THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
In the Court of General Sessions

The Honorable Frank Addy, Jr., Circuit Court Judge

Appellate Case No. 2019-001865

State of South Carolina . . . . . Respondent

v.

Terry Renee McClure . . . . . Appellant

FINAL BRIEF OF APPELLANT

Mario A. Pacella
Matthew B. Robins
Strom Law Firm, LLC
6923 N. Trenholm Road, Suite 200
Columbia, SC 29206
(803) 252-4800
mpacella@stromlaw.com
mrobins@stromlaw.com

Attorneys for Appellant

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1. Did the Circuit Court err in admitting the redacted video of McClure's interrogation when the video contained numerous hearsay and burden-shifting statements?

2. Did the Circuit Court err in charging the jury on inferred malice when there was positive evidence of express malice in the record and McClure was charged with attempted murder?

3. Did the Circuit Court err in admitting Justin Butler's text messages as non-hearsay statements of a co-conspirator when there was no evidence of conspiracy and when McClure was not charged in any conspiracy?

4. Did the Circuit Court err in qualifying Officer Zwolak as an expert in "Street Culture, Language, and Slang?"

5. Did the Circuit Court err in refusing to allow McClure to question Tyvona Toland regarding her dismissed charges when such testimony constituted relevant evidence of potential bias and when the refusal caused actual prejudice to McClure in violation of his State and Federal rights to a speedy trial?

STATEMENT OF THE CASE

On July 25, 2016, Terry McClure was extradited from California to South Carolina and served with arrest warrants for the shootings of VonKeith and Tycus Toland. McClure was ultimately indicted by the Lexington County Grand Jury for murder, attempted murder, burglary in the first degree, and possession of a weapon during a violent crime.

On July 26, 2019, McClure filed a motion to dismiss his charges due to a violation of his state and federal rights to a speedy trial. On September 6, 2019, the circuit court held a hearing on the motion and denied the motion but permitted McClure to renew the motion at the start of trial. McClure's trial was conducted on October 21–25, 2019.

At the close of trial, McClure was found guilty of all charges. The circuit court sentenced McClure to life in prison for the murder conviction, and thirty-years' imprisonment for the attempted murder charge, with both sentences to run concurrently. This appeal follows.

FACTS

On April 26, 2014, VonKeith and Tycus Toland were shot at VonKeith's home in Pelion, South Carolina. (R. 156, 159, 170–72). VonKeith survived the shooting, but Tycus died on the scene. (R. 608). On July 25, 2016, Terry McClure was extradited from California to South Carolina and served with arrest warrants for the shootings. (R. 19). Several years after the alleged crime occurred, McClure was eventually indicted by the Lexington County Grand Jury for murder, attempted murder, burglary in the first degree, and possession of a weapon during a violent crime. (R. 896–903).

On July 26, 2019, McClure filed a motion to dismiss his charges due to a violation of his state and federal rights to a speedy trial. (R. 3). A hearing on the motion was held on September 6, 2019, and the circuit court ruled that (1) McClure could renew his motions when his trial commenced on October 21, 2019, and (2) if McClure was not brought to trial by October 21, 2019, he would be released from pretrial detention on a personal recognizance bond. (R. 1, 13). The court ultimately conducted the trial on October 21–25, 2019. (R. 15).

Prior to the commencement of trial, McClure made several pretrial motions. First, McClure renewed his motion to dismiss his charges due to a violation of his speedy trial rights. (R. 17). The court denied the motion due in part to the court's determination that McClure could not demonstrate actual prejudice. (R. 27). However, the court indicated that its ruling was without prejudice, permitting McClure to renew the motion should he be able to demonstrate actual prejudice over the course of the trial. (R. 27).

Second, McClure moved to suppress the out-of-court identification made by VonKeith Toland, resulting in a *Neil v. Biggers*[1] hearing. (R. 34–71). VonKeith Toland testified that the

[1] 409 U.S. 188 (1972).

lead investigator on the case, Detective Roy Mefford, showed him a photo lineup two weeks after the incident while he was still recovering from his injuries in the ICU. (R. 52, 58). Notably, VonKeith further explained that he was on pain medication, but that it did not affect his memory or his understanding of what he was doing. (R. 57–58). After hearing all of the testimony and arguments related to the out-of-court identification, the circuit court concluded the identification was admissible. (R. 71).

Third, McClure moved to suppress the video of his interrogation, and the court conducted a *Jackson v. Denno*[2] hearing. (R. 73). During the hearing, the State offered the two officers from California who conducted McClure's interrogation. The first officer, Detective Brent Pucci, testified that he read McClure his *Miranda*[3] rights and that McClure voluntarily waived those rights. (R. 73–83). The second officer, Detective Steven Trojanowski, testified that he actually conducted McClure's interrogation regarding a shooting that occurred in Pelion. (R. 85). On cross-examination, Detective Trojanowski conceded that none of the information he conveyed to McClure during his interrogation, including information regarding cell site location information, flight manifests, and VonKeith Toland's identification, was based on his own personal knowledge. (R. 97–99). Rather, Detective Trojanowski testified that all of the information forming the basis of his questions and statements during the interview was relayed to him by third parties, including Detective Mefford, McClure's girlfriend, and the phone technicians employed by the Fairfield Police Department. (R. 97–99). Additionally, Detective Trojanowski conceded that during the interrogation, he lied and made several unverified statements to McClure, including statements that (1) McClure's co-defendant, Justin Butler, was cooperating against McClure, (2) Detective

[2] 378 U.S. 368 (1964).
[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Trojanowski was certain that McClure's DNA would be found on the scene, and (3) officers in South Carolina had McClure "locked in." (R. 98–99).

Following Detective Trojanowski's testimony, McClure argued that the video interrogation should be suppressed because it "was riddled with inadmissible hearsay statements" and contained numerous burden-shifting statements. (R. 101–03). The State argued the video interrogation should be admitted to provide context and to demonstrate McClure's demeanor and evasiveness. (R. 129–130). Additionally, the State argued that, under South Carolina law, Detective Trojanowski's questions did not constitute hearsay and his statements were not offered for the truth of the matter asserted. (R. 130). In regard to the burden-shifting objection, the State argued that the statements in question constituted law enforcement tactics that were not being offered for the truth of the matter asserted. (R. 131). After hearing arguments from both parties, the circuit court indicated that it would review the video again before making a final determination. (R. 134).

Finally, McClure moved to suppress text messages in a text message log that were sent by a telephone belonging to Justin Butler. (R. 116–20). Butler was separately tried for the same alleged crimes as McClure. McClure conceded that text messages he sent would be admissible under Rule 801, SCRE, but argued that Butler's text messages constituted inadmissible hearsay and presented a Confrontation Clause issue because Butler could not be cross-examined about the statements at trial. (R. 116–18). The State argued that Butler's text messages were admissible as the statements of a co-conspirator in furtherance of a conspiracy. (R. 117–120). To establish the existence of a conspiracy, the State relied on Butler's status as a co-defendant, arguing, "I think we can fairly say that Justin Butler is a co[-]conspirator in this case because he is a co-defendant . . . ." (R. 120). The circuit court ultimately indicated that it would wait to rule on the admissibility of the text messages. (R. 120).

After opening arguments, the State called VonKeith Toland as its first witness. (R. 155). Before testifying about the shooting, VonKeith conceded that he had previously been convicted of two counts of drug trafficking. (R. 158). VonKeith then explained that Butler had contacted him about purchasing a car, and the two discussed Butler potentially purchasing an Infiniti. (R. 159–60). Later that day, Butler and a man VonKeith did not know well met up with VonKeith at his mother's house. (R. 160). While the two men played cards and sat with Toland's family, VonKeith left the house for a short period of time. (R. 160). When VonKeith returned, the two men indicated that they were ready to view the Infiniti and VonKeith asked his brother Tycus to come with him to VonKeith's house. (R. 160–61, R. 167).

When they arrived at the house, VonKeith showed the two men the Infiniti parked in the driveway of his mobile home, lifted up the hood to let the two men inspect the engine, and allowed them to take a test drive. (R. 167–68). After the test drive, Butler inspected the engine a second time while VonKeith, Tycus, and the other man had a conversation. (R. 169). VonKeith testified that when the conversation went stale, the man drew a gun from his waistband and shot Tycus in the head. (R. 170). VonKeith testified that he attempted to run from the man into the backyard, but the man shot him three or four times. (R. 171). VonKeith claimed that Butler and the other man proceeded to demand that VonKeith give up his drugs and money or they would kill him. (R. 172). VonKeith further claimed that after he told the men there was money in the home, they kicked through the glass door in the back and ransacked the home. (R. 172–73). VonKeith testified that while the men were in the house, he attempted to call 9-1-1 but the other man caught him and shot him three more times. (R. 173).

VonKeith claimed that after the men went back into the house, he crawled under his mobile home and hid behind one of the support pillars. (R. 174). VonKeith testified that after the two

men left, he waited five minutes before removing his shorts and crawling out of the front side of the mobile home to his car. (R. 175–76). Once he reached his car, he retrieved his other phone and called 9-1-1. (R. 176).

After recounting his version of the incident, VonKeith conceded that he initially lied to the police about his brother's possession of a stolen Dodge Challenger at the time of the incident. (R. 195–96). VonKeith further conceded that law enforcement found a firearm under his bed, but asserted that a shell casing found in the backyard was left after his fiancé fired the weapon on New Year's Eve. (R. 201–02, 206). VonKeith then testified that after the incident, he was unconscious in the hospital for roughly sixteen days and indicated that he was on pain medication and an IV when Detective Mefford presented him with a photo lineup on May 10, 2014. (R. 198, 204–05). VonKeith asserted that he was alert at the time he was presented with the lineup, and claimed that he identified McClure as the other man involved in the incident without any suggestion from law enforcement. (R. 205, 210). However, VonKeith subsequently testified, "I noticed someone else that that I knew, so that's how I kind of remembered the picture. Like I was - - I kind - - that kind of left me *because I was still mentally challenged* . . . ." (R. 210) (emphasis added).

