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September 28, 2017

RECEIVED

SEP 28 2017

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

Re: State v. Johnny N. Sexton, Appellate Case No. 2015-001055

Dear Ms. Kitchings:

The above referenced case is set for oral argument on Wednesday, October 4, 2017, at 10:40 a.m. in this Court. Counsel would ask the Court to take notice of the following case, which counsel may cite at oral argument.

State v. Robert Jared Prather, Op. No. 5514, (S.C. Ct. App. filed September 6, 2017).

Please find enclosed a copy of the above-referenced opinion. By copy of this letter, I am informing opposing counsel of this matter.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

LaNelle Cantey DuRant
Appellate Defender

LCD/cnp

Enclosure

cc: Deborah R. J. Shupe, Esquire (with enclosure)

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Robert Jared Prather, Appellant.

Appellate Case No. 2014-001500

RECEIVED

SEP 28 2017

SC Court of Appeals

Appeal From Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 5514

Heard April 11, 2017 – Filed September 6, 2017

REVERSED AND REMANDED

Elizabeth Anne Franklin-Best, of Blume Norris &
Franklin-Best, LLC, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General J. Anthony Mabry, all of Columbia;
and Solicitor Samuel R. Hubbard, III, of Lexington, for
Respondent.

KONDUROS, J.: In this criminal case, Robert Jared Prather appeals his convictions of murder and armed robbery, arguing (1) the State's expert witness's testimony was not proper rebuttal testimony, not scientifically valid, and invaded the province of the jury; (2) the expert's testimony was not properly produced during discovery; (3) the State "sandbagged" the defense with the expert's rebuttal testimony; (4) Prather's codefendant's statement was inadmissible hearsay and

violated Prather's Confrontation Clause rights; (5) the trial court erred in denying Prather's motion for a directed verdict; (6) the State's actions in pursuing factually inconsistent theories in Prather's and his codefendant's cases denied Prather's right to due process; (7) the trial court denied Prather due process because it did not allow him to introduce a statement made by an unavailable witness; and (8) the trial court violated Prather's Fourth Amendment rights because it did not suppress evidence produced as the result of a fatally defective warrant. We reverse and remand.

FACTS

A grand jury indicted Prather for the murder of Gerald Stewart (Victim), armed robbery, and first-degree burglary.¹ Prather was originally tried in October of 2009, but that trial resulted in a hung jury. At the second trial, Officer Ronald Suber testified he went to the hospital on April 22, 2005 in response to a sexual abuse claim involving a male victim. Officer Suber indicated Prather told him that he, Phillips, and Victim were drinking at Victim's residence and Phillips passed out on the couch. Officer Suber explained Prather stated he left the residence and when he returned, Victim answered the door completely nude. According to Officer Suber, Prather claimed Victim asked him if he knew Phillips "likes to have his dick sucked." Officer Suber said Prather explained he pushed his way past Victim and found Phillips in a bedroom "wearing nothing but his boxer shorts and asleep on the bed." Officer Suber testified Prather said, "I beat the shit out of [Victim] and those were devastating blows." Officer Wayne Kleckley testified Prather also told him "he beat up" Victim. Officer Suber transported Prather to the police station for "investigative purposes" after he learned Victim was dead.

Donna Sharpe, a nurse, testified Phillips told her all he remembered was waking up in his boxers. Sharpe stated Prather admitted he beat Victim and he was "probably still laying there." Sharpe explained Prather asked her if he could wash his hands because he hated getting blood on them and he laughed. Sharpe testified Prather asked, "I'll probably go to jail for this, won't I?" Sharpe asked if he meant for beating Victim, and Prather replied "yes, I beat him. But he's alive though, maybe barely though."

¹ Prather's codefendant, Joshua Phillips, was also indicted for these charges, but he accepted a deal with the State to plead guilty to armed robbery and voluntary manslaughter.

Officer Brandon Field testified he was dispatched to check on Victim at his residence at approximately 5:30 a.m. on April 22, 2005. Officer Field explained he found Victim dead "underneath a blanket, kind of on [his] knees, knelt down, like face-down on the couch." Virginia Youmans, a medical technician, testified Victim had "what appeared to be markings or carvings more or less on the small of [his] back or the lower back area where you[r] pants and shirt would meet." Youmans stated the word carved was "rapist." Officer Al Stuckey stated he discovered an adult sex toy, a dildo, underneath Victim's armpit at the crime scene.

