The Supreme Court of South Carolina

Re: Amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2014-002391

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Court-Annexed Alternative Dispute Resolution Rules are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 29, 2015

Rule 4(d)(2) of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to add subparagraph (C), which provides as follows:

(C) Either party may request the appointment of a mediator at any time by submitting a Request for Appointment of Mediator Form to the Clerk of Court. Upon receipt of a Request for Appointment of Mediator Form, the Clerk of Court shall appoint a primary mediator and a secondary mediator according to the same process set forth in Rule 4(d)(2)(B). A Notice of ADR appointing the mediators shall be issued upon a form approved by the Supreme Court or its designee.

The Supreme Court of South Carolina

Re: Amendment to the South Carolina Rules of Civil Procedure

Appellate Case No. 2014-000335

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 45(b)(1) of the South Carolina Rules of Civil Procedure (SCRCP) is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 29, 2015

Rule 45(b)(1), SCRCP, is amended to provide as follows:

> **(1)** A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made in the same manner prescribed for service of a summons and complaint in Rule 4(d) or (j). If the person's attendance is commanded, then that person shall, upon his arrival in accordance with the subpoena, be tendered fees for each day's attendance of $25.00 and the mileage allowed by law for official travel of State officers and employees from his residence to the location commanded in the subpoena. When the subpoena is issued on behalf of the State of South Carolina or an officer or agency thereof, fees and mileage need not be tendered. Unless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance.

The following Note is added to Rule 45, SCRCP:

Note to 2015 Amendment:

> Paragraph (b)(1) is amended to provide that fees for attendance and reimbursement for mileage must be tendered when the person arrives in accordance with the subpoena, rather than at the time of the service of a subpoena. The amendment also clarifies that a person commanded to appear is entitled to a fee for each day's attendance, and mileage is properly measured from the person's residence to the location commanded in the subpoena. Parties issuing subpoenas commanding the attendance of a person should take care to promptly notify the person if his or her attendance is no longer required because a trial, hearing, or deposition has been cancelled or rescheduled.

The Supreme Court of South Carolina

Re: Amendments to South Carolina Rules of Magistrates Court

Appellate Case No. 2014-002183

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 16 and 19 of the South Carolina Rules of Magistrates Court (SCRMC) are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 29, 2015

Rule 16(b), SCRMC, is amended to provide as follows:

> **(b)** If, at the close of all the evidence, a directed verdict is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised during the trial of the case if the case is being tried before a jury. If a jury verdict is returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if a directed verdict had been granted. A jury verdict is final if no motion for a new trial or judgment notwithstanding the verdict is filed with the court within ten (10) days of the rendering of the jury verdict and the court has not on its own motion ordered a new trial or directed a verdict notwithstanding the jury verdict. However, in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code, a jury verdict is final if no motion for a new trial or judgment notwithstanding the verdict is filed with the court within five (5) days of the rendering of the jury verdict and the court has not on its own motion ordered a new trial or directed a verdict notwithstanding the jury verdict.

Rule 19(b), (c), and (d), SCRMC, are amended to provide as follows:

> **(b)** The motion for a new trial shall be made in writing and filed with the court no later than ten (10) days after notice of the judgment. However, a motion for a new trial in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code, must be filed within five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.
>
> **(c)** Not later than ten (10) days after entry of judgment, the court, on its own initiative, may order a new trial for any reason for which it might have granted a new trial on motion of a party. However, the court may order a new trial under this paragraph not later than five (5) days after entry of judgment in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a

reason not stated in the motion. In either case, the court shall specify in the order the grounds for granting a new trial.

(d) A motion to alter or amend the judgment shall be filed no later than ten (10) days after notice of the judgment, except that in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code, the motion shall be filed no later than five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.

The Supreme Court of South Carolina

In the Matter of Thomas G. Eppink, Deceased.

Appellate Case No. 2015-000173

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition advising the Court that Thomas G. Eppink, Esquire, passed away on January 24, 2015, and requesting the appointment of the Receiver, Peyre T. Lumpkin, to protect the interests of Mr. Eppink's clients pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition is granted.

IT IS ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for Mr. Eppink's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Eppink maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Eppink's clients. Mr. Lumpkin may make disbursements from Mr. Eppink's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Eppink maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Eppink, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

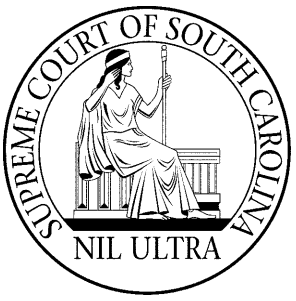
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Eppink's mail and the authority to direct that Mr. Eppink’s mail be delivered to Mr. Lumpkin’s office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.

Columbia, South Carolina

January 30, 2015



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
February 4, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Stephen Francis Krzyston, Respondent.
Appellate Case No. 2015-000155

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent has filed a return opposing interim suspension. In the event the Court places him on interim suspension, respondent requests the Court waive the requirement that he file the affidavit required by Rule 30, RLDE.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

The Court denies respondent's request to waive the requirement that he file the affidavit required by Rule 30, RLDE. The Court shall, however, accept an affidavit from respondent which is filed no later than fifteen (15) days from the date of this order and contains the information required by Rule 30(i)(2) and (3), RLDE. Within fifteen (15) days of the date of this order, the Fifth Circuit Public Defender's Office shall confirm in writing that: 1) respondent's clients have been notified of respondent's interim suspension and that the clients have been assigned

new counsel; and 2) opposing counsel on respondent's cases have been notified of respondent's interim suspension and that new counsel has been assigned.

s/ Jean H. Toal C.J.

Columbia, South Carolina

January 29, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

George L. Chavis, Appellant.

Appellate Case No. 2011-188568

Appeal from Marlboro County
Howard P. King, Circuit Court Judge

Opinion No. 27491
Heard October 2, 2013 – Filed February 4, 2015

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

PLEICONES, J: George Chavis (Appellant) was convicted of multiple crimes involving unlawful sexual conduct with a minor, Appellant's step-daughter (Victim). The issues before the Court concern the qualification and testimony of two child abuse assessment experts. We affirm.

FACTS

Appellant was convicted of one count of criminal sexual conduct with a minor (CSCM) in the first degree, two counts of CSCM in the second degree, one count of lewd act upon a child, and one count of contributing to the delinquency of a minor. Appellant was sentenced to twenty-five years on the CSCM first, twenty years on each of the CSCM seconds, fifteen years for the lewd act, and three years for the contributing to the delinquency of a minor with all sentences running concurrently.

Appellant's convictions arose out of unlawful conduct between Appellant and Victim that began when Victim was seven years old. The State presented evidence that Appellant molested Victim, forced her to perform sexual acts on him, and forced her to watch pornography.

In addition to the assaults of Victim, Victim testified that when Victim's stepsister (Stepsister) visited, Appellant would have them both perform sexual acts on him. This testimony was corroborated by Stepsister, who stated that she and Victim were sexually assaulted by Appellant and gave further detailed accounts of her own abuse at the hands of Appellant.[1]

In 2004, Stepsister reported Appellant's sexual abuse of both her and Victim. At this time, Victim was around ten years old and Stepsister was around fourteen. As a result of Stepsister's disclosure, Stepsister was taken to the Durant Children's Center (Durant Center) in Florence, where a forensic interview was performed by Mrs. Ginger Gist. Stepsister testified that during the interview Stepsister disclosed that she and Victim had been sexually assaulted by Appellant. In addition to the forensic interview, a medical exam was performed by Dr. Kathy Saunders who testified without objection that Stepsister's results were consistent with sexual activity.

Victim was also taken to the Durant Center in 2004, where a forensic interview was conducted by Mrs. Debbie Elliot. Victim testified that in 2004 she denied being sexually abused to Mrs. Elliot and claimed that Stepsister was lying. Victim was also examined by Dr. Saunders, who testified that the 2004 exam was normal.

