STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2019-001865

THE STATE, ...RESPONDENT,

v.

TERRY RENEE MCCLURE, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

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II. The trial judge properly charged the jury on inferred malice pursuant to the law of South Carolina.

III. The trial judge correctly allowed admission of the codefendant's text messages as non-hearsay statements because there was separate evidence of the conspiracy between the codefendant and Appellant.

IV. The trial judge properly qualified Officer Zwolak as an expert in "street culture, language, and slang."

V. The trial judge properly refused trial counsel's request to question a witness on dismissed criminal charges because there was no indication the dismissal of her charges could have impacted her testimony. Further, the trial judge's refusal did not violate Appellant's rights to a speedy trial.

STATEMENT OF THE CASE

The State agrees with Appellant's Statement of the Case.

STATEMENT OF FACTS

In April of 2014, VonKeith Toland lived in Pelion, South Carolina where he was in the business of repairing salvaged vehicles and selling them for a profit. VonKeith got into the business after he was convicted of two counts of trafficking drugs in 2009, for which he served a prison sentence of sixteen months. At some point in the days leading up to April 26, 2014, VonKeith was contacted by Justin Butler, a man he knew by the nickname of "Jona," who was looking for a "nice car." VonKeith had previously met Butler through a mutual friend, Alonzo Walker, approximately ten months earlier. On a few occasions, Butler, who lived in Alabama at the time, would travel to Pelion to view VonKeith's inventory of vehicles but he never ended up purchasing any of the vehicles he considered. On April 26, 2014, Butler wanted to set up a time to view an Infinity which VonKeith was selling for $10,000. VonKeith, who was planning on attending his son's little league baseball game, could not meet with Butler during the latter's initially suggested times, but agreed to meet with him later in the day. (R.p.155, line 13–R.p.160, line 6; R.p.161, line 3–R.p.163, line 25; R.p.164, lines 10–17)

Butler met up with VonKeith at the latter's mother's home in North, South Carolina. Butler, unlike his previous visits, was not alone: he was accompanied by Appellant who VonKeith learned was from California. Both Butler and Appellant joined in the poker game VonKeith was playing with his family. Butler and Appellant remained at the house playing poker for an extended period, even waiting while VonKeith left for approximately thirty minutes for an errand. When VonKeith returned, he, Butler, and Appellant decided to go look at the Infinity. Tycus, Appellant's brother, also agreed to go with the men. After they arrived at VonKeith's home, VonKeith helped Butler and Appellant inspect the vehicle and allowed them

to take it for a test drive. (R.p.160, line 7–R.p.161, line 2; R.p.164, lines 1–9; R.p.164, line 22–R.p.169, line 4)

After the men returned from the test drive, the dynamics among them became awkward when VonKeith mentioned Alonzo Walker's name and Appellant expressed hostility towards him. After approximately a minute of awkward silence, Appellant pulled a gun out of waistband and shot Tycus in the head. VonKeith, stunned, pushed away from Appellant who responded by telling him to "give it up" or he would kill him. VonKeith took off running but was shot three to four times, knocking him to the ground. VonKeith dragged himself to the rear of his home, but at that point could no longer move. At this point, Appellant was standing over VonKeith and Butler had retrieved his own gun from the vehicle he and Appellant were driving. Appellant repeatedly threatened to kill VonKeith if he failed to give the men money and drugs. VonKeith, trying to buy himself time, told the men that money was in his home but the men would have to look for it. (R.p.169, line 5–R.p.172, line 25)

Appellant broke into the home through a sliding glass door, with Butler following closely behind. While the men were inside, VonKeith tried dialing 9-1-1 but was discovered by Appellant who shot him several more times. VonKeith, out of options, dropped the phone and pretended to me dead in the hopes that the men would refrain from shooting him further. Then men returned into the home to look for the controls to the camera system for the property, at which point VonKeith crawled under the nearby trailer and hid behind one of its pillars. When the men exited the home, they attempted to find VonKeith, even looking under the trailer, but were unable to find him. VonKeith could tell the men were carrying his recording equipment because he saw the cords for it dragging on the ground. Frustrated, the men jumped in their vehicle and left. After several minutes, Appellant left his hiding spot and crawled to the vehicle

he and Tycus had driven to the property, where he located another cell phone which he used to call 9-1-1 and gave the operator all the information he could about the shooting. (R.p.173, line 1–R.p.176, line 14)

VonKeith was taken to the hospital for medical care, where he spent weeks in intensive care, of which he spent approximately sixteen days in a coma. When he was finally able to communicate with law enforcement, he provided them with entire recollection of the events surrounding the attack. In turn, officers provided him with photographic lineups to get him to identify the people that attacked him and Tycus that day. VonKeith identified Butler and Appellant as the perpetrators. (R.p.197, line 10–R.p.213, line 23)

Tyvona Toland, the sister of VonKeith and Tycus, was one of the family members at her mother's house when Butler and Appellant visited that day. Later, after the shooting, she searched through Walker's Instagram and found a picture of Butler, which she provided to law enforcement to aid in its investigation. Further, she positively identified Appellant as the second man at the home that day. (R.p.244, line 22–R.p.258, line 2)

Prior to trial counsel's cross-examination of Tyvona, trial counsel informed the court that it wanted to question Tyvona regarding charges which arose in January of 2014 which were nol-prossed May 3, 2016, approximately a month before Butler's trial in June of 2016. Trial counsel explained it was not offering the information as impeachment evidence pursuant to Rule 609, SCRE: it was offered as evidence of potential bias of the witness that the jury was entitled to hear. The trial judge allowed trial counsel to proffer the evidence, at which time Tyvona explained she was arrested in January of 2014 on multiple charges including trafficking cocaine, manufacturing/distribution of drugs, delivery of a pistol, and possession of a weapon during a violent crime. During the in-camera redirect examination, Tyvona testified she did not know

why her charges were dismissed and no one made any promises regarding the charges in exchange for her testimony. She also explained her husband, who lived in the same home, pled guilty to the same charges and he was given probation as a result. Further, the State confirmed that no offer of any kind was made to Tyvona in relation to her charges. (R.p.258, line 5–R.p.265, line 19)

After the parties reviewed the opinion in State v. Aleksey and the sentencing sheets for Tyvona's husbands charges, the trial judge made a few observations: Tyvona's husband appeared to get "such a good deal" in his sentencing because the agent in charge of his case was fired; Tyvona's charges were dropped because her husband took responsibility for the drugs found at their residence. The trial judge also stated he could "see in the prior case involving Mr. Butler where perhaps [the dismissed charges] might have been more germane" because the timing of the dismissal of the charges was "curious." He stated the dismissal would have been more relevant in Butler's case than Appellant's because, in the years since they had been dismissed, Tyvona was not re-indicted. Explaining that narcotic offenses "are not necessarily proof – or proof of evidence of truthfulness or untruthfulness" especially when they are dismissed, he found no evidence of a "quid pro quo" for her testimony and denied trial counsel's request to bring up the charges in front of the jury. (R.p.265, line 20–R.p.269, line 20)

Ishland Toland, VonKeith's cousin, was also at his mother's home on the day in question. She saw Butler and Appellant, and the latter sat next to her during the poker game. Ishland picked both men out of photographic lineups after the shooting and, at trial, identified Appellant. (R.p.279, line 5–R.p.288, line 8)

Keith Sprinkle, was a crime scene investigator with the Lexington County Sheriff's Office when the shooting occurred and assisted in processing the vehicles and the exterior of

VonKeith's home for latent fingerprints. Notably, he was able to find a few "quality prints" on the Infinity: one was on the interior window of the front passenger door and a second on the hood of the vehicle's trunk. The print he found on the interior window appeared to be fresh due to how much oil and material were left on the surface but Sprinkle could not provide an exact date for when it would have been left on the surface. (R.p.361, line 13–R.p.372, line 10)

Seraphim Haftoglou, the supervisor of SLED's Automated Fingerprint Identification System (AFIS) identified a fingerprint card from the system with prints belonging to Appellant. James Hickman, a latent print examiner with the Lexington County Sheriff's Office and a qualified expert in the field, reviewed the prints collected from the Infinity and matched the fingerprint from the inside window to Appellant's left middle finger. (R.p.402, line 6–R.p.419, line 9)

Roy Mefford was a sergeant in the major crimes unit the Lexington County Sheriff's Office in 2014. When he arrived at the crime scene, he immediately observed blood on the ground near the trailer and visual indicators that someone had crawled underneath the structure. The back door was broken from an obvious effort to break into the building. Inside the home, he noticed it appeared ransacked and that, despite the presence of security cameras, he was unable to locate the recording device to which they would be connected; all he found was an area with unplugged cables which he assumed was where the recording device had been. (R.p.469, line 11–R.p.478, line 5)