On cross-examination, VonKeith admitted that he did not know whether he asserted that the shell casing from his firearm found in the backyard was fired by his fiancé when he testified at a prior hearing in June of 2016. (R. 215). Additionally, despite claiming that he no longer sold or trafficked drugs, VonKeith was presented with text messages he received in January 2014 regarding the sale of marijuana and firearms. (R. 218–25). VonKeith further admitted that he did not tell law enforcement that Butler and the other man demanded money and drugs from him until January 2016. (R. 232). Finally, VonKeith admitted that the State granted him immunity from prosecution for possession of a stolen vehicle and felon in possession of a firearm. (R. 225, 240).

After VonKeith's testimony, the State called his sister Tyvona Toland to testify. (R. 244). Tyvona testified regarding two men she did not know or recognize arriving and spending time at her mother's house on the day of the incident. (R. 245–51). She also testified regarding her identification of Justin Butler on Instagram. (R. 256–57). After testifying on direct-examination, McClure requested to question Tyvona about her pending charges that were dismissed a month before Justin Butler's trial in June 2016. (R. 258–59). The State argued the charges were not admissible for any purpose, but McClure asserted that he should be allowed to question Tyvona about the charges as evidence of potential bias. (R. 259). After hearing the proffered testimony, the circuit court noted that the timing of the State's dismissal of the charges may have made the charges relevant in Butler's case, but concluded that McClure should not be allowed to solicit Tyvona's testimony regarding the charges. (R. 268–69).

Later in the trial, the State called Roger Gilland, a former crime scene investigator who responded to the scene of the incident. (R. 292–93). Gilland testified that he removed several shell casings from the scene, swabbed a reddish-brown stain on the handrail of the front porch for blood, and located VonKeith's firearm under the bed. (R. 295–316). Gilland also testified that he found a bag of marijuana in the shorts VonKeith discarded under the mobile home. (R. 318).

On cross-examination, Gilland testified that all of the shell casings found on the scene could have been fired by the gun under the bed, but indicated that he did not swab the gun for gunshot residue. (R. 334–35). Moreover, Gilland testified that he found a box of ammunition inside the house that was missing bullets. (R. 345). Gilland further testified that in addition to the marijuana found in VonKeith's shorts, he also found over $1,000 in cash. (R. 342). Additionally, Gilland testified that there were no blood trails left in the sand around the home, nor any crawl marks leading from the front of the home to VonKeith's car. (R. 349–51). Gilland also testified

that officers did not find any fingerprints inside the home, nor did they collect any touch DNA from the home. (R. 353–54, 356).

Similarly, Keith Sprinkle, a former crime scene investigator at the Lexington County Sheriff's Office testified about the collection of evidence at the scene. (R. 362–63). Sprinkle testified that he did not observe any marks on the ground that would indicate someone had crawled, and did not see any blood trails. (R. 374). Additionally, Sprinkle testified that despite finding the gun under VonKeith's bed, officers were unable to find the corresponding magazine anywhere on the property. (R. 379). Sprinkle also testified that officers did not find any fingerprints inside the house. (R. 382).

The State also presented Lilly Gallman, a former DNA analyst at the South Carolina Law Enforcement Division, as an expert in DNA analysis and interpretation. (R. 430–32). Gallman testified that the DNA profile developed from the blood swab taken from the handrail on the front porch matched the DNA profile of VonKeith Toland. (R. 440). Gallman also testified that after comparing the swabs taken from the house with McClure's DNA profile, she did not find McClure's DNA on any of the swabs. (R. 441).

The State called Roy Mefford, the lead detective in the case, to testify about the investigation. (R. 474). Detective Mefford explained how he used social media, phone records, cell site location information, and flight manifests to identify Butler and McClure as suspects. (R. 474–538). During Detective Mefford's direct-examination, McClure made a hearsay objection to Detective Mefford's testimony regarding Justin Butler's text messages consistent with the argument McClure made in his pre-trial motion to suppress the text messages. (R. 499, 502, 547). The objection was overruled, and the circuit court explained that it did not find the text messages to be hearsay because the messages were made in furtherance of a conspiracy. (R. 547–48).

On cross-examination, Detective Mefford testified that there were no blood trails or crawl marks around the home. (R. 558). Detective Mefford also testified that VonKeith's mother told 9-1-1 that a white man shot her son. (R. 565). Finally, Detective Mefford conceded that in the five and a half years between the incident and the trial, he never took a written statement from VonKeith about the incident. (R. 567).

During a break in the State's case, the circuit court again raised the issue regarding the motion to suppress the video of McClure's interrogation. (R. 591). The court indicated that after reviewing the video, its only concern was whether the interrogating officer asking McClure to explain himself constituted burden shifting. (R. 591–92). However, the court indicated that it was inclined to let the State publish a redacted version of the video because it believed McClure's demeanor was relevant, and because the video "corroborate[d] a lot of the State's theory." (R. 592–93).

In response, McClure renewed his objection, arguing that the entire video should be suppressed because it was riddled with inadmissible hearsay. (R. 593–94). The circuit court responded that even if the statements in the video did constitute hearsay, McClure's cross-examination of Detective Mefford alleviated any Confrontation Clause issues, rendering the statements admissible because "it[was] almost as if [Detective Trojanowski] step[ped] into the shoes of [Detective] Mefford." (R. 594). McClure further raised objections to the lies and false statements made by Detective Trojanowski during his interrogation of McClure. (R. 594–95). The Court responded that McClure could address any false statements made by Detective Trojanowski on cross-examination. (R. 595).

Finally, McClure argued that the video should be suppressed because Detective Trojanowski made several burden-shifting statements, and he identified several examples to the

court. (R. 595). First, McClure took issue with one of Detective Trojanowski's statements that McClure could "explain it or not." (R. 595). The circuit court responded that it did not see a problem with the statement because McClure had the right to remain silent. (R. 596). McClure also took exception to Detective Trojanowski asking him to explain how his cell site location information tracked the path of flights he took from California to Georgia and back. (R. 597–98). The circuit court responded that it believed the question to be a legitimate one. (R. 598). The circuit court ultimately ruled that the interrogation video could be published to the jury, but indicated that it would have to be redacted in the event the video was sent to the jury room. (R. 598–99).

Prior to the State calling its expert in forensic technology examination, the circuit court ruled that Justin Butler's text messages were admissible as non-hearsay evidence of conspiracy. (R. 663). After the ruling, the State offered Mike Phipps, a forensic technology examiner at the Lexington County Police Department, as an expert in forensic technology examination. (R. 668). During Phipps's testimony, the state moved the text message log, including Justin Butler's text messages, into evidence. (R. 701). On cross-examination, Phipps testified that he did not mark any conversations on VonKeith Toland's phone related to drug dealing or selling firearms. (R. 718). Additionally, Phipps indicated that an extraction of Tycus Toland's phone revealed an outgoing call at 1:35 p.m. on April 27, 2014, the day after Tycus' death. (R. 725).

Following Mike Phipps's testimony, the State sought to offer Officer Brian Zwolak as an expert in "street culture, language, and slang" to define certain words in the text message log. (R. 751). McClure objected, arguing, *inter alia*, that "street culture and language" was not an appropriate topic for expert testimony. (R. 752). The State and McClure then conducted *voir dire* of Officer Zwolak. (R. 753–771).

After the circuit court ruled that Officer Zwolak could be qualified as an expert, McClure raised an exception to Officer Zwolak being qualified as an expert in the field of "street culture, language, and slang," arguing that the term "street culture" carried a negative connotation. (R. 771). Accordingly, the circuit court offered to use several other field descriptions to qualify Officer Zwolak, including (1) modern, colloquial idioms, (2) uncommon idiomatic expressions, (3) unconventional expressions, (4) unconventional common expressions, and (5) Non-King's English. (R. 772–73). Despite defense counsel's willingness to agree to one of the listed fields, the State strenuously opposed qualifying Officer Zwolak in anything other than "street culture, language, and slang." (R. 773). In reference to the term "street culture," the State asserted that "[i]t is what it is," further arguing that it would "*lose the point of the expert qualification* by trying to change it." (R. 773) (emphasis added). Ultimately, the circuit court allowed the State to qualify Officer Zwolak as an expert in "street culture, language, and slang." (R. 774).

During Officer Zwolak's testimony, the State published the text message log to the jury. (R. 776). The text message log revealed conversations between Butler and McClure, including a conversation about having a woman named LaDondra Ellis pick Butler up from the Atlanta Greyhound Station. (R. 910–12). The text message log also revealed a text message from Butler to VonKeith Toland about meeting up on April 26, 2014. (R. 910–12). Officer Zwolak was then asked to define certain words appearing in the text message log. (R. 777–79). When asked to define the word "nickel," Officer Zwolak opined that the word was used to refer to "an amount or a firearm." (R. 778). Then, despite conceding that he had never heard the word in use before, Officer Zwolak testified that "hammy" was used to refer to a firearm. (R. 779).

Following Officer Zwolak's testimony, the State called Detective Pucci and Detective Trojanowski to testify regarding McClure's interrogation. After Detective Pucci testified to

Mirandizing McClure, Detective Trojanowski testified about the substance of the interrogation. (R. 783–87). Toward the beginning of Detective Trojanowski's testimony, the State moved the redacted interrogation video into evidence. (R. 789). Detective Trojanowski testified that during the course of an interrogation, he would often play along as if he were aware of information that he did not actually possess in an effort to induce a suspect to make an admission or confession. (R. 790–91). Detective Trojanowski further explained that this technique often resulted in him lying to the suspect or giving the suspect information that is incorrect. (R. 791). Additionally, Detective Trojanowski testified that McClure denied all of the allegations leveled against him. (R. 793–97). After the State concluded its direct-examination of Detective Trojanowski, the State published the redacted interrogation video to the jury. (R. 798).