Dr. Janice Ross, a pathologist, testified Victim suffered bruising around his eye, scalp, and lips; a fractured nose and ribs; scratch marks on his thigh and buttocks; and a burn mark on his finger, which was likely from a cigarette. She stated Victim's blood test revealed 0.279 percent alcohol and Valium in his system. Dr. Ross believed Victim's death was caused by an irregular heartbeat, due to the stress of a beating and his enlarged heart. She opined a healthier person could have survived the beating. Dr. Ross explained she could not rule out suffocation as a contributing cause because of the position of Victim's body.

Ronald Rabon testified he was Victim's roommate. He had moved in approximately a week before the incident after having met Victim in an alcohol rehabilitation facility. Rabon testified he had only recently discovered Victim was a homosexual, and he planned to move out. He stated he returned from work the day of the incident and Prather and Phillips were drinking with Victim at his residence. Rabon was in and out of his room throughout the evening, also drinking, and he testified he saw Phillips hit Victim twice and bust Victim's lip. Victim fell onto a chair, and Prather and Rabon told Phillips to stop. Rabon testified he, Prather, and Phillips left the residence to buy cocaine. Rabon explained that after they returned, Prather left again. Rabon claimed he went to his bedroom and when he emerged he observed Phillips and Victim in activity of a "sexual nature." He later observed Phillips and Victim on Victim's bed. Rabon later heard Prather yelling for Phillips. Rabon testified he went to sleep and woke up "with about four cops standing over me."²

Prather took the stand in his defense. He testified he and Phillips had spent the afternoon at Victim's house drinking and hanging out. Prather indicated that at one point, Victim and Phillips got into a fight outside the residence. Prather stated the fight broke up, but when they came back inside Phillips hit Victim twice again

² Rabon testified he is half-deaf in one ear and sleeps very soundly if he falls asleep on that side.

until Rabon and Prather told him to stop. The parties were in and out throughout the afternoon and evening replenishing alcohol and cigarettes. Finally, Prather claimed he left Victim's residence to buy cocaine. When he returned, Victim "came out [of] the bedroom completely naked with an erection" and told him Phillips "liked his dick sucked." Prather stated he wanted to take Phillips home but Victim told him "you're not going any fucking where." Prather testified he hit Victim three times because Victim grabbed his arm and he wanted to get away. Prather stated he "jumped up and went to the bedroom door" and found Phillips "in his bed in his boxers." Prather claimed "there was a dildo on the bed by [Phillips]'s feet." Prather testified he and Phillips went to the living room and Phillips "was screaming and upset and kicking" Victim. Prather claimed that as they were leaving, Phillips went back inside to get his shoes and Prather waited in his vehicle for about ten minutes. Prather testified Victim was still alive when he left. Prather explained he and Phillips eventually went to the hospital, where Prather told hospital staff Victim had raped Phillips.

On cross-examination, Prather denied telling Officer Suber he "beat the shit out of [Victim] and those were devastating blows." Prather claimed he hit Victim only three times as necessary to defend himself against a larger man. Prather stated he was not responsible for "leaving [Victim] in this condition," including beating him on the sofa, carving rapist on his back, or covering him with a blanket.

After the defense rested, out of the presence of the jury, the State informed the trial court it intended to call Paul LaRosa, an expert on crime scene analysis, as a reply witness "to explain the crime scene." Prather argued the reply testimony was not an "appropriate response to the testimony given by the defendant." The State asserted it was appropriate rebuttal testimony because Prather claimed "he left the house and that anything done after he left was done by Mr. Phillips."

LaRosa testified he worked at South Carolina Law Enforcement Division (SLED) as a special agent for eighteen years and worked in the crime scene unit for six years. LaRosa stated he was "currently assigned to the behavioral science unit as a criminal profiler" and his duties included reconstructing crime scenes to determine the natural flow of the crime. LaRosa testified he "trained under [a] court qualified crime scene analyst" and "went through intensive training with our Department of Mental Health." LaRosa stated he completed his crime scene analysis training in a two-month long program with the Federal Bureau of Investigation. LaRosa explained he previously testified as an expert in crime scene reconstruction and assessment but this was "the first time as a crime scene analyst through the behavioral science program."