[1] There is no challenge on appeal to Stepsister's testimony.

Dr. Saunders also testified that a normal exam may be consistent with a history of sexual abuse. [2]

Victim finally told her mother about Appellant's abuse in 2009. Victim was taken back to the Durant Center, where she was again examined by Dr. Rosa and underwent a forensic interview performed by Mrs. Robin Griggs. Dr. Rosa testified that Victim's exam was consistent with being sexually active. The exam also revealed Victim had chlamydia. At trial, the State presented medical records that Appellant was taking medicine commonly used to treat chlamydia at this time. Finally, Victim informed Dr. Rosa that she was sexually active with her boyfriend at the time.

In addition to Victim and Stepsister, two of Appellant's sisters testified, without objection, to their own experiences of being sexually assaulted by Appellant. They described similar experiences to Victim's and Stepsister's claims of being molested and sexually abused by Appellant in their youth.

In addition to testimonial evidence, photographs were introduced of Victim in only her underwear and other various stages of undress. Victim and her mother testified that Appellant took the pictures.

ISSUES

I. Did the circuit court err in qualifying Mrs. Griggs and Mrs. Elliott as experts in child abuse assessment?

II. If so, was the error harmless?

DISCUSSION

I. Qualification of Mrs. Griggs and Mrs. Elliot

Appellant contends that Mrs. Griggs and Mrs. Elliot should not have been qualified as expert witnesses in the field of child abuse assessment because there was not a sufficient showing of reliability or peer review of their work product. We agree as to Mrs. Elliot. As to Mrs. Griggs, we do not reach the expert issue but find error in the admission of part of her testimony on separate grounds.

---

[2] This finding was consistent with Victim's testimony that she had not had vaginal intercourse with Appellant by this time.

The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion. *State v. Meyers*, 301 S.C. 251, 391 S.E.2d 551 (1990). A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price,* 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *State v. Douglas,* 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

Both parties argue, and we agree, that *State v. White* should apply in qualifying child abuse assessment experts because their testimony is non-scientific. 382 S.C. 265, 676 S.E.2d 684 (2009). Both Mrs. Griggs and Mrs. Elliot were identified as child abuse assessment experts, they both conducted forensic interviews, and both testified they used the RATAC[3] forensic interviewing technique, which this Court has identified as non-scientific. *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) fn. 4 ("The RATAC style of interviewing is not scientific."). Accordingly, we will analyze the qualification of Mrs. Griggs and Mrs. Elliot under *White*.

Under *White*, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert's testimony will be reliable. *White* at 273, 676 S.E.2d at 688 (citing Rule 702, SCRE).

Appellant does not argue that the *qualifications* of Mrs. Elliot or Mrs. Griggs are insufficient. Instead, Appellant's argument focuses on the *reliability* prong of the *White* analysis. Appellant contends that the State failed to demonstrate sufficient reliability and peer review for Mrs. Griggs and Mrs. Elliot to be qualified as experts in the field of child abuse assessment. We agree that Mrs. Elliott should not have been qualified as an expert witness but do not address Mrs. Griggs's qualifications due to part of her testimony being inadmissible on other grounds.

A. Mrs. Elliott

Appellant contends the circuit court abused its discretion by improperly qualifying Mrs. Elliot and allowing her to testify concerning a report by Mrs. Gist,[4] the forensic interviewer who interviewed Stepsister in 2004 after Stepsister's initial

[3] RATAC stands for Rapport; Anatomy; Touch; Abuse Scenario; and Closure.
[4] Mrs. Gist was unavailable for trial.

allegations of abuse by Appellant. The testimony survived a hearsay objection because the trial court ruled that as an expert, Mrs. Elliot was allowed to rely on the report under Rule 703 SCRE. Mrs. Elliot testified that in her expert opinion a disclosure of abuse had been made to Mrs. Gist.[5]

The State argues that the trial judge did not abuse his discretion in qualifying Mrs. Elliot as an expert. The State cites to Mrs. Elliot's training, education, knowledge of RATAC protocol, and evidence of her performing over 5000 interviews. The State contends that RATAC protocol is peer reviewed and reliable, and therefore Mrs. Elliot's testimony is reliable.[6] While we agree Mrs. Elliot has extensive experience and training, we find that there is insufficient evidence demonstrating Mrs. Elliott's individual reliability.

We agree with Appellant that although Mrs. Elliott was sufficiently trained in RATAC protocol, and that she used RATAC protocol during her interviews, there is simply no evidence that her conclusions or impressions taken from these interviews were accurate. During cross examination, when asked if there was any way to discern what her error rate was, she responded "no." Her only peer review involved one other interviewer reviewing her work to ensure she was using RATAC protocol. When asked what her quality control procedures were, she responded "I use R[A]TAC protocol every time in the interview room."

There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. *Id.* at 274, 676 S.E.2d at 688. However, evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies. We find no evidence in this record as to Mrs. Elliott's ability to draw reliable results from the RATAC procedures she consistently follows, and thus find that the threshold reliability requirement of Rule 702 is not met. Accordingly, we hold that

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[5] The exact colloquy regarding this disclosure went as follows:

> Q: Okay. And after reviewing that interview, and without going into anything that was said to Mrs. Gist, in your expert opinion, was a disclosure made?
>
> A: It was.

[6] This Court has recently acknowledged that RATAC is not without its critics. *See Kromah,* 401 S.C. at 357, 737 S.E.2d at 499 fn. 5 (2013).

the circuit court abused its discretion in allowing Mrs. Elliot to testify as an expert regarding the report by Mrs. Gist.

B. Mrs. Griggs

Appellant argues that the circuit court erred in qualifying Mrs. Griggs as an expert because there was insufficient evidence of her reliability. Additionally, Appellant contends the circuit court erred when it found Mrs. Griggs qualified as an expert because this allowed Mrs. Griggs to testify regarding her recommendation that Victim "not be around [Appellant] for any reason," which improperly bolstered the credibility of Victim.

Assuming that there was sufficient evidence of reliability presented for Mrs. Griggs to be qualified as an expert, we find that the circuit court erred in admitting her testimony regarding her recommendation because it was improper bolstering of Victim's credibility.

While experts may give an opinion, they are not permitted to offer an opinion as to the credibility of others. *State v. Kromah, supra*. "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *Id.* at 358-359, 737 S.E.2d at 500.

Mrs. Griggs's recommendation that Appellant not be around Victim for any reason, can only be interpreted as Mrs. Griggs believing Victim's claim that Appellant sexually abused her. This type of testimony is improper. *See e.g., State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding error where there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful"); *Kromah*, at 360, 737 S.E.2d at 500 (cautioning forensic interviewers to avoid "any statement that indirectly vouches for the child's believability"); *State v. Dawkins*, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding admission of therapist's testimony indicating he believed victim's allegations were genuine was improper). This type of bolstering, especially when made by a witness imbued with imprimatur of an expert witness, improperly invades the province of the jury. *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977) ("It is axiomatic that the credibility of the testimony of these witnesses is for the jury."). Accordingly, assuming the circuit court properly qualified Mrs. Griggs as an expert, we find the court erred in allowing Mrs. Griggs to testify regarding her recommendation.

II. Harmless Error

While we find the qualification of Mrs. Elliott and the testimony of both Mrs. Elliot and Mrs. Griggs improper, in light of the substantial evidence of guilt, we hold that these errors were harmless beyond a reasonable doubt.

An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. *Id.*[7]

There are two pieces of testimony which Appellant contends warrant reversal. First, Mrs. Elliott's testimony that Stepsister disclosed abuse to Mrs. Gist in 2004, and second, Mrs. Griggs's testimony regarding her recommendation that Appellant not be around Victim for any reason.