During the publication of the redacted interrogation video, the jury heard the following questions and statements made by Detective Trojanowski:

> I'm not going to come at you with some BS that I don't know the answer to. (State's Ex. 4; 20:33).
>
> If I said you flew out on the 24th and came back on the 27th would that sound reasonable? (State's Ex. 4; 20:37).
>
> Let's go back to a different phone number because your girl has got it in her phone. Just trying to figure out when you had this number: (707) 392-[xxxx]. Ok because your girl has it in her phone. How long ago did you use that number? It's in her call log. We had her phone downloaded. Our tech said that this phone number was in her phone. She said, that's your number. (State's Ex. 4; 20:39).
>
> You're in college right? Ok, do you remember on the 21st a text message while you were in class going to Justin Butler. And you said I'm in class bro let me hit you back later. Something like that. April 21st. You remember texting him you'd call him back because you were in class? (State's Ex. 4; 20:40).
>
> But she thinks you're still hooking up with your old lady right? Are you? Maybe. No? But what about that girl in Atlanta? What's that girl's name in Atlanta? That picked you up at the airport? (State's Ex. 4; 20:41).

The whole weekend you never saw Justin Butler? Well, Justin stays in Alabama. Alright, well what if I told you I know you were with Justin. (State's Ex. 4; 20:42).

Terry, c'mon man. I'm not going to commit to this pushing bullsh[**]. **I'm not asking any questions that I don't know the answer to so it doesn't really help for you to lie.** See there's certain things that I can prove right? And one of them has to do with being in Atlanta. . . . You went to some other cities. You went to two other cities. You ever heard of a city called Greenwood, South Carolina? Terry, I know you were there. (State's Ex. 4; 20:43) (emphasis added).

You ever heard of the city called North? So here you are you're over there in Atlanta you're making your way up the coast there and you're hanging out with Justin Butler **and I know this because what you don't get is what information he gave, right? I'm not going to tell you that. You know we got sh[**] on you.** (State's Ex. 4; 20:44) (emphasis added).

So either you're going to be able to explain this, or you're not. Bottom line is, we have you there. We have enough information to put you there. I've got enough information to put you in a city called . . . Pelion,[] South Carolina. I can tell you, you do have a clue. (State's Ex. 4; 20:45) (emphasis added).

I know you were there. See the tree line and the little road going back there? You were there. So there's no reason your DNA would be out there? (State's Ex. 4; 20:46).

So you understand about touch DNA right? Some of the new techniques they're using to extract DNA from things right? **What's going to happen when we finish this testing and your DNA comes up at this house in Pelion. It is going to come up, you were there.** (State's Ex. 4; 20:47) (emphasis added).

Here's the problem Terry, South Carolina, brother, it's the other side of the nation, right? **It's coast to coast, there ain't no way some dude back in South Carolina is going to pick you out. There ain't no way that your phone number at the Sacramento airport, it follows the same exact flight plan as you did at all your stops the phone turns on and off.** The phone is doing you right now you can deny it all you want. (State's Ex. 4; 20:50–51) (emphasis added).

If you can explain your way out of this, I'm here to listen. That phone number that I'm talking about, that your girl says is your number. It's at the Sacramento airport on the 24th just around 7:30 a.m. A flight leaves Sacramento ends up at Dulles airport in Washington. There's only one flight that made that trip. And it's the same flight that you were on. Ok. Once it gets to Dulles, phone turns back on period of time later the phone shuts back and reappears at A T L the Atlanta airport. Same exact airport that you landed at. And checking the manifest there is nobody else on the flight from Sacramento to Washington that rode that flight from Washington to Atlanta. That was the only flight that connected. **This work's**

> **already been done, ok.** That same phone number is communicating with Justin Butler. That same phone number is connecting to Justin Butler, not only during that trip, but beforehand because on the 21st from the area of Solano College where you're in class says "let me hit you up later bro I'm in class." (State's Ex. 4; 20:51–52) (emphases added).
>
> Now Terry here is what we gotta do dude. Look I don't know what happened there. I don't have enough information about that call, about that incident to give you all the specifics. **But what I do know, is brother they got you locked in.** (State's Ex. 4; 20:52) (emphasis added).
>
> **Either this is a self-defense issue and we deal with it now, or we're going to go with you don't know sh[**] I wasn't there and dude the world is going to unload on you. I'm trying to give you the opportunity to explain it away.** Because I know you were at their mama's house first. Their mama's house. We didn't just make this sh[**] up dude. (State's Ex. 4; 20:53) (emphasis added).
>
> You and Justin were at his Mom's house. **Dude we got you locked in.** It's not mind blowing because you were there. **So how did somebody with that phone number travel the same exact path you did?** And you're the only person on that manifest that could have possibly done it. And its communicating with Justin Butler. It travels with Justin Butler's phone off the cell towers. (State's Ex. 4; 20:54) (emphases added).
>
> **Then explain to me why that phone number followed the airplane.** The same time that you were in Atlanta. **How do you explain that? It's mathematically impossible for it to have been anybody else.** Because there is only one flight that made that route at that time. Not to mention that phone number, ok, booked your flight through the travel agency on that phone. (State's Ex. 4; 20:55) (emphases added).

After Detective Trojanowski's testimony, the State rested. (R. 800).

During the jury charge conference, the circuit court indicated that it removed any express or implied malice language from the instructions, further indicating that it did not intend to charge the jury on implied malice. (R. 810–11). However, the State argued that it was still good law to instruct the jury that malice could be inferred from conduct showing a total disregard for human life. (R. 811). In deciding to include the charge, the circuit court explained

> I'm go[ing to] have my clerk put that instruction back in. I think you're correct in the sense that as far as the attempted murder instruction is concerned you have multiple shots being fired into the victim, which could indicate the intent to kill

> necessary -- the specific intent to kill necessary, the specific malice that's necessary for the attempted murder charge.

(R. 813).

After the charge conference, the parties proceeded to closing arguments. In its closing argument, the State relied on several of the statements Detective Trojanowski made in the interrogation video, and asked the jury, "[i]f he was there legitimately looking at a car and wasn't part of what happened and wasn't the cause of what happened, why would he have lied to the police when asked, and [given an] opportunity to tell the story?" (R. 825–29). Following closing arguments, the circuit court charged the jury, including the instruction that, "[m]alice may be inferred from conduct showing a total disregard for human life." (R. 870).

Ultimately, the jury found McClure guilty of all charges. (R. 880–81). The circuit court then sentenced McClure to life imprisonment for the murder conviction, and thirty-years' imprisonment for the attempted murder conviction, to be served concurrently. (R. 894). This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). Accordingly, "[appellate courts are] bound by the [circuit] court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

The admission of evidence will be reversed if the circuit court abuses its discretion. *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Sims*, 426 S.C. 115, 129, 825 S.E.2d 731, 738 (Ct. App. 2019) (quoting *Cook v. State*, 415 S.C. 551, 556, 784 S.E.2d 665, 667 (2015)).

Similarly, "[a]n appellate court will []reverse the [circuit court]'s decision regarding a jury charge [if it amounts to] an abuse of discretion." *Id*. (quoting *Cook*, 415 S.C. at 556, 784 S.E.2d at 667). "In reviewing jury charges for error, [an appellate court] must consider the [circuit] court's jury charge as a whole 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) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). Misleading portions of jury charges constitute reversible error "[i]f, as a whole, the charges are [not] reasonably free from error[.]" *State v. Patterson*, 367 S.C. 219, 232, 625 S.E.2d 239, 246 (Ct. App. 2006) (quoting *State v. Zeigler*, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005)). Moreover, erroneous jury instructions constitute prejudicial error when "the instructions given [fail to] *afford the proper test for determining issues*." *Id*. at 232, 625 S.E.2d at 245–46 (emphasis added) (quoting *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002)).

ARGUMENT

I. The circuit court erred in admitting the redacted video of McClure's interrogation.

The circuit court abused its discretion in admitting the redacted video of McClure's interrogation because (1) the video was replete with inadmissible hearsay for which there was no exception to the rule against hearsay, and (2) the video contained numerous statements which improperly shifted the burden to McClure to prove himself innocent.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Pursuant to Rule 802 of the South Carolina Rules of Evidence, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." In regard to investigations by law enforcement, our Supreme Court has found it

"necessary to caution prosecutors against using 'investigative information' as it appears [to be] an attempt to circumvent the rules against hearsay." *State v. King*, 422 S.C. 47, 66–67, 810 S.E.2d 18, 28 (2017). With this in mind, our Supreme Court has explained that

> An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. If it is relevant and probative *only* to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule.

Id. at 67, 810 S.E.2d at 28 (quoting *Ruiz v. Commonwealth*, 471 S.W.3d 675, 681 (Ky. 2015)). In other words, "[s]o-called 'investigative hearsay' is still, fundamentally, hearsay." *Id*. at 67, 810 S.E.2d at 29 (quoting *Ruiz*, 471 S.W.3d at 682).

In *State v. Brewer*, our Supreme Court addressed both hearsay statements made to law enforcement and those made by law enforcement in the context of an audiotaped police interrogation. 411 S.C. 401, 406–08, 768 S.E.2d 656, 658–59 (2015). The Court began by "acknowledg[ing] the propriety of law enforcement interrogation techniques, including misrepresenting the existence and strength of the evidence against an accused, as well as asking the accused to produce evidence voluntarily." *Id*. at 406, 768 S.E.2d at 658. The Court noted, however, that "[s]uch matters are typically examined *in camera* when the [circuit] court is making a preliminary determination as to the admission of a confession[,]" as "such evidence will *rarely* be proper for a jury's consideration." *Id*. at 406, 768 S.E.2d at 658–59 (second emphasis added).