LaRosa stated he never physically examined the crime scene but rather reviewed photographs and a video of the crime scene along with reports regarding how police found Victim's body and Victim's autopsy report. LaRosa indicated he went over this case with two other crime scene analysts at SLED and they agreed with his analysis. LaRosa testified that the carving in Victim's backside and placement of the dildo, coupled with the opposing behavior of covering Victim, led him to believe there were "two specific personalities [and therefore] two offenders within that crime scene." LaRosa admitted he had not made criminal profiles for Prather, Phillips, or Victim because he "couldn't get a complete victimology, I couldn't look at their past histories, their psychological files or any of that." On cross-examination, LaRosa testified he also reviewed the transcript from Prather's first trial and "some of" Phillips's statements but claimed he did not use the statements in his analysis. LaRosa indicated the information provided to him by the prosecution was sufficient for him to determine "how many offenders were in the scene." LaRosa admitted he had "not looked at any mental health history from Mr. Prather, Mr. Phillips[,] or [Victim]."

Prather argued LaRosa's testimony was not proper reply testimony, it did "not possess enough scientific validity," and LaRosa was not "qualified as an expert in this area and never has been accepted as one." The trial court found the testimony appropriate on rebuttal based on Prather's claims as to what had occurred the night of the crime. The court explained under *State v. White*,³ an expert witness can meet the qualification threshold and it is "up to the jury to believe . . . an expert witness." The court found LaRosa "sufficiently convinced the court that he qualifies as an expert in the field of crime scene analysis with regard to . . . crime scene assessment, behavioral analysis." The court also found the testimony was "sufficiently relevant, probative, and reliable." The court cautioned the State "no identification can be made as to who did what and no suggestion can be made to the jury as to their conclusion as to who did what." Prather objected to the court's ruling, arguing LaRosa's testimony would invade the province of the jury.

In the presence of the jury, LaRosa explained an offender uses "staging" to alter "the crime scene from what truly happened. It is to get law enforcement . . . on a

³ 382 S.C. 265, 273-74, 676 S.E.2d 684, 688 (2009) (explaining an expert may satisfy the qualification threshold and any "defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility"; a trial court may take the same approach with the reliability factor "after making a threshold determination for purposes of admissibility").

different idea." He testified the carving of the word rapist on Victim's backside did not impact the actual murder and was a "superficial wound." LaRosa explained, "It's the offender's way of saying, hey, look at this guy. Not only is he a bad guy, he's bad enough that somebody's carving rapist in his back." He testified, "Whether . . . that is what they believe or not, I can't say, but they want to project that to the first responders that this guy's a rapist." LaRosa stated the placement of the dildo was "another example of evidence that is not necessary to commit the crime." He continued "not only is this offender, the personality wanting to carve rapist into this individual[']s back, he finds that one item for shock value to show what type of rapist he is and . . . places it gently underneath his arm pit." Additionally, LaRosa testified, "This is a classic case of undoing, which is covering up the victim with a blanket and pillow. It is symbolically erasing what has occurred in the scene." LaRosa stated the theories of staging and undoing "are in absolute conflicts with each other." He concluded there were "[t]wo distinct offenders who [in] the heat of the moment one of them decides to carve the word rapist and place an adult sex toy, a dildo next to him, and the other one taking blankets and wanting to erase, to just undo what has just occurred." He also stated, "I can't tell which offender, if both of them were not participating in the crime itself, of the physical assault, but there were two offenders that have different personalities, different behaviors at the end while the victim is dying."

The jury found Prather guilty of murder and robbery. The trial court sentenced Prather to ten years' imprisonment for robbery and thirty years' imprisonment for murder, to run concurrently. Prather filed a motion for a new trial, arguing the trial court erred by allowing LaRosa's reply testimony and qualifying him as an expert in "crime scene analysis." The trial court denied Prather's motion. This appeal followed.

LAW/ANALYSIS

I. Rebuttal Testimony

Prather argues the trial court erred in permitting LaRosa's testimony on reply. We agree.

The admission of reply testimony is within the sound discretion of the trial court. *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). "Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief." *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). Testimony that is "arguably contradictory and in

reply to" that offered by the defense is admissible. *Todd*, 290 S.C. at 214, 349 S.E.2d at 340. However, reply testimony should be limited to that which refutes or rebuts testimony presented by the defendant. See *State v. Durden*, 264 S.C. 86, 90, 212 S.E.2d 587, 589 (1975) (finding reply testimony proper noting "[t]he reply testimony did not go beyond a refutation of that which the [defendant]'s witness had asserted"); *State v. Garris*, 394 S.C. 336, 351, 714 S.E.2d 888, 896 (Ct. App. 2011) (affirming admissibility of reply testimony that rebutted the defendant's claim he did not own a pistol or fire one on the day in question).

