STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Respondent,

vs.

ROBERT JARED PRATHER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. The Trial Court Judge Abused His Discretion, and Violated Prather's Rights to Due Process, by Allowing the State to Present a "Crime Analyst" When His Testimony Was (1) Not Proper Rebuttal Testimony, (2) Not Scientifically Valid, and (3) Invaded the Province of the Jury.

II. The Trial Court Judge Additionally Abused His Discretion When He Allowed The Testimony Because It Was Not Produced In Discovery Pursuant to South Carolina Rules of Criminal Procedure, Rule 5 Or Brady v. Maryland.

III. The State Committed Prosecutorial Misconduct and Violated Prather's Right to Due Process, When It "Sandbagged" The Defense With Larosa's Rebuttal Testimony.

IV. The Trial Court Judge Abused His Discretion By Allowing The State To Introduce Prather's Co-Defendant's Inadmissible Hearsay Because (1) It Was Inadmissible The South Carolina Rules of Evidence, (2) It Was Unreliable, (3) It Was Irrelevant, and (4) Its Admission Violated Prather's Right to Confront The Witnesses Against Him In Violation Of The Eighth Amendment And South Carolina Law.

V. The Trial Court Judge Erred, And Prather Was Denied His Right to Due Process, When He Denied Prather's Motion For A Directed Verdict Because The Evidence Did Not Rise Above A "Mere Suspicion" That Prather Caused The Decedent's Death.

VI. The State's Actions In Pursuing Factually Inconsistent Theories In Prather and Phillips' Cases Denied Prather His Right To Due Process.

VII. The Trial Court Judge Abused His Discretion, and Prather Was Denied Due Process Of Law When He Did Not Allow Prather to Introduce A Statement Made By Ralph Jody Webb Becknell, An Unavailable Witness, When The Statement Was Admissible As A Statement Would Have Corroborated Prather's Defense That He Was Not Responsible For Stewart's Death.

VIII. The Trial Court Judge Erred and Violated Prather's Rights Under The 4th Amendment And South Carolina Law When He Did Not Suppress The Coca-Cola Glasses And Knife Pursuant To A Fatally Defective Warrant.

RESPONDENT'S STATEMENT OF THE CASE

On August 22, 2005, after midnight, appellant and a co-defendant murdered Gerald Stewart in his home in Lexington County and stole items from Stewart's residence. Appellant was arrested for the murder the following morning, still on August 22nd. Appellant was subsequently indicted by the Lexington County grand jury for murder, armed robbery, and burglary 1st degree. (Ind. #2012-GS-32-2619, 2621, 2622). He was represented by Wayne Floyd, Esquire. Appellant proceeded to a jury trial before the Honorable Clifton Newman from November 26 – 28, 2012.[1] At the trial's conclusion, the jury found appellant guilty of murder and common law robbery.[2] Judge Newman sentenced appellant to thirty (30) years for murder and ten (10) years for common law robbery. On December 7, 2012, appellant filed a motion for a new trial. Judge Newman held a hearing on the motion on February 7, 2013. The motion was denied by a written twenty-four (24) page Order on July 1, 2014. (Order). This appeal followed.

RESPONDENT'S STATEMENT OF FACTS

Gerald "Radar" Stewart ("the victim) was described as a large, big hearted man. He was known to cook at cookouts in West Columbia, was jovial, and "always cutting up." He was studying nursing at Midlands Technical College. However, he was not perfect. The victim was a chronic drinker, an alcoholic, and had sought treatment for the same for years. He could drink large amounts of alcohol and never pass out. The victim also had a tendency to brag, brag about important people he knew, and spend whatever money he had on him on others. (Tr. 184-85, 370-80, 503-11, 550). Unfortunately, these last tendencies came back to haunt him.

On April 22, 2005, the victim was murdered in his own home at 1737 Decree Ave. in West Columbia. When police responded to the victim's home at approximately 5:30 a.m., the home's doors were locked, and police had to gain entry by crawling through an unlocked window to the residence. Once inside, police found the victim covered with a blanket and a

[1] Appellant was initially tried from October 26-29, 2009 but that jury was unable to reach a unanimous verdict.

[2] At the conclusion of the State's case, Judge Newman directed a verdict of not guilty on the burglary 1st degree charge.

pillow over his head. The blanket and pillow were removed. The victim was *fully clothed*, kneeling in front of his den couch, with his face planted in the couch seat cushion. A *cigarette butt* was found on the victim's shoulder. (Tr. 268-83, 283-91, 317-19, 830-31).

An Emergency Medical Technician (E.M.T.) called to the scene moved the victim's clothing to make sure there were no signs of life. After placing E.K.G. leads on the victim's body, the victim's heart showed no electrical activity or pulse. When removing the leads from the victim, the E.M.T. noticed someone had carved something in the victim's lower back and down his buttocks with a *sharp instrument*. The carving extended down under the victim's pants and underwear. The word "rapist" was carved into the victim's back-side. A sex toy [a dildo] had also been placed under the victim's shoulder on the couch. (Tr. 283-91, 322-23, 345).

The autopsy determined the victim died as a proximate result of a beating, blunt force trauma that caused a cardiac arrhythmia, and caused the victim's heart to stop beating. Smothering [suffocation] could not be ruled out as a contributing factor because of the position of the victim when he died. (Tr. 339-52).[3] The victim had bruising around his left eye, a fractured nose, bruising and lacerations on the inside of his lips, scratch marks on his right thigh, bruising under the skin on the right chest and upper abdomen, two (2) fractured ribs on the left, bruising to the scalp on both sides of the head underneath the skin, *a cigarette burn* to the back of his middle finger on his right hand, and the scratch marks on his buttocks and lower back. The last marks were from a sharp instrument, and very superficial. Someone had scratched the letters into the victim's lower back and down to his buttocks before he died. All of the injuries to

[3] The victim was in poor health at the time he was murdered. He was a chronic alcoholic, obese, diabetic, had cirrhosis of the liver, an enlarged heart, and a blood alcohol of .279 [ocular fluid of .342] and valium in his toxicology screen. However, he did not die from bad health or his alcohol or drug content. It was the beating that killed him. (Tr. 339-52, 417, 506-07).

the victim occurred before his death. The manner of death was homicide, i.e. caused by the act of another or others. (Tr. 339-52).

Inside the home, police found the victim's new housemate, Rob Rabon ("Rabon"), asleep in his own bed in his own bedroom.[4] Rabon informed police and testified at trial he had gone to sleep after midnight on April 22nd and he did not hear the victim's murder. Rabon had only recently moved into the victim's home after meeting the victim at an alcohol rehabilitation center. Rabon was "down on his luck," and the victim offered to let Rabon stay in his home and rent a room for $100 a week. Rabon moved in one (1) week before the victim was murdered. A few days before the victim's murder, Rabon found out the victim was gay and was moving out of the home the day following the victim's murder. However, Rabon testified the victim did not make any homosexual advances toward Rabon, and Rabon had his own bedroom. (Tr. 512-47).

Rabon testified that earlier the previous day, April 21, 2005, appellant Jared Prather ("Prather") and his co-defendant, Joshua Phillips ("Phillips), had come to the residence and were drinking with the victim and playing cards. Rabon testified when he met Prather and Phillips they represented themselves to be "Jerry" and "Ray" not Jared and Joshua. Based on their appearance and the way they were acting, Rabon was suspicious of the men and thought they were up to something. At one point, Rabon thought Prather and Phillips were gay and the two (2) men were going to jump on him because he was not gay and had told the victim the same. Prather even asked Rabon if he was gay, and Rabon responded he was not. Prather then stated: "well, then I have a surprise for you, but maybe not now. [W]ell, then again, maybe I do."

[4] The victim's housemate, Rabon, is partially deaf in one (1) ear and sometimes sleeps on the other ear. He had also been drinking that night and used some cocaine before going to bed. Rabon did not hear anything after going to sleep until police awakened him after they discovered the victim's body in the den. (Tr. 512-47). Appellant Prather testified at trial that Rabon had nothing to do with the victim's death. (Tr. 656-731).

Rabon was uncomfortable with this conversation and decided to go to his own bedroom, and called a girlfriend and told her he was moving out the next day. (Tr. 512-47).

Rabon left his room a little later to get a beer, and there was an altercation in which "Ray" [Phillips] punched the victim in the lips twice busting his lip.[5] Rabon stopped Phillips from punching the victim anymore by yelling at him. "Jerry" [Prather] also yelled at Phillips and told him to stop and to get something to clean the victim up, or he [Prather] was going to jump on Phillips. Phillips complied with Prather's order. Rabon testified based on his observations of the two (2) men, Prather was the leader and Phillips was the follower. Rabon then talked with the victim privately and told him he needed to "remove these people" from his home. The victim said everything was alright, and the victim let "Jerry" and "Ray" stay in his home. (Tr. 512-47).

At this point, Rabon made another phone call and to protect himself from "Jerry" and "Ray" decided to befriend "Jerry" [Prather] because he [Prather] was the "badest" or scariest of the two (2) men in the victim's home. Rabon struck up a conversation with Prather about drugs, and Rabon, Prather, and "Ray" [Phillips] left in Prather's car and bought some cocaine. Rabon and Prather used the drugs, but Phillips did not. They all returned to the victim's home, and Rabon and Prather had to carry Phillips back in the house, because "Ray" [Phillips] was either passed out *or* faking being passed out. "Jerry" [Prather] then left the victim's house alone and stayed gone for a period of time. Rabon went back to his bedroom. (Tr. 527-31).

Later during the night, Rabon got back up to go to the bathroom or kitchen, and saw the victim and "Ray" [Phillips] engaged in some kind of consensual homosexual sex in the living

[5] A neighbor of the victim may have witnessed the beginning of this altercation which began outside in the victim's back yard or simply witnessed the victim, who was intoxicated, falling down and being assisted into his home. (Tr. 639-48).

room and then in the victim's bedroom. Rabon did not like what he saw and returned to his room. Prather was not in the victim's home when this occurred; he was still gone. (Tr. 512-47).

A little while later, Prather came back to the victim's home and opened the door to the house and called in for "Ray." Rabon heard the victim get out of his bed and go in the bathroom, and then the victim and Prather left the residence and went somewhere. Rabon left his room and saw "Ray" [Phillips] still lying in the victim's bed. Rabon testified there was no argument or anything like that before the victim and Prather left together. Because things had calmed down, Rabon then got in bed and fell asleep because he had to go to work in the morning. The next thing Rabon knew, police were waking him up at 5:30 a.m., after they discovered the victim's body in the den. (Tr. 533-36).[6]

Police discovered the victim's body after receiving a call from the Lexington Medical Center Emergency Room ("the E.R."). Two (2) men had appeared at the E.R. at 4:28 a.m., with one (1) of the men, Prather, claiming the other, the co-defendant, Phillips, had been raped or sexually assaulted. Prather was doing almost all of the talking. (Tr. 181-96, 206, 562-64).

