RECEIVED

Nov 20 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

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

Unpublished Opinion No. 2023-UP-258 (S.C. Ct. App. Filed July 12, 2023)

THE STATE, ...RESPONDENT,

v.

TERRY RENEE MCCLURE, ... PETITIONER.

Appellate Case No. 2023-001444

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3713

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the trial court abused its discretion by admitting a redacted recording of McClure's interview with police where the officer's statements therein were not offered for their truth, did not reasonably suggest McClure was required to prove himself innocent at trial, and were essential to understanding McClure's responses.

II. Whether the trial judge correctly charged the jury that malice may be inferred from conduct showing a total disregard for human life, and whether McClure was prejudiced where the evidence overwhelmingly showed he acted with malice.

III. Whether the trial judge correctly admitted a codefendant's text messages as non-hearsay statements when the other evidence in the case overwhelmingly showed the existence of a conspiracy.

IV. Whether the trial judge correctly qualified a police officer as an expert in "street culture, language, and slang" in order to explain slang terminology in conspiratorial text messages between McClure and his co-defendant.

V. Whether the trial judge correctly refused trial counsel's request to question a witness about distant, dismissed criminal charges where the dismissal of her charges could not reasonably have impacted her credibility, and whether such refusal prejudiced McClure such that his right to a speedy trial was violated where McClure failed to otherwise show a speedy trial violation.

STATEMENT OF THE CASE

In My 2017, a Lexington County grand jury indicted Petitioner Terry McClure for Murder, Attempted Murder, First-degree burglary, and Possession of a Weapon during the Commission of a Violent Crime. The State alleged McClure travelled from California to South Carolina to carry out a robbery scheme with his co-defendant Justin Butler. Tycus Toland was shot and killed during the alleged robbery, and his brother VonKeith Toland was shot but survived. McClure proceeded to jury trial in October 2019, before the Honorable Frank Addy, Jr., Circuit Court Judge. McClure was convicted on all counts. He was sentenced to life imprisonment for Murder and Burglary and 30 years for Attempted Murder. His convictions were affirmed on direct appeal in a unanimous unpublished opinion. State v. McClure, 2023-UP-258 (S.C. Ct.App. filed July 12, 2023). His petition for rehearing was denied on August 18,

2023. McClure filed a petition for writ of certiorari with this Court on October 6, 2023. This return follows.

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). A trial court's jury charge is reviewed for an abuse of discretion. State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). 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). 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).

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. Rule 242, SCACR.

I.

The trial court correctly admitted a redacted recording of McClure's interview with police because it contained incriminating false statements, and the officer's statements were not admitted for their truth and did not reasonably suggest McClure was required to prove himself innocent at trial. Even if the trial court erred, the Court of Appeals correctly found McClure was not prejudiced.

The trial court correctly admitted a redacted video recording of McClure's interview with police.[1] The officer's questions and statements during the interview were not hearsay because they were not offered for their truth. The video, which was the last evidence introduced at trial, was admitted to show McClure's consciousness of guilt in the form of his lies to police. The State had already proved the facts McClure claims constituted hearsay, and the officer's statements and questions merely provided necessary context for McClure's incriminating responses. Likewise, the statements did not improperly shift the burden of proof because they did not reasonably suggest McClure was required to prove himself innocent at trial. Even if the trial court erred, the Court of Appeals correctly found the error harmless. Certiorari should be denied.

Hearsay

When police identified McClure as a suspect, he had already returned to California, where he resided. An investigation by Lexington police led to eyewitness's identifying McClure as one of two men who claimed to want to purchase a car from Tycus Toland, but who actually wanted to rob him. Lexington police asked for assistance from police in Fairfield, California, and McClure agreed to speak with a detective. The alleged hearsay consisted of the detective, Steven Trojanowski, confronting McClure with some of the evidence against him, including a

[1] Because the Court of Appeals found admission of the video was error, the State presents this portion of its argument as an alternate sustaining ground. See Rule 220 (c), SCACR.

victim's identification and documentary evidence such as flight logs, in order to elicit a response. The detective also claimed to have DNA evidence linking McClure to the crime, which was not true. McClure initially denied travelling to South Carolina, only to later admit it when confronted with irrefutable evidence. He admitted he knew his eventual co-defendant, Justin Butler, and denied knowing either victim. His denied shooting the victims, but only after the officer told him VonKeith Toland had identified him.

Rule 801(c), SCRE defines hearsay 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 is not hearsay. See State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (holding statement implicating defendant in prior crimes was not offered to prove the truth of the matter asserted, but to establish motive, and was not hearsay); 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, where statements contained therein were not offered for their truth). Likewise, 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. See 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).