In *Durden*, in which the defendant was convicted of killing his wife's ex-husband, the wife "testified that she had on occasions called the police to their home because of rowdy conduct of the [victim] on her premises." 264 S.C. at 90, 212 S.E.2d at 589. In reply, the State called a police officer who denied this testimony and testified the police had not received any calls about the victim. *Id.* Our supreme court found the officer's "reply testimony was made necessary by the evidence which the [defendant] had submitted. The reply testimony did not go beyond a refutation of that which the [defendant]'s witness had asserted." *Id.* The court reasoned it could "hardly be argued that the [defendant]'s counsel was taken by surprise." *Id.* Accordingly, the court found "no error." *Id.* at 90, 212 S.E.2d at 590.

In *Garris*, the defendant argued "the trial court erred in denying his request to call an expert to rebut the reply testimony given by the State's expert." 394 S.C. at 350, 714 S.E.2d at 896. Our court explained the defendant "took the stand and testified he did not have or handle a gun the day he was arrested [but] fired a rifle the day before." *Id.* In response, the State called "a SLED agent who performed a gun residue analysis on samples taken from [the defendant's] hands." *Id.* at 350-51, 714 S.E.2d at 896. In proffered testimony, the agent opined the defendant had fired a pistol; the defendant objected because this information was not in the agent's report and the defendant had just learned about it during the proffered testimony. *Id.* at 351, 714 S.E.2d at 896. However, the trial court allowed the "testimony to be presented to the jury to rebut [the defendant's claim] he did not own a pistol or fire one." *Id.* Our court found the agent's "testimony was properly limited to a reply to" the defendant's testimony because the State put the agent on the stand to rebut the defendant's "testimony that he did not own a pistol and had not shot one the day of the incident." *Id.*

Furthermore, in *State v. McDowell*, the defendant was convicted of murdering his sixteen-year-old son by shooting him in the head, and the defendant told the police his "third shot was fired after [the victim] had fallen to the floor." 272 S.C. 203,

205, 249 S.E.2d 916, 917 (1978) (per curiam). "At trial, however, [the defendant] testified the third shot was fired in rapid succession to the second shot while [the victim] was standing." *Id.* The defendant argued the trial court "erred by permitting the examining pathologist to testify for the State on reply that the victim's head was resting against a hard, flat object at the time the third shot was fired." *Id.* at 206, 249 S.E.2d at 917. The basis for the defendant's argument was his "contention that this testimony should have been introduced during the State's case[-]in[-]chief and was improper reply testimony." *Id.* Our supreme court found the testimony "was in reply to the [defendant]'s testimony that the third shot was fired while the victim was still standing," and was unnecessary until the [defendant] testified in direct opposition to his earlier statements." *Id.* at 206-07, 249 S.E.2d at 917.

Unlike the previous cases, LaRosa's testimony was not proper reply testimony because the rebuttal should have been limited to refuting Prather's testimony, rather than to complete the State's case-in-chief. Prather claimed he waited in his vehicle for about ten minutes after Phillips went back inside Victim's residence. He denied carving rapist in Victim's back and covering Victim with a blanket, and he claimed he merely saw "a dildo on the bed by [Phillips]'s feet." In reply, LaRosa opined there were "two distinct offenders" in this crime scene because there were "two specific personalities." LaRosa testified in detail about staging and undoing, why someone would carve rapist in a victim's back, and about the level of anger associated with superficial cutting. LaRosa opined the offenders used the dildo "for shock value to show what type of rapist [Victim] is" and the blanket to "symbolically eras[e]" what had occurred at the scene.

Prather did not testify to the number of perpetrators or to anyone's motives for carving rapist, for the placement of the dildo, or for covering Victim with a blanket at the scene.⁴ He did not testify to any of the conduct surrounding these events.

⁴ We are not convinced by the dissent's citation to the following testimony that Prather testified Phillips committed the crime alone, regardless of what the jury may have inferred from it.

[State]: And Joshua Phillips was alone in the house for eight to ten minutes?

[Prather]: Somewhere around there.

Prather's answer to the compound question is more responsive to the length of time that passed than the number of individuals in the house or what Phillips did while

He did not testify they happened in a specific manner or for a specific reason but simply denied doing them. Such broad expert testimony on reply "explain[ing] the crime scene" could not reasonably be anticipated by Prather. Accordingly, we conclude the trial court abused its discretion in allowing LaRosa's testimony on reply as it was not limited to refuting or rebutting specific testimony from Prather, but was general testimony as to the circumstances of the crime.