Prather told the E.R. nurse he and Phillips had been at an old man's home drinking, and Phillips passed out on the couch. Prather alleged he left the home and when he returned the old man answered the door naked and said something about having sex with his friend, Phillips. Prather found Phillips in the victim's bedroom with nothing but his boxers on. Prather stated it took them about an hour and a half to find Phillips' clothes because they were scattered all over

[6] The co-owner of "Uncle Louie's" bar corroborated Rabon's testimony confirming that around closing time, Prather and the victim came into "Uncle Louie's" and the victim purchased drinks. Prather did not drink anything. The victim left to go to a bar across the street, and then the owner, as he was closing up, spoke to the victim and Prather in the parking lot. Prather was driving and the victim, who was intoxicated, was in the passenger seat. Prather was not intoxicated. The owner did not remember any visible marks on the victim's face. (Tr. 548-62).

the old man's house. Prather claimed he was so upset about what the old man had done to his long-time friend Phillips, that he beat the old man. (Tr. 562-64).

Prather told the E.R. nurse he had severely beaten the man who committed the rape or sexual assault. Both Prather and Phillips stated they had beaten the man. Prather stated the man who sexually assaulted his friend was alive, but barely. They both stated they had beaten the victim, and he was probably still laying there. Prather also stated he needed to wash blood off of his hands, and laughed. The nurse was so disturbed by what Prather said she made contemporaneous notes about the conversation. (Tr. 562-80).

The nurse then obtained the victim Gerald Stewart's wallet from Phillips, who had it on his person. Prather said the E.R. nurse could keep the wallet because, "it's not like it was a robbery or anything." From the wallet, the E.R. nurse obtained the victim's identification including his home address. At this point, Prather stated: "I'll probably go to jail for this, won't I?." The nurse, fearing for the safety of the old man, had the police called. (Tr. 562, 574-75).

Then the E.R. nurse could not find Prather or Phillips. She found Phillips outside the E.R. on a bench smoking a cigarette. Prather had disappeared. Phillips told the nurse Prather had gone to smoke a cigarette; however, Prather was nowhere around. The nurse searched the parking lot with Phillips, but Prather could not be located nor could his car. Phillips denied knowing what kind of car Prather drove and denied knowing Prather's name other than "Jerry." The nurse found this strange because Prather had told her he beat the man who allegedly assaulted Phillips because Prather and Phillips had been long-time friends. (Tr. 562-80).

At some point, Prather reappeared in the E.R. entering through the front door of the E.R. When the E.R. nurse asked a social worker to place Prather in a conference room, she reported Prather had gone to call his mother to let her know where he was. (Tr. 584-85).

The E.R. doctors who examined Phillips, found no evidence of a sexual assault or rape. A sexual assault kit was performed which was negative for any semen *or* DNA of the victim Gerald Stewart. There was no trauma to Phillip's rectum, *and* Phillips did not complain of a sexual assault. However, there were superficial marks and scratches on Phillip's arms and back indicating he had been in some type of struggle before arriving at the E.R. Phillip's toxicology screen was completely *negative* for alcohol or drugs. (Tr. 212-49, 250-58, 259-67, 425-26).

When police arrived at the E.R., Prather told them his friend [Phillips] had been sexually assaulted by the victim in this case, and as a result he, Prather, had severely beaten the victim. "I beat the shit out of him." Prather stated he had hit the victim with "devastating blows." Prather described striking the victim by striking his fist in the palm of his other hand. Prather stated the victim was probably alive, but barely. Phillips was present when these comments were made but "was withdrawn, quiet, wouldn't say anything, wouldn't even make eye contact with" one officer. Prather also admitted he had taken the victim's wallet so he and Phillips would have evidence of who did this to Phillips. Prather was taken into investigative detention. It was at this point other officers were dispatched to the victim's residence to check on his welfare and discovered the body as described above. (Tr. 181-96. 196-206).

In the E.R. parking lot, police located Prather's car. An officer was stationed with it while a search warrant was being obtained. In plain view in the car, the officer could see a *Coca Cola* collector's item box. This box belonged to the victim Gerald Stewart and had been stolen by Prather and Phillips. Several witnesses testified this box originally belonged to the victim's father, who worked for *Coca Cola*, and the victim would not have parted with this item willingly. Eventually, the search warrant arrived and the car was towed to the towing company where a search/inventory was conducted. Police recovered the stolen *Coca Cola* collector's item

box from Prather's car. In the front floorboard, under the *Coca Cola* collector's item box, police also found a *small knife.* (Tr. 291-96, 323-30, 321-22, 370-80, 503-06). Police also obtained the victim's wallet from the nurse who had obtained it from Phillips and Prather. Phillips also had in his possession collector's coins and bullets stolen from the victim's home. (Tr. 181-96, 309-11).[7]

Prather was searched at the police department. On his person, police found a pack of Marlboro *cigarettes* and a *cigarette lighter.* (Tr. 441-42). Prather's clothes were also collected. The victim Gerald Stewart's blood [DNA] was found on Prather's socks and on the back of his shirt. (Tr. 495-96).

Prather was interviewed at the police department and gave a statement regarding his *alleged* version of events that night. He informed police he was not gay nor was Phillips. He did not know the victim [Stewart] was gay, but was suspicious he might be. Prather and Phillips had known each other for about five (5) years graduating high school together. Earlier the previous day, he and Phillips went to the victim's residence and drank and left but then returned in the evening. Phillips and the victim then got drunk on whiskey, and Phillips fell asleep on the couch around midnight. Prather stated first that he left by himself to return a box of Phillips' clothes to Phillips' brother's home. Prather then changed his statement and stated he and the victim Stewart left together and went to "Louie's" a bar and then returned to the residence. Then, Prather claimed he left alone and took the box of clothes to the brother's home. (Tr. 585-611).

[7] Prather's co-defendant, Phillips, was not called by either the State or Prather as a witness. In relation to this case, Phillips pled guilty to armed robbery in 2009 and was sentenced to ten (10) years and pled guilty to voluntary manslaughter and was not sentenced. He subsequently refused to cooperate with the State and his convictions were vacated through a PCR action. Phillips eventually **pled guilty** again to armed robbery and voluntary manslaughter on December 5, 2012, before Judge McMahon and was sentenced to a negotiated sentence of twenty (20) years concurrent on both charges. (Tr. December 5, 2012, the Honorable Knox McMahon, pp. 1-36).

Prather claimed when he returned, he entered the home without knocking, and the victim [Stewart] came out of his bedroom completely naked.[8] Stewart made a remark about committing oral sex on Phillips and that Phillips liked it. Prather said he found Phillips on Stewart's bed with nothing but his boxers on. He had trouble waking Phillips, and had to pull him out of the bed by his hair. As he was leaving the residence with Phillips, Prather claimed the victim [Stewart] grabbed him by the arm, and Prather stated he pushed Stewart over a footstool and as Stewart was falling, Prather hit Stewart a few times. Prather then claimed he and Phillips left the house together immediately, got in Prather's car, and drove away. (Tr. 585-611).

Prather at first stated they drove immediately to the hospital. He then changed his statement and stated he and Phillips went to "Calloway's" bar and shot pool. They then decided to go to the hospital. (Tr. 585-611).

The officer who interviewed Prather confronted him with the fact his shirt was completely clean, and the crime scene was extremely bloody. The officer told Prather he was lying and told Prather he wanted the clothes Prather was wearing at the time of the murder. Prather curled up in a ball and started crying and terminated the interview. (Tr. 585-611).

Argument I.

Judge Newman did not abuse his discretion in admitting proper reply testimony.

The Issue

On appeal, Prather alleges Judge Newman abused his discretion, and violated his rights to due process, by allowing the State to present a "crime scene analyst" when this testimony was *allegedly* (1) not proper reply, (2) not scientifically valid, and (3) invaded the province of the

[8] This contradicted Prather's statement to two (2) different police officers and the nurse at the E.R. where he told them when he returned to the victim's home, the door was locked and he banged on the door, and the victim answered the front door nude. (Tr. 188, 201).

jury. This argument fails because (1) the State properly presented the reply testimony in response to claims made by Prather in his testimony, (2) the validity of crime scene staging testimony has been affirmed multiple times by state courts as an appropriate form of *opinion* testimony, and (3) based on South Carolina precedent, the testimony did not invade the province of the jury since at no point did the witness opine on the law of the case, Prather's state of mind, or Prather's guilt.

What Occurred Below

At trial, Prather testified he did not cause the death of the victim. Specifically, Prather testified he believed the victim sexually assaulted his co-defendant; he struck the victim only three (3) times; he left the house after striking the victim; he did not carve the word "rapist" on the victim's back or have anything to do with that and he did not cover the victim up; he did not see either of those things occur; and, after he left the victim's home, the co-defendant, who had also beaten the victim, remained in the house with the victim for approximately 8 to 10 minutes before coming out and getting in the car with Prather. (Tr. 656-731).

The State moved *in camera* to be allowed to call Special Agent Paul LaRosa in reply to Prather's testimony. The State proffered LaRosa's qualifications and testimony *in camera* for Judge Newman's determination of its admissibility **pursuant to** State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) and State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). **(Tr. 731-55).**

The State established the following regarding the knowledge, skill, experience, training, and education of Agent LaRosa as it relates to crime scene analysis: He had been employed by the State Law Enforcement Division (SLED) for 18 years; from 1994-2000 as a Special Agent in the crime scene unit collecting and processing evidence, and analyzing and reconstructing crime scenes based on the evidence; from 2005-10 as a violent crimes investigator; and from 2010-12 as a behavioral analyst assigned to the behavioral science unit. As a behavioral analyst, he

studied under and is currently working with two (2) qualified crime scene analysists at SLED. He interned with the S.C. Dept. of Mental Health under a forensic psychiatrist and psychologist being treated as a peer; completed rounds at psychiatric hospitals; and gave assessments on those individuals. He completed a two-month internship with the Federal Bureau of Investigation (FBI) working cases and completing crime scene analysis and profiles alongside FBI personnel. Specifically, he had an active caseload, worked independently, and FBI personnel peer reviewed his work. He had previously been qualified as an expert and testified in federal and state court as an expert in crime scene, crime scene reconstruction, and crime scene assessment. In being qualified as an expert in crime scene analysis in this case, LaRosa testified he would combine forensics, crime scene reconstruction, and the psychology and behavior exhibited at the crime scene to give an opinion as to the number of offenders involved in the crime. LaRosa reviewed the crime scene photographs and video, the reports of first responders regarding how they found the victim's body, and he was present for the testimony of Prather in this trial. (Tr. 731-51).