The officer's statements and questions were not admitted for their truth. The State had already introduced at trial the evidence with which the detective confronted McClure in the

interview. VonKeith testified and identified McClure as the shooter, and VonKeith's photographic identification had already been admitted. The State had already introduced documentary evidence, such as flight logs, text messages, and cell phone location data, proving McClure travelled from California to South Carolina and placing his cell phone in the area at the time of the crime. McClure's statement was the last evidence admitted. The detective's statements were not offered as proof.

Rather, the interview showed McClure's consciousness of guilt in the form of his lies and demeanor. The Jury was entitled to view his statements in context to judge for themselves whether he was telling the truth and to witness his lies. But McClure's statements, often in the form of brusque denials and brush-offs, would have been non-sensical without hearing the questions and assertions to which he was responding. 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."). The California detective had no personal knowledge of the case, and testified he was asking questions based on information given to him by South Carolina police merely to elicit a response from McClure. The officer's representation that police found McClure's DNA at the scene was not true, and by definition could not have been offered for its truth. This was made clear at trial. (R.790–800).

The trial court's finding that the officer's statements were not admitted for their truth is consistent with case law in other jurisdictions allowing 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, 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).

This case is distinguishable from State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). In Brewer, "investigators frequently referenced *and quoted* many purported eyewitnesses to Brewer shooting both victims." Brewer, at 406, 768 S.E.2d at 659. Some of these purported eyewitnesses were anonymous and did not testify at trial. Here, the detective referenced evidence that had already been admitted at trial, and made a representation about evidence that did not actually exist (which was explained to the jury). Thus, unlike in Brewer, the investigators were not quoting out-of-court statements by anonymous declarants and representing them as fact, thereby accomplishing an "end-run" around the hearsay rule. Brewer at 407–09, 768 S.E.2d at 659. The interview video was properly admitted.

Burden Shifting

McClure argued below that the video contained burden-shifting statements, such as the officer's insinuations that McClure was lying and statements that he was giving McClure the opportunity to "explain" the evidence. The Court of Appeals held the video should not have been admitted, but did not specifically address the burden-shifting claims. The Court of Appeals cited this court's opinion in State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), and its own opinions in State v. Washington 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020), cert. denied Feb. 22, 2022, and State v. Carter, 438 S.C. 463, 884 S.E.2d 195 (Ct.App. 2022), rehearing denied March 22, 2023.[2]

[2] As of the date of this filing, a petition for writ of certiorari in Carter is pending before this Court.

In Brewer, the defendant was told over and over again to "prove" his innocence and, despite continuous questioning, repeatedly denied any participation in the charged crime. Here, the police questioned McClure's credibility and pressed him with specific questions backed by later-admitted evidence when his statements were inconsistent with the evidence or with his own previous statements. Police never told McClure to "prove himself innocent," and that specific language is significant to McClure's claim that the statements shifted the burden of proof. The alleged burden-shifting statements here were not nearly as bad as those in Brewer. In further contrast with Brewer, Detective Trojanowski's discussion with McClure 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, police questioned McClure only until he declined to participate further, demonstrating McClure understood had no obligation to prove his innocence or to continue the interview against his wishes.

The officer's statements were necessary to give context to McClure's responses. Numerous jurisdictions have held this type of interview 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 "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," but are necessary to place the defendant's answer's in context. Castaneda, 715 S.E.2d at 294. 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. Id. 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. Id. at 221. Courts in Georgia have allowed police interview questions 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) (holding trial court did not err in denying motion to suppress 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 interrogator's argumentative comments).

In the instant case, after performing the Rule 403 analysis, the trial court found the video, with redactions admissible and fashioned an appropriate instruction preceding its publication to the jury on how the jury was to consider the evidence. The California officer testified he had no personal knowledge about the facts of the case and was using techniques, including lying, when interviewing McClure. 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. This instruction, combined with the officer's explanation, protected McClure's rights.

Inordinately restrictive redactions of police interviews could result in confusing evidence stripped of much of its probative value. 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, 411 S.C. at 407-408, 768 S.E.2d at 659. In this case, the State redacted the video to exclude irrelevant and unfairly prejudicial portions of the interview. The trial judge properly allowed the admission of the recorded interview.

McClure was not prejudiced.

Even if the trial court erred, the Court of Appeals correctly held the error was harmless. The case against McClure was overwhelming. In particular, VonKeith Toland's testimony describing McClure's cold-blooded murder of his brother was conclusive. Likewise, Ishland and Tyvona Toland identified McClure as the person who arrived with Butler to buy VonKeith's car. Finally, text messages and flight logs proved McClure travelled from California to engage in this conspiracy to rob. The eyewitness identifications were corroborated by cell phone location data.