II. Harmless Error

The State contends the admission of LaRosa's reply testimony was harmless beyond a reasonable doubt because Prather admitted he assaulted Victim, and LaRosa's testimony did not identify Prather as the second perpetrator. We disagree.

"Whether an error is harmless depends on the circumstances of the particular case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" *Id.* (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). "[O]ur jurisprudence

inside. The remaining testimony cited by the dissent is a basic denial of the crime. Additionally, the record demonstrates Victim's roommate was also in the house at the time of the crime—a fact Prather acknowledged on cross-examination:

[State]: That [Phillips] goes back in, correct?

[Prather]: Yes.

[State]: That [Phillips] must be the one that carved rapist?

[Prather]: Yes, but there's also someone else in the house.

[State]: So now you think Mr. Rabon did it?

[Prather]: I don't know who did it sir.

requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012).

In this case, the jury was presented with Prather's prior statements to police and the emergency room nurse that he had beat up Victim and had struck him with "devastating blows" and had "beat the shit" out of Victim. Prather admitted in his trial testimony he struck Victim three times as necessary to defend against a larger man. Both Rabon and Prather testified Phillips had hit Victim earlier in the evening, and Rabon claimed to have seen Victim and Phillips in what appeared to be a sexual encounter. Prather testified Phillips hit and kicked Victim after Prather returned to the house and retrieved Phillips from the bedroom. According to Prather, Phillips went back inside to get his shoes while Prather waited in his car. At that point, it was within the jury's province to determine what version of events was more credible based on all the evidence and testimony.

LaRosa testified two people were present at the crime scene and manipulated the crime scene to present a particular version of events to authorities. Such expert testimony left little room for the jury to conclude anything other than that Prather was the second offender, as the State's theory of the case was that Prather and Phillips acted in concert to take advantage of Victim.⁵ See *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) ("[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."). Not only did LaRosa espouse *his* opinion as to the circumstances of the crime, he bolstered the credibility of his own testimony by stating his assessment of the case had been reviewed by other SLED agents who agreed with him. While Prather did not specifically object to this improper bolstering, the augmentation of LaRosa's credibility likely affected the weight given his testimony by the jury.

⁵ Prather also contends LaRosa's expert testimony was not sufficiently reliable under *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). While we decline to rule on the reliability of crime scene analysis testimony in general, we find expert testimony that speculates on the motives and mindset of a perpetrator to be suspect, particularly when based on crime scene photographs, instead of viewing the crime scene in person, "some" of a codefendant's prior statements, and none of the mental health histories of the parties.

Finally, while not determinative in our analysis, the hung jury in Prather's previous trial supports our conclusion that LaRosa's testimony affected the outcome of this trial. See *Christopher v. State of Fla.*, 824 F.2d 836, 847 (11th Cir. 1987) (stating the court's conclusion that the admission of defendant's confession in second trial was not harmless error was "buttressed" by defendant's first trial having ended in a hung jury); *United States v. Ince*, 21 F.3d 576, 585 (4th Cir. 1994) ("Had the case against [defendant] been as strong as the Government would have us believe, it seems unlikely that the first jury would have ended in deadlock."); *United States v. Paguio*, 114 F.3d 928, 935 (9th Cir. 1997) ("We cannot characterize the error as harmless, because the hung jury at the first trial persuades us that the case was close and might have turned on this [erroneously admitted] evidence."). According to Prather's brief, two new elements were introduced in his second trial. First, the State introduced redacted portions of Phillips' written statements in which the word rapist was spelled "rapeist." The carving on Victim's backside was spelled correctly. Second, the State introduced LaRosa's testimony on reply. We cannot assign comparative weight to this new evidence and testimony or discern with certainty how each may have influenced the jury. However, we are not convinced beyond a reasonable doubt that LaRosa's improperly bolstered, expert testimony which implicitly pointed to Prather's involvement, did not contribute to the second jury's guilty verdict. That conclusion is buttressed by the previous hung jury.

We conclude the trial court erred in allowing LaRosa's testimony because it was not proper reply testimony. Furthermore, we conclude under the totality of the circumstances, the admission of his testimony was not harmless. Therefore, we reverse and remand to the trial court for a new trial.⁶

REVERSED AND REMANDED.

LEE, A.J., concurs.

WILLIAMS, J., dissenting.

WILLIAMS, J.: I respectfully dissent and I would affirm the circuit court.

