufficiency of training and experience". The trial court found that the proposed expert had merely taken the word of the motorists as to the speeds they were traveling; he "did not use any particular reconstructive techniques in making this determination." *Id.* As such, the *McDill* Court's consideration of a lack of methodology is not relevant to the arguments that Petitioner is asserting on appeal, *i.e.* the sufficiency of training and experience.[10]

While *Ellis* and *McDill* fail to support Petitioner's arguments, there is case law in support of the trial court's decision to qualify Mr. Hightower as an expert. In *State v. Franks*, the Court of Appeals found that proposed expert witness, Sargent Kelley, was sufficiently trained and experienced in historical cell site analysis as he had conducted analysis on "approximately *fifty cases* over the course of three or four years" in using the GeoTime software in question, in addition to his 15 years of experience working with cell phone technology and his seminars for utilizing the GeoTime software. *State v. Franks*, 432 S.C. 58, 76, 849 S.E.2d 580, 590 (Ct. App. 2020),

[10] In any case, the facts concerning Mr. Hightower's methodology likewise differ from *McDill* because the data pertinent to historical cell site analysis is provided in the official records from the cell service provider, not the witnesses or culprits of an accident. Additionally, Mr. Hightower testified that the location analysis was conducted *both* by the entry of that data into the CASTViz software system designed to compute the location analysis and by manual computation, which Mr. Hightower explained in detail. (R. p. 261). Demonstrating the accuracy of his work, Mr. Hightower testified that the software results matched his manual computation. (R. p. 51, lines 18-21).

reh'g denied (Nov. 24, 2020). While Sargent Kelley may have 15 years of experience with cell phone technology, the opinion demonstrates that his collective training and experience specific to historical cell site analysis is moderately *less* than that of Mr. Hightower, and does not include any mention of manual computation to confirm the accuracy of the utilized software.

In *State v. Young*, the defendant attempted to challenge the qualifications of the first time qualified expert, Agent Grabski (referred to in the Record as "Grabinski") claiming no prior qualification and a lack of peer reviewed analysis of his work. The Court of Appeals noted that:

> The proffer at trial established Agent Grabski had been a member of the SLED surveillance and intelligence unit for two years and had performed cell phone location analysis in over 200 cases. It also revealed Agent Grabski was trained by the FBI's Cellular Analysis Survey Team and received additional training from private entities. Agent Grabski also said he received extensive training in pen register track and trace techniques.

State v. Young, 432 S.C. 535, 543, 854 S.E.2d 615, 619 (Ct. App. 2021). In comparison, Mr. Hightower had analyzed approximately half as many sets of records, but Mr. Hightower possessed more than double the total years of experience in performing the job in question, and Mr. Hightower's training in both "Pen" and CAST bears remarkable similarity to Agent Grabski's trainings. Incidentally, this was the CV the solicitor found *comparable* to Mr. Hightower's CV in arguing for expert qualification at Petitioner's trial.[11] (R. p. 7). In further support of Mr. Hightower's expertise, he demonstrated both training and experience in conducting the location

[11] Petitioner attempts to differentiate Grabski's experience and training from that of Mr. Hightower's by referencing the portion of the *voir dire* where Mr. Hightower is questioned as to the specifics of Grabski's CV, a subject he obviously was not able to speak to with much confidence. Petitioner relies upon Mr. Hightower not attending a "Cellular Analysis Training School", and otherwise attempts to suggest that any difference between the two resumes renders Mr. Hightower unqualified as an expert witness. (Brief of Petitioner, p. 21). While such an argument is inherently flawed, it should be noted that while Mr. Hightower did not attend "Cellular Analysis Training School", he did attend CATS, aka "Call Analysis Training School" (R. p. 588) as well as other trainings that were not mentioned to be part of Grabski's CV. (R. p. 578-589).

analysis *manually*, and used this skillset as a confirmation of the accuracy of the results the software creates. (R. p. 51, lines 18-21). This further demonstrates Mr. Hightower's sufficient training, experience, and knowledge in the discipline in comparison to other qualified experts.

What is particularly striking about Petitioner's legal argument *is what is noticeably absent from his argument*. In the entirety of his brief, nowhere does Petitioner set forth the controlling maxim that any defects in the training or experience of a proposed expert go to its weight, and not its admissibility – a ruling that the trial court explicitly noted in response to defense counsel's arguments against qualification. (R. p. 70, lines 21-25). While Respondent argues that no such defect exists, Petitioner's failure to address such law is not surprising, as addressing this legal maxim would leave no room for the arguments he presents in this case.

The simple fact is, Mr. Hightower had studied the area of historical cell cite analysis extensively, had obtained extensive experience in conducting such analysis, and the performance such analysis had served as his career for the seven years prior to Petitioner's trial. He has, by reason of study and experience, acquired "such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." The record demonstrates that Mr. Hightower satisfied the legal standard to be qualified as an expert witness in this case and the trial court's decision is in no way arbitrary, unreasonable, or unfair. Petitioner's arguments as to the supposed deficiency of Mr. Hightower's collective training and experience, relying on a lack of previous expert qualification and certification, are by existing law, not sufficient arguments to warrant reversal and the Court of Appeals decision should be affirmed.

b. Certain factual arguments set forth by Petitioner are without support in the record

In addition to the legal deficiencies of Petitioner's arguments, there are also a number of factual assertions that require correction or clarification. First, Petitioner asserts that Mr.