Turning to the recorded interrogation in question, the Supreme Court explained that "[d]uring the interrogation, investigators frequently referenced *and quoted* many purported eyewitnesses to Brewer shooting both victims." *Id*. at 406, 768 S.E.2d at 659. The Court concluded that "[t]his evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." *Id*. at 406–07, 768 S.E.2d at 659.

Moreover, the Court flatly rejected the State's argument that the evidence served a non-hearsay purpose as "patently without merit[,]" further indicating that it found "no support in the law for the State's argument that the interrogators' statements were admissible for purposes of context or for the effect the statements had on Brewer." *Id.* at 407, 768 S.E.2d at 659. Rather, the Court determined "[t]he only effect these statements had on Brewer was to make him repeatedly deny shooting anyone[,]" and "[t]he meaning of these repeated denials [wa]s obvious and require[d] no explanatory context." *Id.* The Supreme Court concluded its analysis by reminding circuit "courts that the questions police pose during suspect interviews may contain *false accusations, inherently unreliable, unconfirmed or false statements*, and *inflammatory remarks* that constitute legitimate points of inquiry during a police investigation, but *that would otherwise be inadmissible in open court*." *Id.* at 408, 768 S.E.2d at 659 (emphases added) (quoting *State v. Miller*, 676 S.E.2d 546, 556 (N.C. Ct. App. 2009)).

In addition to its hearsay concerns, the Supreme Court also highlighted "the grave constitutional error in the admission of the challenged evidence . . . ." *Id.* The Court explained that "[l]aw enforcement's *ad nauseam* insistence that Brewer prove his innocence *has no place before the jury*." *Id.* (second emphasis added). Stressing its concern, the Supreme Court noted that "[i]t is chilling that [the courts] have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt." *Id.*

Similarly, in *State v. Washington*, this Court reversed the appellant's conviction after determining the appellant's audiotaped interrogation was tainted by hearsay and burden-shifting statements. 431 S.C. 619, 621–26, 848 S.E.2d 794, 795–98 (Ct. App. 2020). In doing so, this Court explained the proper manner in which to admit a defendant's statement during an interrogation involving the use of "investigative hearsay." *Id.* at 623, 848 S.E.2d at 796. This

Court explained that, pursuant to Rule 801(d)(2)(A), SCRE, a defendant's statements during an interrogation are not hearsay because they are admissions of a party offered against that party. *Id*. Therefore, rather than admitting the recorded interrogation, "the State [can] admit[a defendant]'s statements by asking [the interrogating officer] about them, avoiding the hearsay taint of [the interrogating officer]'s statements in the recording." *Id*.

Like the recorded interrogations in *Brewer* and *Washington*, the video of McClure's out-of-court interrogation was replete with hearsay statements made by Detective Trojanowski. *See id*. at 622–23, 848 S.E.2d at 796 ("[The officer]'s interrogation method may have been a proper investigative technique, *but every word he uttered during the out of court interview was inadmissible hearsay*." (emphasis added)). Such hearsay statements included, but are not limited to, the following assertions: (1) "I'm not asking any questions that I don't know the answer to so it doesn't really help for you to lie."; (State's Ex. 4 20:43); (2) "You know we got s[***] on you."; (State's Ex. 4 20:43); (3) "Here's the problem Terry, South Carolina, brother, it's the other side of the nation, right? . . . There ain't no way some dude back in South Carolina is going to pick you out [of a lineup]."; (State's Ex. 4 20:50); (4) "The phone is doing you right now, you can deny it all you want."; (State's Ex. 4 20:51); and (5) "Either this is a self-defense issue and we deal with it now, or we're going to go with you don't know s[***], I wasn't there and dude the world is going to unload on you." (State's Ex. 4 20:53). Moreover, during the *Jackson v. Denno* hearing, Detective Trojanowski conceded that he received all of the information forming the basis of his recorded questions, lies, and statements from third parties, including Detective Mefford, McClure's girlfriend, and phone technicians working at the Fairfield County Police Department. (R. 98–97). *See King*, 422 S.C. at 67, 810 S.E.2d at 28 ("An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court

declarant." (quoting *Ruiz*, 471 S.W.3d at 681)); *see also* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Furthermore, Detective Trojanowski testified that he did not have verifiable information to support his videotaped assertions that Justin Butler provided information against McClure and that McClure's DNA would be found at the scene. (R. 98–99). *See Brewer*, 411 S.C. at 406, 768 S.E.2d at 659 ("[S]uch evidence will *rarely* be proper for a jury's consideration." (emphasis added)). Thus, like the evidence in *Brewer*, "[t]his evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing [McClure]'s guilt to all charges." *Id*. at 406–07, 768 S.E.2d at 659.

The State cannot provide a valid hearsay exception justifying the admission of the redacted video, and the availability of Detective Trojanowski's testimony begs the question of why the State sought to have the video admitted in the first place. *See* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). Notably, McClure denied all of the allegations leveled against him during the interrogation, and Detective Trojanowski testified to statements McClure made during the interview. (R. 790–97). Thus, the State could have avoided the threat of inadmissible hearsay by relying solely on Detective Trojanowski's testimony. *See Washington*, 431 S.C. at 623, 848 S.E.2d at 796 ("[T]he State [can] admit[a defendant]'s statements by asking [the interrogating officer] about them, avoiding the hearsay taint of [the interrogating officer]'s statements in the recording."). However, at trial, the State fought to have the video admitted, arguing that it was necessary to provide "context" and to demonstrate McClure's "demeanor" during the interrogation. (R. 129–30). As previously mentioned, our Supreme Court has flatly rejected a "context" exception to the rule against hearsay. *See Brewer*, 411 S.C. at 407, 768 S.E.2d at 659 ("[W]e find

no support in the law for the State's argument that the interrogators' statements were admissible for purposes of context or for the effect the statements had on Brewer." (emphasis added)). Rather, like the defendant in *Brewer*, the meaning of McClure's "repeated denials is *obvious and requires no explanatory context*." *Id*. (emphasis added). Because there is no context exception to the hearsay rule, and because the same information in the video could have been elicited on direct-examination, the State's strenuous fight to publish the interrogation video to the jury raises questions about its motivation to have such evidence admitted. *See United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) ("So to what issue *other* than truth might the testimony have been relevant? . . . Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the [S]ixth [A]mendment and the hearsay rule."), *cited with approval in Brewer*, 411 S.C. at 407, 768 S.E.2d at 659. Ultimately, by publishing the interrogation video immediately prior to resting its case, the State utilized Detective Trojanowski's interview as a pseudo closing argument that neatly summarized and improperly bolstered all of the evidence admitted over the course of the trial.

Moreover, in addition to the admission of inadmissible hearsay, statements in the redacted video interrogation had the effect of improperly shifting the burden to McClure. Like the defendant in *Washington*, Detective Trojanowski constantly implored McClure to explain discrepancies between his account of events and the circumstances surrounding his alleged involvement in the crimes. (State's Ex. 4 20:45-20:56). *See Washington*, 431 S.C. at 622, 848 S.E.2d at 796. Additionally, Detective Trojanowski repeatedly claimed that he knew McClure committed the crimes he was accused of, and that officers in South Carolina had McClure "locked in." (State's Ex. 4 20:43-20:54). Further, Detective Trojanowski stated that the flight and phone

records made it "mathematically impossible" that McClure was not the shooter, and told McClure that the world was "going to unload on" him. (State's Ex. 4 20:53-20:55). These statements had the effect of shifting the burden to McClure to explain himself and prove his innocence to Detective Trojanowski. As our Supreme Court has explained, "[l]aw enforcement's *ad nauseam* insistence that [a defendant] prove his innocence *has no place before the jury*." *Brewer*, 411 S.C. at 408, 768 S.E.2d at 659 (second emphasis added). Consequently, the publication to the jury of such burden-shifting statements results in a "grave constitutional error." *Id*.

The circuit court's erroneous admission of the redacted interrogation video caused significant prejudice to McClure. As indicated above, the video had the effect of shifting the burden to McClure to prove his innocence in violation of his Due Process rights. *See Sandstrom v. Montana*, 442 U.S. 510, 512 (1979) ("[T]he Fourteenth Amendment[] require[s] that the State prove every element of a criminal offense beyond a reasonable doubt."). In addition to the prejudicial effect stemming from this burden-shifting language, the video had the effect of bolstering the testimony of the State's witnesses and creating inferences not supported by evidence in the record. At trial, the State relied heavily on circumstantial evidence and the testimony of several witnesses. McClure responded with vigorous cross-examination, highlighting numerous holes in the State's theory and challenging the credibility of the witnesses. However, in determining that the video was admissible, the circuit court explained that the video "*substantiate[d]. . . a lot of evidence that[had] already been admitted*" and "*corroborate[d] a lot of the State's theory*." (R. 593) (emphases added). In other words, the court found that Detective Trojanowski's hearsay statements, as well as those provided by Detective Mefford,[4] McClure's

[4] The circuit court found that even if the statements in the video did constitute hearsay, McClure's cross-examination of Detective Mefford alleviated any Confrontation Clause issues. (R. 594). Thus, the court found the statements were admissible because "it[was] almost as if [Detective

girlfriend, and the Fairfield Police Department's technicians and relied upon by Detective Trojanowski in the interrogation video, had the effect of strengthening the State's case and bolstering the testimonies of its witnesses, including Detective Mefford and VonKeith Toland. This is improper and unfairly prejudicial.