Agent LaRosa testified he found evidence of "staging." He explained "staging" is a term used in crime scene assessment and reconstruction[9] indicating the person who committed the crime altered the crime scene in order to misdirect law enforcement and hide the truth. He opined the carving of the word "rapist" into the victim's back was evidence of staging. The superficial nature of the carvings supported his belief the scene was staged as compared to directed or real anger he would expect to see from an actual rape. The lack of evidence of real anger, such as deeper carvings, or anger directed towards the instrument of the rape, such as injury to the penis or mouth supported his opinion of staging. Additionally, staging was also evidenced in the positioning of the body and in the placement of a dildo beside the victim's

[9] *See* State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

body; the victim was found on his knees face down on the sofa; there was no sign or evidence the dildo was used in any manner or had anything to do with the murder. The staging in this case indicated the personality in the crime scene at the time wanted to misdirect law enforcement towards the idea the victim was a rapist. LaRosa further opined the crime-scene showed evidence of "undoing." "Undoing" is a symbolic message from the offender that he wants to cover up the crime or erase what has happened. Evidence of undoing was present in this case by the victim being covered up by a blanket and pillow, and this was a classic case of "undoing." "Staging" and "undoing" are two (2) completely distinct and conflicting emotions. Based on his review of the evidence and Prather's testimony, he concluded two (2) offenders were at the scene at the time of the crime. In addition, in accordance with SLED policy and prior to testifying, LaRosa submitted the evidence from this case to his colleagues for peer review, and they shared his opinion on this matter. (Tr. 734-51).

At the conclusion of the hearing, Judge Newman found LaRosa's testimony was proper reply testimony given Prather's trial testimony; LaRosa was qualified to testify as an expert in crime scene analysis based on his experience and training, *and* his testimony was relevant, reliable, and admissible **pursuant to the requirements of Rule 702, SCRE, and State v. Tapp. (Tr. 752-55).** As a result, the State introduced the testimony in reply. (Tr. 755-74).

The issues not preserved

Prather raises several issues not preserved for appellate review because they were not raised at trial. At the time the evidence was introduced, Prather objected to the expert's testimony because it was not proper reply, it was not scientific, he was not qualified to testify as an expert, and the testimony invaded the province of the jury. Prather did not object to the testimony violating his right to due process, or that the testimony was unreliable non-scientific

testimony, the basis on which it was offered. These issues are not preserved for appellate review. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998)(constitutional arguments must be raised to be preserved); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000)(same); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)(a new trial motion may not be used to raise an evidentiary issue for the first time); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), *citing* State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996). Regardless, there is no merit to any of the issues Prather raises.

Standard of Review
(Reply Evidence or Testimony)

The admission of reply testimony is within the discretion of the trial judge. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). "The admission of evidence in reply rests largely in the discretion of the trial judge, and this court on appeal will not interfere, unless there has been an abuse of discretion." Goethe v. Browning, 146 S.C. 7, 143 S.E. 362 (1928). If evidence is relevant and admissible, the order in which such evidence is received must be left the sound discretion of the trial judge, and his ruling will not be reversed unless it clearly appears that there was an abuse of discretion. State v. Van Williams, 212 S.C. 110, 46 S.E.2d 665 (1948).

(Expert Witness' Testimony)

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." White, 382 S.C. at 269, 676 S.E.2d at 686, *quoting* State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). *See also* Rule 702, SCRE ("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."); Mizzell v.

Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002)("A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion).

The Law

Any testimony which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986); State v. South, 285 S.C. 529, 311 S.E.2d 775 (1985).[10] "Reply testimony should be limited to rebuttal of matters raised in defense." State v. Farrow, 332 S.C. 190, 504 S.E.2d 131(1998) *citing* Daniel v. Tower Co., 205 S.C. 333, 32 S.E.2d 5 (1944). Reply testimony may not be used to complete the prosecution's case. Id.; State v. Robinson, 223 S.C. 314, 75 S.E.2d 465 (1953). Reply testimony should not be admitted where the testimony involves a collateral issue. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973); State v. Brock, 130 S.C. 252, 126 S.E.2d 28 (1924). In determining whether or not the matter is a collateral issue, the test is whether the party offering the reply testimony would have been allowed to prove the fact in question as part of its case; if so, the matter is not collateral. State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983).[11] Thus in a murder prosecution, where the defendant testified the deceased victim grabbed the barrel of the pistol, as it was fired, it was proper to present reply testimony there were no powder burns on the deceased hands, which tended to show the deceased did not have hold of the barrel of the pistol at the time it was fired. State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904).

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[10] *See also* State v. Stewart, 283 S.C. 104, 3220 S.E.2d 447 (1984); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); State v. Bell, 263 S.C. 239, 209 S.E.2d 890 (1974); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972).

[11] *See also* State v. Griffin, 153 S.C. 11, 150 S.E. 312 (1929); State v. Johnson, 137 S.C. 7, 133 S.E. 823 (1926); State v. Underwood; 127 S.C. 1, 120 S.E. 719 (1923).

The Lack of Merit of Prather's argument

The State presented testimony of a crime scene analysis expert to rebut Prather's testimony the murder of the victim had not been committed by two (2) people. LaRosa testified based on his expertise and the materials he reviewed it was his opinion there were two (2) personalities at work or involved in the crime because of contradictions in the crime scene's staging and undoing. This testimony was proper as it directly challenged and contradicted the defense's theory raised through Prather's testimony that only (1) person committed the murder, Phillips, and Prather was not involved. State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904). *See* Farrow, *citing* Daniel v. Tower Co., 205 S.C. 333, 32 S.E.2d 5 (1944).[12]

Prather argues LaRosa's testimony should have been presented earlier, in the State's case-in-chief. As support for this, Prather cites State v. Watson, 353 S.C. 620, 632, 579 S.E.2d 148, 150 (Ct. App. 2003), in which this Court stated that "if the evidence sought to be introduced in *surrebuttal* could or should have been introduced at an earlier stage, its admission or rejection is a matter for the **discretion of the trial court**, as where the evidence is cumulative, or where there is no sufficient excuse for not introducing the evidence in chief at the proper time." Watson, at 632, 579 S.E.2d at 150. However, Prather's use of Watson is deceptive. Prather seems to have misread Watson as applying to *rebuttal testimony*, however, it is quite clear from the language above Watson concerned the admission of testimony in *surrebuttal*. Id. Regardless, the Watson court made clear even if the evidence should have been introduced "at an earlier part of trial", it is still in the "discretion of the trial court" whether to admit it or not. Id. Obviously, Judge Newman exercised his discretion to admit or deny admission of the State's rebuttal or reply testimony, and he chose the former. There is no merit to this issue.

[12] Prather admits in his brief the expert's testimony directly contradicted Prather's testimony and version of events. (See IBOA). Therefore, the evidence was proper reply testimony.

Further, the testimony of the expert only became relevant and probative when Prather took the stand and alleged he did not kill the victim or pose, carve, or cover-up the victim's body. Prather alleged he only hit the victim three (3) times and left the house, but the victim was still alive. Prather alleged in his trial testimony that it had to have been Phillips who committed the murder, as he [Prather] left the house and got in his car, and Phillips remained in the home for 8 to 10 minutes and must have carved "rapist" in the victim's back-side, placed the dildo beside the victim's shoulder, and then covered up the victim with a blanket.[13] As a result, the expert testimony contradicted Prather and was proper reply. Todd; South; Stewart.

Prather further argues LaRosa's testimony should not have been allowed because it was not scientifically valid. For support of this proposition, Prather relies on scholarly articles and selected federal case law applying the Daubert factors for the admission of scientific evidence. This reasoning fails for two (2) main reasons.

First, all of Prather's authority applies the Daubert test—which South Carolina has never adopted as its standard for admission of scientific expert testimony. Instead, South Carolina follows State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) to assess the admissibility of expert scientific testimony.

> In considering the admissibility of scientific evidence under the Jones standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

Council, *citing* State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

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[13] Prather also argues the State should have offered LaRosa's testimony in its case in chief because Prather testified in his previous trial; and, as a result, the State knew he was going to testify again. There is no merit to this argument. A defendant does not have to testify in a retrial after a mistrial, nor can the prosecution be clairvoyant and know whether a defendant will chose to take the stand in a retrial several years after a mistrial.

Second, as many courts have pointed out, expert crime scene staging testimony is not actual scientific testimony at all, but expert *opinion* testimony—not subject to the various heightened *scientific* expert testimony standards. *See* State v. Essa, 194 Ohio App.3d 208, 955 N.E.2d 429 (Ct. App. 8th D. 2011)(Testimony was proper since agent did not offer any opinions concerning defendant's possible motives or any opinions as to whether he believed *defendant* had staged wife's death); State v. Patton, 280 Kan. 146, 120 P.3d 760 (2005)(since testimony "was based on specialized knowledge that would not be familiar to a lay person . . . [and was] developed from inductive reasoning based on the expert's own experiences, observations, or research," it was "was pure opinion as it related to the staging of a crime scene [and] not subject to Frye."); Simmons v. State, 797 So.2d 1134 (Ct. Crim. App. Ala. 1999)(crime-scene analysis does not rest on scientific principles like those contemplated in Frye; this field constitutes specialized knowledge. "[T]he evidence offered through Neer's testimony was not 'profile' testimony" since "Neer's testimony concentrated on his opinion of what the crime scene and the physical condition of M.A.'s body suggested happened during the murder" and "Neer's testimony did not accuse Simmons of committing the crime."); *see also* United States v. Meeks, 35 M.J. 64 (Ct. Mili. App. 1992)(stating "Crime scene analysis, that is, gathering an analysis of physical evidence, is generally recognized as a body of specialized knowledge, for purposes of rules regarding admissibility of expert witness testimony," and "The proper standard for determining the admissibility of expert witness testimony is helpfulness to the members, rather than absolute necessity." Further, "[t]he mere fact that expert witness' homicide crime scene analysis supported prosecution's case against the accused did not make the evidence unduly prejudicial, particularly as witness did not directly opine concerning accused's guilt, but instead offered his opinion concerning generic characteristics of the perpetrator derived from the evidence at the crime

scene."); State v. Swope, 315 Wis.2d 120, 762 N.W2d 725 (Ct. App. 2008) ("Expert testimony of FBI agent about death-scene analysis . . . would assist the jury at a trial . . . agent's testimony included a conclusion that there was staging at the crime scene that was consistent with homicide, and it was beyond the everyday knowledge of an average jury to recognize evidence of staging or to understand the implications of such evidence."); People v. Jackson, 221 Cal.App.4th 1222, 165 Cal.Rptr.3d 70 (Ct. App. Cal. 2nd D. 2013)(the admission of crime scene expert opinion testimony was not error; including expert testimony in his opinion the perpetrator was alone and was someone victim knew.).[14] Prather's contention LaRosa's testimony was "unscientific" is completely correct; and it is this point which is fatal for Prather's argument.[15]

Rule 702, SCRE, governs the testimony of an expert. Specifically, Rule 702, SCRE, states:

> 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.