After leaving the crime scene, Mefford was able to obtain a copy of a computer-aided dispatch (CAD) report summarizing VonKeith's communications with the 9-1-1 dispatcher. Mefford obtained and listened to the 9-1-1 recording and used the information within to focus his investigation. Mefford began searching for information about Alonzo Walker and used the

photograph found by Tyvona to identify Butler. Additionally, after learning from family members that VonKeith and Tycus were shot during what was supposed to be the sale of a vehicle, Mefford obtained VonKeith's cellular phone records to look for information regarding the shooters. VonKeith's phone history indicated he had several contacts with a phone with an Atlanta area code number (404 number) which, among other messages, included VonKeith sending that phone a picture of the Infinity. Mefford began focusing on that cell phone and obtained a search warrant for it and its records. The phone was activated on March 15, 2014, and was purchased at a Wal-Mart in Muscle Shoals, Alabama. Reviewing the records provided by Verizon, Mefford noticed the 404 number participated in several suspicious communications, including a star 67[1] number based out of California, including a 4:00 a.m. call which lasted approximately twenty minutes. Mefford also observed the burner phone was from Folsom, California which appeared relevant due to Walker being a resident of California. The cell phone tower information for the burner phone showed it going from Alabama, Atlanta, the cell phone tower closest to Vonkeith's and Tycus's mother's residence, and eventually to Pelion before stopping in Batesburg-Leesville, South Carolina. (R.p.478, line 6–R.p.493, line 12)

Mefford was able to determine the actual phone number obscured by the star 67 code and called it. He spoke with a woman who confirmed the phone number associated with the burner phone belonged to Butler. She also provided investigators with a new phone number for Butler. Detectives called that number and confirmed Butler was the person in possession of the phone. They used this information to obtain a search warrant for a new number (510 number). The phone was registered to "John McCoy" at a P.O. Box in Irvine California. When he checked the

[1] Phone calls utilizing the star 67 code are used to block a phone number from caller ID or phone records. (R.p.488, lines 14–19)

cell tower information for this phone, he noticed the cell tower location data matched the burner phone's from around the time of the shooting; the only difference was the burner phone stopped in Batesburg-Leesville but the new phone traveled back to Muscle Shoals, Alabama and was used even after the incident. Other evidence also indicated both phones were used by Butler: the 404 number had received text messages in which the people using the other phone numbers referred to the owner of the phone as "Jona," and when officer searched for that name on Walker's Facebook page the profile picture for "Jona McCoy" was of Butler. Jona McCoy's Facebook page in turn advertised a CD and contact information for that CD matched the 510 number. (R.p.493, line 12–R.p.502, line 1)

Further research into the 404 number uncovered text messages in which the person using that number texted with someone using another phone number (707 number) and arranging to pick up the person using that new number from a bus station. A search warrant for records pertaining to the 707 number uncovered that phone was activated on April 4, 2014. On April 24, 2014, the phone moved from Vacaville to the Sacramento, California airport, then to Dulles International Airport in Virginia, and finally Atlanta International Airport in Georgia. After arriving in Atlanta, the 707 number appeared to travel with the 404 and 510 numbers to Pelion, South Carolina on April 26, 2014. While the 404 number stayed in Batesburg-Leesville, the 707 number traveled with the 510 number back to Atlanta. From there, the 707 number traveled to the Charlotte Airport, back to the Sacramento Airport, and eventually returned to Vacaville, California. (R.p.502, line 2–R.p.512, line 21)

After checking passenger manifests for flights coinciding with the time table for the 707 number's cell tower usage, Mefford found two names who could have been using the phone: Appellant's and Jean Ferrosa. When checking passenger manifests for flights coinciding with

that phone's return trip to California, Mefford found Appellant, but not Ferrosa, traveled on those flights. (R.p.512, line 22–R.p.518, line 11)

Using the information gained from these searches, Mefford found photographs of Appellant and Butler and used them to generate photographic lineups. VonKeith, now awake, was presented with these lineups and identified Appellant and Butler as the men responsible for the shooting. (R.p.519, line 17–R.p.524, line 10)

Mefford, following up on the lead about bus tickets, found records that Butler bought two Greyhound bus tickets: one which left on April 24, 2014 from Athens, Alabama and traveled to Atlanta Georgia; and a second ticket for April 27 which traveled the reverse route. Officers also obtained records of Appellant renting a car in Atlanta which was rented on April 24, 2014, and returned three days later. After viewing footage from the Greyhound bus station in Atlanta, Mefford found footage of Butler arriving at the station on both April 24 and April 27; the footage from April 27 showed Butler being dropped off by a vehicle matching the description of Appellant's rental car, a 2014 Hyundai Santa Fe Sport, blue in color. (R.p.527, line 10–R.p.538, line 17)

Ladondra Ellis met Appellant while she was attending high school while living in Fairfield, California, approximately fifteen years prior to trial. In April of 2014, she was living in Atlanta and Appellant asked her to pick up his "brother" from a Greyhound station in Atlanta and take him to the airport. At trial, she confirmed that the 707 number was Appellant's and the 404 number belonged to the brother she picked up. When shown a photographic lineup, she identified Butler as the brother she picked up from the bus station. (R.p.574, line 14–R.p.589, line 5)

Michael Phipps, a forensic technology examiner with the Lexington County Sheriff's Office, performed in-depth reviews of the data collected from the cellular phone companies regarding the phone numbers involved in the case. In addition to supporting Mefford's earlier testimony regarding cell phone location data, he revealed additional information gained from the records search. For example, the 707 number repeatedly transmitted calls through the cell phone tower located closest to Appellant's home. Further, the 707 number contacted a travel booking company called "Cheap Tickets" while maintaining constant communication with a South Carolina based phone number (864 number). Additionally, between 10:26 p.m. on April 24 and 11:24 a.m. on April 26, the 404, 510, 707, and 864 numbers were all located in the area of Greenwood, South Carolina. After this, the 404, 510, and 707 numbers traveled towards North, South Carolina and eventually to Pelion. After the 510 and 707 numbers returned to Atlanta, both numbers resumed correspondence with the 864 number again. (R.p.668, line 15–R.p.699, line 25)

Outside the presence of the jury, the parties discussed the admissibility of the recording of Appellant's interview with Steven Trojanowski, a police officer with the City of Fairfield, California's police department, who interviewed Appellant in May, 2014 after the latter's arrest on unrelated charges. The video was a portion of a longer police interview which the State had edited down to the portion of the interview related to Appellant's charges. Trial counsel objected to the video on the basis that Trojanowski posssed "personal knowledge" or "actually had the records" pertaining to the information with which he questioned Appellant. Trial counsel also complained that portions of the video in which Appellant was asked for explanations were "burden shifting things." In response, the State explained that the statements identified by Appellant were requests for Appellant to explain contradictions between his statements and

information possessed by officers. The trial judge, largely agreeing with the State, agreed the video was admissible but ordered additional redactions before it could be played for the jury. (R.p.591, line 18–R.p.600, line 2)

Aware of Appellant's potential involvement in the Pelion shooting, Trojanowski questioned Appellant about the incident. During his testimony, Trojanowski explained he had no personal knowledge as to the veracity of the information he used to question Appellant and that he, even at times, lied to him in "an attempt to obtain admissions or denials of things that may or may not have happened during a specific crime." He even specifically denied having any knowledge about whether investigators had recovered Appellant's DNA sample from the scene of the crime. (R.p.787, line 18–R.p.791, line 11; R.p.800, lines 4–8)

As to the contents of the interview, Trojanowski testified Appellant initially denied traveling to Atlanta, but eventually caved and admitted to traveling to the area and meeting up with Butler, whom he identified in a photograph. Appellant also denied ownership over the 707 number or traveling further than the Atlanta area; he specifically dismissed any suggestion that he knew VonKeith or had visited his Pelion address even after being shown photographs of the location, VonKeith, and Tycus. However, before being told anything about what had happened to VonKeith or Tycus, Appellant asked whether the former had been shot. (R.p.791, line 12–R.p.800, line 3; State's Exhibit 4)

During trial, the State called Brian Zwolak to testify as an expert in street culture and language in order to explain a few words found in text messages between Appellant and Butler. Before he could testify, trial counsel objected to his expert testimony for several reasons, claiming:

> One, we don't think it's an appropriate topic for expert testimony. Number 2, it just speaks to the obvious. Number 3, there's no evidence in the record that these

> people were members of any gangs, so why would gang culture be relevant in this case? Number 4, there's no evidence that these people who are from different states would use the same vernacular or language that people from South Carolina would use, the same code words or things like that. Number 5, Your Honor, we think it's up to the jury. This is not a foreign language, it's a language they understand, so they'll know the words. They don't need anybody to tell them what the words mean because the words are in English. It's not like we've got somebody interpreting a foreign language, and for all these reasons we feel this testimony, which would be highly prejudicial, [should] not be allowed in the case.