Crucially, the statements in the interrogation video also allowed the State to compensate for the lack of DNA evidence in the case and imply that Butler had offered evidence against McClure. Before the video was published, Detective Trojanowski testified that he may lie to a criminal suspect about what information he may or may not possess in an attempt to elicit a confession. (R. 790–91). However, Detective Trojanowski did not specifically indicate which of his statements to McClure were lies and which were not. Thus, despite the fact that officers did not find McClure's DNA in the house or on items recovered from the scene, Detective Trojanowski's statements confidently asserting that McClure's DNA would be found on the scene were played before the jury. (State's Ex. 4 20:47). Additionally, even though Butler was tried separately and did not testify at McClure's trial, Detective Trojanowski implied that Butler provided information against McClure, improperly suggesting to the jury that Butler's testimony would have been harmful to McClure. (State's Ex. 4 20:44).

Trojanowski] step[ped] into the shoes of [Detective] Mefford." (R. 594). However, in making this determination, the circuit court improperly conflated the rule against hearsay with the Confrontation Clause. *See State v. Burdette*, 335 S.C. 34, 44, 515 S.E.2d 525, 530 (1999) ("[H]earsay exceptions and the Confrontation Clause of the United States Constitution *are not identical in their application*." (emphasis added)). Accordingly, statements can constitute inadmissible hearsay without violating the Confrontation Clause. *See State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) ("*[I]f evidence is deemed inadmissible hearsay, the inquiry is concluded* and a determination of whether such evidence is testimonial or non-testimonial is irrelevant." (emphasis added)). Therefore, the fact that McClure had an opportunity to cross-examine Detective Mefford does not render Mefford's hearsay statements to Detective Trojanowski admissible.

The prejudicial effects of the interrogation video were compounded because (1) the State published it to the jury immediately before resting its case, and (2) the State relied heavily on the video in its closing argument. As such, Detective Trojanowski's confident and accusatory summary of the evidence against McClure, which was based on inadmissible hearsay, his misrepresentations regarding DNA and Butler's alleged cooperation, and his burden-shifting hearsay statements are some of the last things the jury heard before deliberating. *See Shepard v. United States*, 290 U.S. 96, 104 (1933) ("The reverberating clang of those accusatory words would drown all weaker sounds."). Additionally, in its closing argument, the State repeated several of Detective Trojanowski's hearsay statements and placed more burden-shifting language before the jury by asking "[i]f he was there legitimately looking at a car and wasn't part of what happened and wasn't the cause of what happened, *why would he have lied to the police when asked, and [given an] opportunity to tell the story*?" (R. 825–29) (emphasis added). *See State v. King*, 334 S.C. 504, 514–15, 514 S.E.2d 578, 584 (1999) ("The State continuously stressed this improper [evidence] in its closing argument. Therefore, *it is impossible under these circumstances to conclude the improper evidence did not impact the jury's verdict*." (emphasis added)). Consequently, the admission of the redacted interrogation video resulted in significant prejudice to McClure because the video allowed the State to (1) bolster the evidence in the record by presenting an improper second closing argument, (2) place inferences in the record that were unsupported by the evidence, and (3) shift the burden to McClure to prove himself innocent.

Accordingly, the circuit court abused its discretion in admitting the interrogation video because it was rife with inadmissible hearsay and burden-shifting statements. *See Sims*, 426 S.C. at 129, 825 S.E.2d at 738 ("An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law . . . ." (quoting *Cook*, 415 S.C. at 556, 784 S.E.2d at 667)). Therefore, because

the admission resulted in significant prejudice to McClure, his conviction must be reversed. *See State v. Hughes*, 419 S.C. 149, 155, 796 S.E.2d 174, 177 (Ct. App. 2017) ("The improper admission of hearsay is reversible error []when the admission causes prejudice." (quoting *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006))).

II. The circuit court erred in charging the jury on inferred malice.

The circuit court erred in instructing the jury that it could infer malice from conduct showing a total disregard for human life because the instruction (1) constituted an unnecessary judicial comment on facts in the record, and (2) lowered the State's burden of proof in regard to the attempted murder charge.

A. The inferred malice instruction constituted a judicial comment on facts in the record

The circuit court erred in charging the jury on inferred malice because the State presented positive evidence of express malice at trial, rendering the court's instruction an unnecessary comment on facts in the record.

"Malice may be either express or implied." *State v. Wilds*, 355 S.C. 269, 276, 584 S.E.2d 138, 142 (Ct. App. 2003). However, "[t]he words 'express or implied' add nothing to the meaning of the word 'malice.' They do not imply different kinds of malice, but merely the manner in which the only kind known to the law may be shown to exist—that is, *either by positive evidence or by inference*." *Id*. (emphasis added) (quoting *State v. Milam*, 88 S.C. 127, 130, 70 S.E. 447, 449 (1911)). "Express malice is when there is a deliberate intention to unlawfully take the life of another." *Id*. "Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life' or 'a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.'" *Id*. at 276–77, 584 S.E.2d at 142 (quoting 40 C.J.S. Homicide § 35 (1991)). Our Supreme Court

has indicated that malice need be implied *only if there is no positive evidence of express malice*. *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020) (emphasis added).

In *Smith*, our Supreme Court addressed the inference of malice in the context of an erroneous attempted felony murder instruction. 430 S.C. at 232–34, 845 S.E.2d at 498–99. In the case, "the State argued the felony attempted-murder charge was permissible because it was merely 'another way to infer malice.'" *Id*. at 232–33, 845 S.E.2d at 498. In rejecting the State's argument, the Court explained that "[i]n claiming self-defense, *Smith admitted he had an express intent to kill*, but argued his intent to kill was legally justified due to an imminent threat to his life from the rival group." *Id*. at 233, 845 S.E.2d at 498. Therefore, "the jury was faced with the choice of either believing Smith's story and finding he acted in self-defense, or believing Smith had a self-admitted intent to kill that was *not* legally justified—*the very definition of express malice*." *Id*. (second emphasis added). The Court concluded that "[i]n either case, an implied malice charge was wholly unnecessary to the jury's decision[,]" noting that "[t]he State's unrelenting quest to obtain an implied malice charge [wa]s troubling." *Id*.

In *State v. Burdette*, our Supreme Court explained the dangers of instructing the jury on inferred malice in the context of a deadly weapon. 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019). The Court noted that it has "held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven." *Id*. at 502, 832 S.E.2d at 582. Therefore, the Court explained, "[s]imply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that [the jury] should be charged that these facts are probative of guilt." *Id*. (quoting *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013). When the circuit court "tells the

jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, *the [circuit] court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury*." *Id*. (emphasis added). "Such an instruction is no different than an instruction that the jury may use evidence of flight as evidence of guilt." *Id*. at 503, 832 S.E.2d at 582. Moreover, the Court explained that "[e]ven telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given *does not remove the taint of the [circuit] court's injection of its commentary upon that evidence*." *Id*. at 502–03, 832 S.E.2d at 582 (emphasis added).

Consequently, the Supreme Court determined "[a] jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted." *Id*. at 503, 832 S.E.2d at 582. The Court emphasized that its concern was specific to jury instructions, indicating "whether the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record." *Id*. In conclusion, the Supreme Court explained, "[i]t is axiomatic that some matters appropriate for jury argument *are not proper for charging*. Do jurors need the court's permission to infer something? The answer is, of course not." *Id*. at 503, 832 S.E.2d at 583 (internal quotation marks omitted) (emphasis added) (quoting *State v. Belcher*, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009)).

Here, a jury instruction on inferred malice was unnecessary because VonKeith Toland testified that a man he later learned to be McClure shot his brother in the back of the head at point-blank range. Any argument that such evidence constitutes evidence of implied malice rather than express malice is without merit. *See Wilds*, 355 S.C. at 276, 584 S.E.2d at 142 ("Express

malice is when there is a deliberate intention to unlawfully take the life of another."). Therefore, Toland's testimony constitutes positive evidence of express malice. *See Smith*, 430 S.C. at 233, 845 S.E.2d at 498 (indicating that malice need be implied only if there is no positive evidence of express malice). As such, the circuit court abused its discretion in instructing the jury on implied malice because "an implied malice charge was wholly unnecessary to the jury's decision[,]" as "*there was no need for the jury to infer []malice* from the circumstances surrounding the shooting." *Id*. (emphasis added); *see also Sims*, 426 S.C. at 129, 825 S.E.2d at 738 ("An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting *Cook*, 415 S.C. at 556, 784 S.E.2d at 667)).

Additionally, the circuit court's inferred malice charge is inconsistent with its determination that Justin Butler's text messages could be admitted as statements by a co-conspirator under Rule 801(d)(2)(E) of the South Carolina Rules of Evidence, discussed further *infra* Section III. In allowing the statements to come in, the circuit court had to determine whether there was evidence demonstrating that Butler and McClure agreed to kill the Tolands. *See State v. Sims*, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010) (defining "conspiracy" as "a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful" (quoting *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001))). Evidence that Butler and McClure conspired to kill the Tolands would constitute positive evidence of express malice, as one cannot conspire to kill someone with total disregard for human life. *See Wilds*, 355 S.C. at 276, 584 S.E.2d at 142 ("Express malice is when there is *a deliberate intention to unlawfully take the life of another*." (emphasis added)). Therefore, a conspiracy to commit murder and inferred malice are mutually exclusive.

Thus, the inferred malice charge constituted an unnecessary judicial comment on facts in the record. *See Burdette*, 427 S.C. at 503, 832 S.E.2d at 582 ("A jury instruction that malice may be inferred from [conduct demonstrating a total disregard for human life] is an improper court-sponsored emphasis of a fact in evidence."). When the circuit court told "the jury it may use evidence of [a total disregard for human life] to establish the existence of malice, a critical element of the charge of murder, the [circuit] court []*directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury*." *Id*. at 502, 832 S.E.2d at 582 (emphasis added). The elevation and emphasis of these facts to the jury immediately before deliberations caused significant prejudice to McClure.