⁶ Because our resolution of the prior issue is dispositive, we decline to address the remaining issues on appeal. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

I. Reply Testimony

In my view, the circuit court did not abuse its discretion when it admitted the State's reply testimony. Accordingly, I would affirm the circuit court as to this issue.

Reply testimony is inadmissible to complete the plaintiff's case-in-chief and should be limited to rebutting matters the defense raised. *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). "The admission of reply testimony is a matter within the sound discretion of the [circuit court]." *State v. Stewart*, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984). However, "an abuse of discretion does not occur solely because the reply testimony is contradictory to the previously presented testimony." *Huckabee*, 388 S.C. at 243, 694 S.E.2d at 786.

At trial, Prather testified to being outside Victim's residence when the purported "staging and undoing" occurred. Moreover, Prather claimed he did not participate in any of these acts and testified Phillips was inside the residence when these acts occurred. Through his testimony, Prather inferred that only one person committed these acts.⁷ Conversely, the State's reply testimony contradicted Prather's notion

⁷ Specifically, Prather stated:

[State]: Now, let's talk about this crime scene. It's your testimony that you're not the one responsible for leaving [Victim] in this condition?

[Prather]: No, I'm not.

[State]: That you didn't beat [Victim] down on that sofa; correct?

[Prather]: That's correct. I didn't.

.....

[State]: You didn't pull his pants down and carve on him?

[Prather]: No.

that only one person participated in these acts. Importantly, the testimony was in response to Prather's testimony and was introduced to counter Prather's testimony—even though it did not directly implicate Prather. Specifically, LaRosa's testimony indicated two individuals were at the crime scene based on the types of personalities involved in "staging" and "undoing."⁸ Accordingly, I do not

[State]: And you didn't go into the bedroom and take this object out of the bedroom, this sex object, and place it beside [Victim]'s body, did you?

[Prather]: The last time I saw it, it was at Josh's feet in that room. And, no, because I'm not touching that thing.

[State]: You're not responsible for the cigarette burn on [Victim]'s finger; is that your testimony?

.....

[Prather]: No, I'm not responsible for the cigarette burn.

[State]: And you're also saying you're not the one who took this blue blanket, this comforter and covered up that body. Is that your testimony?

[Prather]: Yes, sir. I don't recall seeing that blue blanket anywhere in the house.

[State]: And you didn't take this blue pillow and put it over his head?

[Prather]: No.

[State]: And Joshua Phillips was alone in the house for eight to ten minutes?

[Prather]: Somewhere around there.

⁸ At trial, LaRosa testified:

[LaRosa]: Undoing is a term that we use in crime analysis where an offender would want to erase, symbolically erase what has happened. In this case, it could be -- it's on a spectrum. You could have a lot or you can have a little, where an offender may throw a t-shirt over a victim's face because they can't look at it any more. It's not what they want -- they don't want to remember him a certain way. This is a classic case of undoing, which is covering up the victim with a blanket and a pillow. It is symbolically erasing what has occurred in the scene.

[State]: Is staging and undoing show the same emotion [sic]?

[LaRosa]: They are in absolute conflicts with each other. You have this -- I don't want to call it elaborate, but I'll call it detailed staging of taking the time to carve the word rapist in the back of the victim and then placing the adult sex toy next to him to show first responders that this guy is a rapist. Hey, look at this. They are yelling. They are expressing this is the way I want this guy to be portrayed, as a rapist. Then you have another personality that goes in and says, I'm not comfortable with that. I'm going to undo it, cover it up. You have two distinct personalities which points us to me and my opinion that you have two offenders within that scene at the same time.

.....

[LaRosa]: Yes, yes. Two distinct offenders who at the heat of the moment one of them decides to carve the word rapist and the place an adult sex toy, a dildo next to him, and the other one

find that the circuit court abused its discretion in allowing LaRosa's testimony on reply. *See State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("The admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony.").

Additionally, I disagree with Prather's remaining arguments on the admission of the reply testimony, and accordingly, would affirm the circuit court based on the lack of prejudice to Prather. "[T]he improper admission of [reply testimony] may not serve as the basis for reversal unless found to be prejudicial." *State v. Farrow*, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998) (per curiam).

In the instant case, I do not believe LaRosa's reply testimony prejudiced Prather. LaRosa's testimony was general in nature and only sought to establish the presence of two people at the crime scene, rather than to establish Prather as the sole perpetrator. Moreover, LaRosa's testimony regarding the personality traits of those involved in the crime was offered to show the differing and distinct personalities that would engage in staging and undoing, which ultimately supported his conclusion that two people participated in the crime scene. LaRosa made no mention of Prather's name or any of Prather's personality traits during his reply testimony. Indeed, LaRosa did not offer his testimony as evidence of Prather's involvement in the crime; rather, LaRosa discussed the distinct personality traits to demonstrate that two individuals necessarily participated.