(R.p.751, line 1–R.p.752, line 22)

In response, the State proffered Zwolak's testimony and the text messages his was supposed to explain. The first text read, "Brah, you can bring that nickel with you tomorrow," for which Zwolak would explain a "nickel" either meant a quantity of something, such as drugs, or a firearm; the second text involved the term "hammy," which Zwolak explained was a firearm. When Zwolak was questioned about prior instances of him being utilized as an expert in the proffered field, he explained his only previous instance of testifying as an expert in this field was in Butler's trial; however, such testimony was based on eight years of investigating street crime and organized crime in Richland and Lexington counties, training at the Regional Counterdrug Academy in Meridian, Mississippi, classes on gang investigation and prosecution techniques, training with the FBI Safe Streets Task Force, and other classes on "basic and advanced gang and street investigations." Further, Zwolak's years of experience on these subjects was the basis for him teaching classes about street crime, organized crime, and gangs to law enforcement officers throughout the United States. (R.p.752, line 23–R.p.757, line 21; R.pp.911–12)

After hearing the proffered testimony, the trial judge acknowledged it would be beneficial for the jury to "get some idea" about some of the terms and their usage because "nickel" was not referring to "a five cent piece" and "hammy" being a term for a gun rather than

an innocuous abbreviation for hamster. However, the trial judge also noted that Zwolak testifying about his full history of experience would include repeated mention of gangs and may give the improper inference that Appellant's case was somehow gang related. Thus, the trial judge offered to allow trial counsel to voir dire Zwolak in camera and make specific objections to his qualification at that time, but when the jury returned it would be informed the court found Zwolak qualified as an expert in the field of "street culture and language" and could give opinion testimony in that field. (R.p.757, line 22–R.p.759, line 12)

Trial counsel appreciated the trial judge's suggested compromise, but maintained his objection, claiming Zwolak testimony was not appropriate because "[h]e [thought] the jury can interpret the language, it is English, and they can interpret it as they deem it fit and appropriate without someone telling them what some items mean." He added that "if [he] heard correctly" that a nickel could refer to money or drugs, the latter could be an inappropriate comment on Appellant's character. The trial judge explained that the text messages and Zwolak's testimony were not being submitted for evidence of bad character, but as evidence of a criminal conspiracy to commit the crime. Still, the trial judge allowed the parties to continue their voir dire of Zwolak. After further questioning by the State, Zwolak revealed additional sources of his experience with street culture and language: the subject was a common thread running through all of his law enforcement education classes and seminars he had taken in recent years, he had performed thousands of police interviews using this knowledge, and he invested time into monitoring social media for changes and developments on the subject. Notably, many of the classes he had attended over the years focused on utilizing social media for this very purpose. (R.p.759, line 13–R.p.764, line 16)

During his voir dire of Zwolak, trial counsel asked him whether he had ever heard the term "hammy" used in a rap video. Zwolak testified he had heard a variation of the term, "hamma," used in rap videos before but could not recall a specific video using "hammy" itself. However, he had heard the term used to describe firearms throughout his law enforcement career, including in police interviews. When asked whether a specific dictionary existed which explained the various terms he had learned, Zwolak explained these terms change regularly, almost on a "daily basis." After trial counsel's questioning, the trial judge allowed Zwolak to testify as an expert. However, the parties debated how to best define his expertise to the jury in order to avoid unnecessary prejudice. Initially, trial counsel suggested describing Zwolak as an expert in "unconventional expressions," with the court suggesting other terms such as "Non-King's English." After researching what federal courts have done in similar situations, the parties discovered those courts allowed such witnesses to be introduced as "gang experts." After noting the parties had already agreed to remove any references to gangs from Zwolak's credentials and testimony, the trial judge finalized his title as an expert in street culture and slang. (R.p.764, line 20–R.p.774, line 24)

Once the jury returned, Zwolak was qualified as an expert in street culture and slang based on his experience in law enforcement and his "hundreds of interviews" and monitoring of "current music lyrics, rap music and the like." Reviewing the text messages, Zwolak explained a "nickel" may be either an amount or a firearm, with the latter term arising from some firearms being nickel-plated. He also explained a "whip" is a term for a vehicle and that "hammy" is a variation of "hammer, hamma" which are known terms for firearms. On cross-examination, Zwolak acknowledged that some of these unique terms changed frequently, as often as "week to

week" or "day to day." He also clarified that "nickel" could mean an amount of money or an amount of drugs. (R.p.774, line 25–R.p.783, line 12)

Jury Instructions

At the conclusion of the State's case, the parties discussed potential jury instructions. Trial counsel sought an instruction on voluntary manslaughter but the trial judge, noting there was no evidence of a sudden heat of passion, declined such an instruction. Pivoting to his murder charge, the judge told the parties he removed "any express or implied language from the instructions" because "express and implied malice was kind of a lead-up to the part about inference of malice from use of a deadly weapon" and, because the inference of malice from the use of a deadly weapon was no longer a proper charge,[2] any reference to express or implied malice was no longer proper in jury instructions. The State disagreed with the complete removal of explanations of express and implied malice, claiming that courts could still instruct juries that "malice may be inferred from conduct showing a total disregard for human life." In response, trial counsel argued Burdette was an example of "a definite trend toward the elimination of inferences as being burden shifting." The trial judge decided to have his clerk insert language regarding express and implied malice back into his charge, explaining that, as far as the attempted murder charge, multiple shots were fired into VonKeith, which could indicate "the specific malice that's necessary for the attempted murder charge." (R.p.809, line 15–R.p.813, line 19)

[2] See State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) (finding it improper for a trial court to "instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon," but allowing the parties to continue to argue such at trial). See id. at 502–03; 832 S.E.2d at 582–83.

During jury instructions, the trial judge provided the following charges on murder and attempted murder:

> Now ladies and gentlemen, [Appellant] is charged with murder. To prove this charge, the State must prove beyond a reasonable doubt [Appellant] killed another person with malice aforethought. Malice is defined as hatred, ill will, or hostility towards another person. It's the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law would infer an evil intent. Malice aforethought does not require that the malice exists for any particular time before the act is committed, but malice must exist in the mind of [Appellant] just before and at the time of the act being committed; therefore, there must be a combination of the previous evil intent and the act. Malice may be inferred from conduct showing a total disregard for human life. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be considered by you along with the other evidence in the case and you may give it the weight you decide it should receive.
>
> [Appellant]'s also charged with attempted murder. In order to prove this crime, the State must prove [Appellant] attempted to kill another person with malice aforethought, either express or implied, as I have just defined it for you. The State must prove beyond a reasonable doubt [Appellant] had the specific intent to kill a person. A specific intent to kill is necessary to convict [Appellant] for attempted murder. Intent means intending the result which actually occurred, not accidentally or involuntarily. Intent may be shown by acts and conduct of [Appellant] and other circumstances from which you may naturally and reasonably infer intent. Intent may be inferred when it is demonstrated [Appellant] voluntarily and willfully commits an act the natural tendency of which is to destroy another's life.

(R.p.869, line 19–R.p.871, line 4)

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence.").

Likewise, decisions regarding the conduct of a criminal trial are left largely to the sound discretion of trial judges, and a trial judge's ruling on the conduct of a trial will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

I.

The trial judge properly allowed admission of the redacted recording of Appellant's interview because the challenged statements did not constitute hearsay nor did they improperly shift the burden of proof to Appellant.

Appellant argues the trial judge erred in allowing the State to play the redacted recording of Appellant's police interview at trial. The State disagrees with this allegation of error because Trojanowski's statements during the interview were not hearsay nor did they improperly shift the burden of proof to Appellant. Trojanowski's statements, which were not submitted as evidence of Appellant's guilt, were shown to the jury only to provide context for the incriminating comments and actions made by Appellant during his interview.

Accuracy of Appellant's Quoted Portions of the Video

As an initial matter, the State emphasizes that the portions of the interview "quoted"[3] in Appellant's brief have inaccuracies and are misleading. Notably, the referenced sections of the interview include accurate portions of Trojanowski's statements, but they entirely omit any of Appellant's statements from the interview. This is a critical misstep because the quoted statements were part of a dialogue with the officer, including times when Appellant commented during the questions and statements quoted in Appellant's brief which, in turn, impacted Trojanowski's questions and responses. For example, Appellant omits the following interaction from his brief:

> Trojanowski: [showing picture of VonKeith and Tycus] How do you know these two individuals?
>
> Appellant: [shrugs shoulders, inaudible statement]
>
> Trojanowski: The guy on the right . . . he's alive. He didn't die.
>
> Appellant: What's that supposed to mean . . . **he got shot**?

[3] (Br. of Appellant pp.14–16)

Trojanowski: He identified you as shooting him.

Appellant: **He identified me? Man, what the fuck is this today?!**

(State's Exhibit 4, 20:47–20:48) (emphasis added). Accordingly, the State asseverates that the video itself, and not Appellant's summary of its contents, should be the focus of this Court's analysis.