Mrs. Elliott's testimony did little if any harm to Appellant. Multiple witnesses confirmed that Stepsister made a disclosure of sexual abuse in 2004, as did Stepsister in her testimony. Victim confirmed that Stepsister had made a previous disclosure. Victim's mother testified that she knew Stepsister had made a disclosure, and finally, Dr. Saunders testified regarding her medical exam that was performed as a result of Stepsister's disclosure. Therefore, the jury heard three independent witnesses referencing Stepsister's disclosure of abuse in 2004, and testimony of a medical exam that was performed as a result of this disclosure.

---

[7] We disagree with the dissent that the "contributing to the verdict" standard and the "overwhelming evidence" standard are used interchangeably, and that one is less stringent than the other. In this case, where there is error in admitting certain testimony, we find that the error can be deemed harmless because there is other overwhelming evidence of guilt. However, we readily acknowledge that there are some errors, particularly errors of law, which cannot be rendered harmless by overwhelming evidence. *See,e.g., State v. Middleton* 407 S.C. 312, 755 S.E.2d 432 (2014) (Pleicones J, dissenting) (noting that a failure to charge a lesser included cannot be rendered harmless by overwhelming evidence). While we appreciate the discussion by the dissent, as the dissent acknowledges, this issue was not raised by either party.

Accordingly, any error in admission of Mrs. Griggs's testimony is harmless beyond a reasonable doubt. *State v. Johnson,* 298 S.C. 496, 498, 381 S.E.2d 732, 732 (1989) (admission of evidence is harmless where it is merely cumulative of other evidence).

Mrs. Griggs's recommendation that Appellant not be around Victim improperly bolstered Victim's credibility. However, all of Appellant's crimes were established by evidence independent of both Mrs. Griggs and Victim. The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim. *Compare State v. Jennings, supra* (finding improper bolstering by a forensic interviewer not harmless, where there was no physical evidence and the case turned on the victims' credibility), *with Kromah, supra*, (finding error harmless in light of abundant evidence and distinguishing *Jennings* because the case did not turn on the credibility of the victim). We find this case more akin to *Kromah,* as there is physical evidence and multiple witnesses who corroborated the Victim's testimony regarding her abuse at the hands of Appellant.

As to physical evidence corroborating Victim's claims of abuse, first, the State introduced multiple pictures that were found on the Appellant's computer. These pictures included the Victim in various stages of undress and provocative positions.[8] Second, the State presented testimonial and circumstantial evidence establishing that the Appellant took the photos.[9] These pictures not only corroborate Victim and Stepsister's testimony, but are evidence of lewd act upon a minor and contributing to the delinquency of a minor.

Additionally, medical evidence supported Victim's claims of sexual abuse by Appellant. Immediately after Victim made her 2009 disclosure, her medical exam showed that she had chlamydia, and the State presented medical records showing Appellant had been taking medications commonly used to treat chlamydia at this time. This circumstantial evidence corroborated Victim's testimony that Appellant sexually abused her.

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[8] Pictures of the Appellant completely nude were also found on the computer, which is consistent with Victim and Stepsister's testimony that Appellant showed them pictures of himself naked.

[9] The dissent misunderstands our holding. It is not whether the photos prove the crimes, but rather whether they are independent circumstantial evidence corroborating Victim's testimony.

In addition to physical evidence, substantial testimonial evidence corroborating Victim's testimony was presented. Stepsister gave substantially detailed testimony describing not only her abuse but also describing the times when Stepsister and Victim were abused together. In addition, she testified to seeing Appellant abuse the Victim separately.

Finally, two of Appellant's sisters testified. Each gave detailed testimony of similar instances of abuse by Appellant, which they suffered at a young age. While this did not directly corroborate Victim's testimony, it supported her claims by demonstrating Appellant's common scheme of abusing those close to him. Rule 404, SCRE (allowing evidence of other crimes to demonstrate common scheme or plan). We find the testimony of Mrs. Griggs and Mrs. Elliot harmless beyond a reasonable doubt.

AFFIRMED.

BEATTY, J., concurs. TOAL, C.J., concurring in part and dissenting in part in a separate opinion in which KITTREDGE, J., concurs. HEARN, J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: While I concur in the result reached in the majority opinion, I write separately to state my disagreement with the reasoning contained in both the majority and dissenting opinions.

1. Expert Qualification

First, the majority finds error in the trial court's admission of Elliott's expert testimony on the basis that it was unreliable. *See State v. White*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009) (stating that for non-scientific expert testimony to be admissible, the qualifications of the expert must be sufficient, and that there must be a determination that the expert's testimony will be reliable) (citing Rule 702, SCRE)). I disagree with the majority's reasoning that Elliott should not have been qualified as an expert because she did not demonstrate the reliability of the RATAC method of forensic interviewing.

Despite the pall this Court has cast on the RATAC method in past decisions—especially in *Kromah*[10]—RATAC it is still a recognized method of forensic interviewing in this state, and in my opinion, for good reason, due to the sensitive nature of the interviewing process involving a child victim of sexual abuse. However, I read the majority's opinion to imply that the RATAC method itself is no longer reliable.[11]

If the majority's goal is not to discredit the RATAC method entirely, then I fail to see how Elliott's testimony was unreliable. She testified that she had performed over 5,000 forensic interviews using the method, and she also testified to her specific training, education, and knowledge of RATAC. *Cf. White*, 265 S.C. at 274, 676 S.E.2d at 688 (stating there is no "one-size-fits-all" approach for determining the foundational requirements of qualification and reliability in non-scientific evidence).

Regardless, I ultimately agree with the majority that any error was harmless

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[10] *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

[11] In fact, trial courts across the country routinely qualify experts who use the RATAC method. Not only did this Court acknowledge this fact in *Kromah*, but we also stated that RATAC was a useful tool in interviewing child victims of sexual abuse. *See Kromah*, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5.

beyond a reasonable doubt for the reasons stated by the majority.[12]

2. Improper Bolstering

Next, with respect to the actual testimony of both Elliott and Griggs, it is my opinion that both the majority and the dissent wrongly conclude that the testimony improperly bolstered the victim's credibility.

Without a doubt, our precedents stand for the proposition that an expert in child abuse assessment may not bolster the child victim's veracity or credibility, the idea being that, even if instructed not to, the jury might place more credence in the expert's opinion, thereby invading the jury's fact-finding role. While I respect the import of our previous holdings, as I alluded to previously, I am concerned that the Court has gone too far in discrediting forensic interviewers in these child sex abuse cases, and now finds error whenever a forensic interviewer testifies. In my opinion, forensic interviewing generally, and the RATAC method specifically, have an important role to play in these cases, not just because of the sensitive subject matter and relative immaturity of the victims, but because children often communicate differently than adults. To me, this testimony has evidentiary value.

With respect to Elliott, the dissent finds that the trial court erred in permitting Elliott to testify that Stepsister made a disclosure of abuse to Gist in 2004.[13] With respect to Mrs. Griggs, both the majority and the dissent find that her

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[12] At this point, I feel compelled to comment on the dissent's criticism of this Court's so-called "inconsistent" application of the doctrine of harmless error. I see no error in the characterization of the standard across our case law *as applied to the facts of each case*. Whether characterized as an "overwhelming evidence" standard or a "contribute to the verdict" standard, the ultimate consequence of the analyses under each standard is the same in that courts are trying to parse whether or not a criminal defendant received a trial that comports with notions of fundamental fairness. Criminal defendants are entitled to a fair trial, but not a perfect trial. Thus, where an error does not impact the fairness of the trial, it is harmless. Both inquiries guide this Court in assessing the question of fairness, and therefore, they are not inconsistent as the dissent suggests.