B. The inferred malice instruction relieved the State of its burden to prove the element of express malice necessary to obtain a conviction for attempted murder

Furthermore, the circuit court erred in charging the jury on implied malice because it lessened the burden of proof necessary to convict McClure for attempted murder.

"A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015). In *State v. King*, our Supreme Court concluded that the Legislature intended to require that the State prove specific intent to commit murder as an element of attempted murder. 422 S.C. at 55, 810 S.E.2d at 22. However, the Court acknowledged the inclusion of the language "with malice aforethought, either express or implied" created an ambiguity in the statute, as the inclusion of the word "implied" is inconsistent with a specific-intent crime. *Id*. at 62, 64 n.5, 810 S.E.2d at 25–26, 27 n.5. In clarifying the law, the Court explained that

> [a]ttempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact. One cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result. An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired

> result. Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "implied malice." One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.

Id. at 57, 810 S.E.2d at 23 (internal quotation marks omitted) (quoting *Keys v. State*, 766 P.2d 270, 273 (Nev. 1988)).

Pursuant to *King*, this Court has held that "the State need[s] to prove [a defendant] acted *with express malice and* the specific intent to kill in order to be found guilty of attempted murder." *State v. Shands*, 424 S.C. 106, 131, 817 S.E.2d 524, 537 (Ct. App. 2018) (first emphasis added). Consequently, this Court "question[ed] whether an implied malice instruction is proper *in any attempted murder trial*." *Id*. (emphasis added).

At trial, the circuit court indicated that it did not intend to charge the jury on implied malice, however, the State argued that it was still good law to instruct the jury that malice could be inferred from conduct showing a total disregard for human life. (R. 810–11). In deciding to reinclude the charge, the circuit court explained

> I'm go[ing to] have my clerk put that instruction back in. I think you're correct in the sense that *as far as the attempted murder instruction is concerned you have multiple shots being fired into the victim*, which could indicate the intent to kill necessary -- the specific intent to kill necessary, the specific malice that's necessary for the attempted murder charge.

(R. 813) (emphasis added). In other words, the circuit court's decision to instruct the jury that malice could be inferred from circumstances showing a total disregard for human life stemmed from evidence indicating that VonKeith Toland was shot four times. However, because the State alleged Toland was the victim of an *attempted murder*, the circuit court abused its discretion in deciding to charge the jury on inferred malice. *See Shands*, 424 S.C. at 131, 817 S.E.2d at 537 ("*[T]he State need[s] to prove [a defendant] acted with express malice and* the specific intent to kill in order to be found guilty of attempted murder." (first emphasis added)); *Sims*, 426 S.C. at

129, 825 S.E.2d at 738 ("An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law . . . ." (quoting *Cook*, 415 S.C. at 556, 784 S.E.2d at 667)).

During the jury charge, the court gave the following instruction regarding attempted murder: "In order to prove this crime, the State must prove the Defendant attempted to kill another person with malice aforethought, either express or implied, *as I have just defined it for you*." (R. 870) (emphasis added). In its charge on malice, the court instructed the jury that "Malice may be inferred from conduct showing a total disregard for human life." (R. 870). However, the circuit court did not instruct the jury that the State had the burden of proving express malice in order for McClure to be found guilty of attempted murder. *See Shands*, 424 S.C. at 131, 817 S.E.2d at 537 ("*[T]he State need[s] to prove [a defendant] acted with express malice and* the specific intent to kill in order to be found guilty of attempted murder." (first emphasis added)).

When read in its entirety, the circuit court's instruction indicates that McClure could be found guilty of attempted murder if the jury found that circumstances demonstrated he acted with a total disregard for human life. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 ("In reviewing jury charges for error, [an appellate court] must consider the [circuit] court's jury charge as a whole in light of the evidence and issues presented at trial." (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 463)). Stated more succinctly, the court's jury charge indicated that McClure could be found guilty of attempted murder based on inferred malice. *See Patterson*, 367 S.C. at 232, 625 S.E.2d at 245–46 (finding that erroneous jury instructions constitute prejudicial error when "the instructions given *[fail to] afford the proper test for determining issues*." (emphasis added) (quoting *Burkhart*, 350 S.C. at 263, 565 S.E.2d at 304)). Thus, by erroneously instructing the jury that it could infer malice, the court relieved the State of its burden to prove express malice as an element of attempted murder, violating McClure's Due Process right and causing significant

prejudice to McClure.[5] *See State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law *as instructed to them*." (emphasis added)); *see also Sandstrom*, 442 U.S. at 512 ("[T]he Fourteenth Amendment[] require[s] that the State *prove every element of a criminal offense beyond a reasonable doubt*." (emphasis added)).

III. The circuit court erred in admitting the cell phone records as non-hearsay statements of a co-conspirator.

The circuit court erred in admitting the text messages sent by Justin Butler as non-hearsay statements made by a co-conspirator in furtherance of a conspiracy because there was not sufficient evidence demonstrating the existence of a conspiracy outside of the statements themselves.

Pursuant to Rule 801(d)(2)(E) of the South Carolina Rules of Evidence, "A statement is not hearsay if [t]he statement is offered against a party and is a statement by a co[-]conspirator of a party during the course and in furtherance of the conspiracy." "A conspiracy is 'a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. *The essence of a conspiracy is the agreement*.'" *Sims*, 387 S.C. at 564, 694 S.E.2d at 13 (emphasis added) (quoting *Buckmon*, 347 S.C. at 323, 555 S.E.2d at 405). "Under the Federal Rules of Evidence, this same rule has been interpreted to allow admission of a co-conspirator's statement only where there is evidence of the conspiracy *independent* of the statement sought to be admitted." *State v. Gilchrist*, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000).

Here, outside the statements in the text message log, there was no evidence presented that McClure and his alleged co-conspirator Justin Butler conspired to kill the Tolands. To establish

[5] The prejudice resulting from the lowered burden of proof for attempted murder is compounded when taken in conjunction with the burden-shifting language employed by Detective Trojanowski in the redacted interrogation video shown to the jury. *See supra* Section I.

the existence of a conspiracy, the State relied on Butler's status as a co-defendant, arguing "I think we can fairly say that Justin Butler is a co[-]conspirator in this case *because he is a co-defendant* . . . ." (R. 120) (emphasis added). However, the mere fact two defendants were charged with the same crime does not automatically lead to the conclusion that a conspiracy exists. Notably, neither Butler nor McClure were charged with conspiracy and the two were not charged in the same indictment. Similarly, the mere fact that the two parties traveled together from Atlanta to South Carolina does not lead to the conclusion that the parties conspired to murder two individuals at some point in the future. *See State v. Crawford*, 362 S.C. 627, 637, 608 S.E.2d 886, 891 (Ct. App. 2005) ("The mere fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a conspiracy." (quoting William Shepard McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina*, 476 (4th ed. 2002))). Rather, to establish conspiracy, the State must present direct or circumstantial evidence demonstrating that McClure and Butler agreed to murder the Tolands. *See Sims*, 387 S.C. at 564, 694 S.E.2d at 13 ("*The essence of a conspiracy is the agreement*." (emphasis added) (quoting *Buckmon*, 347 S.C. at 323, 555 S.E.2d at 405)).

The State offered no independent evidence demonstrating the existence of such an agreement between Butler and McClure. Crucially, however, the following evidence in the record cuts against the finding of conspiracy necessary to allow the statements into evidence under Rule 801(d)(2)(E): (1) neither Butler nor McClure were charged with conspiracy in any form; (2) VonKeith Toland testified that after the man he learned to be McClure shot Tycus, Butler was "scrambling," "confused," and ran back to the vehicle he and McClure arrived in; and (3) the circuit

court gave the jury an instruction on implied malice.[6] Notably, in a later ruling, the circuit court indicated that the "[text message log] has been introduced as evidence of conspiracy . . . ." (R. 760). As such, the text message log constitutes the only evidence of a conspiracy in the record. *See Gilchrist*, 342 S.C. at 372, 536 S.E.2d at 869 ("[T]his []rule has been interpreted to allow admission of a co-conspirator's statement *only* where there is evidence of the conspiracy *independent* of the statement sought to be admitted." (first emphasis added)). Therefore, because no independent evidence of conspiracy existed, the circuit court abused its discretion in admitting the text messages from Justin Butler as the non-hearsay statements of a co-conspirator.

This error caused significant prejudice to McClure because it resulted in the presentation of numerous inadmissible hearsay statements to the jury. The hearsay statements in the text message log served as evidence of a premeditated scheme between Butler and McClure that could not be established in their absence. The text message log also served as the source from which the State's expert could speculate to the jury that Butler and McClure were discussing firearms with each other days before the shootings occurred. *See infra* Section IV. Accordingly, the admission

[6] As previously mentioned, *supra* Section II(A), a jury charge instructing the jury that it may infer malice from conduct demonstrating a total disregard for human life is inconsistent with the determination that a conspiracy to commit murder existed. A person cannot *conspire* to commit murder with implied malice any more than a person can *attempt* to commit murder with implied malice because there is no such criminal offense as an agreement to achieve an unintended result. *Cf. King*, 422 S.C. at 57, 810 S.E.2d at 23 ("One cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result. (quoting *Keys*, 766 P.2d at 273)). Rather, the very essence of conspiracy is an agreement that intends to bring about a criminal result. Accordingly, an agreement to commit murder would be predicated on express malice. *See Wilds*, 355 S.C. at 276, 584 S.E.2d at 142 ("Express malice is when there is a *deliberate intention to unlawfully take the life of another*." (emphasis added)). Thus, if malice must be inferred from McClure's conduct, then there is not sufficient evidence of an agreement to kill the Tolands from which it could be determined that a conspiracy to commit murder existed. *See Smith*, 430 S.C. at 233, 845 S.E.2d at 498 (indicating that malice need be implied *only if there is no positive evidence of express malice* (emphasis added)).

of these text messages resulted in extreme prejudice to McClure and his conviction must be reversed.