Last, regardless of whether the reply testimony was proper, I would find the circuit court's admission of reply testimony to be harmless error. *See State v. McClellan*, 283 S.C. 389, 393, 323 S.E.2d 772, 774 (1984) ("However, [when] guilt is proven by competent evidence and no rational conclusion can be reached other than the accused's guilt, a conviction will not be set aside because of insubstantial errors not affecting the result."). Prather's admission to striking Victim; other witnesses' testimony that Prather claimed: to have struck Victim with "devastating blows," to have left Victim barely alive, and that he needed to wash the blood off of his hands; and the pathologist's testimony that Victim's death was caused by an irregular heartbeat that resulted from the stress of a beating and an enlarged heart provide competent evidence to establish Prather's guilt in this case. Moreover, I respectfully disagree with the majority's view that the additional evidence of LaRosa's testimony affected the outcome of this trial; particularly to their point that

taking blankets and wanting to erase, to just undo what has just occurred.

LaRosa's testimony left the jury with only the conclusion that Prather was the second offender. *See State v. Black*, 400 S.C. 10, 30, 732 S.E.2d 880, 891 (2012) (determining the error to be harmless after a review of the entire record and finding the admission of additional evidence against the defendant "could not reasonably have affected the jury's result in this case"). In the instant case, prior to LaRosa's testimony, evidence that stolen items were found in Prather's vehicle and on Phillips; that blood was found on Prather's sock and on the back of his shirt; and that a knife was found in Prather's car indicated Prather and Phillips were involved in Victim's murder and supported the State's theory of the case. Accordingly, any error resulting from the State's reply would be harmless.

In conclusion, I would affirm the circuit court's admission of the reply testimony because it was properly admitted. Furthermore, I do not believe Prather established he sustained any prejudice. Last, I would affirm the circuit court because any error Prather may have established by the admission of the reply testimony would be harmless.

II. Remaining Issues

In addition to Prather's argument regarding reply testimony, he also argues that: (1) LaRosa's testimony was not properly produced during discovery; (2) the State committed prosecutorial misconduct when it "sandbagged" the defense with LaRosa's testimony; (3) the introduction of a portion of Prather's codefendant's statement to the police was inadmissible hearsay, unreliable, irrelevant, and violated Prather's Confrontation Clause rights; (4) the circuit court improperly denied Prather's motion for a directed verdict; (5) the State denied Prather's right to due process when it pursued factually inconsistent theories in Prather's and his codefendant's cases; (6) the circuit court denied Prather due process when it did not allow him to introduce a statement from an unavailable witness; and (7) the circuit court violated Prather's Fourth Amendment rights when it did not suppress evidence produced as a result of a fatally defective warrant.⁹ I would affirm the circuit court as to Prather's remaining issues on appeal.

1. Regarding Prather's arguments that LaRosa's testimony was not properly produced during discovery and the State committed prosecutorial misconduct when it "sandbagged" the defense with LaRosa's testimony, I would find these issues unpreserved. Prather did not raise these issues during the in camera hearing or at

⁹ The majority did not address these issues because its holding was dispositive.

trial; instead, Prather first raised these arguments in his motion for a new trial. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); *see also State v. King*, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999) (finding that a party cannot raise an evidentiary issue for the first time in a new trial motion). Thus, I would affirm the circuit court as to these two issues.

2. Similarly, I would find the circuit court did not abuse its discretion by allowing the State to introduce a portion of the statement of Prather's co-defendant—Phillips—to the police, in which Phillips misspelled rapist.¹⁰ As to whether the statement was inadmissible hearsay under the South Carolina Rules of Evidence; unreliable; and irrelevant, I would find this argument unpreserved. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector."). Prather did not object to the statement's admissibility on these grounds or as hearsay during the in camera hearing or contemporaneously during trial. Rather, Prather specifically raised an objection to the admissibility of the statement based solely on the exclusion of testimonial evidence under the Confrontation Clause. Thus, I believe Prather's assertion that portions of Phillips' statement are inadmissible, unreliable, and irrelevant is unpreserved.