[13] I note that the majority does not reach the question of the admissibility of Elliott's testimony because it finds that her testimony was unreliable. While the

testimony impermissibly bolstered the victim's credibility because she testified that she recommended that Victim "not be around [Appellant] for any reason."

In my opinion, neither of these experts impermissibly bolstered Victim's credibility or impermissibly vouched for her veracity. *See Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (where the expert testified to a "compelling" finding of child abuse), *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (same). Elliott's testimony simply relayed what Stepsister disclosed to her; and Griggs's testimony merely restated her recommendation that Appellant stay away from Victim. The important distinction between this case and cases such as *Kromah* and *Jennings* is that the experts did not state whether or not they *believed* Victim. Therefore, I cannot see how this expert testimony improperly bolstered Victim's testimony either directly or indirectly.

Accordingly, for the foregoing reasons, I agree that the trial court should be affirmed.

KITTREDGE, J., concurs.

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dissent agrees with majority that Elliott should not have been qualified as an expert, the dissent would also find that Elliott improperly bolstered Victim's testimony.

JUSTICE HEARN: I concur with that portion of the majority opinion holding the trial court erred in admitting the expert testimony of Elliott and Griggs. However, I believe the errors in this case were not harmless and I would reverse. Accordingly, I dissent.

Harmless error exists to enforce criminal procedural safeguards while ensuring that inconsequential, technical errors do not result in a new trial. *See Chapman v. California*, 386 U.S. 18, 22 (1967). Error is harmless when it could not reasonably have affected the result of the trial.[14] *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Whether an error is harmless depends on the facts of the particular case. *Id.*

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[14] Although not raised by the parties or the majority, I would note this Court has shifted frequently in its approach to harmless error review between the contribute to the verdict standard, which focuses on an error's impact on the jury, and the overwhelming evidence standard, which focuses on the weight of the evidence in general. *Compare State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("The key factor for determining whether a trial error constitutes reversible error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"(quoting *State v. Charping*, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993))), *with State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]n insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached."); *see also Lowry v. State*, 376 S.C. 499, 510, 657 S.E.2d 760, 766 (2008) (applying a hybrid of the two standards); *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) (stating both standards together as the harmless error standard). Most other courts, including the United States Supreme Court, struggle with similar inconsistency. *Compare Harrington v. California*, 395 U.S. 250, 254 (1969) (applying the overwhelming evidence standard), *with Chapman*, 386 U.S. at 24 (applying the contribute to the verdict standard); *see* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027, 2037 (2008) ("Since [*Harrington*], the Court has shifted between the two standards—harmlessness based upon whether the error contributed to the verdict and harmlessness based upon whether the residual evidence was overwhelming—in applying the harmless error rule."). However, even under the less stringent overwhelming evidence standard used by the majority, the errors in this case were not harmless beyond a reasonable doubt.

As the majority holds, the trial court erred in qualifying Elliott as an expert witness, and furthermore, it erred in allowing Elliott to testify that Stepsister made a disclosure of abuse to Gist in 2004.[15] The majority finds Elliott's testimony "did little if any harm" because other witnesses independently confirmed Stepsister's disclosure. Respectfully, this finding is conclusory. None of the three witnesses identified by the majority—Victim, Victim's mother, and Dr. Saunders—were qualified as expert witnesses in this case, and thus none were in an equal position to influence the jury. *See State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) ("[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."). By ignoring Elliott's impact as an expert witness, the majority undermines its own conclusion as to the impropriety of her testimony, and overlooks the broader importance of Stepsister's credibility in the case against Chavis.

Additionally, the trial court erred in permitting Griggs to testify as an expert that she recommended Victim not be around Chavis for any reason. As the majority points out, Griggs' testimony was improper because the only logical inference to be drawn was that she believed Victim was telling the truth about being abused by Chavis. *See State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper."); *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) ("[W]itnesses are generally not allowed to testify whether another witness is telling the truth.").

The majority minimizes the possible effect of this improper bolstering by asserting that Chavis's crimes "were established by evidence independent of both Mrs. Griggs and Victim." However, the majority cites only to photographs found on Chavis's computer, medical evidence that Victim had chlamydia coupled with evidence that Chavis was taking medications used to treat chlamydia, and testimonial evidence of other witnesses in the case. I cannot agree this evidence

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[15] The concurrence misapprehends this holding by suggesting it is distinct from that of the majority. As noted, I fully concur in the majority's conclusion it was error for the trial court to allow Elliot to testify about Gist's report *because* it was error for Elliot to be qualified as an expert in the first place. My disagreement with the majority lies only in its harmless error analysis.

provides overwhelming proof of guilt taken independently of the errors in this case.

As to the photographs found on Chavis's computer, it is true that some show Victim and her mother in their underwear. However, the photographs do not display any nudity or sexual conduct. Furthermore, the only evidence that Chavis took the pictures or even knew of their existence was testimony from the Victim, whose credibility had been improperly bolstered by the admission of Griggs' testimony, and Victim's mother.

As to Victim's chlamydia, she admitted having sex with her boyfriend prior to being diagnosed, making it possible Victim could have contracted chlamydia through that sexual conduct. The only evidence tying Victim's chlamydia to Chavis was testimony by a police officer with no medical training that Chavis was taking antibiotics commonly used to treat chlamydia, and had a number of urinary tract infections consistent with chlamydia. However, the officer could not say with any degree of certainty that Chavis actually *had* chlamydia. Additionally, Chavis introduced evidence his antibiotics are prescribed for a wide range of illnesses in addition to chlamydia.

Finally, the majority relies on testimony from Stepsister, Chavis's two sisters, and Victim's mother. As to Stepsister's testimony, the majority cannot have it both ways; if her testimony is merely cumulative to hold harmless Elliott's improper testimony, it cannot also be central to overcome Griggs' testimony. Stepsister's credibility was improperly bolstered by Elliott, as discussed above, and thus her testimony should not be the primary piece of evidence that shows the jury would have reached the same result had the errors not occurred. As to the testimony of Chavis's sisters, each stated they were sexually abused by Chavis as children. Even accepting their testimony as true, the fact that Chavis abused his sisters over thirty years ago is weak circumstantial evidence—at best—that he abused Victim.[16] In regards to Victim's mother's testimony, it is noteworthy that she never witnessed nor testified to any sexual conduct between Chavis and Victim. Although she testified about behavior that may rise to the level of contributing to the delinquency of a minor (for example she testified Chavis had

[16] Although Chavis did not object to this evidence, had he, its admissibility would be in serious doubt. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

Victim in the shower assisting him with bathing while Victim was not wearing a bra), this is not the crime for which the majority finds overwhelming evidence of guilt. [17]

Viewed as a whole, the errors in this case were not harmless because they reasonably could have affected the end result of the trial. In my view, the majority's opinion—which allows it to sit as a second jury in the case and weigh the evidence against Chavis—employs a dangerously broad harmless error analysis to sanitize serious errors by the trial court.

Therefore, because I believe the errors in this case were not harmless, I would reverse and remand for a new trial.

[17] The majority's analysis also overlooks the fact that Chavis elicited evidence in support of his theory that the group of Victim, mother, and sisters was falsely accusing him in order to gain ownership of his house and surrounding property.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frewil, LLC, Respondent,

v.

Madison Price and Carter Smith, Appellants.

Appellate Case No. 2012-213055

Appeal From Charleston County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5293
Heard December 9, 2014 – Filed February 4, 2015

REVERSED

Joseph Francis Runey, of Charleston, for Appellants.

John A. Massalon and Irish Ryan Neville, both of Wills Massalon & Allen LLC, of Charleston, for Respondent.

KONDUROS, J.: In this lease dispute, Madison Price and Carter Smith appeal the circuit court's grant of summary judgment in favor of Frewil, LLC on its claim for breach of contract. Price and Smith further appeal the circuit court's grant of summary judgment in Frewil's favor as to their counterclaims. We reverse.

