



The Supreme Court of South Carolina

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April 17, 2020

The Honorable Lisa M. Comer
Clerk of Court, Lexington County
205 East Main Street
Suite 128
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REMITTITUR

Re: The State v. Robert Jared Prather
Lower Court Case No. 2012GS3200219, 2012GS3202621
Appellate Case No. 2018-000753

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CHIEF DEPUTY CLERK

cc:

Elizabeth Anne Franklin-Best, Esquire

Samuel R. Hubbard, III, Esquire

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Susannah Rawl Cole, Esquire

Melody Jane Brown, Esquire

J. Anthony Mabry, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Petitioner,

v.

Robert Jared Prather, Respondent.

Appellate Case No. 2018-000753

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 27954
Heard March 5, 2019 – Filed March 11, 2020

REVERSED

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Susannah Rawl Cole, and Assistant Attorney General J. Anthony Mabry, all of Columbia; and Solicitor Samuel R. Hubbard III, of Lexington, all for Petitioner.

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

JUSTICE JAMES: Robert Jared Prather was convicted of murder and strong arm robbery. The trial court sentenced Prather to concurrent prison terms of thirty years for murder and ten years for strong arm robbery. Prather appealed, and a divided court of appeals reversed and remanded the case for a new trial. *State v. Prather*, 422 S.C. 96, 810 S.E.2d 419 (Ct. App. 2017). We granted the State's petition for a writ of certiorari. We hold the trial court did not err in admitting the State's reply testimony, and we hold Prather's additional sustaining grounds are without merit. We therefore reverse the court of appeals and reinstate Prather's convictions.

I. FACTUAL AND PROCEDURAL HISTORY

At approximately 4:30 a.m. on April 22, 2005, Prather and Joshua Phillips presented to Lexington Medical Center and reported to an ER nurse that Gerald Stewart (Victim) had sexually assaulted Phillips. As detailed below, Prather told the nurse he had beaten Victim with his fists following the assault and that Victim was probably barely alive. Law enforcement officers were dispatched to both Lexington Medical and Victim's residence.

Police found Victim dead in his residence. He was clothed and kneeling face-down into his living room couch. His head was covered by a pillow and his body was covered by a blanket. The word "rapist" was carved into the small of Victim's back, and a dildo was found underneath his right armpit. Police found Victim's roommate, Rob Rabon, asleep in Rabon's bedroom. Rabon testified at trial he was asleep when Victim was murdered. An autopsy revealed Victim died from an irregular heartbeat caused by the stress of a beating and a pre-existing enlarged heart.

Prather and Phillips were indicted for murder, first-degree burglary, armed robbery, possession of a firearm or knife during the commission of a violent crime, and filing a false police report alleging the commission of a felony. Prather's first trial ended in a hung jury. Prather was then re-indicted for all the original charges except the weapon charge and the false police report charge. Phillips pled guilty to voluntary manslaughter and armed robbery after Prather's second trial. The trial court's various rulings during the second trial are the focus of this appeal.

During the second trial, Rabon testified he moved in with Victim about a week before the incident but was planning to move out after discovering Victim was homosexual. Rabon testified that on the evening before Victim died, he returned to Victim's residence and found Prather and Phillips with Victim. Rabon testified Phillips hit Victim in the face, busting Victim's lips. Rabon testified to later purchasing and using cocaine with Prather, drinking several beers, and retiring alone to his bedroom, as he had to go to work the following morning. Rabon testified he

later came out of his bedroom and saw Victim "kind of over" Phillips in the living room engaging in a sexual act of some kind. Rabon testified he later witnessed Victim and Phillips on Victim's bed and noted Victim was nude and Phillips was also nude or wearing very little. Rabon testified Prather was not in the residence during either encounter. Rabon testified he later heard Prather yelling for Phillips and heard Victim leave the residence with Prather. Rabon testified he is partially deaf in one ear and sleeps very soundly if he sleeps on his "good" ear. Rabon claimed he went to sleep and woke up to about "four cops standing over me."

Donna Sharpe, an ER nurse at Lexington Medical, testified Phillips and Prather presented to the emergency room at approximately 4:30 a.m. Sharpe testified her ensuing conversation with Prather and Phillips in the triage area was so alarming that she typed detailed notes of the conversation within an hour of its end. She testified Prather told her that he and Phillips were drinking at Victim's house, and that Prather left Phillips at the house and later returned. Sharpe testified Prather told her that when he (Prather) returned, Victim answered the door nude and asked Prather if he knew that Phillips liked receiving fellatio. Sharpe testified Prather told her he went inside the home and found Phillips wearing only his underwear. Sharpe testified Prather and Phillips admitted to beating up Victim, and Prather said to her, "He's probably still laying there."