Regarding Prather's Confrontational Clause argument, I would find the circuit court did not abuse its discretion because the State only introduced two words from a six page document and redacted every other remaining word. The admission of a redacted statement does not violate the Confrontation Clause when the statement does not incriminate the defendant on its face, even though "its incriminating import was certainly inferable from other evidence that was properly admitted against [the defendant]." *State v. Evans*, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). Here, Prather's rights were not violated because only the two misspelled words from Phillips' statement to the police were admitted with the remaining six page document being redacted. Furthermore, "rapeist" does not incriminate Prather on its face, even

¹⁰ Phillips spelled the word "rapeist."

though its incriminating nature was inferable from other admissible evidence, and Prather had the opportunity to cross-examine Officer Jones, who testified to witnessing Phillips spell the word incorrectly. Thus, I would affirm the circuit court on this issue.

3. As to Prather's argument that the circuit court erred in denying his motion for a directed verdict, I would find evidence supports the circuit court's findings. See *Sellers v. State*, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) ("When ruling on a [defendant's] motion for directed verdict, a [circuit] court is concerned with the existence of evidence, not its weight."); *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002) (finding the appellate court may only reverse the circuit court if no evidence supports the circuit court's ruling); *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.").

Specifically, Prather asserts the State failed to prove proximate cause existed between his actions and Victim's death. However, the record demonstrates the circuit court properly denied Prather's motion for a directed verdict because evidence supported submitting this issue to the jury. See *State v. Dantonio*, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) ("A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." (citation omitted)). Indeed at trial, witnesses testified Prather admitted to severely beating Victim. Moreover, the pathologist testified the stress of the beating and an enlarged heart caused the death of Victim. Accordingly, I would affirm the circuit court's denial of Prather's motion for a directed verdict.

4. As to whether Prather's rights to due process were denied because the State pursued factually inconsistent theories in Prather's and Phillips' cases, I would find this issue unpreserved. Prather failed to raise this issue to the circuit court at trial or in his post-trial motion. See *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); *State v. Varvil*, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) ("Constitutional arguments are no exception to the rule, and if not raised to the [circuit] court are deemed waived on appeal.").

5. As to whether the circuit court abused its discretion by not allowing Prather to introduce a statement from an unavailable witness, I would affirm the circuit court's ruling because, notwithstanding the statement containing two levels of hearsay, I believe the statement to law enforcement does not fall under the present sense impression or excited utterance exceptions to the rule against hearsay. *See* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the [South Carolina Supreme Court] or by statute."); Rule 803(1), SCRE (defining "present sense impression" as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); Rule 803(2), SCRE (defining "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"); *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014) (finding victim's mother's statement to a 911 operator—in which victim's mother stated victim's boyfriend broke into the house, beat up victim, and raped victim—was inadmissible hearsay not covered by the present sense impression exception because the mother did not perceive the rape contemporaneously while she made the statement); *State v. Davis*, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) ("[S]tatements 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 hearsay rule.").

In the instant case, Prather attempted to introduce a statement made by Jody Becknell—who was deceased at the time of the trial—to law enforcement regarding a conversation he had with Victim, wherein Victim described his injured ribs to Becknell. Becknell did not perceive Victim's rib pains, did not witness the event causing the pain, and did not have firsthand information about the event when he relayed the information to the police. Therefore, regardless of whether Victim's statements to Becknell would fall under an exception to hearsay, Becknell's statement to the police would not qualify under the excited utterance or present sense impression exceptions to the rule against hearsay. Accordingly, I would affirm the circuit court as to this issue.

6. Finally, as to whether the circuit court violated Prather's Fourth Amendment rights by not suppressing the Coca-Cola glasses and knife found in his car pursuant to a fatally defective warrant, I would find the circuit court did not commit an error because the inevitable discovery doctrine would permit admission of this evidence. *See State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, [the appellate

court] applies a deferential standard of review and will reverse if there is clear error."); *State v. Spears*, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)) (stating that the inevitable discovery doctrine—an exception to the exclusionary rule—allows for the admission of illegally obtained evidence if the prosecution can establish by a preponderance of the evidence that the evidence would inevitably or ultimately have been discovered by lawful means). Upon review of the record, I find the State satisfied its burden under the inevitable discovery doctrine when testimony detailed the police department's policy of impounding a vehicle and the department's policy of conducting a routine, warrantless inventory of an entire vehicle when impounded. Furthermore, the record demonstrates Prather's vehicle remained in the hospital's parking lot after police detained him, and the car would have been impounded. Therefore, I would find the circuit court committed no error in admitting this evidence.