FACTS/PROCEDURAL BACKGROUND

Price and Smith were prospective students planning to attend the College of Charleston. In April 2009, they contacted David Abdo, a Frewil employee, about renting an apartment at the beginning of the Fall semester. According to both Price and Smith, they informed Abdo they wanted an apartment with a washer/dryer and dishwasher. Price went to see the apartment with an assistant of Abdo's and testified in her affidavit she was told tenants were occupying the apartment and she would only be able to look at it quickly. She was "rushed around the living room and two bedrooms" and "only spen[t] a few minutes looking at the inside of the unit." Smith indicated she viewed the apartment with Carl Dietz, an independent contractor who worked for Frewil, and was "not allowed to inspect the apartment because there were tenants living there." Her affidavit states she was "only allowed to look at [the apartment] for less than a minute" and "not allowed to go beyond the foyer." Price and Smith attested they asked Abdo and Dietz at the time of signing the lease if the apartment had a washer/dryer and dishwasher and they were told yes. They signed the lease and other documents including a policies agreement and security deposit agreement.

In August 2009, when they arrived to move in, Price and Smith discovered the apartment did not contain a washer/dryer or dishwasher. They told Dietz the apartment was unacceptable, and they discussed moving into another Frewil unit that did contain a washer/dryer and dishwasher or to which a washer/dryer connection and dishwasher might be able to be added at a later date. Neither of those alternatives worked out, and Price and Smith found alternate housing.

Abdo sent a letter to Price's and Smith's parents indicating Frewil would retain its security deposit on the apartment and seek to mitigate damages by renting it. Frewil did rent the apartment but at a lesser rent than Price and Carter had agreed to under the terms of their lease. Frewil filed suit for breach of contract or in the alternative, unjust enrichment or quasi contract/quantum meruit. Price and Smith counterclaimed for negligent misrepresentation, breach of contract accompanied by a fraudulent act, and violation of the South Carolina Landlord Tenant Act.

The circuit court granted summary judgment to Frewil stating no genuine issues of fact existed, the lease was unambiguous that it contained no washer/dryer or dishwasher, Smith and Price signed the lease, and they committed an unjustified failure to perform their obligations under the lease. The circuit court reasoned any representations by Abdo or Dietz were not part of the lease and were subsumed by the merger clause contained therein. With respect to Price's and Smith's

counterclaims, the circuit court stated fraud could not be proven when they had the opportunity to inspect the apartment, removing any reliance they could have had on the representations regarding the disputed appliances. The court further indicated Smith and Price signed the lease even though it was unambiguous the unit did not contain a dishwasher or washer/dryer. This appeal followed.

LAW/ANALYSIS

Smith and Price contend the circuit court erred in granting Frewil's summary judgment motion. They contend the lease was ambiguous thereby permitting the introduction of parol evidence revealing genuine issues of material fact regarding Frewil's breach of contract claim. We agree.

> If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto. However, where a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent.

Columbia East Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 519, 386 S.E.2d 259, 261 (Ct. App. 1989). "For, generally, parol evidence is admissible to show the true meaning of an ambiguous written contract." *Id.* "Such a contract is one capable of being understood in more ways than just one, or an agreement unclear in meaning because it expresses its purpose in an indefinite manner." *Id.* "When an agreement is ambiguous, the court may consider the circumstances surrounding its execution in determining the intent." *Id.* at 519-20, 386 S.E.2d at 261. "Where the contract is susceptible of more than one interpretation, the ambiguity will be resolved against the party who prepared the contract." *Id.* at 520, 386 S.E.2d at 262. "[I]t would be virtually impossible for a contract to encompass all of the many possibilities which may be encountered by the parties. Indeed, neither law, nor equity, requires every term or condition to be set forth in a contract." *Id.* If a situation is unaddressed in a contract, the court may look to the circumstances surrounding the bargain as an aid in determining the parties' intent. *Id.*

In this case, the circuit court relied upon the merger clause and the lease itself to conclude the girls had breached the lease as a matter of law. However, if a contract is subject to more than one interpretation, it is ambiguous and parol

evidence is admissible. Frewil contends, and the circuit court found, the lease unambiguously states the unit does not contain a washer/dryer or dishwasher. However, the lease states any overflow from washing machines or dishwashers is the responsibility of the tenant. Additionally, the Security Deposit Agreement, specifically made part of the lease by section 22C of the lease, indicates the dishwasher must be clean in order for the tenant to receive a return of the security deposit. The lease does not explicitly indicate what appliances are or are not in the unit. Because the lease is ambiguous on this point, parol evidence was admissible. As these appliances are mentioned and Price and Smith allege they were told the washer/dryer and dishwasher were included, the circuit court erred in concluding the lease and its merger clause precluded any challenge to Frewil's breach of contract claim as a matter of law.

Smith and Price also allege the circuit court erred in dismissing their counterclaims at the summary judgment stage. We agree.

"Neither the parol evidence rule nor a merger clause in a contract prevents one from proceeding on tort theories of negligent misrepresentation and fraud." *Slack v. James*, 364 S.C. 609, 616, 614 S.E.2d 636, 640 (2005). "[I]f [a] writing was procured by words and with fraudulent intent of [the] party claiming under it, then parol evidence is competent to prove facts which constitute fraud." *Id*. "Whether reliance is justified in a given situation requires an evaluation of the circumstances involved, including the positions and relations of the parties." *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003) (internal quotation marks omitted).

> What constitutes reasonable prudence and diligence with respect to reliance upon a representation in a particular case and the degree of fault attributable to such reliance will depend upon the various circumstances involved, such as the form and materiality of the representation, the respective intelligence, experience, age, and mental and physical condition of the parties, the relation and respective knowledge and means of knowledge of the parties, etc.

Id. at 475, 581 S.E.2d at 504 (internal quotation marks omitted). "The general rule is that questions concerning reliance and its reasonableness are factual questions

for the jury." *Unlimited Servs., Inc., v. Macklen Enters., Inc.*, 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991). "Issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the triers of the facts." *Starkey v. Bell*, 281 S.C. 308, 313, 315 S.E.2d 153, 156 (Ct. App. 1984).

The circuit court concluded Price's and Smith's claims for fraud and negligent misrepresentation failed as a matter of law because they read and signed the agreement and inspected the premises. However, in this case, as discussed above, the lease mentioned the disputed appliances and did not specifically exclude them. Smith and Price alleged they had been told the appliances were included. Furthermore, they alleged they were prevented by the Frewil representative from conducting a full inspection of the apartment because it was occupied. These allegations create questions of fact for a jury regarding the reasonableness of their reliance on representations the unit contained a dishwasher and washer/dryer. *See Watts v. Monarch Builders, Inc.*, 272 S.C. 517, 519-20, 252 S.E.2d 889, 891 (1979) (finding *absent* allegations purchasers were hindered in their investigation of the property or were told specific facts regarding metes and bounds, no fraudulent misrepresentation could be established).

Based on all of the foregoing, we conclude the circuit court erred in granting summary judgment to Frewil as to its breach of contract claim and with respect to Price's and Smith's counterclaims. Therefore the order of the circuit court is

REVERSED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Darryl L. Drayton, Appellant.

Appellate Case No. 2012-213295

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5294
Heard November 3, 2014 – Filed February 4, 2015

AFFIRMED

Appellate Defender Susan B. Hackett, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

SHORT, J.: Darryl L. Drayton appeals his murder conviction, arguing the trial court erred in (1) refusing to charge the jury concerning how to consider circumstantial evidence; (2) admitting evidence when the search warrant lacked

probable cause; and (3) limiting Drayton's cross-examination of the pathologist concerning the victim's toxicology report. We affirm.