"This language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)(holding a dog handler met the requirements of Rule 702, SCRE, based on experience and training).

Judge Newman, following White and Tapp, and acting as the required gatekeeper of non-scientific expert witness' testimony, conducted an *in camera* hearing and after hearing the

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[14] Crime scene analysis, which involves the gathering and analysis of physical evidence, is generally recognized as a body of specialized knowledge. *See generally* 2 Wigmore, *Evidence*, Section 417b at 499 (1979); State v. Russell, 125 Wash.2d 24, 882 P2d 747 (1994); Meeks, *supra*; Nolan, *supra*, Hill v. State, 647 S.W.2d 306 (Tex. App. 1982).

[15] As Judge Newman correctly pointed out in his Order Denying the Motion for a New Trial, below both the State and Prather agreed, and Judge Newman found, the testimony offered by LaRosa was non-scientific in nature. (Order Denying Motion for a New Trial, p. 12).

proffered testimony and cross-examination of Agent LaRosa, made the required findings regarding the expert's qualifications, the relevancy of the testimony, the "threshold reliability" of the proffered testimony, and that it would be helpful to the jury. **(Tr. 752-54).** *See* White, 382 S.C. at 270, 676 S.E.2d 684; Tapp, *supra*.

Agent LaRosa's qualifications, as indicated above, were adequately developed, and, based on his knowledge, skill, experience, training, and education, he was properly qualified to offer an expert opinion in crime scene analysis. **(Tr. 732-51).** Specifically, based on his experience and training, LaRosa provided testimony regarding staging, directed anger, undoing, and the number of personalities present given the physical evidence and distinct emotions shown, and, thus, the number of offenders present. (Tr. 732-51).

This Court next turns its attention to the reliability of the non-scientific testimony offered. *See* White. at 273-74, 676 S.E.2d at 688. "The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating non-scientific expert testimony. Id. at 274, 676 S.E.2d 688; Council, 335 S.C. 1, 515 S.E.2d 508. The Supreme Court offers "no formulaic approach" to addressing Rule 702, SCRE, "reliability challenges that could arise with respect to nonscientific expert evidence." White, 382 S.C. at 274, 676 S.E.2 at 688.

In this case, Agent LaRosa did not offer profile evidence or evidence of victimology. Importantly, LaRosa did not offer an opinion as to who the killer was or what role the defendant played, if any, in the murder. Prather did not dispute below the concepts of "staging" and "undoing" were reliable and accepted concepts. He also did not object to LaRosa's opinion the "staging" and "undoing" showed two (2) distinct emotions. However, he did object to Agent LaRosa's opinion that multiple actors were present at the crime scene.

LaRosa's *in camera* testimony demonstrated the reliability of the proffered testimony. His prior work had been peer reviewed at the F.B.I. His work in this case had also been peer reviewed by two (2) other crime scene analysts he works with at SLED, and they concurred with his findings. He also explained to Judge Newman what crime scene analysis is. His testimony supports the conclusion of the general acceptance of crime scene analysis. **(Tr. 732-51).**

The evidence was also relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that his of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule, 401, SCRE. It cannot be seriously contended Agent LaRosa's expertise in the area of crime scene analysis *and* his testimony in this case did not meet this criteria. Agent LaRosa's testimony showed: (1) the crime scene was staged to misdirect police that the victim was a rapist, which contradicted Prather's trial testimony; (2) the staging was undone by someone; and (3) there were two (2) different persons or personality's involved in the murder, i.e. one who staged the crime scene and one who undid or covered up the staging, which is also contrary to Prather's trial testimony.[16]

Finally, the testimony was certainly helpful or would assist the jury. "A homicide and its crime scene, after all, are not matters likely to be within the knowledge of an average [trier of fact.]" Simmons v. State, 797 So.2d 1134, 1156 (Ala. Crim. App. 1999) *quoting* United States v. deSoto, 885 F.2d 354, 359 (7th Cir. 1989). In light of the grotesqueness of the crime scene, and the condition of the victim's body, the trial court did not err in admitting the expert testimony because the jury would be greatly assisted by a professional analysis of the crime scene in

[16] Prather's argument overlooks that similar testimony in the area of crime scene analysis, and even profiling, was used to overturn the conviction and death sentence for a capital inmate in State v. Spann, 334 S.C. 618, 621-22, 513 S.E.2 98, 100 (1999). Everyone is familiar with the old saying, "what is sauce for the goose is sauce for the gander." Basic principles of fairness call for the prosecution to be able to introduce similar evidence under same evidentiary rules to show the jury the truth, i.e. that the defense' version or theory is false.

comparison to other murder cases. Expert testimony on this subject was reasonably likely to assist the jury in understanding and assessing the evidence, in that the matter at issue was highly material, and beyond the realm of "acquired" knowledge normally possessed by lay jurors. Simmons, 797 So.2d at 1156-57); Meeks, *supra* at 68-69 ("A homicide and its crime scene, after all, are not matters likely to be within the knowledge of an average" juror).

Judge Newman found below that "staging" and "undoing" are basic concepts of crime scene reconstruction and assessment, both areas to which Agent LaRosa testified previously as an expert. Judge Newman also found as reliable that two (2) distinct, separate, and opposing emotions are shown in "staging" and "undoing." Finally, Judge Newman found Agent LaRosa's opinion multiple actors were present at the death scene was reliable, and was consistent with logic and common sense in light of the testimony of the defendant Prather. Judge Newman's findings are fully supported by the record, including the statements of Prather to the hospital nurse and police, the testimony of Ron Rabon, and the evidence at the crime scene.

Finally, Prather argues LaRosa's testimony improperly invaded the province of the jury as fact finder. This is clearly not accurate. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. "[S]o long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." State v. Commander, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011).

LaRosa's testimony plainly did not enter the province of the jury since at no point did LaRosa "opine on the criminal defendant's state of mind or guilt or testify on matters of law . . ." Id. (emphasis added). He merely opined on the potential personality of whoever may have

committed the crime. He offered no testimony as to whether, in his opinion, Prather had this criminal state of mind or had committed the crime. LaRosa's testimony revolved around the limited issue of, based on the staging of the crime scene, and undoing, how many perpetrators committed the crime and what personalities they may have possessed. At no time did he advise the jury to find Prather guilty and in fact made no mention of Prather or the governing law of the case. Therefore, Prather's argument regarding the expert testimony is clearly without merit, and Judge Newman did not abuse his discretion in admitting this rebuttal or reply testimony.

Even assuming *arguendo* the admission of this reply testimony was erroneous, its admission was harmless. The focus of this analysis is "whether beyond a reasonable doubt the trial error did not contribute to a guilty verdict." State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). The Supreme Court mentioned a number of factors to be considered in determining whether an error is harmless:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684, (1986); *see also* State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). Applying these factors, any error would be harmless. Prather's statements to both the hospital staff and police that he assaulted the victim (i.e. he struck the victim with "devastating blows", the victim was alive, but just barely, and he needed to wash the victim's blood off his hands) corroborated the evidence found at the scene and the autopsy. The stolen items found in Prather's vehicle and on Phillips, the blood (DNA) found on Prather's sock and the back of his shirt, and the knife found in Prather's car also corroborated two people were involved in this murder, not just one, and this crime was motivated by robbery not Prather's

claim of a sexual assault on Phillips. This reply evidence was also subject to rigorous cross-examination by Prather, leading to favorable testimony from this witness who admitted he could not say Prather staged the crime scene or carved the word "rapist" on the victim's back. Judge Newman also instructed the jury they were to determine the credibility of any expert witness testimony just as they did a lay witness. The jury was the judge of the credibility of Prather and LaRosa in reply. Prather's trial testimony was impeached several times when he alleged he either did not make statements testified to by the E.R. nurse or police, or his version of events had changed at trial. As a result, the admission of this testimony, was harmless beyond a reasonable doubt. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012).

Argument II.

Judge Newman did not abuse his discretion in admitting LaRosa's testimony because there was no discovery violation.

Prather argues Judge Newman abused his discretion when he allowed LaRosa's testimony because it was not produced in discovery pursuant to SCRCr.P., Rule 5, or Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). There is absolutely no merit to this argument.

This issue is not preserved for appellate review. This objection was not raised to Judge Newman during the *in camera* hearing or when the evidence was introduced before the jury. It was not raised until Prather raised it in his post-trial motion for a new trial. As a result, it is not preserved for appellate review. King, supra (a new trial motion may not be used to raise an evidentiary issue for the first time); Kelly, supra *citing* Holmes; McGee v. Bruce Hosp. Sys..

Further, there is no factual or legal merit to this ground. This is not a Rule 5 issue since LaRosa issued no discoverable report. Rule 5, SCRCr.P. Further, his name as part of the witness list for the State was not required to be given to the defense since he was to be called only in the event Prather took the stand, i.e. he was a reply witness. The defense had an opportunity to cross-

examine LaRosa both in the *in camera* hearing and during testimony in front of the jury. The defense also had opportunity to request the Court to allow the defense to present surrebuttal testimony. However, the defense made no request. *See* State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005)(defendant not entitled to suppression or continuance to get his own expert where the State called the expert to testify about general characteristics of sex abuse victims; informing the defense of this witness before the trial was just professional courtesy).

Finally, non-disclosure of LaRosa's testimony prior to his calling in reply was not a Brady violation. The State has a duty to disclose evidence that is *favorable to the defendant.* Brady v. Maryland, 373 U.S. 87, 83 S.Ct. 1194 ("the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."). A defendant asserting a Brady violation must demonstrate the evidence the State failed to disclose was favorable to the defendant [i.e. *exculpatory*], in possession of or known to the State, suppressed by the State, and material to guilt or punishment. *See* Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Prather cannot show a Brady violation because LaRosa's testimony was not *exculpatory* and was limited to only the staging of the crime scene as regards to how many perpetrators committed the crime. He offered no testimony directly stating he believed Prather and or Phillips were guilty of the murder. Therefore, his testimony was **not exculpatory** nor was it directly incriminating and, not a due process violation under Brady.

Furthermore, the failure to provide Agent LaRosa's name would be harmless. *See* State v. Miller, 289 S.C. 316, 345 S.E.2d 489 (1986)(where parties were ordered to exchange lists and the State called a witness not on the list, the Court found the error was harmless).

Argument III.

The State did not commit prosecutorial misconduct by allegedly "sandbagging."

Prather further argues the State committed prosecutorial misconduct and violated Prather's right to due process, when it *allegedly* "sandbagged" the defense with Larosa's reply or rebuttal testimony. There is no merit to this ground.