Hightower "demonstrated no knowledge, skill, experience, training or education in [the area of historical cell site analysis]." (Brief of Petitioner, p. 6). Such an assertion is inaccurate, as the record demonstrates that Mr. Hightower took numerous courses in the discipline, had practiced the discipline as his career for seven years prior to Petitioner's trial, and had performed the type of analysis in question on more than 100 sets of data. To suggest Mr. Hightower possesses no training or experience requires one to overlook 26 pages of the record where Mr. Hightower discussed in detail his training and experience. (R. p. 3-29). Petitioner later hedges, and argues similarly that Mr. Hightower "had very little experience conducting analyses of historical cell site location information." (Brief of Petitioner, p. 18). The record demonstrates that this assertion also lacks support.

Second, Petitioner asserts that the State "relied primarily" upon the FBI CAST training as its basis for expert qualification. (Brief of Petitioner, p. 17). Such an assertion is again inaccurate as the record clearly indicates that the State relied *on the totality of Mr. Hightower's training and experience,* not just the completion and certificate of one training course. (R. p. 7; p. 69, line 21 through p. 70, line 3).

Third, Petitioner suggests that Mr. Hightower's expertise cannot be trusted due to Mr. Hightower testifying that the proximity of the cell phone tower is the determining factor for what tower and sector are utilized for cell service. (Brief of Petitioner, p. 18). This is again inaccurate, and Mr. Hightower testified explicitly that the determining factor for which tower a cell phone pings off of is based on the *"strength of the tower"*, not on the proximity of the phone to a given tower. (R. p. 46, lines 1-9). Petitioner leans upon this supposed mistake heavily and then ventures into a lengthy challenge against the trustworthiness of tower/sector tracking science itself by repeatedly referencing a University of Toledo Law Review article. (Brief of Petitioner, p. 18-19).

Notwithstanding the concerning issue that Petitioner is citing to a resource written by a non-expert law student as if he were an authority on the science and trustworthiness of tower/sector analysis, such information is not part of the factual record in this matter, such information was not put forth by the defense via a competing expert witness, such information was not utilized as part of a vior dire to gauge Mr. Hightower's understanding of the science, and such information is ultimately irrelevant to the issue of whether Mr. Hightower possessed sufficient training and experience so as to qualify as an expert in the field.

c. Petitioner cannot demonstrate prejudice resulting from the admission of Mr. Hightower's testimony

As previously set forth, "[t]o warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields*, 363 S.C. at 25, 609 S.E.2d at 509. No such prejudice arises in this case because the supposed damaging information was confessed to separately by Petitioner during his extensive interviews with law enforcement officers.

Petitioner asserts that the trial court's decision to qualify Mr. Hightower and permit his testimony as an expert was prejudicial error because it "allowed the jury to hear very damaging evidence from Hightower, who claimed that Petitioner's phone was using towers located near the site of the death around the time of death and his phone was using towers near where the body was found later." Petitioner suggests that the damaging evidence was presented through a witness "imbued with the imprimatur of an expert witness" and that the cell phone records provided "independent and virtually irrefutable evidence against [Petitioner]." Notwithstanding Petitioner's omission that Mr. Hightower's testimony only provided the *general location* of Petitioner's cell phone throughout the night based upon the tower/sector service area, the element of prejudice is

impossible to satisfy given that Petitioner confessed to being at the precise location of the kidnapping, the precise location of the murder, and the precise location of the body's disposal at the times those events were taking place. *Creech v. South Carolina Wildlife Marine Res. Dept.*, 328 S.C. 24, 35, 491 S.E.2d 571, 576 (1997) (citing *Knoke v. South Carolina Dep't of Parks,* 324 S.C. 136, 478 S.E.2d 256 (1996) (noting that even if evidence is improperly admitted by a trial court, there can be no prejudice when the evidence in question is cumulative to other evidence in the record)). Mr. Hightower's testimony, though corroborative for showing the general location of Petitioner's cell phone, was relevant to demonstrate the various calls exchanged between Petitioner and his co-defendants throughout the night, as well as the confirmation of Petitioner's phone dialing a tow-truck service so as to corroborate the testimony offered by Mr. Cook. While Respondent argues that there was no error by the trial court in admitting Mr. Hightower's historical cell site analysis testimony, there is certainly no reasonable probability that the jury's verdict was influenced by such testimony once they heard Petitioner's various confessions set forth in State's Exhibits 30A, 30B, and 43.

CONCLUSION

Mr. Hightower's training and experience more than satisfied the threshold for qualification as an expert under Rule 702. There was no error on the part of the Court of Appeal in upholding the trial court's decision to qualify Mr. Hightower to testify as to his historical cell site analysis, and even if some error existed to that issue, no prejudice arose from the jury hearing the testimony. For these reasons and for the arguments set forth above, there is no basis for reversal and the Court of Appeals' decision should be affirmed.

Respectfully submitted,

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