FACTS

Michael Bartley testified he was engaged to the victim, Alexis Lukaitis, and had given her an engagement ring. Bartley and the victim had twenty-two-month-old twin boys. Bartley testified the victim took unprescribed medication and received the pills from "D," whom he identified in the courtroom as Drayton. Bartley explained the victim had received pills from Drayton in the past in exchange for driving him places.

Bartley testified the victim was friends with a neighbor, Shannon Hooper, who lived in their apartment complex in Bluffton. According to Bartley, Drayton was "always" at Hooper's apartment. Hooper's former sister-in-law, Tina Johnson, was also at Hooper's apartment, and the victim would "get pills from them."

On Sunday, August 8, 2010, Bartley prepared the twins to go to his mother's house for dinner, which was a recurring family event for Bartley, the victim, and the twins. The victim experienced an allergic reaction to a fabric softener dryer sheet and did not accompany Bartley. According to Bartley, the victim called him at 6:00 p.m., indicating she was going to drive "Darryl" to Charleston to get pills. Bartley testified he last spoke to the victim at 8:19 p.m. that evening. At the time, the victim was on the road. Bartley testified the victim confirmed she was with "D"; she said "make a right here" as though speaking to someone in the vehicle; Bartley heard a person speak to her in a voice too muffled for him to distinguish; and she told Bartley she loved him and would be home soon. At approximately 10:00 p.m., Bartley called the victim's cell phone, and it appeared to answer and sounded muffled, "like I thought she was digging her phone out of the purse. And then it got quiet. And I was like hello, hello. And then it hung up, and that was it." Bartley attempted "all night" to reach the victim by phone and also called hospitals, jails, and police stations looking for her.

The following morning, Monday, August 9th, Bartley reported the victim missing to the police and Detective Todd Calhoun of the Beaufort County Sheriff's Office (BCSO) responded. Both Calhoun and Bartley attempted to reach Drayton by phone. Calhoun called Drayton's cell phone, and Drayton identified himself and agreed to meet Calhoun at Drayton's house, but he did not show. After numerous

attempted calls by Bartley, Drayton answered and denied going to Charleston with the victim.

Bartley drove with Hooper along Highway 17 looking for the victim's vehicle. After he returned home, Bartley saw an internet report that a body had been found in Charleston, and he called the Charleston police. He described the victim, including two small tattoos. He also shared the cell phone numbers of the victim, Hooper, and Drayton.

Johnson testified she met the victim through Hooper. On Monday, Bartley arrived at her house very early looking for the victim. Johnson told her eleven-year-old son about the visit and that the victim had allegedly driven Drayton to Charleston and was missing. The son knew Drayton from meeting him at Hooper's house.

Johnson further testified Drayton lived in a brick house next door to a Bluffton self-help facility, and she and the victim had been there to meet Drayton. Later on Monday, Johnson, her son, and other family members were at the self-help facility. Johnson's son told her he saw Drayton. Johnson notified the police. At trial, the son testified Drayton was in the parking lot at the self-help facility. According to the son, Drayton had scratches on his face, a bandage on his finger, and a hospital bracelet.

Jackie Seward, a professional logger in Hollywood, South Carolina, testified he was driving onto his family's property on Monday, August 9th, when he saw the victim's body on the side of the road. He notified the police. Deputy William Shepherd of the Charleston County Sheriff's Office (CCSO) and James Thomas Milz, a forensic investigator for the CCSO, responded. Milz testified the victim suffered a large laceration to the throat and her clothing and limbs were charred. It appeared she had been moved because a bloody handprint was on her ankle.

Milz photographed footprints and tire marks at the scene. Milz also took cast impressions of the tire marks. Vicki Hallman, a South Carolina Law Enforcement Division (SLED) employee in the latent prints crime scene unit, testified the tests on the tire impressions were not totally exclusive and the tracks could have been made by the victim's vehicle, a 2001 white Pontiac Grand Prix, or another vehicle with Michelin Symmetry tires. Paul McManigal, the supervisor of forensic services for the CCSO, testified he was at the scene with Milz. McManigal testified no usable fingerprints were obtained from the victim's body.

Stephen Edwards of Bluffton testified he was Drayton's cousin. On Monday morning, August 9, 2010, Drayton knocked on Edwards' door, waking him and asking for a ride to the hospital. Drayton's hand was wrapped in bloody tissue, and he told Edwards he had been in a fight with three men from Beaufort and suffered a cut on his finger. Edwards did not have gas in his car so Drayton left, returning approximately ninety minutes later with five dollars for gas. Edwards took Drayton to the emergency room at a hospital in Hilton Head. When they left the hospital, Edwards took Drayton to a jewelry store because Drayton claimed he wanted to pawn a class ring. At Drayton's request, they registered and checked into a motel in Hardeeville for that night.

On Tuesday, Edwards drove Drayton to a plastic surgeon for further treatment on his finger, and they spent a second night at the motel. According to Edwards, Drayton requested a ride to Florida, but Edwards refused, and on Wednesday morning, he dropped Drayton off at the library in Bluffton. Edwards spent the day receiving medical treatment for high sugar levels. When he arrived at his home on Wednesday evening, he discovered bloodied, foreign trash on his porch, including a spare tire, speakers, diapers and a diaper bag, a blanket, and a CVS bag filled with clothes. He called 911 from a neighbor's apartment and reported the bloody trash. Detective Calhoun responded, and retrieved the trash. Bartley identified numerous items found at Edwards' house as belonging to the victim, including the diaper bag and blanket. He also testified numerous items did not belong to the victim, including the CVS bag, clothing, and a speaker box.

Dr. Luca Delatore testified he treated Drayton on the morning of August 9th for a finger laceration, reportedly inflicted by a saw the previous evening. An x-ray revealed a fracture of the bone, which was exposed from the laceration. Delatore prescribed an antibiotic and pain medication. Maggie Mae Furchak testified she knew Drayton, and he came to the pharmacy where she worked on Monday to fill two prescriptions. Drayton told her he cut his finger at work that morning on a piece of glass.

Christopher Golis testified he worked at Golis Family Jewelers in Bluffton. He knew Drayton and testified he purchased an engagement ring from Drayton on August 9, 2010. Golis testified Drayton claimed he found the ring at a gas station. Golis described the ring as a unique, three-stone "past, present, future" ring. Golis noticed Drayton's bandage, and Drayton told Golis he cut his finger on a saw

working for a fence company. Golis later received a telephone call from Detective Calhoun. Golis identified Drayton from a photographic line-up and surrendered the ring. Bartley identified the ring as the victim's engagement ring.

Sargent Robert DiCarlo of the BCSO testified he responded to a call on August 10, 2010, regarding the Bluffton Police Department finding what was suspected to be the victim's vehicle parked on Wharf Street in Bluffton. Upon arrival at the scene, he noticed what appeared to be blood near the trunk. Bartley identified the vehicle as belonging to the victim.

Kimberly Dinh, then of SLED, testified she specialized in processing crime scenes and processed the vehicle. She located suspected blood on numerous surfaces of the vehicle, including in the interior, inside the driver's door, on the passenger seat, on the back of the car, on the license tag, below the tag, and on the passenger side door of the vehicle. She also located strands of hair. The trunk had been "mostly cleaned out", the spare tire was missing, and there was water in the trunk. Dinh collected twenty-one swabs of suspected blood or DNA, including two DNA swabs from the steering wheel and two swabs from the driver-door pull.

Drayton was arrested Wednesday, August 11th. Investigator John G. Adams of the BCSO photographed Drayton the day of his arrest, noting scratches around his neck, in the center of his chest, on his forearm, on the palm of his hand, and noting the injury to his finger. Adams admitted the photographs did not show scratches on the right side of Drayton's face.