Hearsay

Appellant contends that Trojanowski's recorded statements constituted inadmissible hearsay. Rule 801(c), SCRE defines "[h]earsay" as "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." A statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. See State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (statement implicating defendant in alleged prior crimes, which was not offered to prove the truth of the matter asserted, that is, that defendant in fact committed the prior crimes, but to establish motive, was not "hearsay" and its admission was not error); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998) (allowing admission of letters, an anniversary card, and video to show close familial bond between the decedent, her husband, and her children in a malpractice action). In particular, statements of one person to another to explain subsequent actions taken by the person to whom the statements were made are admissible as non-hearsay evidence. State v. Coffey, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). "The reason such statements are admissible is not that they fall under an exception to the [hearsay] rule, but that they simply are not hearsay—they do not come within the ... legal definition of the term." Long v. Paving Co., 268 S.E.2d 1, 5 (N.C, App. 1980).

Appellant argues State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015)[4] compels this Court to find the trial judge erred in admitting the interrogation interview. However, his objection to the video was presented in his arguments against its admissibility which were considered by the trial judge and rejected as distinguishable from Brewer. First, the misrepresentation of the evidence to Appellant is not a hearsay issue. As was fully developed on cross-examination, the statements by the investigators were not offered for the truth of the matter asserted; Trojanowki testified he had no personal knowledge regarding the crime or Appellant's participation in it. Notably, he specifically disclaimed knowledge that investigators had found any DNA samples connecting Appellant to the shooting, which was the only assertion made by Trojanowski during the interview which was not otherwise supported by evidence at trial. Indeed, his testimony specifically discredited the **truth** of the matter asserted. Pursuant to this, the trial judge made a specific finding that the statements of the investigators in the video were not being offered for the truth of the matter asserted. The trial judge's finding is consistent with other jurisdictions that have allowed out of court statements offered to show context or to show the reaction of one to whom the statement is made. See, e.g., State v. Ninci, 936 P.2d 1364,

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[4] In his brief, Appellant also cites to this Court's opinion in State v. Washington, 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020), which, applying Brewer, found the admission of the video recording of a defendant's interrogation reversible error. However, the State believes it is improper to focus on this decision for several reasons, including: (1) a petition for a writ of certiorari is currently pending; (2) the Court's analysis does not point to any specific language as hearsay, but makes the broad claim that "every word [the officer] uttered . . . was inadmissible hearsay"; and (3) the opinion does not explain how the officer's statements shifted the burden from the State to the defendant. See id. at 623–24, 848 S.E.2d at 796–97. Notably, the Court's blanket assertion that "every word" stated by an officer during the interview is hearsay appears to directly conflict with the Brewer court's claim that its opinion "[was] not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial." Brewer, 411 S.C. at 407, 768 S.E.2d at 659.

Due to these concerns, and the understanding that Washington is an application—not expansion—of Brewer, the State will focus on Brewer in this brief.

1385 (Kan. 1997) (video tape interrogation not offered for truth of matter asserted but to place suspect's answers in context); Lehman v. State, 926 N.E.2d 35, 38 (Ind. Ct. App. 2010) (informant's statements recorded in the course of a controlled drug buy were not offered by the State to prove the truth of the matter asserted and, therefore, were not hearsay.)

Second, in Brewer, "investigators frequently referenced and quoted many purported eyewitnesses to Brewer shooting both victims." Brewer, at 406, 768 S.E.2d at 659. Here, Trojanowksi referred, broadly, to witnesses being able to identify Appellant and to cell phone data which connected Appellant to the area where the crime occurred and to others involved in the crime. Thus, as distinguished from Brewer, the investigators were not quoting out of court statements by anonymous declarants offered for the truth of the matter asserted.

Burden Shifting

The other facet of Appellant's argument the interrogation video is inadmissible draws upon the portion of the Brewer opinion in which the Court cautioned against presenting to the jury any statements that appear to shift the burden of proof to the defendant. See Brewer at 408, 768S.E.2d at 659. Appellant argues that because the investigators called him a liar or accused him of lying during the interrogation, they impermissibly shifted the burden to Appellant to prove his innocence. In Brewer, the defendant was told to "prove" his innocence to the police and, despite continuous questioning, he repeatedly denied any participation in the charged crime. Here, the police questioned Appellant's credibility and pressed him with questions when his statements began contradicting the information in law enforcement's possession and also statements he had made earlier in the interview. For example, despite claiming to have no knowledge of VonKeith or the shooting, he quickly suggested that VonKeith had been shot. Similarly, Appellant denied knowing Butler until he was confronted with phone records

indicating the opposite. That is a substantially different situation than that found in Brewer. Witness credibility is frequently challenged on the stand through cross-examination and impeachment. Neither the burden of production nor the burden of persuasion was shifted to Appellant when the Trojanowski challenged his credibility on certain statements he made during their interview.

In further contrast with Brewer, Trojanowski's discussion with Appellant was entirely consensual. In Brewer, the defendant attempted to end the interview numerous times but was instead told he had to prove his innocence to cease the questioning. Here, however Trojanowki questioned Appellant only until the latter declined to participate further, demonstrating Appellant understood he had no obligation to prove his innocence or to continue the interview against his wishes. His current attempt to equate the accusations of deceit to warnings against burden shifting in Brewer does not make it any more applicable.

Admissibility of Video Evidence to Assess Credibility As a Matter of Policy

As a general rule, "the assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). A witness may not give an opinion on whether he or she believes another witness is telling the truth or comment on another witness' veracity. State v. Kromah, 401 S.C. 340, 358–59, 737 S.E.2d 490, 499–500 (2013); State v. Smith, 411 S.C. 161, 170, 767 S.E.2d 212, 217 (Ct. App. 2014). These rules provide guidance for the permissible boundaries of witness testimony on the stand before a jury. In a trial, however, the jury observes the precise questions and the tone presented by counsel when the questions are asked which, in turn, allows it to assesses the witness' response in that context.

With the introduction of a defendant's out of court statement, however, the court must balance the probative and prejudicial impact of showing the jury the context in which the statement is made. Without the ability to view the context in which a defendant made a statement during a police interview, how can they accurately assess the credibility of the statement? The ability to know the question and other factors, such as the tone with which it was delivered or statements made prior to it may impact how jurors interpret a defendant's interview responses; a defendant's responses might not even be understandable without such information.[5] See United States v. McDowell, 918 F.2d 1004, 1007 (1st Cir. 1990) ("McDowell's own statements could, of course, be used against him; his part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions in context.")

Numerous jurisdictions have held this particular police tactic is not so prejudicial as to preclude its submission to the jury. In State v. Casteneda, 715 S.E.2d 290 (N.C. Ct. App. 2011), the North Carolina Court of Appeals upheld the admission of a transcribed video in which the investigators told defendant parts of his story were not true, finding:

> The majority of appellate courts of other jurisdictions that have considered such statements have held them admissible based on the rationale that such "accusations" by interrogators are an interrogation technique and are not made for the purpose of giving opinion testimony at trial. See, e.g., Dubria v. Smith, 224 F.3d 995, 1001 (9th Cir.2000) (rejecting, in habeas corpus case, defendant's argument that detective's "comments and questions contained statements of disbelief of [defendant] 's story, opinions concerning [defendant]'s guilt,

[5] The North Carolina Court of Appeals recognized need to put a defendant's answers in context in a case cited by this Court in Brewer. In State v. Miller, the North Carolina Court of Appeals affirmed the decision of the trial court to allow the statements of officers made during Miller's interview to be played for the jury when the trial court determined "that redacting the detectives' questions from the DVD would serve to confuse the jury." The Court also noted the trial judge provided a curative instruction which informed the jury the statements of officers were not being offered for the truth of the matter asserted. State v. Miller, 676 S.E.2d 546, 555 (N.C. Ct. App. 2009).

> elaborations of the police theory of [victim]'s death, and references to [defendant]'s involvement in the crime" should have been redacted from tape and transcript because "[t]he questions and comments by [the detective] placed [defendant]'s answers in context");

Castaneda, 715 S.E.2d at 294 (2011). In Lanham v. Com., 171 S.W.3d 14 (Ky. 2005), the Kentucky Supreme Court advised the admission of statements by the police that a defendant is lying should include a limiting admonition to the jury before its publication. Lanham, 171 S.W.3d at 28.

In State v. Boggs, 185 P.3d 111 (Az. 2008), the Arizona Supreme Court found the accusations by law enforcement that the defendant was lying were part of an ordinary interrogation technique, were not offered for the purposes of giving opinion testimony, and provided a necessary context for the defendant's responses. Boggs, at 121. In State v. O'Brien, 857 S.W.2d 212 (Mo. 1993), the Missouri Supreme Court upheld an officer's testimony in which he recalled accusing the defendant of lying during an interrogation. The court found that reading the testimony and challenged statement in their respective contexts, the admission was not error. O'Brien, at 221.

Moreover, the courts in Georgia have allowed latitude given police interview question that are admitted into evidence. Windhom v. State, 729 S.E.2d 25 (Ga. App. 2012), citing Axelburg v. State, 616, 669 S.E.2d 439 (Ga. App. 2008); DeYoung v. State, 493 S.E.2d 157 (Ga. 1997) (trial court did not err in denying a motion to suppress a statement obtained through police trickery or deceit); Carroll v. State, 408 S.E.2d 412 (Ga. 1991) (trial court, which redacted other portions of interview, did not abuse discretion in not redacting the interrogator's argumentative comments).