This issue is not preserved for appellate review. Prather did not raise this issue at the time the evidence was offered in the *in camera* hearing or before the jury. This issue was not raised until a post-trial motion for a new trial. As a result, this issue is not preserved for appellate review. King, (a new trial motion may not be used to raise an evidentiary issue for the first time); Kelly, *citing* Holmes; McGee v. Bruce Hosp. Sys..

Further, the testimony did not constitute "sandbagging" as it was offered to rebut Prather's contentions in his testimony only one (1) person committed the murder, Phillips, and Prather's timeline and claim he was not involved. Furthermore, unlike in Coreas v. United States, 565 A.2d 594 (D.C. App. 1989), the State did not offer LaRosa's testimony in reply in order to present a new theory of the case. The rebuttal testimony served to rebut the arguments of Prather through his testimony and were wholly consistent with State's theory of the murder, presented in its case-in-chief. Prather similarly misuses United States v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996), a case in which the court reversed on prejudicial statements made in the State's closing arguments—completely unlike the present case. A similarly unrelated situation is presented in Wallis v. State, 546 S.W.2d 244 (Tenn. Crim. App. 1976), in which the court disallowed the defense from presenting a closing argument.

All of Prather's case law points to a procedural error not presented in this case. These cases present issues where the State offered new evidence or theories of the case in their closing

arguments and did not allow the defense to rebut it in any way. These cases are not analogous to the present case in which State was merely presenting reply testimony which the defense had opportunity to both cross-examine and to present a motion for *surrebutal*. Further, the defense had the opportunity to argue against the interpretation offered by LaRosa in its closing argument, unlike the cases cited by Prather. Prather cites no South Carolina case law to support his contention. This appellate ground has no merit and must be denied and dismissed.

Argument IV.

Judge Newman did not err in admitting in evidence the fact that Phillips spelled the word rapist "rapeist" because the fact that Phillips misspelled the word was relevant, was not hearsay, did not violate the Confrontation Clause, and its prejudicial effect did not substantially outweigh its probative value.

How the Issue arose below

As previously stated, the word "rapist" had been etched in the victim's back. At trial, in a *in camera* hearing, the State sought to introduce in evidence the fact Prather's co-defendant, Phillips, misspelled the word rapist ["rapeist"] when talking to police. Prather objected to the admissibility of the misspelling of the word "rapist" on confrontation clause grounds and because the testimony was allegedly highly prejudicial. *In the hearing*, the State offered a six-page statement written by Phillips describing the death of the victim. Captain Mark Jones of the West Columbia Police observed Phillips write this statement. Jones did not direct Phillips to write the statement nor did he dictate anything to Phillips for him to write. On page three (3) of the statement, Phillips describes how Prather carved the word "rapist" on the victim's back-side. In describing this event, Phillips wrote the word "rapist" twice. However, he misspelled the word on both occasions, spelling the word "r-a-p-e-i-s-t." The State viewed this misspelling as significant and relevant because the word carved on the victim's back was spelled correctly "r-a-

p-i-s-t." The statement of Phillips also included other misspellings. For example, on page three (3), Phillips spelled "torturing" as "t-o-r-c-h-e-r-i-n-g" and "pretense" as "p-r-e-t-i-n-c-e."

Notably, the State informed the Court in the *in-camera* hearing **it did not intend to introduce the statement of the co-defendant Phillips**, nor did it introduce the six-page written statement as evidence before the jury, nor was it ever referenced during the trial. The State cut the words "rapeist" from a copy of the statement, enlarged them, and offered them as exhibits.

During the trial, the testimony offered by Captain Jones was limited. He testified he recognized the two (2) cutouts of the word "rapeist" as words Phillips wrote in his presence. He acknowledged Phillips was under arrest at the time, but he never mentioned anything about Phillips writing a statement. Jones testified he did not ask Phillips to write, or tell him how to spell, the word "rapist," and he did not ask Phillips how he spells the word. He testified that the misspelling was important because the word carved on the victim was spelled correctly.

On cross-examination, Jones testified he never told Phillips the importance of the word "rapist." He admitted he did not know if Phillips intentionally misspelled the word. In addition, Prather introduced a photograph of coins and bullets stolen from the victim and found on Phillips at the hospital after the victim was killed, suggesting to the jury Phillips was the killer.

Prather raised similar issues regarding the word "rapeist" in his Motion for a New Trial. After hearing arguments from both parties in the *in camera* hearing, Judge Newman held the two (2) exhibits (State's 24 & 25) of Phillips' misspelling of the word "rapist" were admissible. In ruling on the Motion for a New Trial, Judge Newman also found he did not abuse his discretion in admitting the two (2) exhibits as the word was not a hearsay statement and was not a testimonial statement subject to the Confrontation Clause of the Constitution, and the statement

was properly redacted. In addition, Judge Newman found he did not abuse his discretion by allowing Jones to testify to his observation of Phillips writing the word "rapeist." (Order, p. 4).

Judge Newman found the evidence was not hearsay because it was not offered to prove the truth of the matter asserted, i.e. rapeist, but that Phillips could not properly spell the word rapist correctly, when the word was carved into the victim's buttocks spelled correctly, i.e. rapist.

Prather contends Judge Newman abused his discretion by allowing the State to introduce alleged co-defendant hearsay because (1) it was inadmissible under the SCRE, (2) it was unreliable, (3) it was irrelevant, and (4) its admission violated Prather's right to confront the witnesses against him. There is no merit to this argument.

First, Prather's arguments the evidence was unreliable, irrelevant, and inadmissible generally under the South Carolina Rules of Evidence are not preserved for appellate review. These issues were not raised to the trial court when the evidence was sought to be admitted or admitted during the trial as discussed above. (Tr. 298-311).[17] As a result, these issues are not preserved for appellate review. King, (a new trial motion may not be used to raise an evidentiary issue for the first time); Kelly, *citing* Holmes; McGee v. Bruce Hosp. Sys..

Furthermore, there is no merit to Prather's arguments. In this case, there were two (2) people charged with murder. The misspelled word "rapeist" was clearly significant, relevant, and probative because the word carved on the victim's back was spelled correctly. Phillips misspelled the word twice, in the presence of a police officer. The inference from this evidence is Phillips did not know how to correctly spell the word rapist. This evidence implicates Prather as being involved in the carving of the word on the victim's back, either as directly making the carving or directing Phillips how to carve the word. As a result, Prather's argument the evidence

[17] Prather concedes in his brief, an objection to relevancy was not raised at trial. And, it was only addressed by Judge Newman Order denying the Motion for a New Trial. (IBOA, p. 24.

was not relevant has no merit. Rule 401, SCRE (relevant evidence "is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Second, the fact Phillips misspelled the word rapist "rapeist" does not constitute hearsay, as the word in the context in which State presented it lacked a communicative value. 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." If a statement is not offered to prove the truth of the matter asserted, it is not hearsay and is admissible. *See* State v. Lewis, 293 S.C. 107, 359 S.E.2d 66 (1987). In State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996), a witness testified about a verbal altercation resulting in the defendant pulling out a pistol and shooting the victim. *See* Id., at 41, 476 S.E.2d at 682. The witness testified immediately prior to the shooting he heard an unidentified person ask the defendant "you got a gun?" and the defendant responded "yeah, and I ain't scared to shoot." Id. at 41, 476 S.E.2d at 682. The defendant objected on hearsay grounds. *See* Id. at 41, 476 S.E.2d at 682. The Court held "you got a gun" was not hearsay as it was not offered to prove the truth of the matter asserted. Id. at 42, 476 S.E.2d at 683.[18] The mis-spelled word "rapeist" was not an assertion under SCRE Rule 801(a). Out of context of the sentence in which Phillips wrote the word, it lacks any assertive value and serves as merely an example of Phillips' spelling acumen, nothing more. The fact the word was taken from a statement written by Phillips is irrelevant. The statement **in its entirety** would certainly constitute his assertion of what really happened and

[18] Further, the Court found the statement was not even an assertion, but was a question asked to appellant. *See* Id. at 42, 476 S.E.2d at 683.

who was truly responsible for the victim's death; however, **the statement was never introduced at trial before the jury.**

By taking the misspelled word "rapeist" from Phillips' statement, the State separated the word from any assertion made by Phillips. The word "rapeist" does not say anything about what transpired or who killed the victim. The State's theory the misspelled word "rapeist" is evidence Prather, not Phillips, carved "rapist" on the victim's back *or* directed Phillips to carve rapist, does not change this analysis. The misspelled word "rapeist" is not hearsay. Likewise, Jones' testimony was not hearsay. He testified to his observations and the significance he attributed to the misspelling. He did not testify about Phillips' version of events.[19]

Having, properly determined the misspelled word "rapeist" was not hearsay, the Confrontation Clause does not apply. However, even assuming *arguendo* the misspelled word "rapeist" is hearsay, Prather's objection still fails. In this case, the purpose of admitting the misspelled word "rapeist" was not for the purpose of introducing Phillips' version of events. The word, standing alone, in no way reflects the version of events written by Phillips in his six-page statement. There is no accusation against Prather. The State introduced the misspelled word "rapeist" because of the independent evidentiary value it had apart from Phillips' statement. The

[19] What's more, the word "rapeist" could potentially qualify as an exception under SCRE Rule 803(3) as a statement of Phillips' then existing state of mind—lack of an ability to properly spell "rapist". Furthermore, since the officer merely testified to seeing Phillips write "rapeist" and then the jury was shown the word to prove the officer's assertion, this likely falls under the exception described in State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (2007). Like the officer in the present case, in Rice, "Officer Smith did not testify as to what someone told him. He simply related what he learned as a result of his investigation." The Court goes on: "[t]he hearsay rule does not require exclusion of testimony about what an investigating officer learns from his investigation"—in this case, that Phillips could not correctly spell "rapist."

word, on its own, can be compared to a handwriting exemplar.[20] In this case, Prather was able to confront and cross examine the witness against him. That witness was Jones, who testified as to his observations, and Prather vigorously cross-examined him.