Catherine Leisy, a SLED forensic scientist, testified she tested DNA from the victim, Bartley, and Drayton. With probabilities of one in 3 million and one in 1.9 trillion, Drayton's DNA was found on the victim's driver's side rear window; the driver's door; and the driver's doorframe. DNA from the steering wheel was a mixture of two individuals with the major contributor matching Drayton and the minor contributor not exclusive of the victim. Leisy also tested cuttings from the diaper bag and tire cover found in Edwards' trash and concluded they contained the victim's DNA and had a matching probability of one in 50 quadrillion. As to the DNA on the victim's shoes found at the crime scene, the DNA matched the right shoe with a matching probability of one in 340 million and the left shoe with a matching probability of one in 1.9 quadrillion. Finally, the CVS bag contained DNA from at least two individuals, with Drayton's DNA the major contributor and the minor contributor insufficient for reliable interpretation.

Subject to Drayton's objection to admissibility, the parties stipulated to Drayton's cell phone number, and the State called Kenneth Ray Aycock, Jr., of the Army National Guard's counter-drug task force as a witness. Aycock testified he primarily analyzed cellular phone analysis and tracking for the FBI. Aycock created maps to illustrate his findings regarding the use of Drayton and the victim's cell phones.

Aycock testified the review of the victim's cell phone use on August 8th showed use beginning in the Bluffton area. The cell phone was used between 8:19 and 9:49 p.m. in the Ravenel area. Calls after 9:49 p.m. were unanswered or went to voicemail and did not contain cell-site data. At 8:19 p.m., the victim's phone made an eighty-six second call, and at 9:49 p.m., the phone received an unanswered call that went to voicemail but contained cell-site data. Both calls were to or from Bartley's phone. There were also seven calls from Bartley's number that went to the victim's voicemail. After 9:49 p.m., there was no cell-site data.

As to Drayton's cell phone, Aycock testified calls on August 8th between 9:08 a.m. and 6:36 p.m. were made in the Bluffton area. At approximately 7:20 p.m., Drayton's phone began hitting towers along Highway 17 into Charleston. Between 7:20 and 7:52 p.m., his phone registered in Ravenel, showing travel between Charleston and the Ravenel-Hollywood area. At 9:13 p.m., the phone tower near the victim's body registered his phone. At 9:26 p.m., the tower closer to Charleston registered. Every call after 9:26 p.m. registered closer to Charleston until the last call at 11:38 p.m. On August 9th, the phone registered in Bluffton at 6:48 a.m. Text messages originated from Drayton's cell phone on August 10th at 5:11 p.m., stating: "[B]aby, do you have a credit or a debit card to get me a room over the phone. I have eighty bucks and I want to save that so I can get on the road in the morning" and "Come up there in the morning. I've got to get away from here." Aycock admitted cell phones occasionally pick up a routed call, appearing to be outside of the normal sphere of travel. He explained a cell phone will pick up the strongest signal and if the frequencies are being used up at that tower, it will go to another tower. He also explained that at the edge of the radius of a tower's reach, a cell phone begins searching for the next tower.

Dr. Susan Erin Presnell, a forensic pathologist, testified she performed an autopsy on the victim. She had several abrasions and bruises on her face, lacerations on her upper and lower left lip, cuts and/or scrapes on her chest, bruises on her arms and

knees, and bruising and contusions on her lower legs. Presnell testified the victim also suffered puncture injuries resulting from a pointed object such as a knife, screwdriver, or icepick. The victim suffered two punctures and a cut to her lower right chest, a cut through the web of the left thumb down to the bone, and small cuts on the right hand. The victim also suffered gaping cuts to her neck that severed the carotid artery, the neck muscles, the thyroid gland, the trachea, and the esophagus. Of the punctures to the victim's neck, Presnell opined the injury to the carotid artery caused the victim's death. Presnell also testified hemorrhages across the victim's eyes and face indicated strangulation. Thus, Presnell "felt pretty comfortable that cause of death . . . [was] carotid artery transection from the sharp-force injury. But there . . . was likely some amount of neck compression or . . . strangulation." Presnell also described thermal injury to the victim's skin from burning, but she opined it likely occurred after death.

During cross-examination, Drayton's counsel questioned Presnell regarding the toxicology report performed on the victim. The State objected when counsel asked Presnell about buprenorphine, a narcotic. Outside the presence of the jury, the parties argued about the admissibility of the toxicology report, which indicated the victim "had a blend of different drugs that included not just the kind of opiates that she was allegedly going to look for, but that she had somehow acquired a significant quantity of amphetamines that were in her system at the time and other depressants like . . . Prozac and marijuana . . . ." Counsel argued the existence of unexplained drugs in her system "undercuts the State's circumstantial evidence." The State argued it was irrelevant and proffered Presnell's testimony that she would not be comfortable testifying as to when the victim had ingested the drugs and a toxicologist would be more appropriate to testify regarding the matter. Citing Rule 403, SCRE, the trial court excluded the evidence.

The jury convicted Drayton of murder, and the trial court sentenced Drayton to life imprisonment without the possibility of parole. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence

or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

LAW/ANALYSIS

I. Jury Charge

Drayton argues the trial court erred in denying his request for the "reasonable hypothesis" circumstantial evidence jury charge. We disagree.

The trial court instructed the jury on circumstantial evidence as follows:

> There are two types of evidence which are generally presented during trial. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes a fact to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all the evidence[,] if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

Drayton objected to the charge on circumstantial evidence, arguing the trend in the cases was to return to the "reasonable hypothesis" language used for directed verdict issues. He further argued it was "patently misleading" to instruct jurors that

there was no difference between direct and circumstantial evidence. In requesting his jury charge, Drayton relied upon the "reasonable hypothesis" language discussed in *State v. Edwards*, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004) (holding that the language in *State v. Grippon*, 327 S.C. 79, 83-84, 489 S.E.2d 462, 462 (1997), "is the sole remaining charge to be utilized by the courts of this state in instructing juries in cases relying, in whole or in part, on circumstantial evidence"). Citing *Edwards*, Drayton requested the following jury charge:

> Every circumstance relied upon by the state [must] be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused *to the exclusion of every other reasonable hypothesis*. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilty [sic] of the accused, the proof has failed.

(emphasis added). The court denied the request.

In reviewing jury charges for error, this court reviews the charge as a whole and in light of the evidence and issues presented at trial. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). A jury charge is correct if when read as a whole, it adequately explains the law. *Id.* A jury charge that is substantially correct and covers the law does not require reversal. *Id.*

Our supreme court found no error by the trial court in *Grippon*, 327 S.C. at 82, 489 S.E.2d at 463, when it refused to charge the phrase "to the exclusion of every other reasonable hypothesis," and in *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 447 (2013), our supreme court found the circuit court did not err in providing a circumstantial evidence charge consistent with *Grippon*. The *Logan* court also noted that "erroneous jury instructions are subject to harmless error analysis" and that due to other jury charges provided by the circuit court, the "instruction, as a whole, properly conveyed the applicable law." 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8.

The court in *Logan* held the following circumstantial evidence charge, and a proper reasonable doubt charge, should be given when requested by a defendant:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. *The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.*
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

405 S.C. at 99, 747 S.E.2d at 452 (emphasis added).

The court explained its holding did "not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53. The court continued:

> Our *Grippon* and *Cherry* decisions commendably sought to remove confusion from the jury's consideration regarding the weight and value afforded to circumstantial evidence. However, at times, a separate framework is necessary to the jury's analysis of circumstantial

> evidence. Thus, we modify *Grippon* and *Cherry* to allow the additional language provided above if requested by a defendant.

Id. at 100, 747 S.E.2d at 453.