Sharpe testified Prather then asked to wash his hands, and Sharpe told him he could use the sink there in the triage area. Sharpe testified that as Prather washed his hands, he "kind of chuckled" and said he did not like getting blood on his hands. Sharpe then asked Prather for Victim's address, and Prather asked Phillips, "Do you still have his wallet?" According to Sharpe, Phillips handed Victim's wallet to Prather, and Prather took Victim's identification card from the wallet and gave the wallet and card to her. Sharpe in turn gave these items to her supervisor, who gave them to law enforcement. Sharpe testified Prather asked her, "I'll probably go to jail for this, won't I?" Sharpe asked Prather if he was referring to him beating Victim; she stated Prather's response to her was, "[Y]es, I beat him. But he's alive though, maybe barely though."

Officer Brandon Field was dispatched to check on Victim and entered Victim's home through a partially open window. Field testified he found Victim dead "underneath a blanket, kind of on [his] knees, knelt down, like face-down on the couch." Paramedic Virginia Youmans testified the word "rapist" was carved on the small of Victim's back. South Carolina Law Enforcement Division (SLED) Agent Al Stuckey testified he discovered a dildo underneath Victim's right armpit. Of note in this appeal are (1) the placement of the blanket and pillow, (2) the carving of the word "rapist," and (3) the placement of the dildo under Victim's armpit.

Officer Ronald Suber spoke with Prather at Lexington Medical. Suber testified Prather told him that after he, Phillips, and Victim finished drinking, he left Phillips passed out on Victim's couch. Suber's testimony regarding Prather's account of his departure and return to Victim's home tracked Nurse Sharpe's testimony as recited above. Suber testified Prather told him the last time he entered Victim's home, he found Phillips asleep in a bedroom wearing only his underwear. Prather said he woke Phillips up by shaking him, yelling at him, and pulling his hair. Suber further testified Prather told him, "I beat the shit out of [Victim] and those were devastating blows."

Sergeant Wayne Kleckley testified he also spoke with Prather at Lexington Medical and that Prather told him he "beat the shit out of [Victim,]" and that he "laid some devastating blows on him." Kleckley testified Prather demonstrated by balling up his fist and striking the palm of his other hand.

Dr. Janice Ross, a pathologist, testified the cause of Victim's death was homicide; specifically, she testified Victim's pre-existing enlarged heart and the stress of being beaten caused cardiac arrhythmia (rapid heartbeat), which in turn caused Victim to die. She testified Victim suffered bruising around his left eye, a fractured nose, scratch marks on his right thigh, bruises underneath the skin on his right chest and upper abdomen, two fractured ribs on his left side, bruising to his scalp, bruises and lacerations on the inside of his lips, a superficial burn mark consistent with a cigarette burn to the middle finger of his right hand, and an abrasion around his knuckle. Dr. Ross was unable to rule out smothering as contributing to Victim's death since he was found face-down on a couch.

Police found a Coca-Cola collectible box on the front passenger-side floorboard of Prather's car. Victim's aunt testified Victim inherited the item from his father and that Victim treasured the item and would never part with it.

Prather testified he and Phillips visited Victim and drank with Victim throughout the day before Victim died. Prather testified that sometime after Rabon arrived at Victim's home, Phillips and Victim got into a fight, and Phillips hit Victim in his face, mouth, chest, and stomach. Prather testified Phillips later hit Victim in the mouth again. Prather testified he left and returned to Victim's residence and that he and Victim later went to a bar. Prather testified that after he took Victim back to Victim's residence, he left to try to find some cocaine for Victim. According to Prather, when he returned to Victim's residence, Victim emerged from his bedroom nude with an erection and asked Prather if he ever had sexual relations with Phillips and whether he knew Phillips enjoyed receiving fellatio. Prather testified Victim walked towards him and when Prather stated he was going to take Phillips home,

Victim responded that he was "not going any [expletive] where." Prather testified Victim grabbed his arm and that he hit Victim three times in self-defense.

Prather testified that when he woke Phillips up to take him home, he found a dildo on the bed by Phillips' feet. Prather testified Phillips hit Victim while they were looking for Phillips' clothes. Prather further testified that after he found Phillips' clothes, he and Phillips left Victim's residence, but Phillips went back inside to find his shoes. Prather testified he did not go back inside and that when he left Victim's residence, Victim was alive. Prather testified he waited for Phillips for about eight to ten minutes and that Phillips emerged from Victim's residence "walking really, really fast to the car" with something in his hands.

Prather denied telling Nurse Sharpe that Victim was barely alive. Prather further testified he did not beat Victim down onto the sofa, carve "rapist" into Victim's back, burn Victim's finger with a cigarette, cover Victim's body with the blanket, place the pillow over Victim's head, or place the dildo under Victim's armpit. Prather reiterated Phillips was alone in Victim's residence for about eight to ten minutes.