Also, Judge Newman gleaned guidance from authority regarding the redaction of statements written by non-testifying co-defendants. When dealing with statements of non-testifying co-defendants, the Supreme Court does not take a position that would unjustifiably shackle the state in presenting an admissible confession. *See* State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994). In cases where a co-defendant's version of the facts would otherwise be admissible, to require the State to redact completely anything that could be viewed in combination with other evidence as a reference or allusion to the defendant, would "unduly handcuff the government's ability to introduce admissible confessions and statements against a declarant in a joint trial." Id. at 307, n. 2, 450 S.E.2d at 50 n. 2 (where co-defendant's statement

[20] Handwriting exemplars are nontestimonial in nature and do not involve the 5th Amendment right against self-incrimination. *See* State v. Frasier, 341 S.C. 546, 534 S.E.2d 711 (Ct. App. 2000); Gilbert v. California, 388 U.S. 263 (1967). However, the 5th Amendment protects a handwriting exemplar *by dictation* where one incriminating aspect of exemplars was the spelling of a certain word by a defendant. *See* United States v. Matos, 990 F.Supp. 141 (E.D.N.Y. 1998). When a word is *dictated*, the spelling of that same word is testimonial because it is a result of the thought process of the defendant. *See* Id.; *see also* In re Grand Jury Subpoena to John Doe, 475 F.Supp.2d 1185 (M.D. Fla. 2006), *aff'd sub nom.*, In re Grand Jury Subpoena No. 2002r028I0(163), No. 2005-01 to John Doe, 176 Fed. Appx. 72 (11th Cir. 2006); United States v. Kallstrom, 446 Supp. 2d 772 (E.D. Mich. 2006)(requiring the defendant to write a dictated statement will constitute a testimonial act because it involves an intellectual exercise in which the defendant will be quizzed on how to spell the dictated words); United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984)(recognizing when a defendant writes a dictated word, he is saying "this is how [he] spells it" – a testimonial message in addition to a physical display). By contrast, in this case, Jones did not dictate the word "rapist" to Phillips, nor did he ask him how to spell the word. Phillips voluntarily wrote a six-page statement that included a word that proved to be of independent evidentiary value. Similar to a handwriting exemplar not dictated, the misspelling of the word "rapeist" was not testimonial in nature. *See* United States v. Dionisio, 93 S.Ct. 764, 765 (1973).

he was not driving did not incriminate the defendant on its face was admissible, even though it was clear there were only two (2) people in the vehicle, the other was obviously the defendant).

In Bruton v. United States, 391 U.S. 123 (1968), the Court held a defendant's rights under the Confrontation Clause are violated by the admission of a non-testifying co-defendant's statement that expressly inculpates a defendant, even if a cautionary instruction is given. The Court, in Richardson v. Marsh, 481 U.S. 200 (1987), specifically declined to extend this rule to the situation when the defendant's name or any reference to the defendant is redacted, and held as long as a statement on its face does not incriminate the defendant, it can properly be admitted. If the misspelled word "rapeist" is considered an out-of-court statement, on its face it does not incriminate Prather. Prather's rights were not violated as the "statement" was **properly redacted.** This case was a case of redaction in the extreme. All six pages of the statement were redacted except for two words, rapist misspelled twice. There is no merit to Prather's argument.

Finally, Prather presents no specific case law to support the assertion the admission of the word "rapeist" was unreliable—other than Prather's bald assertion. It is the duty of the finder of fact to assess the credibility of the State's assertion. Determination of reliability of potential evidence is in the sound discretion of the court. Phillips misspelled other words besides rapist, including torturing and pretense. The evidence was reliable to show Phillips could not spell. Judge Newman did not abuse his discretion. There is no merit to this argument.

Finally, the misspelled word "rapeist" was admissible under Rule 403, SCRE. Pursuant to Rule 403, relevant admissible 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." Id. "Evidence is unfairly prejudicial if it has a undue tendency to suggest a decision

on a improper basis, such as an emotional one." State v. Caldwell, 378 S.C. 268, 287, 662 S.E.2d 474, 484 (Ct. App. 2008)(*citing* State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Id. at 547, 662 S.E.2d at 484 (*citing* State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004).

In this case, there were two (2) people charged with murder. The misspelled word "rapeist" by Phillips was clearly significant and probative because the word carved on the victim's back was spelled correctly. This evidence implicates a second person and thus Prather as being involved in the carving of the word on the victim's back, either as directly making the carving or directing Phillips how to carve the word.

The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. First, there is no unfair prejudice here. Second, if the jury did not believe the above inference from this evidence, then the evidence actually was beneficial to Prather, who claimed Phillips committed the murder and carved "rapist" into the victim's body. Further, the manner in which this evidence was presented and the fact Prather was able to thoroughly cross-examine Jones substantially reduced any possible prejudicial effect of its admission. Jones admitted Phillips could have intentionally misspelled the word in Jones' presence. The word was admissible because its probative value was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. As a result, this appellate ground has no merit.

Furthermore, "[i]n the event testimony is improperly admitted, the error is reversible only when the admission causes prejudice." State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). "If Smith's testimony constituted inadmissible hearsay, the admission was harmless. The information he provided only served to show Rice did not want her fingerprints taken. Nothing in

the record indicates the prints matched evidence found at the scene of the murder." Id. The violation of a defendant's right of confrontation, if proven, is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).[21] Even if the testimony and admission of the word into evidence constituted hearsay, it was harmless error since, like in Price, the information only tended to prove Phillips could not spell "rapist." It was completely in the jury's province whether to take this inference to the next step and believe this circumstantially proved that Prather etched "rapist" into victim's buttocks or directed Phillips to do so. Jones admitted on cross-examination Phillips could have intentionally misspelled the word twice.

Argument V.

Judge Newman did not err in denying the motion for a directed verdict.

Prather contends Judge Newman erred in denying his motion for a directed verdict because he *alleges* the evidence did not rise above a "mere suspicion" he proximately caused the decedent's death. (BOA). There is no merit to this argument.

Standard of Review

A defendant may only appeal from a trial judge's denial of a motion for a directed verdict of acquittal where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). In reviewing a denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Larmand, 2015 W.L. 4751033 (2015); State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). This Court views the evidence *and all reasonable inferences* in the light most favorable to the State. State v. Thompson, 413 S.C. 90, 776 S.E.2d 413 (Ct. App. 2015); State v. Harry, 413 S.C. 534, 776

[21] It is not *per se* reversible error. State v. Dinkins, 345 S.C. 412, 548 S.E.2d 217 (2001). *See* State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 815 (Ct. App. 1996); State v. Bell, 302 S.C. 18, 393 S.E.2d 362 (1990).

S.E.2d 387 (Ct. App. 2015). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S.E.2d 493, 495 (2013). If there is any direct evidence, or if there is substantial circumstantial evidence, reasonably tending to prove the defendant's guilt, this Court must find the trial court properly submitted the case to the jury. State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015).

This Court considers only the existence or non-existence of evidence, not witness credibility, in reviewing the denial of a directed verdict. Rogers *supra*, n. 5, 748 S.E.2d 265, n. 5; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475 (2004). Our appellate courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the fact finder. Rogers *supra*. If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013).[22]

"The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 863 (Ct. App. 2005). On appeal, this Court is limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). An abuse of discretion occurs when a ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Moore, 374 S.C. 468, 649 S.E.2d 84 (Ct. App. 2007).

[22] Further, when the defendant offers proof in his case in chief, the appellate court is to consider all of the evidence in ruling on whether a directed verdict motion at the close of the defendant's case was properly denied. *See* Hepburn, 406 S.C. at 429-42, 753 S.E.2d 402, *adopting* State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996); *Cf.* State v. Thompkins, 220 S.C. 523, 68 S.E.2d 465 (1951)(citation omitted).

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. Cherry, 361 S.C. at 593, 606 S.E.2d at 477-78. "Any concerns about contradictory statements by the accuser, whether on the stand or outside the courtroom setting, were ultimately about his credibility and therefore in the domain of the jury." State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005)(rejecting credibility as a factor in ruling on a motion for a directed verdict).[23] A trial court should grant the directed verdict motion when the evidence merely raises a suspicion the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. On the other hand, "a trial judge is not required to find that evidence infers guilt to the exclusion of any other reasonable hypothesis." Hepburn, 406 S.C. 416, 753 S.E.2d 402; Cherry. The trial judge is required to deny the motion for a directed verdict and submit the case to the jury if there is any direct evidence or any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which her guilt may be fairly and logically deduced. Hepburn, 406 S.C. at 429, 753 S.E.2d 402.

The Lack of Merit of Prather's' Argument

The State more than satisfied the standard to overcome the motion for a directed verdict on murder. Rogers, *supra.* Judge Newman appropriately denied the motion. Hepburn

"The defendant's act need not be the sole cause of the death provided that it be a proximate cause actually and contributing to the death of the deceased." State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990). In other words, "one ...is deemed to be guilty of the homicide if the injury inflicted contributes immediately to the death of the deceased. Id. at 498 (internal

[23] *See also* State v. Buckmon, 347 S.C. 324 n. 6, 555 S.E.2d 402, 406, n. 6 (2001)(witness credibility is not considered in a directed verdict motion); State v. Crawford, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct. App. 2005)(a contradiction between a witness's "sworn statement to police and his later testimony in court is a matter of weight for the jury to decide.").

citations omitted). It was completely within the province of the jury to decide whether Prather was a proximate cause of the victim's death. Judge Newman did not abuse his discretion in denying the motion for a directed verdict.

The pathologist testified the victim died as a proximate result of the sum total of injuries he received in the beating in this case. The pathologist testified the victim did not die from his bad health or alcohol or drug intoxication, but from the beating that triggered a cardiac arrhythmia which caused the victim's heart to stop beating.[24] An investigating officer testified the crime scene was very bloody. Prather stated to the E.R. nurse he needed to wash blood off his hands, and laughed. Prather admitted to police and the E.R. nurse at the hospital that he severely beat the victim. He also admitted the victim was probably still alive *from his beating*, but just barely. The victim was in fact dead as a result of the beating Prather inflicted on him. Judge Newman and the jury did not have to believe Prather's later statement at the police station or his trial testimony, including the sequence of events.[25] The autopsy showed numerous injures to the victim's body, including blows to the head, ribs, face, and a cigarette burn to the back of his finger, and the word "rapist" carved into his backside. (Tr. 339-52). When Prather was arrested, found in his possession was a pack of cigarettes containing five (5) cigarettes and a cigarette lighter. Found in the floorboard of Prather's car was a knife.

In the present case, Prather admitted at the E.R. he had assaulted the victim violently. He admitted to police he had hit the victim with devastating blows. The pathologist testified the

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[24] Testimony was introduced at trial that the victim's alcohol and drug intoxication did not cause his death; and, in fact, given the victim's tolerance for alcohol, the amount of alcohol in his system would not have been fatal to the victim.

[25] In fact, Rabon directly contradicted Prather's sequence of events. Rabon testified that after the initial altercation between Phillips and the victim, the victim had consensual sex with Phillips, and then left his home with Prather. The owner of "Louie's" also confirmed the victim was with Prather drinking in the wee hours of the morning, and was intoxicated, and Prather was sober. He saw the two (2) men leave the bar in Prather's car with Prather driving.

victim died of cardiac arrest as a result of the beating he received. The victim's injuries were numerous including a broken nose, broken ribs, blows to the side of the head and face, blows to the body, and suffocation could not be ruled out as a contributing factor. Furthermore, the evidence showed Prather and Phillips stole items from the victim's residence after killing the victim. Judge Newman did not abuse his discretion in denying the directed verdict. Burton

Argument VI.