In the instant case, the trial judge, after performing the Rule 403 analysis, found the video with redactions admissible and fashioned an appropriate instruction preceding its publication to

the jury on how, as a matter of law, the jury was to consider the evidence. Trojanowski testified, before the jury, that he had no personal knowledge about the facts of the case and was using techniques, including lying, when interviewing Appellant. The trial judge instructed the jury on of the State's burden to prove every element of the offense beyond a reasonable doubt and told the jury the defendant was required to prove nothing. (R.p.862, line 5– R.p.868, line 22.) This instruction, combined with Trojanowski's disclaimer, properly protected Appellant's rights to Due Process. Because the video contained no impermissible hearsay and was not unfairly prejudicial, the jury, as the trier of fact, was entitled to view the relevant, probative, and contemporaneous representation of Appellant's statement to law enforcement. As a matter of policy, transparent police tactics should be encouraged.

The Brewer Court directed the trial courts to "be vigilant in redacting problematic portions of law enforcement's investigatory questions," but did not create a "categorical rule that any statement by an investigator during an interrogation is inadmissible." Brewer, at 407-408, 768 S.E.2d at 659. In fact, such a categorical rule would be improper and hamstring the ability of the State to present compelling evidence of a defendant's guilt. Thus, the finding of admissibility is, correctly, a fact specific inquiry. In consideration of that language, the State redacted the video to exclude irrelevant and unfairly prejudicial portions of the interview. Accordingly, the trial judge properly allowed the admission of the recorded interview.

II.

The trial judge properly charged the jury on inferred malice pursuant to the law of South Carolina.

Appellant claims the trial judge's instruction in inferred malice was improper because there was "positive evidence" of Appellant's express malice to commit attempted murder. However, the State disagrees with this assertion because, pursuant to South Carolina law, jury

instructions on inferred malice are appropriate for attempted murder when the presence and type of malice is a matter in dispute. Further, any alleged error in providing the instruction was harmless given State's evidence at trial.

Pursuant to Section 16-3-29 of the South Carolina Code: "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 (2010) (emphasis added).

Appellant argues the trial judge erred in instructing the jury that it could "infer malice from conduct showing a total disregard for human life" because the instruction constituted an unnecessary judicial comment on the facts in the record and it lowered the State's burden of proof. Neither assertion is true. To support his first argument that the instruction was unnecessary, Appellant cites to State v. Smith, 430 S.C. 226, 845 S.E.2d 495 (2020) in which the Supreme Court ruled as such based on the facts of that case. Id. at 232–33, 845 S.E.2d at 498. However, Appellant fails to recognize the critical difference between Smith and his own case: in Smith, the defendant claimed self-defense but admitted he had an express intent to kill, meaning the issue was uncontested by the parties and, as explained by the court, "an implied malice charge was wholly unnecessary to the jury's decision. See id. at 233, 845 S.E.2d at 498. Such is not the case in the instant case because Appellant contests his guilt and participation in the crime. Because malice was not an undisputed question for the jury, the implied malice charge was appropriate.

Furthermore, the jury charge did not lessen the burden of proof necessary to convict Appellant; the charge is entirely consistent with State law. In the language of S.C. Code Ann. § 16-3-29, chosen by the Legislature, the State could prove malice aforethought through either expressed or implied malice. No case law in South Carolina has provided for a blanket

disallowance of an implied malice charge; the only case law finding implied malice charges inappropriate involves versions of the charge stating malice could be inferred from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) ("Under our policy-making role in the common law, we hold that the 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)."). In that opinion, the Court did **not** prevent the application of **any** implied malice charge in every situation; it barred the use of a very specific implied malice instruction, which was **not** requested in this case. Additionally, this Court cannot simply ignore the statute for attempted murder and its allowance of implied malice. See Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute.").

Regardless, any alleged error was necessarily harmless. An erroneous instruction alone is insufficient to warrant this Court's reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. (quoting Kerr, 330 S.C. at 145, 498 S.E.2d at 218). In the instant case, there is no possibility the disputed language could

have impacted the jury's verdict. VonKeith was shot numerous times as he attempted to flee from Butler and Appellant following the latter's execution of his brother. He was shot again as he tried to use a cellular phone and call for help, which Appellant took from him. Ultimately, he only survived because he was able to hide under his home while Appellant and Butler attempted to cover up their crimes by stealing his surveillance equipment. The only reasonable interpretation of Appellant's actions was that he intended to murder VonKeith that day. Accordingly, any alleged error in the use of the inferred malice charge must be harmless. See Middleton, 407 S.C. at 317, 755 S.E.2d at 435.

III.

The trial judge correctly allowed admission of the codefendant's text messages as non-hearsay statements because there was separate evidence of the conspiracy between the codefendant and Appellant.

Appellant claims the trial judge improperly allowed for the admission of codefendant's text messages to Appellant. The State disagrees with this allegation because the State provided separate evidence of the conspiracy between Appellant and Butler.

Pursuant to Rule 801(d)(2)(E), SCRE, "[a] statement is not hearsay if . . . [t]he statement is offered against a party [opponent] and is . . . a statement by a coconspirator 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 of achieving by criminal or unlawful means an object that is neither criminal nor unlawful." State v. Sims, 377 S.C. 598, 606, 661 S.E.2d 122, 126 (Ct. App. 2008), *aff'd*, 387 S.C. 557, 694 S.E.2d 9 (2010) (internal quotations and citations omitted). "The essence of a conspiracy is the agreement." State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). It must be shown that the defendant is connected to the conspiracy and "intended to act together [with at

least one other] for their shared mutual benefit within the scope of the conspiracy charged." State v. Sims, 377 S.C. at 607, 661 S.E.2d at 126 (internal quotations and citations omitted). An overt act is not required. Id. at 606, 661 S.E.2d at 126. Neither is proof of an express agreement. Buckmon, 347 S.C.at 323, 555 S.E.2d at 405. Also, "direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." Id. Conspiracy "may be proven by the specific overt acts done in furtherance of the conspiracy but the crime is the agreement." Id.

In the instant case, Butler's text messages were admissible as statements of a coconspirator pursuant to Rule 801(d)(2)(E), SCRE. This rule categorizes statements made by a coconspirator "during the course of and in furtherance of the conspiracy" as non-hearsay. Rule 801(d)(2)(E), SCRE. Coconspirator communications are admissible as non-hearsay so long as the statement advances the conspiracy and so long as there exists additional independent evidence of the conspiracy. State v. Gilchrist, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000). Despite Appellant's claims to the contrary, the State presented evidence independent of the text messages that Butler was Appellant's conspirator in the crime. First and foremost, VonKeith's testimony linked Appellant and Butler as willing coparticipants in the crime: VonKeith testified Butler contacted VonKeith about the vehicle and scheduled the test drive/inspection of the Infinity; both men showed up to his mother's home; and after Appellant executed Tycus, Butler retrieved a gun of his own and both men burglarized the home while VonKeith lay bleeding on the ground. VonKeith's testimony is convincing evidence of Butler's willing participation in the crime. See Buckmon, 347 S.C. at 323, 555 S.E.2d at 405 ("The essence of a conspiracy is the agreement.") Other circumstantial evidence only confirmed this testimony: VonKeith's family members all confirmed Appellant and Butler were the men who visited that day; cell phone

location data confirmed the codefendants met up in Atlanta and traveled together to South Carolina; and Ellis even testified that Appellant arranged for her to pick up Butler from the Greyhound bus station in Atlanta. Accordingly, the direct and circumstantial evidence presented at trial—independent of Butler's text messages—proved the existence of a conspiracy and justified the admission of Butler's text messages into evidence. See Buckmon, 347 S.C.at 323, 555 S.E.2d at 405; Gilchrist, 342 S.C. t 372, 536 S.E.2d at 869.

IV.

The trial judge properly qualified Officer Zwolak as an expert in "street culture, language, and slang."

Appellant argues the trial judge improperly qualified Zwolak as an expert in "street culture, language, and slang." The State asseverates that the trial judge acted within his discretion in qualifying Zwolak because the latter provided ample evidence of his qualifications and the reliability of his testimony which, in turn, provided probative value outweighing any potential unfair prejudice to Appellant.

Rule 702, SCRE, provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). "There is no exact requirement concerning how knowledge or skill must be acquired." Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988) (citation omitted). In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather should make a broad inquiry. Maybank v. BB&T Corp., 416

S.C. 541, 567, 787 S.E.2d 498, 511 (2016), *reh'g den.* (July 13, 2016). "The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." Wilson v. Rivers, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). Any "defects in the amount or quality of education or experience go to the weight of the expert's testimony and not its admissibility." State v. Robinson, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct.App.2012).

The Supreme Court has explained that:

> In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." . . . Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the particular branch of the field." . . . Finally, the substance of the testimony must be reliable. . . . It is this final requirement of reliability which is the central feature of the inquiry.

Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74–75, 735 S.E.2d 650, 655 (2012).