The officer's statements recounting the evidence against McClure were entirely cumulative. There was no inadmissible hearsay admitted through the back door, as in Brewer. Likewise, the officer's alleged burden-shifting statements were not made "ad nauseum" and did not reasonably suggest McClure was required to prove his innocence at trial. Finally, the alleged burden-shifting comments did not constitute a structural error, as is evidenced by the Brewer court's employment of a harmless error analysis. For all the foregoing reasons, certiorari should be denied.

II.

The Court of Appeals correctly held Petitioner's argument that the trial court gave an erroneous jury charge concerning implied malice was not preserved for review. Even if preserved, the trial judge properly charged the jury that malice may be inferred from conduct.

The Court of Appeals correctly held McClure's specific argument regarding the court's jury charge was not preserved for review. Regardless, the charge was proper. Finally, any error was harmless given the indisputable evidence of malice in this case. Certiorari should be denied.

At trial, in accordance with State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the trial court removed from its jury charge the instruction that malice may be inferred from the use of a deadly weapon. (R.810–11). However, the court retained the portion of the charge stating

that malice may be inferred from conduct showing a total disregard for human life, and explaining that such an inference is merely an evidentiary fact to be given whatever weight the jury deems appropriate. (R.812–13). Defense counsel objected on the ground that "the Burdette case is a definite trend toward the elimination of inferences as being burden shifting." (R.812). The trial court responded that "I don't know that it's so much burden shifting as . . . they're asking the courts to no longer instruct on that they consider factual issues." (R.812). Defense counsel made no further objection.

Because McClure's only objection at trial was based on burden-shifting, his argument to the Court of Appeals that the charge was a comment on the facts was not preserved for review, and the Court of Appeals correctly held so. Furthermore, counsel cited only to the Burdette case, which involved a charge that malice can be inferred from the use of a deadly weapon. No such charge was given in this case.

Even if preserved, the jury charge was a correct statement of law. A jury charge which is substantially correct and covers the law does not require reversal. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). Both Murder and Attempted Murder require "malice aforethought, either expressed or implied." Malice may be proved "either by positive evidence or by inference." State v. Wilds, 355 S.C. 269, 276, 584 S.E.2d 138, 142 (Ct. App. 2003). While this Court has prohibited an inferred malice charge in circumstances where the charge can be interpreted as a charge on the facts, this Court has not provided for a blanket disallowance of an inferred malice charge. In State v. Smith, this Court held that "trial courts may no longer give an implied malice charge when there has been evidence presented that the defendant acted in self-defense." State v. Smith, 430 S.C. 226, 230, 845 S.E.2d 495, 496 (2020). However, McClure did not present evidence of self-defense in this case.

Even if the charge was erroneous, any error was harmless. Given the overwhelming strength of the State's case, the jury instruction did not reasonably affect the result of trial. An erroneous jury charge is not itself grounds for reversal; the charge must be prejudicial. Burdette, 427 S.C. at 496, 832 S.E.2d at 578. Tycus was shot and killed at point-blank range. VonKeith was shot numerous times as he attempted to flee from Butler and McClure following McClure's execution of his brother. He was shot again as he tried to call for help. Ultimately, he only survived because he was able to hide under his home while McClure and Butler attempted to cover up their crimes by stealing his surveillance equipment. The only reasonable interpretation of McClure's actions was that he intended to murder VonKeith. Certiorari should be denied.

III.

The trial judge correctly admitted text messages between McClure and his co-defendant as non-hearsay statements because the evidence overwhelmingly showed the existence of a conspiracy.

McClure claims the trial judge improperly admitted text messages between him and his codefendant. The Court of Appeals correctly rejected this argument. The evidence as a whole strongly indicated the existence of a criminal conspiracy between McClure and Butler to rob the Tolands.

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. Nor 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.

Butler's text messages were admissible as statements of a coconspirator pursuant to Rule 801(d)(2)(E), SCRE. The State presented evidence independent of the text messages that Butler was McClure's conspirator in the crime. First and foremost, VonKeith's testimony linked McClure and Butler as 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 McClure 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. Other circumstantial evidence corroborated this testimony. VonKeith's family members all confirmed McClure and Butler were the men they saw that day, cell phone location data confirmed the codefendants met in Atlanta and traveled together to South Carolina, and Ladondra Ellis testified McClure 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. at 372, 536 S.E.2d at 869.

IV.

The trial judge properly qualified Officer Zwolak as an expert in "street culture, language, and slang" because such testimony was necessary for the jury's understanding of the conspiratorial text messages.