The State did not pursue inconsistent theories against co-defendants.

Prather next argues the state's actions in *allegedly* pursuing factually inconsistent theories in Prather's and Phillips' cases denied Prather his right to due process. This appellate issue is not preserved for appellate review. This issue was not raised to the trial court at trial or in Prather's post-trial motion. (See Order). It cannot now be raised on appeal. State v. Powers, 331 S.C. 37, 501 S.E.2 116 (1995); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000); Wilder Corp. v. Wilkie, 330 71, 497 S.E.2d 731 (1998). As a result, this issue must be dismissed.

Further, there is no factual or legal merit to this ground. Prather has completely misrepresented the Record. Prather excerpts one (1) portion of co-defendant Phillips' guilty plea transcript and argues from this the State presented inconsistent theories against co-defendants; and, he is entitled to a new trial because his due process rights were violated. The entire record of Phillips' guilty plea and of Prather's trial shows the State did not pursue inconsistent theories. (Tr. December 5, 2012, the Honorable Knox McMahon, pp. 1-36 & Trial Transcript of Appellant).

In relation to this case, Phillips pled guilty on December 5, 2012 before Judge Knox McMahon to voluntary manslaughter and armed robbery, just a few days after Prather's convictions. During the State's recitation of the factual basis for Phillips' pleas, Deputy Solicitor

Rick Hubbard informed Judge McMahon *of each* of the different statements Phillips had given police and the Solicitor's Office about the murder of the victim *prior to the first (1st) trial of Prather in 2009.* (Tr., December 5, 2012, pp. 1-36).

Deputy Solicitor Hubbard laid out details of each of those statements including Phillip's last statement to police and prosecutors in which Phillips indicated he and Prather planned all along to rob the victim the night the victim was murdered.[26] Deputy Solicitor Hubbard made clear to Judge McMahon that police believed this last statement to be the closest to the real truth, but Hubbard also indicated to Judge McMahon that "we still don't know." Hubbard then informed Judge McMahon that the day following his last statement, Phillips contacted prosecutors and told them everything is in his last statement was a false, and he was not cooperating with the State. Hubbard informed Judge McMahon that regardless of which statement was the truth, if any, in all of his statements Phillips implicated himself in the murder of victim. The record of Phillips' guilty plea transcript shows the State was not pursing inconsistent theories but giving Judge McMahon a factual basis for Phillips' guilty pleas to **voluntary manslaughter** and **armed robbery** in the death of Gerald Stewart. (Guilty plea Tr., December 5, 2012, pp. 1-36). The record of the guilty plea also shows Hubbard indicated to the Court that if Phillips decided at any point during the plea he wished to withdraw the plea, then

[26] Hubbard informed Judge Newman that in this last statement Phillips detailed that Prather had been stealing from the victim for some period of time, and had even stolen guns from the victim's home on an earlier occasion. Phillips indicated that on the night of the murder, Prather had beaten the victim with a T.V. tray table and then positioned the victim's body as it was found by police. Phillips stated Prather told him [Phillips] to smother the victim with a pillow, which Phillips did. Phillips indicated Prather told him to carve the writing into the victim's buttocks, which he did. Phillips indicated he and Prather then stole items from the victim's home. Phillips indicated he and Prather left the victim's home and went to a pool hall, got their stories straight, and then reported the *alleged* rape at the hospital. Phillips indicated there was no rape or sexual assault, and he had not been drinking that night and had faked being passed out on the couch earlier in the evening. (Guilty plea Tr, December 5, 2012, pp. 1-36).

the State was prepared to go forward with the trial against him and introduce all of the evidence against him including his multiple statements. (Guilty plea, Tr. December 5, 2012, pp. 1-36).

Similarly, at Prather's trial, the State contended both men were involved in the murder of the victim and the cover-up of the murder. The State did not call Phillips as a witness at Prather's trial and vouch for his statements, nor did Prather. The State's theories were not contradictory since the State presented at both Prather's trial and Phillips' guilty plea the theory that both men were directly involved in the murder. (Trial Transcript of Appellant Prather & Guilty plea, Tr. pp. 1-36). In fact, at Phillips plea, Phillips admitted he was guilty under "the hand of one is the hand of all." (Guilty plea, Tr. pp. 1-36).

Prather argues he was unable to use the prosecutions' statements at Phillips' plea in arguing against the admission of evidence at his trial; and this violated due process because the prosecution took inconsistent positions. However, as the record shows, the prosecution did not take inconsistent positions as to the two (2) co-defendants. The record shows the State did not vouch for the credibility of any specific statement of Phillips' at his plea only that he had incriminated himself repeatedly and the State would use those statements against Phillips if he backed out of the plea and they were a sufficient factual basis for the guilty pleas. (Guilty plea, Tr. December 5, 2012, pp. 1-36). Further the record shows **Prather** had received *Phillips' prior statements* prior to trial and could have offered them at trial in opposition to any evidence the State attempted to introduce or cross-examined the State's witnesses with them. (Tr. 750-51).[27] Finally, there was no obligation of the State to inform Judge Newman of the contents of Phillips numerous prior statements, which had been turned over to Prather, before seeking to admit evidence in Prather's trial.

[27] There is absolutely no evidence in the record the State did not turn over Phillips' prior statements made in 2009 or before, before Prather's trial in 2012.

This situation is analogous to Bradshaw v. Stumpf, 454 U.S. 175 (2005)(holding that "[t]he Court of Appeals was also wrong to hold that prosecutorial inconsistencies between the Stumpf and Wesley cases required voiding Stumpf's guilty plea."). Like in Stumpf where the Court held "the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder," the precise identity of the victim's buttocks-etcher was immaterial to Prather's or Phillips' guilt or innocence for the murder of victim. This case is unlike shocking cases where two (2) defendants are independently tried and convicted for the same crime which could have been committed by only one (1) person. *See* Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997). Here, the State argued factually consistent cases against co-defendants.

Here, the record shows the prosecutor was relating to the plea/sentencing court in the co-defendant's guilty plea what *police* believed, that Prather's co-defendant's last statement was the closest he had come to telling the truth about what had actually happened. As the prosecutor also pointed out to the plea/sentencing court, no one really knows the real truth, only the two (2) perpetrators; Prather and Phillips. Finally, at Prather's trial the State contended either Prather carved "rapist" into the victim's buttocks or the co-defendant did so at Prather's direction. The theories are not inconsistent. There is no merit to this appellate ground. It must be dismissed.

Argument VII.

Judge Newman did not abuse his discretion in not admitting the written statement.

What Occurred Below

During the defense' case, Prather sought to introduce the written statement of an unavailable witness, Ralph Becknell (deceased), given to police, about the substance of a conversation Becknell had with the victim, Gerald Stewart (deceased), the evening before the victim's murder. (Tr. 630-34, Def.'s Ex. 4 for I.D.). Prather contends Judge Newman abused his

discretion, and he was denied due process, when the court denied admission of the *written* statement of Becknell, when the statement was *allegedly* a present sense impression or excited utterance, and it would have corroborated Prather's defense he was not responsible for Stewart's death. There is absolutely no merit to this appellate issue.[28]

"Whether a statement is admissible under the excited utterance exception to the hearsay rule depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court." State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999). There are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007). "Statements which are not based on firsthand information, such as *where the declarant was not an actual witness to the event*, are not admissible under the excited utterance exception to the rule against hearsay." State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006) (emphasis added).

This hearsay statement was properly not allowed because it was not based on firsthand information since the declarant was not an actual witness to the event—the altercation between the victim and Phillips, Davis; and also because Becknell's relaying of victim's alleged statement was not an "excited utterance" made while Becknell was under the stress of excitement caused by a startling event. *See* State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007).[29] What's more, this situation represents a case of two (2) layers of hearsay since victim was relaying the event to

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[28] The due process issue was not raised to Judge Newman below. It is not preserved.

[29] Even if Becknell immediately called police after the victim's call to him, he would not have been in a "stress of excitement . . . caused by [a] startling event" since he was not a witness to the event and was merely hearing about the so-called startling event from the victim after the fact.

Becknell who then relayed it to police later. *See* State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014). Therefore, the excited utterance exception would have to be satisfied first with the statement of the victim to Becknell, then with Becknell to police. It is obvious Becknell's statement does not meet the exception.[30] Judge Newman did not abuse his discretion.

Likewise, the statement does not meet the exception of a present sense impression. "There are three (3) elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (2014) *citing* United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998).[31] Regardless, it is inarguable the second level of hearsay meets at least one (1) prong of the present sense impression test. First,

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[30] It is also likely the victim's statement to Becknell does not meet the requirements of the exception since the statement lacked the requisite spontaneity. Prather is not able to prove "the nature of [his] reaction was such that it generated the spontaneity that gives an excited utterance its inherent reliability." Id. Further, Prather "did not show [the victim] was still under the required stress of excitement when [he] actually made [his] statement." Id. *citing* Davis, 371 S.C. at 180, 638 S.E.2d at 62 (finding the State elicited no evidence the declarant "was still under the stress or excitement of [the victim's] shooting," and "[t]herefore, the State did not meet its burden of establishing a foundation for the excited utterance"). Prather offered no evidence the victim was "shaking, crying, and distraught" when he made the statement to Becknell. Id. Also there was no reliable indication as to exactly how close in time was the confrontation between Phillips and the victim to when the victim called Becknell. A close proximity is essential to proving he was still "under the stress of excitement." Ladner, at 116 644 S.E.2d at 691. Finally, the record does not show, and Prather has not argued, the fight was of a sufficiently shocking nature to have caused the victim to give an excited utterance in the first place. *See* Id., *citing* State v. Sims, 348 S.C. 16, 22, 558 S.E.2d 518, 521 (2002) (noting the "declarant's demeanor . . . and the severity of the startling event" are factors a trial court should consider in determining whether a statement qualifies as an excited utterance).

[31] It is uncontroverted that, as regards the victim's alleged transmission of this statement to Becknell, it passes the first and third prong of the test. The statement described the event of Phillips' and the victim's altercation. Likewise, it satisfies the third prong because victim not only perceived the event, he was at the epicenter of it. However, it is inarguable victim's statement satisfies the second prong as it is not clear from the record when, exactly, the victim and Phillips had the altercation and then when the victim called Becknell.

the statement Becknell made to police was not contemporaneous with the event, but it had occurred sometime later. Second, the declarant, Becknell, did not witness the event. Therefore, the statement made by Becknell to police fails to meet the requirements of the present sense impression test at both levels of hearsay, rendering it inadmissible. Therefore, Judge Newman did not abuse his discretion by refusing to admit *Becknell's statement* to police.

Argument VIII.

Judge Newman did not err in denying the motion to suppress on Prather's car.

Finally, Prather argues Judge Newman erred when he did not suppress the *Coca-Cola* collector's box and knife found in his car. There is no merit to this argument.