After the defense rested, the State called Paul LaRosa of SLED in reply as an expert in crime scene analysis. The State explained it did not intend to present LaRosa "to develop a profile or to say that anybody is consistent with that type of individual, just to explain the crime scene." The State contended *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), allowed such testimony.

During an *in camera* hearing, LaRosa testified he had been employed by SLED for eighteen years: from 1994 to 2000 as a special agent in the crime scene unit collecting and processing evidence and analyzing and reconstructing crime scenes based on collected evidence; from 2005 to 2010 as a violent crimes investigator; and from 2010 to 2012 as a criminal profiler assigned to the behavioral science unit. In the behavioral science unit, LaRosa completed a two-year understudy program that mirrored the Federal Bureau of Investigation (FBI) criminal profiler study program, with two court-qualified SLED crime scene analysts. He completed a thirty-day internship with the South Carolina Department of Mental Health (SCDMH) under a forensic psychiatrist and psychologist, completing rounds at psychiatric hospitals assessing patients. LaRosa completed a two-month internship with the FBI, working independently on an active case load that was peer-reviewed by FBI supervisors.

LaRosa testified *in camera* that he would combine forensics and crime scene reconstruction with the psychology and behavior exhibited at the crime scene to give an opinion as to the number of people present after the crime. LaRosa testified he reviewed photographs and a video of the scene; reports from first responders and law enforcement; the autopsy report; the transcript from the first trial; and at least one statement from Phillips, which he did not use in his analysis. LaRosa also watched Prather's trial testimony. LaRosa testified there were two phases at the crime scene evidencing two specific personalities: he testified the first phase was "staging," based on the carving and placement of the dildo, and the second phase was "undoing," based on the covering of Victim with a blanket and pillow. LaRosa testified two people were present during these phases because the two phases indicated two personalities. LaRosa testified he had not created a profile on Prather or Phillips because he did not have their past histories and psychological files. He also testified he would not be offering an opinion as to whether Prather "did anything."

Prather objected to LaRosa being qualified as an expert in crime scene analysis and to his proffered testimony. He first argued LaRosa's testimony was improper reply testimony because it did not purport to rebut anything presented by the defense. Prather also argued LaRosa was not qualified in the field of crime scene analysis and his testimony was not reliable.

The trial court found LaRosa's testimony was proper reply because it was in response to Prather's testimony as to who was with Victim at various times before and after Prather claimed he left the residence. The trial court concluded LaRosa's testimony was relevant, probative, and reliable on the issues of staging, directed anger, and covering, and the testimony would not invade the province of the jury by "pointing a finger to say who did what in this instance." The trial court cautioned the State that no suggestion could be made to the jury as to who did what at the scene.

LaRosa testified before the jury that offenders engage in "staging" to alter "the crime scene from what truly happened. It is to get law enforcement . . . on a different idea." He testified the carving and the placement of the dildo were two instances of staging at this crime scene. He concluded the carving was staging "because it doesn't impact the actual murder itself. . . . 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. I want the world to know that this guy is a rapist." LaRosa further testified the placement of the dildo underneath Victim's armpit was staging because it "had nothing to do with the murder." He concluded the placement of the dildo under Victim's armpit was done for "shock value."

LaRosa explained offenders use "undoing" to "symbolically erase what has happened" at a crime scene and that the covering of Victim with a blanket and pillow was "a classic case of undoing." LaRosa testified the staging and undoing in this case were in absolute conflict with one another, with one personality deciding in the heat of the moment to carve on Victim's back and place a dildo under his arm and the other personality using the blanket and pillow to erase what had just occurred.

LaRosa acknowledged there were three people other than Victim in Victim's house around the time of the murder (Rabon, Prather, and Phillips). He did not offer an opinion as to whether any of the three engaged in the staging or undoing. LaRosa also did not offer an opinion as to whether either the "staging" personality or the "undoing" personality participated in the murder, but he testified "there were specifically two people in there after the crime," one carving on Victim's back and placing the dildo, and the other placing the blanket and pillow over Victim.

The trial court denied Prather's motion for a directed verdict, and the jury convicted Prather of murder and strong arm robbery (a lesser-included offense of armed robbery). The trial court denied Prather's motion for a new trial, and Prather appealed.