Zwolak's Qualifications as an Expert

As an initial matter, the State asseverates that Appellant's objections to Zwolak's qualifications are not preserved for Appellate review. During the trial, counsel did not object to Zwolak's testimony on the basis of his educational background or experience. Instead, trial counsel's objections focused on the reliability of the testimony and whether the subject matter was outside the ordinary knowledge of jurors. In fact, Appellant's trial arguments contradict his current challenge of Zwolak's qualifications: he repeatedly emphasized that Zwolak's expertise was not needed because the jurors spoke English and did not need someone to define words from their native tongue.[6] Accordingly, because Appellant did not object to Zwolak's education and

[6] See (R.p.752, lines 13–21) ("This is not a foreign language, it's a language they understand, so they'll know the words. They don't need anybody to tell them what the words mean because the words are in English. It's not like we've got somebody interpreting a foreign language . . . .); (R.p.759, lines 14–19) ("We still don't feel that this is appropriate testimony and we think the

experience at trial, this portion of his issue is not preserved for Appellate review. See, e.g., State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.")

As to the merits of his argument, Appellant claims Zwolak should not have been permitted to testify as an expert simply because did not possess an educational degree "in the fields of linguistics, sociolinguistics, or lexicography.[7]" (Br. of Appellant p.38). Appellant's argument demonstrates a fundamental misunderstanding for the requirements for a witness to be qualified as an expert under South Carolina law. For example, a person possessing a degree in lexicography and generally involved in the publication of dictionaries would not, because of that degree, be appropriately qualified to discuss slang, code words, and gang terminology. Had the State called such an expert Appellant would, without question, be challenging that witness's lack of experience and knowledge on the subject. It is for this reason that the requirements for qualifying a witness as an expert under Rule 702, SCRE do not demand a potential expert hold a specific undergraduate or graduate degree. In fact, South Carolina courts have noted the requisite knowledge of an expert be based on "study **or** experience **or** both knowledge and skill in a profession or science." See, e.g., Gooding, 326 S.C. at 252–53, 487 S.E.2d at 598.

South Carolina courts have found types of experience and education similar to Zwolak's as proper grounds for qualifying witnesses as experts. For example, in State v. Prather, 429 S.C. 583, 840 S.E.2d 551 (2020), the Supreme Court found SLED Agent Paul LaRosa was qualified

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jury can interpret the language, it is English, and they can interpret it as they deem it fit and appropriate without someone telling them what some items mean.)

[7] "Lexicography" is defined by Merriam-Websters as: (1) "the editing or making of a dictionary"; and (2) "the principles and practices of dictionary making." "Lexicography." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/lexicography. Accessed 28 Mar. 2021.

as an expert in crime scene analysis at trial based on: eighteen years of experience in law enforcement; two years of training with the FBI in its criminal profiler study program, an internship with a forensic psychiatrist and psychologist with the South Carolina Department of Mental Health, and an FBI internship in which he worked on active cases under peer-review by FBI supervisors. Id. at 598–99, 840 S.E.2d at 559.

Based on this standard, the trial judge properly qualified Zwolak as an expert in street culture, language, and slang. During voir dire, Zwolak explained his lengthy history of education and experience which provided him with his expert knowledge. In addition to eight years of experience investigating street and organized crime, Zwolak attended numerous classes on the subject, including training sessions with the FBI Safe Streets Task Force. Zwolak's experience with these subjects progressed to such a degree that he himself now teaches classes on these subjects all over the country. Zwolak, throughout his voir dire, emphasized that gaining and utilizing knowledge about street/gang culture and its terminology was a consistent component among his many years of training and education. Accordingly, the trial judge did not abuse his discretion in qualifying Zwolak as an expert based on his vast experience and education.

Zwolak's Testimony Was Reliable and Concerned Information Outside the Knowledge of the Jury

In addition to a witness needing special skill, knowledge, or training before he can be qualified as an expert, such testimony must also be reliable and beyond the ordinary knowledge of the jurors. Graves, 401 S.C. at 74–75, 735 S.E.2d at 655. Notably, while Appellant argued at trial that definitions of the relevant terms were not outside the knowledge of jurors because they spoke English, he has apparently abandoned this argument in his brief. This was wise: even trial counsel and the trial judge were unaware of the definitions of "hammy" and "nickel" explained

by Zwolak. If legal professionals were unaware of these definitions, then they are surely outside the ken of the average juror.

Instead, Appellant's argument focuses on the reliability of Zwolak's testimony and misrepresents its substance. During voir dire, trial counsel asked Zwolak whether he had ever heard the term "hammy" in a rap video. Zwolak could not say whether he had heard the term in that context, but claimed he had heard the terminology during his career. (R.p.766, lines 10–R.p.767, line 4). When asked what a "nickel" was, Zwolak was firm that the term could be referring either to a firearm or it could be used to describe a quantity.

Zwolak's testimony was reliable. South Carolina law requires trial courts assess "(1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable." State v. Warner, 430 S.C. 76, 86, 842 S.E.2d 361, 365 (Ct. App. 2020). More succinctly put, "[a]s long as the trial court is satisfied the expert's testimony consists of a reliable method faithfully and reliably applied, the gate of admissibility should be opened." Id. at 86–87, 842 S.E.2d at 366. Zwolak's method for obtaining his knowledge of street culture and slang consisted of: (1) regular education classes on the subject; (2) continuous investigation into street and gang crimes, including hundreds of police interviews; and (3) regularly monitoring rap music and similar communications. The State cannot conceive of a better combination of resources for learning new and changing terminology used by organized criminals.

Appellant's central argument as to why it believes Zwolaks testimony was unreliable is that Zwolak could not completely eliminate the possibility that Appellant and Butler were using different definitions of "nickel" and "hamma" than those he offered. However, this argument demonstrates his misunderstanding of the issue. The Supreme Court of South Carolina has

recognized that the possibility that an expert's opinions are incorrect does not make such opinions "unreliable" under the law: "[t]here is always a possibility that an expert witness's opinions are incorrect. . . . Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it may be offered into evidence." See State v. Jones, 423 S.C. 631, 639–40, 817 S.E.2d 268, 272 (2018). Most importantly, however, the definitions provided by Zwolak are accepted interpretations for those terms. Urban Dictionary defines "hammy" as "[g]ang slang for any sort of gun mostly glocks and pistols." See *Hammy*, **Urban Dictionary**[8], https://www.urbandictionary.com/define.php?term=Hammy (last visited March 30, 2021). Similarly, it defines "nickel" as: (1) a unit of measurement for multiples of five[9]; (2) ".45 caliber handgun, auto or revolver"; and (3) "a silverfish pistol, used to make fun of the gunholder." See *Nickel*, **Urban Dictionary,** https://www.urbandictionary.com/define.php?term=Nickels&page=3, 4 (last visited March 30, 2021).

For these reasons, the trial judge did not abuse his discretion in finding Zwolak's testimony reliable.

Appellant Was Not Unfairly Prejudiced by Zwolak's Testimony

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[8] The State notes both this Court and the Supreme Court of South Carolina have relied on Urban Dictionary in the past to define modern slang terms relevant to the determination of issues on appeal. See, e.g., State v. Williams, 427 S.C. 246, 257 n.1, 830 S.E.2d 904, 910 n.1 (2019); State v. Odom, 376 S.C. 330, 338 n.1, 656 S.E.2d 748, 753 n.1 (Ct. App. 2007)

[9] Some examples given by Urban Dictionary are:
(1) Five cents in United States currency;
(2) Five dollars worth of drugs, usually marijuana;
(3) (Slang) Five Hundred dollars;
(4) Five years (in prison, in the army, etc.)

See *Nickel*, **Urban Dictionary,** https://www.urbandictionary.com/define.php?term=Nickels&page=1 (last visited March 30, 2021)

Appellant's final argument concerning Zwolak's testimony is that he was unfairly prejudiced by it due to Zwolak's unreliability and qualification as an expert in street culture, language, and slang. As explained above, the trial judge acted within his discretion when finding Zwolak was: qualified as an expert; his testimony reliable; and the subject matter of the testimony contained information beyond the ken of the average juror. See Graves, 401 S.C. at 74–75, 735 S.E.2d at 655.