IV. The circuit court erred in qualifying Officer Zwolak as an expert in "street culture, language, and slang."

The circuit court erred in qualifying Officer Zwolak as an expert in "street culture, language, and slang" and allowing him to offer his opinion on the meanings of words in the text message log because (1) his qualifications were insufficient, (2) his methods and testimony were unreliable, and (3) the unfair prejudice stemming from his unreliable testimony and the negative connotation of qualifying an expert in "street culture, language, and slang" outweighed the probative value of his testimony.

Pursuant to Rule 702 of the South Carolina Rules of Evidence, "[i]f 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." "[A]ll expert testimony under Rule 702, SCRE, imposes on the [circuit] courts an affirmative and meaningful gatekeeping duty." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009); *see also Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) ("All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise."). "Before admitting expert testimony, [circuit] courts, as the gatekeepers of evidence, must ensure the proffered evidence is beyond the ordinary knowledge of the jury; the witness has the skill, training, education, and experience required of an expert in his field; and the testimony is reliable." *State v. Warner*, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2020). "If the [circuit] court is satisfied the proposed expert evidence meets these criteria, it must then consider whether the probative

value of the evidence is substantially outweighed by its potential for unfair prejudice or other Rule 403, SCRE, considerations." *Id*.

A. Officer Zwolak's qualifications were insufficient to testify as an expert.

The circuit court erred in allowing Officer Zwolak to offer his opinion on the meaning of certain words in the text message log because he did not have sufficient qualifications to do so. "The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." *State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020). "To be competent to testify 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*." *Id*. (emphasis added) (internal quotation marks omitted) (quoting *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997).

Here, Officer Zwolak had previously been qualified as an expert in "street culture, language, and slang" only once before and the State could not offer any examples of other experts who had been qualified in the field. (R. 755). During his *voir dire*, Officer Zwolak testified that he had experience working with street crimes, organized crime, and gangs. (R. 756). Officer Zwolak also indicated that he taught classes on street crimes and gangs, in addition to attending training in counterdrug investigations, gang investigations, and street investigations. (R. 756–57). Further, Officer Zwolak indicated that he was experienced in "street culture, language, and slang" through conducting interviews with "people who communicate in this way," utilizing social media, and watching music and rap videos. (R. 762–63). Notably, however, Officer Zwolak did not testify to having any experience in the fields of linguistics, sociolinguistics, or lexicography.

Consequently, Officer Zwolak was not sufficiently qualified to testify as an expert in "street culture, language, and slang." The mere fact that Officer Zwolak had significant experience in investigating gang and street crime does not lead to the conclusion that Officer Zwolak is an expert in linguistics or lexicography. Moreover, the fact that he had spoken with people who speak in slang, used social media, and watched music videos does not make him more qualified than the jury to decipher the meaning of certain slang words. *See id*. ("To be competent to testify 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." (internal quotation marks omitted) (quoting *Gooding*, 326 S.C. at 252–53, 487 S.E.2d at 598)). It cannot logically be concluded that no one on the jury had ever spoken with someone using slang, used social media, or watched music videos. Accordingly, because Officer Zwolak's experience does not lead to the conclusion that he is more qualified to interpret slang than the jury, the circuit court abused its discretion by qualifying him as an expert.

B. Officer Zwolak's methods and testimony were unreliable.

"In assessing the admissibility of expert testimony, the [circuit] court must make a threshold determination of reliability." *State v. Jones*, 423 S.C. 631, 638, 817 S.E.2d 268, 272 (2018). Indeed, "*[r]eliability is a central feature of Rule 702 admissibility . . . .*" *White*, 382 S.C. at 270, 676 S.E.2d at 686 (emphasis added). "In South Carolina, a [circuit] court minding the Rule 702 gate must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable." *Warner*, 430 S.C. at 86, 842 S.E.2d at 365. Crucially, "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." *State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015) (emphasis added).

Officer Zwolak testified that in order to stay current in "street culture, language, and slang" he conducted interviews with "people who communicate in this way," utilized social media, and watched music and rap videos. (R. 762–63). However, during *voir dire*, Officer Zwolak testified that "street language" changes on a daily basis and differs depending on the region. (R. 767–68). Furthermore, despite his intention to testify on the meaning of the word "hammy," Officer Zwolak could not identify any sources of the word and conceded that he never heard the word used. (R. 767). Instead, Officer Zwolak speculated that the word "hammy" was a variation of the word "hamma." (R. 767). Based on his *voir dire* testimony, Officer Zwolak's method for defining "street language" is unreliable at best. The simple practice of speaking with people, listening to music videos, and reading social media posts is not enough to consistently and accurately define words that are constantly changing and different across the country. *See id.* ("[E]vidence 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." (emphasis added)). Therefore, because Officer Zwolak's method was unreliable, the circuit court abused its discretion in allowing him to testify regarding certain words in the text message log.

The unreliability of Officer Zwolak's method was borne out by his testimony. When asked to define the word "nickel," Officer Zwolak could not provide a reliable definition, opining instead that the word is used to refer to "an amount or a firearm." (R. 778). Then, despite conceding that he never heard the word in use before, Officer Zwolak testified that "hammy" is used to refer to a

firearm. (R. 779). Consequently, Officer Zwolak's testimony was speculative and unreliable, and the circuit court abused its discretion in admitting it.

C. The unfair prejudice stemming from Officer Zwolak's unreliable testimony and his qualification as an expert in "street culture, language, and slang" outweighed the probative value of his testimony.

The unfair prejudice stemming from Officer Zwolak's testimony and his qualification as an expert in "street culture, language, and slang" significantly outweighed the probative value of his testimony.

Pursuant to Rule 403 of the South Carolina Rules of Evidence, "[a]lthough 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." "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403." *State v. McGee*, 408 S.C. 278, 289, 758 S.E.2d 730, 736 (Ct. App. 2014) (quoting *State v. Collins*, 398 S.C. 197, 207, 727 S.E.2d 751, 757 (Ct. App. 2012), *rev'd on other grounds*, 409 S.C. 524, 763 S.E.2d 22 (2014)). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

As demonstrated above, Officer Zwolak was not qualified to testify on matters of linguistics or lexicography, his method was unreliable, and his testimony was speculative and confusing. *See State v. Jones*, 383 S.C. 535, 557–58, 681 S.E.2d 580, 592 (2009) ("In the absence of scientific reliability, the evidence could only operate to provide inaccurate and inconclusive information for the jury."). However, despite his unreliability, Officer Zwolak was allowed to speculate as to the meaning of certain words, guessing on more than one occasion that Butler and

McClure were discussing firearms. In other words, despite the low probative value associated with Officer Zwolak's testimony, he was allowed to repeatedly speculate to the jury in a murder trial that the defendant was discussing firearms with a co-defendant. Given the uncertainty in and lack of basis for these conclusions, this testimony resulted in significant unfair prejudice to McClure.

Furthermore, announcing to the jury that Officer Zwolak was qualified as an expert in "street culture, language, and slang" was extremely prejudicial to McClure because of the associated negative connotation and implications. Notably, the circuit court offered to use several less incendiary field descriptions to qualify Officer Zwolak, including (1) modern, colloquial idioms, (2) uncommon idiomatic expressions, (3) unconventional expressions, (4) unconventional common expressions, and (5) Non-King's English. (R. 772–73). Despite defense counsel's willingness to agree to one of the listed fields, the State strenuously opposed qualifying Officer Zwolak in anything other than "street culture, language, and slang." (R. 773). In reference to the term "street culture," the State asserted that "[i]t is what it is," further arguing that it would "*lose the point of the expert qualification* by trying to change it." (R. 773) (emphasis added). However, if the point of the State's expert was to simply define certain terms, it begs the question why the State would "lose the point of the expert qualification" if Officer Zwolak was not qualified in "street culture, language, and slang."

By having Officer Zwolak qualified as an expert in "street culture, language, and slang" the State was able to associate McClure with the negative connotation of the word "street." This resulted in extreme unfair prejudice, especially in light of the alternative fields suggested. The word "street" in this context has an extremely negative connotation, as it is commonly associated with criminality in the form of street crime. In other words, the term "street" is generally not

associated with law-abiding citizens or reputable livelihoods.[7] Accordingly, the term "street culture" would suggest a culture based in criminality. Consequently, qualifying Officer Zwolak as an expert in "street culture, language, and slang" to define terms in text messages between Butler and McClure implicitly suggested that the two were involved in "street culture," which in turn suggested that they were criminals. Ultimately, this suggested to the jury that McClure was capable of committing the crimes for which he was accused because he was a criminal well versed in "street culture." *See Wilson*, 345 S.C. at 7, 545 S.E.2d at 830 ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one."). As such, the circuit court abused its discretion in qualifying Officer Zwolak as an expert in "street culture, language, and slang" because the unfair prejudice stemming from the negative connotation associated with "street culture" significantly outweighed the probative value of Officer Zwolak's testimony.

V. The circuit court erred in refusing to allow McClure to question Tyvona Toland regarding her dismissed charges, causing actual prejudice to McClure in violation of his right to a speedy trial.

The circuit court erred in precluding McClure from questioning Tyvona Toland regarding the dismissal of her pending charges because it constituted relevant evidence of potential bias. Additionally, the refusal to let McClure question Tyvona Toland resulted in actual prejudice to McClure in violation of his speedy trial rights.