Initially, we agree with Drayton's argument that he should benefit from the *Logan* rule because his case was pending on direct review and the issue was preserved. *See State v. Jenkins*, 408 S.C. 560, 572, 759 S.E.2d 759, 765 (Ct. App. 2014) (finding *Logan* applies to "cases pending on appeal at the time the *Logan* opinion was published"). However, this court in *Jenkins* nevertheless affirmed, applying the harmless error analysis and explaining, "Our supreme court has excluded the 'reasonable hypothesis' language from the circumstantial evidence instruction now required by *Logan*, recognizing that this language is unnecessary." *Id.* at 572-73, 759 S.E.2d at 766 (finding "any error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law). The court next reviewed the trial court's jury instruction on reasonable doubt, which immediately preceded the circumstantial evidence charge, and found it to be a correct statement of the law. *Id.* at 573, 759 S.E.2d at 766. The court concluded the instructions, "as a whole, properly conveyed the applicable law." *Id.* at 573-74, 759 S.E.2d at 766.

The trial court in this case charged the jury on reasonable doubt immediately before charging the law on circumstantial evidence, and we find the reasonable doubt instruction to be a correct statement of the law. As this court concluded in *Jenkins*, we conclude the trial court's instructions in the present case, as a whole, properly conveyed the applicable law. Accordingly, we find no reversible error in the jury charge.

II. Admission of Cellular Data

Drayton argues the trial court erred in admitting the historical cell service location information obtained from his cellular service provider because the trial court construed the warrant as a court order and there was not probable cause to issue a warrant. We disagree.

There were five warrants issued to obtain cell records: Drayton's primary cell number, Drayton's alternate cell number, and the records regarding Bartley, the

victim, and Hooper. Drayton argued all five warrants violated his right to privacy. The court (1) found the warrant was against Verizon; (2) found Drayton had standing to challenge the warrant; and (3) followed "the long line of federal cases that have stated there's no expectation of privacy as to records." The court found reasonable grounds for the warrant under the Federal Stored Communications Act and probable cause was not necessary to obtain the records.

The warrant sought:

> Any and all information in reference to the Verizon cellular telephone number 843-[xxx-xxxx] to include but not limited to subscriber information, account comments, billing records, outbound and inbound calls to include blocked call information from August 06, 2010 to August 10, 2010. Subscriber information on other numbers listed in the report, call origination location, physical address of cell sites and coverage map, all stored communications, or files, including voice mail, email, digital images, text messages, buddy lists, and any other files associated with the cellular target number . . . .

The affidavit in support of the warrant read as follows:

> That on July[1] 09, 2010, Charleston County Sheriff's Office Deputies responded to Old Jacksonboro Rd near Hwy 174 in reference to a deceased person. Upon arrival deputies discovered the body of a female victim on the side of Jacksonboro Rd. On August 09, 2010, [the victim] was reported missing to the Beaufort County Sheriff's Office. The body of the deceased was later positively identified as being [the victim]. Mike Bartley[,] the fiancée of the victim[,] stated that he last spoke with the victim on August 08, 2010 and she informed him that she was traveling to Charleston SC with Darryl Drayton AKA "D." . . . Bartley provided the Verizon cellular telephone number 843-[xxx-xxxx] as a

[1] This appears to be a typographical error in each of the search warrant affidavits.

> contact number for Darryl Drayton. It is believed that the call log and information contained therein will provide information that is pertinent to the death [i]nvestigation. All evidence being sought will be compared with evidence already obtained in the investigation.

"To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched." *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). "A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." *Id.*

Under our analysis of the cases interpreting the United States Fourth Amendment, we find Drayton did not have a legitimate expectation of privacy in his historical cell site location records. First, the Stored Communication Act requires only a showing of "specific and articulable facts" is necessary for the issuance of a search warrant. *See* 18 U.S.C. § 2703(d) (Supp. 2014); *see generally* Elizabeth Elliott, *United States v. Jones: The (Hopefully Temporary) Derailment of Cell-Site Location Information Protection*, 15 Loy. J. Pub. Int. L. 1, 3 (2013) ("Currently under the Stored Communications Act . . . , criminal investigators can obtain cell-site location data with only a showing of 'specific and articulable facts'." (quoting § 2703(d))). Second, the federal courts have found no expectation of privacy in historical data records. *See United States v. Graham*, 846 F. Supp. 2d 384, 389-90 (D. Md. 2012) (stating "[a] majority of courts . . . have concluded that the acquisition of historical cell site location data pursuant to the Stored Communications Act's specific and articulable facts standard does not implicate the Fourth Amendment"). *But see Tracey v. State*, 2014 WL 5285929 at *9 (Fla. Sup. Ct. filed Oct. 16, 2014) (noting "as to 'historical' cell site location information, the federal courts are in some disagreement as to whether probable cause or simply specific and articulable facts are required for authorization to access such information").

Drayton next argues even if he did not have an expectation to privacy in historical cell site location information under the Federal Constitution, he did under the South Carolina Constitution, which our supreme court in *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001), interpreted as "offering a higher level of privacy protection than the [Federal] Fourth Amendment."

In South Carolina, the right to privacy is specifically imbedded in our State Constitution, and our supreme court has recognized that "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler*, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 622 n. 13 (1997). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *Forrester*, 343 S.C. at 647, 541 S.E.2d at 842; *id*. at 643, 541 S.E.2d at 840 ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

We recognize recent United States Supreme Court and South Carolina Supreme Court cases are more stringently viewing electronic *surveillance* vis-à-vis the right to privacy. *See United States v. Jones*, 132 S.Ct. 945, 949 (2012) (finding a global positioning system tracking device installed on and monitoring a vehicle for twenty-eight days without a valid warrant violated the Fourth Amendment); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (finding a thermal imaging device used to scan a home for levels of heat, utilized without a warrant, was an unlawful search); *State v. Adams*, 409 S.C. 641, 646, 763 S.E.2d 341, 344 (2014) (recognizing the court of appeals found a constitutional violation when a GPS device was installed and monitored without a court order, a finding the State did not appeal). However, the evidence sought in this case was not obtained via electronic surveillance; rather, it was sought as business records of Verizon. The South Carolina appellate courts have not addressed historical cell site location data under the South Carolina Constitution. Accordingly, we rely on the federal precedent and find Drayton did not have a reasonable expectation of privacy in his historical cell site location data because he voluntarily contracted with the cellular provider, thereby conveying his cell site location data to the provider who created the records in the ordinary course of business. *See Graham*, 846 F.Supp.2d at 389 (explaining courts that have found no expectation of privacy in historical cell site location data "have concluded that because people voluntarily convey their cell site location data to their cellular providers, they relinquish any expectation of privacy over those records").

Because we find Drayton did not have a reasonable expectation of privacy in the historical cell site location data, we need not reach his argument that there was no probable cause to issue the warrant. *See State v. Crane*, 296 S.C. 336, 341, 372 S.E.2d 587, 589 (1988) (finding because the appellant could not "make the

threshold demonstration of a legitimate expectation of privacy in connection with the searched premises," he was not entitled to challenge whether the magistrate had probable cause to issue the warrant). We also find no merit to Drayton's argument that the trial court erred in designating the search warrant as a court order rather than a warrant. *See State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("Error without prejudice does not warrant reversal."); *see also* Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

III. Limitation of Cross-Examination

Drayton lastly argues the trial court erred in limiting his cross-examination of the pathologist concerning the toxicology report relating to the victim. We disagree.

The trial court found the evidence was not relevant under Rule 403, SCRE, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The decision to admit or exclude evidence "is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011).

We find no error in the exclusion of the evidence. Furthermore, any error in its exclusion was not reversible because the evidence was cumulative to numerous other references in the record regarding the victim's illegal drug use. *See State v. Patterson*, 290 S.C. 523, 528, 351 S.E.2d 853, 856 (1986) (finding any error in the exclusion of evidence that was cumulative to other evidence entered was harmless beyond a reasonable doubt).

CONCLUSION

For the foregoing reasons, Drayton's conviction and sentence is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.