Appellant also complains that the simple act of identifying Zwolak as an expert in street culture, language, and slang was unfairly prejudicial because the word "street," in this situation, "has an extremely negative connotation"[10] due to its association "with criminality in the form of street crime." (Br. of Appellant p.42) However, evidence is only **unfairly** prejudicial if "it has an undue tendency to suggest a decision on an **improper** basis . . . ." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (emphasis added). Here, Zwolak was qualified as an expert in street culture, language, and slang because that was the exact topic on which he was testifying: he was explaining the definitions of relevant terms based on their usage in the street. The parties had already taken steps to remove all language pertaining to gangs from his qualifications or testimony; further drastic modification of the term of his title would have only misrepresented his background to the jury. Notably, jurors were not presented with the majority of Zwolak

[10] The State takes issue with Appellant's unfounded generalization that the word "street" always carries a negative connotation. (Br. of Appellant, p.42). For example, Appellant's example of a "street pharmacist" being viewed less favorably than a "pharmacist" is not because of the word street itself, but because an average juror would know a pharmacist should work in a controlled environment and that working on a street means that a pharmacist is likely not in compliance with the law or medical guidelines. Appellant's pharmacist hypothetical further disintegrates when compared to situations in which the word "street" would, indisputably, be viewed in a neutral or even positive context by jurors. For example, using "street" when describing an expert in "street construction and maintenance" possesses none of the negative connation Appellant claims is inextricably linked to the term.

education and experience in his field and were only told: (1) he had been in law enforcement for twelve years; (2) he had experience with street culture and slang; (3) had performed hundreds of interviews in various capacities; and (4) he monitored the lyrics of music, including rap. Had references to street culture and slang been removed from Zwolak's testimony before the jury, he would have appeared to be someone completely unequipped to provide them with the relevant expert testimony: a person qualified as an expert in "Non-King's English" who listens to rap music and performed interviews. Thus, it was critical for jurors to at least have a basic understanding of Zwolak's background and qualifications before it could fairly weigh his testimony.

Accordingly, because Zwolak's qualifications were relevant to the jury's consideration of his reliable expert testimony, Appellant was not unfairly prejudiced by their introduction. See Rule 403, SCRE (stating relevant evidence should only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice).

V.

The trial judge properly refused trial counsel's request to question a witness on dismissed criminal charges because there was no indication the dismissal of her charges could have impacted her testimony. Further, the trial judge's refusal did not violate Appellant's rights to a speedy trial.

Appellant argues the trial judge erred in refusing to allow trial counsel to question Tyvona regarding the dismissal of charges which occurred a month before Butler's trial, claiming they constituted relevant evidence of potential bias even at the time of Appellant's trial. The State disagrees with the allegation of error because Appellant failed to demonstrate Tyvona's charges, dismissed years before Appellant's trial, could have in any way biased her testimony, particularly when Tyvona's testimony was consistent with other evidence provided by the State. Additionally, the trial judge's refusal did not violate Appellant's right to a speedy trial

especially when Appellant, not the State, was the reason for the majority of the delay between his arrest and actual trial date.

Rule 608(c), SCRE, provides that "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c) "preserves South Carolina precedent holding that generally, '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.' " State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

In State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002), the Court found that defense counsel should have been allowed to explore the pending charges faced by a testifying witness. In that case, the witness was a jailhouse snitch who had been promised by the State that if he testified against the defendant, the State would make his judge aware of his cooperation. The Court found: "There was the substantial possibility Peterson would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case. The excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Peterson's testimony." Sims, 348 S.C. 16, 25-26, 558 S.E.2d 518, 523 (quotation omitted). The clear connection in Sims was established because of the agreement to make the witness's future judge aware of his cooperation and the expectation of a lighter sentence when faced with the possibility of a life sentence. In the instant case, there was no agreement not to prosecute Tyvona for her charges, and absolutely no indication any decision not to prosecute was based upon her status as a witness in Appellant's case. In fact, the evidence presented indicated Tyvona's charges were dismissed because her **husband** was found guilty of

the crimes for which she was charged. While he received a favorable sentence, there was no indication it had anything to do with Tyvona testifying: the officer in charge of the case was fired.

Further, there is no indication that Tyvona's charges could have impacted her testimony in any way. Tyvona testified to two facts: (1) Butler and Appellant were the two strangers who visited her mother's house on the day of the shooting; and (2) after the shooting, she searched through Walker's Instagram where she found the picture of Walker and Butler which she provided to law enforcement. Both of these facts were corroborated by other witnesses and no evidence disputing them was placed in the record. Thus, questioning Tyvona about her dismissed charges possessed no probative value to the defense's case and only risked unfair prejudice to the State. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.") Accordingly, the trial judge acted within his discretion in prohibiting trial counsel from referencing the dismissed charges.

Appellant's Right to a Speedy Trial

Facts

Appellant was served arrest warrants and released into South Carolina custody on July 25, 2016; prior to that, he was incarcerated in California for a probation violation. On November 9, 2016, Appellant was appointed a public defender who issued a Rule 5 request for discovery on December 1, 2016 which was fulfilled on February 10, 2017. A plea offer was mailed on July 5, 2017. Shortly after the offer was made, Appellant switched representation to trial counsel, who the State sent copies of all the discovery and the plea offer in the case. Not hearing anything as

of February 13, 2017, the State again contacted trial counsel regarding the plea offer and setting a date for trial. On March 21, 2017, the State, again, resent the plea offer to trial counsel upon his request, after which the State and trial counsel began a long exchange regarding offers and counter-offers for a potential plea deal; at no point was an offer rejected and trial counsel never told the State that Appellant was ready to schedule a trial. Eventually, the State suggested a trial date for December 2018, but trial counsel claimed he would present a self-defense claim which would be supported with testimony by Butler; problematically, however, Butler was scheduled for trial in Alabama on unrelated charge at that time. Butler pled guilty to those charges on January 2, 2019, and was sent back to South Carolina on January 3, 2019. (R.p.5, line 7–R.p.8, line 16)

Following Butler's return, the State contacted Butler's attorney to find out whether he planned on testifying for Appellant. Butler's attorney stated he could not provide an answer at that time because he was waiting to see how his appeal would turn out. In the interim, the State informed trial counsel that a trial date needed to be set for later that year in case the parties could not work out a resolution to the case. On June 5, 2019, the Court of Appeals affirmed Butler's conviction and subsequent to that he petitioned for certiorari to the Supreme Court. After trial counsel filed the speedy trial motion on July 26, 2019, the State contacted him about scheduling a hearing and a trial date, offering August 2019 for the latter. At that point, trial counsel claimed "he needed more time" and a trial date of October 21, 2019, was set. (R.p.8, line 17–R.p.10, line 11)

Trial counsel argued the defense was not responsible for any of the delays, but did not dispute the State's explanation of the history of the case. Noting that a three year delay is unreasonable, the trial judge expressed concern, but delayed ruling on the speedy trial until the

trial date so that he could determine "whether the defense ha[d] suffered any actual prejudice from the delay." (R.p.10, line 12–R.p.13, line 19)

Prior to trial, the defense renewed its speedy trial motion. Although trial counsel could not point to any actual prejudice suffered by the defense, he claimed there was presumptive prejudice based on the passage of three years between Appellant's South Carolina arrest and trial. In response, the State argued: (1) the period of time between Appellant's arrest and December 1, 2016, should not count against the State because it was only on the latter date the State was notified of Appellant's appointment of counsel; (2) the delay between July 17, 2017 and March 21, 2018, was similarly caused by Appellant due to his decision to change his attorney and trial counsel's repeated request to be resent discovery and the State's plea offer; (3) subsequent to the March 21, 2018, resending of the State's plea offer, the parties alternated offers and counteroffers on plea deals, during which time Appellant never outright rejected a plea offer or requested a trial; (4) the State also held off on scheduling a trial once trial counsel communicated Butler was a necessary defense witness for Appellant's trial, and would support the defense's theory of self-defense; (5) Butler did not return to South Carolina until January 3, 2019, after which he informed the State he would not testify until he had completed the appeals process for his convictions which was not finalized until September 2019; and (6) after trial counsel made his motion for a speedy trial on July 6, 2019, the State offered him an August 2019 trial date but trial counsel declined, saying he would need a few months to prepare for trial. (R.p.16, line 20–R.p.23, line 13)

In response, trial counsel did not dispute the facts as related by the State, but did argue they should not be interpreted against the defense. When speaking about Butler's importance as

a defense witness, trial counsel did not deny telling the State it planned on utilizing him, instead claiming:

> [I]f [the State] had called this case for trial and if we had considered him a crucial witness, we would have, of course moved for a continuance . . . . We haven't filed anything officially saying he's a crucial witness in our case, so the fact that he may be a cause of delay shouldn't be attributed to [Appellant] because we never made any affirmative steps to secure his presence at trial.

(R.p.23, line 14–R.p.24, line 13)

After considering the parties' arguments and relevant case law, including the Supreme Court of South Carolina's opinion in State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368 (2016), the trial court found that there was no deliberate attempt on behalf of the State to delay the trial and, based on the timeline presented to the trial judge, the State "acted promptly" to its best ability and delayed the trial based on its communications with the defense. Further, some of Appellant's actions directly contributed to the delay, such as changing representation. These reasons, plus Appellant's inability to show any actual prejudice, supported a denial of dismissal. However, Appellant was permitted to bring this motion up later at trial if it ever became apparent of actual prejudice as a result of the delay. (R.p.24, line 14–R.p.27, line 17)

Analysis

Pursuant to both the United States Constitution and the South Carolina Constitution, an accused in a criminal prosecution has a constitutionally-guaranteed right to a speedy trial. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"); S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right to a speedy and public trial[.]"). That right is designed to limit undue pre-trial incarceration, to protect against anxiety stemming from public accusation of a crime, and—most seriously—to limit the possibility of a lengthy pre-trial delay impairing an accused's defense.