What Occurred Below

Pretrial, Prather moved to suppress the fruits of the search of his car, found by police in the E.R. parking lot and towed after he was taken into custody, contending the search warrant for the vehicle was invalid. A suppression hearing was conducted. **(Tr. 93-165).**

At the hearing, the State admitted the car search warrant affidavit was facially deficient; however, the State showed through the testimony at the hearing the *Coca-Cola* collector's box was in plain view to the officer tasked to guard the vehicle until a search warrant could be obtained. Further, pursuant to the policies and procedures of the West Columbia Police Dept., the *Coca-Cola* collector's box and the knife would have been inevitably discovered through an inventory of the vehicle. Finally, the State showed through the testimony the Magistrate had probable cause to issue the search warrant for the car because the Magistrate issued the warrant

within a few hours after issuing another search warrant in the case and had also received sworn oral testimony constituting sufficient probable cause. **(Tr. 93-165).**[32]

Judge Newman properly denied the motion to suppress, because pursuant to State v. White, 275 S.C. 500, 272 S.C. 800 (1980), even though this affidavit was facially deficient, due to the fact that considering the other search warrant affidavit and sworn oral testimony presented to the Magistrate that same day regarding this very case, there was probable cause to issue the warrant. Further, Judge Newman found the *Coca-Cola* collector's box was observed in plain view by the officer tasked with maintaining custody of the car at the E.R. parking lot, *and* the evidence found in Prather's car would have been inevitably discovered pursuant to the inventory search exception to the warrant requirement of the Fourth Amendment. **(Tr. 93-165).**

Standard of Review

The standard of review of Fourth Amendment search *or* seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with the appellate court only being able to reverse the ruling of a trial judge where there is clear error. State v. Morris, 411 S.C. 571, 769 S.E.2d 854 (2015). Warrants are constitutionally preferred; and, in determining whether they should issue, magistrates are concerned with probabilities, not certainties. *See* State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, a reviewing appellate court gives great deference to a magistrate's determination of probable cause. *See* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). When determining the propriety of the issuance of a warrant, the duty of this Court is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. State v. Kinloch, 410

[32] At the suppression hearing, the State called not only the officer who observed the *Coca Cola* collector's box in plain view, but also the officer who obtained the warrant, and the officers who obtained another search warrant in this case the same day, *and* the Magistrate who issued both search warrants. (Tr. pp. 93-165)

S.C. 612, 767 S.E.2d 253 (2014). In making such a decision, this Court must consider the totality of the circumstances. Jones, *supra* (under this test, a reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, when determining whether or not probable cause existed).[33] However, all that is necessary for the issuance of a warrant is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is **a fair probability** that contraband or evidence of a crime will be found in a particular place." State v. Herring, 387 S.C. at 212, 692 S.E.2d at 495-96.

Further, a warrant affidavit may be supplemented by sworn oral testimony before the magistrate. S.C. Code Ann. Section 22-3-710; Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006). "[A] warrant affidavit which is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony." State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990) *citing* State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988).[34]

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[33] The magistrate should determine probable cause based on all of the information available to him at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of a warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001).

[34] *See also* State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987); State v. Gore, 408 S.C. 237, 246, 758 S.E.2d 717, 721 (Ct. App. 2014)([o]ral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable

The Lack of Merit of Prather's Argument

The threefold purpose of the warrant requirement is to provide the safeguard of detached judicial scrutiny prior to the issuance of the warrant; to keep lawfully initiated searches within proper bounds; and to assure the individual of the lawful authority of the officer executing the search, his need to search and the limits of his power. State v. White, 275 S.C. 500, 272 S.C. 800 (1980). In White, the Court recognized a warrant affidavit submitted in support of a search warrant failed to establish probable cause; however, the affidavit for the arrest warrant was also before the magistrate at the time. Id. The Court found that facts supplied by two affidavits simultaneously filed and considered by the magistrate could be taken into account by him in determining the existence of probable cause for the search warrant. Id.; *citing* United States v. Nolan, 413 F.2d 850 (6th Cir. 1969); United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966); Blankenship v. State, 258 Ark. 535, 527 S.W.2d 636 (1975); State v. Kalai, 56 Haw. 366, 537 P.2d 8 (1975); State v. Smith, 295 Minn 65, 203 N.W.2d 348 (1972). The White Court noted:

> Our primary concern is that the magistrate is sufficiently informed to make an independent determination of probable cause. A search warrant issued upon affidavit or affirmation does not offend the constitution. State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). Any information relied upon to establish probable cause must be in the words of the Fourth Amendment, 'upon probable cause supported by oath or affirmation.' We held in Sachs, *supra*, that an affidavit could be supplemented by oral testimony. We now hold it is permissible to construe separate affidavits, obtained simultaneously in order to determine the existence of probable cause. There is no inherent defect in utilizing multiple affidavits State v. Gamage, 340 A.2d 1 (Me. 1975); People v. Close, 60 Ill. App. 477, 208 N.E.2d 644 (1965). We concluded the magistrate correctly issued the search warrant.

White, 275 S.C. at 502-03. Other courts have followed our Supreme Court's lead in White. Derr v. Commonwealth, 242 Va. 413, 410 S.E.2d 662 (1991)("we now hold that an 'affidavit may be

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cause."); State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007); State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999).

supplemented or rehabilitated' with additional affidavits which contain collective facts relevant to the same offenses when those affidavits are presented, simultaneously, to the issuing magistrate by the same officer) *citing* White; *and* Tucker v. State, 403 So.2d 1274, 1278 (Miss. 1981). Similarly, this has been extended to multiple affidavits involving the same criminal investigation submitted to the same magistrate on the same day. United States v. Serao, 367 F.2d 347, 350 (2d Cir. 1966), *vacated and remanded on other grounds sub nom*, Piccioli v. United States, 390 U.S. 202 (1968), *indictment dismissed on remand*, 394 F.2d 989 (2d Cir. 1968). In Serao, the Court held:

> It would be hypertechnical for the Commissioner [magistrate] not to act upon an entire picture disclosed to him in interrelated affidavits presented to him on the same day. And, as the United States Supreme Court admonished in United States v. Ventresca, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965), "the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than commonsense, manner.

Id. at 367 F.2d at 350. The Courts of Appeal for the 9th and 6th Circuits found similarly in United States v. Fogerty, 663 F.2d 928, 930 (9th Cir. 1981) and United States v. Manufacturers National Bank of Detroit, 536 F.2d 699, 702 (6th Cir. 1976)("[i]t would needlessly restrict the discretion of a magistrate to hold that two affidavits filed so close in time and referring to a single criminal investigation which was still continuing could not be considered together in determining whether to authorize a further search."). The Tennessee Court of Criminal Appeals held similarly. State v. Smith, 836 S.W.2d 137 (1992)(*citing* White).

Considering all of the sworn testimony presented to the very same Magistrate on the very same day regarding the very same crimes; the Magistrate in this case had a substantial basis for determining probable cause existed to issue the search warrant for Prather's car. The Magistrate knew of the murder earlier in the day through the issuance of the search warrant for the victim's residence. The Magistrate knew through sworn oral testimony this car belonged to Prather and

transported the individuals to the hospital who stated they had beaten the victim, and that the *Coca Cola* box was seen in plain view and was connected to the crime scene. Judge Newman did not abuse his discretion, and there is evidence in the record to support his determination. **(Tr. 93-165).**

Further, the evidence found in Prather's car is subject to the "inevitable discovery" exception to the exclusionary rule since, as stated by the police and Judge Newman, the evidence would have been discovered independently of the deficient affidavit pursuant to the police's impound and inventory policy. **(Tr. 93-165, State's Ex. 3 & 4).** *See* Nix v. Williams, 467 U.S. 431 (1984).[35] In the present case, the State not only cured the inadequacies of the deficient affidavit with the supplemental testimony by police stating further grounds for the search of Prather's car; but the State also made the showing of inevitability of discovery of the contents of the car by providing testimony concerning the police departments' impounding and inventorying policy. (Tr. pp. 93-165, State's Ex. State's Ex. 3 & 4). State v. Boyd, 288 S.C. 206, 341 S.E.2d 144 (Ct. App. 1986)(an "inventory search" is permissible where police intrusion into vehicles impounded or otherwise in lawful police custody is based on securing or protecting the vehicle and its contents). Prather was taken into custody at the E.R. and transported to the police department. His vehicle would have been impounded and inventoried in any event. Therefore, Judge Newman did not err by denying Prather's request to exclude this evidence.

[35] "The inevitable discovery doctrine, an exception to the exclusionary rule, states if the prosecution can establish by a preponderance of the evidence the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained." *See* State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (2011) *citing* Nix, 467 U.S. at 444.

Further, even if Judge Newman erred, the exclusionary rule should not apply. The exclusionary rule should only apply as a last resort, and only after balancing the deterrence value verses the societal costs, and only when there is flagrant police misconduct. Davis v. United States, 131 S.Ct. 2419 (2011).[36] In this case, exclusion would not further the purposes of the exclusionary rule, and suppression is not proper. Id.; State v. Harvin, 343 S.C. 190, 194, 547 S.E.2d 497, 500 (2001)(main purpose of exclusionary rule is deterrence of police misconduct).

Further, the admission of this evidence was harmless on the murder charge given all of the evidence of Prather's guilt including his statements to police and the nurse at the hospital, the victim's blood (D.N.A.) on his clothing, Rabon's testimony, and the impeachment of his trial testimony. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

CONCLUSION

For the above stated reasons, Prather's convictions and sentences must be affirmed.

Respectfully submitted,

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December 30, 2015

[36] *See* Herring v. United States, 555 U.S. 135 (2009); Hudson v. Michigan, 547 U.S. 586 (2006); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012); State v. Weston, 329 S.C. 287, 293 494 S.E.2d 801, 804 (1997); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471 473 (1987); State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324 (Ct. App. 2011). Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. Davis; Herring, 555 U.S. at 144. The conduct of the officers here was neither of these.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001500

THE STATE,

Respondent,

vs.

ROBERT JARED PRATHER,

Appellant.

CERTIFICATE OF SERVICE

I Anthony Mabry, hereby certify that I have served the Initial Brief of Respondent and Designation of Matter in the foregoing action by depositing two copies of same in the United States Mail to Elizabeth Franklin-Best, Esquire, Blume Norris & Franklin-Best, LLC, 900 Elmwood Avenue, Suite 200, Columbia, South Carolina 29201 this 30th day of December, 2015.

ANTHONY MABRY
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 30 2015
SC Court of Appeals

December 30, 2015

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Robert Jared Prather
Appellate Case No. 2014-001500

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc: Elizabeth Franklin-Best, Esquire
Donald V. Myers, Solicitor
Trisha Allen, Victims Assistance