McClure argues the trial court improperly qualified officer Zwolak as an expert in "street culture, language, and slang." However, the court acted within its discretion in qualifying Zwolak because he provided ample evidence of his qualifications and the reliability of his testimony which, in turn, provided probative value outweighing any potential unfair prejudice to McClure.

Rule 702, SCRE, provides: "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).

This Court has explained:

> 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).

As an initial matter, McClure'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. McClure 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. (R.752). Accordingly, because McClure did not object to Zwolak's education and experience at trial, this aspect of his argument 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.")

McClure claims Zwolak should not have been permitted to testify as an expert. 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), this Court found a SLED agent qualified 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. (R.757). 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.

Along these same lines, Zwolak's testimony was reliable because it was based on his extensive experience and training. 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.

During voir dire, defense 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.766–67). 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. McClure's argues Zwolak's testimony was unreliable is that Zwolak could not eliminate completely eliminate the possibility that McClure and Butler were using different definitions of "nickel" and "hamma" than those he offered. This Court has recognized that the possibility that an expert's opinions are incorrect does not make such opinions "unreliable" under the law. "There 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). The trial judge did not abuse his discretion in finding Zwolak's testimony reliable.

Furthermore, the testimony was helpful to the jury. The terms in question mean nothing to the average layperson. Zwolak's expert testimony was essential.

Finally, McClure was not prejudiced. 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

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 had performed hundreds of interviews in various capacities; and (4) he monitored the lyrics of music lyrics, including rap. 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. Additionally, the substance of the testimony was not particularly offensive or suggestive of bad character. Zwolak was merely explaining the meaning of words used by McClure. Certiorari should be denied.

V.

The trial judge properly refused trial counsel's request to question a witness on dismissed criminal charges because the dismissal of her charges could not reasonably have impacted her credibility. Further, the trial judge's refusal did not violate McClure's rights to a speedy trial.

Finally, McClure argues the trial judge erred in refusing to allow trial counsel to question Tyvona Toland regarding the dismissal of criminal charges against her. McClure failed to demonstrate Tyvona's charges, dismissed years before his trial, could have biased her testimony, particularly when Tyvona's testimony was consistent with her prior statements and other evidence provided by the State. Additionally, the trial judge's refusal did not violate McClure's right to a speedy trial. McClure, not the State, was the reason for the majority of the delay between his arrest and actual trial date, which occurred within a reasonable amount of time.

Impeachment

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 informant 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 McClure'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 McClure 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 Tyvona's prior statements 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.

McClure's Right to a Speedy Trial

McClure was served arrested 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, McClure 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, McClure 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, re-sent 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 McClure 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.

Following Butler's return, the State contacted Butler's attorney to find out whether he planned on testifying for McClure. 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.

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.10–12).

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 McClure's South Carolina arrest and trial. In response, the State argued: (1) the period of time between McClure'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 McClure's counsel; a substantia; (2) the delay between July 17, 2017 and March 21, 2018, was similarly caused by McClure due to his decision to change his attorney and trial

counsel's repeated requests 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 McClure 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 McClure'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. (Tr.p.40, line 20–Tr.p.47, line13)

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 [McClure] because we never made any affirmative steps to secure his presence at trial.

(R.23–27)

After considering the parties' arguments and relevant case law, including this Court'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, "acted promptly" to its best ability and delayed the trial based on its

communications with the defense. Further, some of McClure's actions directly contributed to the delay, such as changing representation. These reasons, plus McClure's inability to show any actual prejudice, supported a denial of dismissal. However, McClure was permitted to bring this motion up later at trial if it ever became apparent there was actual prejudice as a result of the delay.

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; S.C. Const. art. I, § 14. 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).

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). 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").

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). 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.

McClure 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 was warranted. However, analysis of the remainder of the factors demonstrates McClure's right to a speedy trial was 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 McClure 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 McClure's benefit and for allowing his attorneys to adequately prepare for trial and investigate potential plea deals. Notably, McClure did not 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 counsel's assertion that Butler was a necessary witness for trial.

Turning to the third factor, McClure failed to assert his speedy trial rights subsequent to his arrest. As acknowledged by trial counsel, McClure 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 indicate delaying the trial was, in fact, a defense priority for McClure. See Langford, 400 S.C. at 440, 735 S.E.2d at 481 (recognizing delay is not an uncommon defense tactic).

The final factor, the primary prejudice suffered by McClure, also disfavors dismissal of his charges. As explained by the State, McClure was not prejudiced by the delay because he was not ready for trial. Rather, McClure benefitted from the delay and would have been prejudiced by any trial date earlier than September 2019. Accordingly, the trial judge properly concluded McClure 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). Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BY: _____
Joshua A. Edwards
Bar # 101188
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 20, 2023