Barker v. Wingo, 407 U.S. 514, 532 (1972); see State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012) ("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. Pittman, 373 S.C. 527, 550, 647 S.E.2d 144, 155-156 (2007) ("[T]he most serious interest to be protected by the guarantee to a speedy trial is the possibility of impairment of the defense.").

In order to trigger a speedy trial analysis, a defendant's trial must have been delayed for a period of time that is presumptively prejudicial, which necessarily depends on the particular circumstances of each case. Langford, 400 S.C. at 442, 735 S.E.2d at 442. Notably, "a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case." Id. In South Carolina, a delay of over two years has previously been found to be sufficient to trigger a speedy trial analysis. State v. Waites, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978). Likewise, the United States Supreme Court has suggested a delay of roughly one year could—in certain circumstances—be presumptively prejudicial. See Doggett v. United States, 505 U.S. 647, 652, n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."). However, even where a delay that is presumptively prejudicial exists, a speedy trial determination "is **not based on the passage of a specific period of time**" and delay alone is not singularly dispositive. Pittman, 373 S.C. at 549, 647 S.E.2d at 155 (emphasis added); see State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997) (recognizing "delay alone is not dispositive"); also Ratchford v. State, 785 A.2d 826, 828 (Md. Ct. Spec. App. 2001) ("Along the delay continuum, the trigger of 'constitutional dimensions' is not itself part of the ultimate merits of a speedy trial claim. It simply marks the

minimal point, short of which a court will dismiss a claim summarily and will not waste its time even inquiring into such things as reason for delay, demand-waiver, or prejudice. Beyond that minimal or triggering point, however, the claim may not necessarily have merit, but it is worthy at least of thoughtful consideration. The trigger of 'constitutional dimensions' is exclusively a procedural phenomenon that justifies a further analysis and then drops out of the picture.").

Ultimately, once a speedy trial analysis has been triggered, the question of whether a defendant's right to a speedy trial has been violated is necessarily dependent on the specific circumstances of the defendant's particular case. State v. Robinson, 335 S.C. 620, 625, 518 S.E.2d 269, 272 (Ct. App. 1999). When attempting to answer that question, several factors should be considered. State v. Kennedy, 339 S.C. 243, 249, 528 S.E.2d 700, 703-704 (Ct. App. 2000). Specifically, a court analyzing a speedy trial claim should consider: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) whether any prejudice was suffered by the defendant as a result of the delay. Barker, 407 U.S. at 530. Notably though, none of the four factors is alone necessary or sufficient for a finding of a speedy trial violation. Id. at 533. Instead, "they are related factors and must be considered together with such other circumstances as may be relevant." Id. "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." Id.

In the case sub judice, Appellant was served arrest warrants and released into South Carolina custody on July 25, 2016 and filed his motion for a speedy trial on July 26, 2019. Based on that length of time, a review of the remainder of the speedy trial factors were warranted. See Brazell, 325 S.C. at 75, 480 S.E.2d at 70 (recognizing delay—although not dispositive—may be sufficient to trigger review of the relevant speedy trial factors); Waites, 270

S.C. at 108, 240 S.E.2d at 653 (finding a twenty-eight month period of delay sufficient to trigger consideration of the factors relevant to a speedy trial analysis).

However, analysis of the remainder of the factors demonstrates Appellant's rights to a speedy trial were not violated by the delay. As to the second factor, the reason for the delay, the record indicates nearly the entirety of the delay was due to decisions made by Appellant and his counsel. The State, who had already prosecuted Butler, did not require any additional evidence or discovery. Instead, nearly all of the delays were for Appellant's benefit and for allowing his attorneys to adequately prepare for trial and investigate potential plea deals. Notably, Appellant did not once request a trial date before July 26, 2019 and, in fact, rebuffed the State's attempts at doing so after March 21, 2018, because of trial counsels assertion that Butler was a necessary witness for trial. The delays related to Appellant's attempts at working out a plea deal and waiting for Butler's testimony work squarely against his argument. See Vermont v. Brillon, 556 U.S. 81, 92-93 (2009) (recognizing delays caused by defense counsel's continuance requests are attributable to the defendant and not the State when conducting a speedy trial analysis) United States v. Anderson, 902 F.2d 1105, 1110 (2d Cir. 1990) (finding no speedy trial violation where "defense counsel agreed to delays and continuances for purposes of plea negotiations"); State v. Carlson, 258 N.W.2d 253, 259 (N.D. 1977) (concluding no violation of the defendant's speedy trial rights occurred because "[t]he record clearly show[ed] that the defendant or his counsel were the cause for the delay of the trial, or agreed to a delay") Accordingly, the reasons for the delays involved in Appellant's case simply did not support a conclusion Appellant's speedy trial rights were violated. See State v. Dukes, 256 S.C. 218, 223, 182 S.E.2d 286, 288 (1971) ("The delay must be attributable to the State before the appellants can complain.")

Turning to the third fact, Appellant failed to assert his speedy trial rights subsequent to his arrest. As acknowledged by trial counsel, Appellant did not assert his right to a speedy trial until July 26, 2019, and without any prior warning to the State. Prior to that date, the records indicates delaying the trial was, in fact, a defense priority for Appellant. See Langford, 400 S.C. at 440, 735 S.E.2d at 481 (recognizing delay is not an uncommon defense tactic); cf. Henderson v. Commonwealth, 563 S.W.3d 651, 665 (Ky. 2018) ("Henderson did, both in writing and verbally, assert his constitutional right to a speedy trial. Yet aside from those steps, all his actions seem intent upon causing delay and utilizing that delay to his defense's advantage. Thus, Henderson's invocation was less than 'vigorous.' "). Appellant's abrupt assertion of his right while simultaneously requesting delays and trying to work out a plea deal also weigh against his assertion that his speedy trial right was violated. See Barker, 407 U.S. at 531 (explaining "[w]hether **and how** a defendant asserts his right is closely related to the other factors" in a speedy trial analysis (emphasis added)); Henderson, 563 S.W.3d at 665 ("[A]lthough a defendant may assert the right to a speedy trial, complicity in continuing dates may be inferred as acquiescing and not **vigorously** invoking the right to speedy trial.")

The final factor, the primary prejudice suffered by Appellant, also disfavors dismissal of his charges. As explained by the State, Appellant was not prejudiced by the delay because he was not ready for trial. After Appellant made his speedy trial motion on July 26, 2019, the State offered to schedule a trial within the next several weeks. Trial counsel rejected the offer, claiming he was not yet prepared for trial. If trial counsel was not prepared for trial, then Appellant, fundamentally, could not be prejudiced by the delay; Appellant was benefitted by the delay and would have been prejudiced by any trial date earlier than September 2019. Accordingly, the trial judge properly concluded Appellant failed to demonstrate he was

prejudiced by the delay. See State v. Cooper, 386 S.C. 210, 218, 687 S.E.2d 62, 66 (Ct. App. 2009) (characterizing prejudice to the defendant as the most important factor in an analysis of whether a speedy trial violation occurred)

Accordingly, based on analysis of the relevant factors, the trial judge acted in his discretion when finding Appellant's speedy trial rights were not violated. See Langford, 400 S.C. at 442, 735 S.E.2d at 482 ("A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."); also Brazell, 325 S.C. at 76, 480 S.E.2d at 70-71 ("Although the delay was lengthy and the justification was unsatisfactory, Brazell's right to a speedy trial was not denied when one balances the Barker factors. The long delay was negated by the lack of prejudice to the defense. There is no evidence that the delay was willful or intentional."); cf. State v. Evans, 386 S.C. 418, 425-426, 688 S.E.2d 583, 587 (Ct. App. 2009) (finding no error in the denial of a motion to dismiss based on an alleged speedy trial violation where the delay prior to trial was approximately twelve years); Cooper, 386 S.C. at 217-218, 687 S.E.2d at 66-67 (affirming the denial of Cooper's speedy trial motion where the delay in bringing the case to trial was at least forty-four months)

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

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July 6, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2019-001865

THE STATE, ...RESPONDENT,

v.

TERRY RENEE MCCLURE, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.".

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July 6, 2021

Caroline Collins

From: Caroline Collins
Sent: Tuesday, July 6, 2021 9:15 AM
To: Matt Robins; mpacella@stromlaw.com
Cc: William Blitch; Bill Schumacher
Subject: The State v. Terry Renee McClure (2019-001865)
Attachments: MCCLURE Terry - Final Brief of Respondent - 2019-001865 (02631259xD2C78).PDF; MCCLURE Terry - Cover Letter - Final Brief of Respondent (02631132xD2C78).PDF

Good Morning Mr. Robins and Mr. Pacella,

Attached pleased find a copy of the Final Brief of Respondent in The State v. Terry Renee McClure (2019-001865), along with its cover letter. This brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. In addition to this email, hard copies will be placed in the mail.

If you will, please reply to confirm receipt of this email.

Thank you!

Caroline Collins
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