A. Dismissal of the charges constituted relevant evidence of potential bias

Pursuant to Rule 608(c) of the South Carolina Rules of Evidence, "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." "Proof of bias *is almost always relevant* because the jury, as

[7] By way of example, consider the term "street pharmacist" in comparison to "pharmacist."

finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *State v. McEachern*, 399 S.C. 125, 140–41, 731 S.E.2d 604, 612 (Ct. App. 2012) (emphasis added) (quoting *State v. Pipkin*, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004)). Moreover, "[e]vidence of a witness's bias can be *compelling impeachment evidence*, and for that reason *'considerable latitude is allowed' to defense counsel in criminal cases 'in the cross-examination of an adverse witness for the purpose of testing bias.'"* *Smalls v. State*, 422 S.C. 174, 182, 810 S.E.2d 836, 840 (2018) (emphases added) (quoting *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991)). Accordingly, "[o]ur courts have followed the 'general rule' that 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony[.]'" *Id*. (internal quotation marks omitted) (quoting *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976)).

In *Smalls v. State*, our Supreme Court found that the defendant's counsel was ineffective for failing to object when the circuit court refused to allow counsel to question a witness about a carjacking charge that had been dismissed. *Id*. at 182–84, 810 S.E.2d at 840–41. At the outset, the Court explained

> Apparently not recognizing that the *dismissal of the charge was potentially stronger evidence of bias than the charge itself*, trial counsel raised no further argument on the issue, and did not ask the [circuit] court to make a ruling as to whether counsel would be permitted to use the carjacking charge or its dismissal to impeach Green.

Id. at 182, 810 S.E.2d at 840 (emphasis added). Regarding the use of pending charges as impeachment evidence, the Court noted that "[t]here [is] substantial possibility [the witness with pending charges] would give biased testimony in an effort to have the solicitor highlight to his future judge how he had cooperated . . . ." *Id*. at 183, 810 S.E.2d at 841 (third alteration in original)

(quoting *State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002)). The Court determined that the witness's carjacking charge was evidence of bias, noting that "[i]n most circumstances, a [circuit] court would admit the evidence of the charge." *Id.* The Supreme Court further explained that "[i]f the mere existence of the charge made it likely [the witness] would give biased testimony, . . . the dismissal of the charge made the likelihood of bias manifest—because [the witness] actually received the benefit he hoped the solicitor would provide in exchange for his cooperation." *Id.*

Here, McClure sought to question Tyvona Toland regarding multiple charges that were dismissed prior to the trial of McClure's co-defendant Justin Butler. (R. 258–59). During McClure's proffer, Tyvona testified that she was arrested in January 2014 by the Lexington County Sheriff's Department on charges of trafficking cocaine, sale and delivery of a pistol, possession of a weapon during a violent crime, and manufacturing/distribution of drugs. (R. 260). Additionally, Tyvona testified that all of the charges were dismissed in May 2016, a month before she testified at Justin Butler's trial. (R. 260–61). In arguing that the dismissed charges were not relevant to McClure's case, the State noted that the charges were dismissed in May 2016 and Butler was tried in June 2016, but McClure was not served with warrants until July 2016. (R. 259). Notably, however, the State explained earlier in the trial that McClure was not extradited from California and served with warrants in South Carolina until July 2016 because he was serving time for a parole violation in California.[8] (R. 25). Ultimately, the court noted that the timing of the State's dismissal of the charges may have made the charges relevant in Butler's case, but concluded that McClure should not be allowed to solicit Tyvona's testimony regarding the charges. (R. 268–69).

[8] In arguing that the State did not violate McClure's right to a speedy trial, the State represented to the court that California would not release McClure for extradition until he served the entire sentence for his parole violation. (R. 25).

The court abused its discretion in refusing to allow McClure to question Tyvona regarding the dismissed charges because they constituted relevant evidence of bias. *See id*. at 182, 810 S.E.2d at 840 (*"'[C]onsiderable latitude is allowed' to defense counsel in criminal cases 'in the cross-examination of an adverse witness for the purpose of testing bias*.'" (emphasis added) (quoting *Brown*, 303 S.C. at 171, 399 S.E.2d at 594)); *id*. at 183, 810 S.E.2d at 841 ("In most circumstances, a [circuit] court would admit evidence of the charge."). The court's determination that evidence of Tyvona's bias would have been relevant in Justin Butler's case but not McClure's is inconsistent. Tyvona was testifying regarding the same alleged crime as Butler, who she testified against a month after having her charges dismissed. The mere passage of time does not automatically eliminate a witness's motivation for repeating the same testimony in a subsequent trial, as the State could have easily reindicted her had she refused to testify against McClure.[9] *See id*. ("If the mere existence of the charge made it likely [the witness] would give biased testimony, . . . the dismissal of the charge made the likelihood of bias manifest—because [the witness] actually received the benefit he hoped the solicitor would provide in exchange for his cooperation.").

Moreover, because she had previously given testimony under oath, Tyvona ran the risk of exposing herself to perjury if she did not offer the same or significantly similar testimony as she did in Butler's trial. *See State v. Stanley*, 365 S.C. 24, 35, 615 S.E.2d 455, 460 (Ct. App. 2005) ("Giving false testimony at trial constitutes the felony of perjury and subjects the perjurer to a fine and/or up to five years imprisonment." (quoting *Collins v. Doe*, 343 S.C. 119, 124, 539 S.E.2d 62, 64 (Ct. App. 2000), *rev'd on other grounds*, 352 S.C. 462, 574 S.E.2d 739 (2002))). The mere fact

[9] Furthermore, the circuit court observed that, in regards to Tyvona's previous testimony, the State would prefer that she testify against Justin Butler without "anything hanging over her head." (R. 268). However, the court found this same logic did not apply to McClure. (R. 268).

that Tyvona would be subject to perjury for offering different testimony in the second trial elevates the importance of her motivation to offer the same testimony in the first trial. Therefore, McClure should have been allowed to question Tyvona's motivation and bias to provide testimony against Justin Butler, which was given without the threat of perjury.

B. Precluding McClure from questioning Tyvona Toland's bias resulted in actual prejudice in violation of his right to a speedy trial.

The circuit court erred in refusing to let McClure question Tyvona Toland about the dismissed charges because it resulted in actual prejudice to McClure in violation of his right to a speedy trial.

Pursuant to the constitutions of the United States and the State of South Carolina, in all prosecutions, the accused shall enjoy the right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14. "A speedy trial means a trial without unreasonable and unnecessary delay." *State v. Hunsberger*, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016). "The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense." *State v. Langford*, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012). "The remedy for a speedy trial violation is dismissal of the charges." *Hunsberger*, 418 S.C. at 342, 794 S.E.2d at 371.

"To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay . . . ." *Id*. at 342–43, 794 S.E.2d at 372. "Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness." *Id*. at 343, 794 S.E.2d at 372. "Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied." *Id*. The factors for establishing a speedy trial violation are "(1) length of delay; (2) the reason for the delay;

(3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused." *Id*.

Prior to trial, McClure moved for a dismissal of his charges due to a violation of his speedy trial rights. (R. 16–17). The circuit court properly concluded that the three-year period between the time McClure was served with his warrants and his speedy trial motion triggered the speedy trial analysis. (R. 25–26). *See State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (holding a delay of two years and four months was "sufficient to trigger []review of the other three factors"). The circuit court indicated it would hold McClure's motion for a speedy trial open throughout the trial to allow McClure to demonstrate actual prejudice stemming from the delay. (R. 27). Ultimately, the circuit court did not find any evidence of actual prejudice to support a speedy trial violation. However, the circuit court's ruling precluding McClure from questioning Tyvona Toland about potential bias constitutes evidence of actual prejudice. *See Hunsberger*, 418 S.C. at 351, 794 S.E.2d at 376 ("Actual prejudice occurs when the trial delay *has weakened the accused's ability to . . . elicit specific testimony* . . . ." (emphasis added)). In so ruling, the circuit court found the dismissal of the charges was not relevant in McClure's trial due to *the passage of time between the dismissal of Tyvona Toland's charges and McClure's trial*. (R. 268–69). Thus, had the State prosecuted McClure with ordinary promptness, McClure would have had the benefit of questioning Tyvona Toland regarding the dismissed charges. *See State v. Reaves*, 414 S.C. 118, 131, 777 S.E.2d 213, 219 (2015) (finding impairment of the defense to be the most serious form of prejudice because "the inability of the defense to prepare its case . . . cuts to the heart of the fairness inherent in the system"). Accordingly, the refusal to let McClure question Tyvona Toland regarding her dismissed charges constitutes the actual prejudice necessary to find that McClure's speedy trial rights were violated.

CONCLUSION

Based on the foregoing, the circuit court abused its discretion in (1) admitting the redacted video of McClure's interrogation; (2) charging the jury on inferred malice; (3) admitting text messages between Butler and McClure as non-hearsay statements of a co-conspirator; (4) qualifying Officer Zwolak as an expert in "street culture, language, and slang"; and (5) precluding McClure from questioning Tyvona Toland about her potential bias. Because these errors resulted in significant prejudice to McClure, McClure's conviction must be reversed.

Respectfully submitted:

June 30, 2021

Mario A. Pacella
Matthew B. Robins
Strom Law Firm, LLC
6923 N. Trenholm Road, Suite 200
Columbia, SC 29206
(803) 252-4800
mpacella@stromlaw.com
mrobins@stromlaw.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
In the Court of General Sessions

The Honorable Frank Addy, Jr., Circuit Court Judge

Appellate Case No. 2019-001865

State of South Carolina . . . . . Respondent

v.

Terry Renee McClure . . . . . Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief complied with Rule 211(b), SCACR.

Mario A. Pacella
Matthew B. Robins
Strom Law Firm, LLC
6923 N. Trenholm Road, Suite 200
Columbia, SC 29206
(803) 252-4800
mpacella@stromlaw.com
mrobins@stromlaw.com

Attorneys for Appellant

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