A divided court of appeals reversed and remanded for a new trial. After the State petitioned for rehearing, the court of appeals withdrew its original opinion and issued a revised opinion. *State v. Prather*, 422 S.C. 96, 810 S.E.2d 419 (Ct. App. 2017). The majority held the trial court erred in admitting LaRosa's testimony because it was not proper reply testimony. *Id.* at 109, 810 S.E.2d at 426. The majority further held the erroneous admission of LaRosa's testimony was not harmless. *Id.* at 109-10, 810 S.E.2d at 426. Judge Williams dissented, concluding the trial court did not abuse its discretion in allowing LaRosa's reply testimony. *Id.* at 110, 810 S.E.2d at 426 (Williams, J., dissenting). Judge Williams did not express an opinion on the reliability of LaRosa's testimony, finding instead that the testimony did not prejudice Prather. Judge Williams also concluded Prather's remaining arguments had no merit. We granted the State's petition for a writ of certiorari.

II. DISCUSSION

A. ADMISSION OF REPLY TESTIMONY

The State argues the court of appeals erred in holding LaRosa's testimony was not limited to refuting Prather's testimony but was instead used to complete the State's case-in-chief. The State also contends the court of appeals erroneously held Prather could not have anticipated LaRosa's testimony.

Prather argues the court of appeals properly reversed the trial court because LaRosa's testimony extended beyond rebutting Prather's testimony and introduced an entirely new forensic science the defense could not have anticipated. Prather contends the State should have offered LaRosa's testimony during its case-in-chief.

As an additional sustaining ground, Prather argues the trial court abused its discretion in qualifying LaRosa as an expert in crime scene analysis and finding LaRosa's testimony reliable. Prather urges this Court to find "this area of 'forensic science' is not scientifically valid" because "this kind of testimony has not been scientifically validated and is extremely controversial." In addition, Prather argues the trial court abused its discretion in admitting LaRosa's testimony because the testimony improperly invaded the province of the jury because it related to Prather's intent. We will first address whether LaRosa's testimony satisfied the requirements of Rule 702 of the South Carolina Rules of Evidence, and we will then address whether LaRosa's testimony was proper reply testimony.

1. Rule 702, SCRE

We have previously referred to crime scene analysis testimony as non-scientific expert testimony. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (holding that although the law at the time of the trial "instructed that the reliability of nonscientific expert testimony was a determination to be made by the jury," under later case law, the trial court was required to evaluate the reliability of the State's proposed expert's testimony in crime scene analysis and victimology). Courts in other jurisdictions have concluded crime scene analysis is a body of specialized knowledge. *See State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) ("The [crime scene analysis] testimony at issue in this case . . . is not based on scientific theory and methodology, but rather, is based on nonscientific 'specialized knowledge,' that is, the expert's experience."); *Simmons v. State*, 797 So. 2d 1134, 1151 (Ala. Crim. App. 1999) (internal citations omitted) ("Crime-scene analysis, which involves the gathering and analysis of physical evidence, is generally recognized as a body of specialized knowledge. Therefore, because crime-scene analysis is not scientific evidence, we conclude that we are not bound by the test enunciated in *Frye*.").

Thus, before admitting non-scientific expert witness testimony, a trial court must determine whether: (1) the qualifications of the expert are sufficient and (2) the subject matter of the expert's testimony is reliable. *See State v. White*, 382 S.C. 265, 273-74, 676 S.E.2d 684, 688-89 (2009) (citing Rule 702, SCRE). "The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion." *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d

336, 338 (2015). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *Id.* "An abuse of discretion occurs when the conclusions of the [trial] court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.*

a. LaRosa's Qualifications

"The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). "To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (quoting *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995), *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)).

As noted above, LaRosa testified of his eighteen-year employment history with SLED and his extensive experience in crime scene analysis. His qualifications include two years of training with the FBI in its criminal profiler study program, his internship with a SCDMH forensic psychiatrist and psychologist (and his continuing relationship with SCDMH), as well as another internship with the FBI, during which he worked on active cases under peer-review by FBI supervisors. LaRosa testified he had been qualified as an expert in crime scene reconstruction and assessment in federal court and in general sessions court. He testified that in this case, he would combine forensics and crime scene reconstruction with the psychology and behavior exhibited at the instant crime scene to give an opinion only as to the number of people present after the crime had been committed.

We hold the trial court did not abuse its discretion in finding LaRosa was qualified as an expert in crime scene analysis.

b. Reliability of LaRosa's Testimony

Before admitting expert testimony, a trial court must qualify the expert and determine whether the subject matter of the expert's proposed testimony is reliable, as required by Rule 702, SCRE. *See Tapp*, 398 S.C. at 388-89, 728 S.E.2d at 474-75; *see also White*, 382 S.C. at 273, 676 S.E.2d at 688 ("Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter."). In *Tapp*, the trial court determined a witness was qualified in the field of crime scene analysis, but we held the trial court erroneously allowed

the jury to resolve the question of whether his testimony was reliable. 398 S.C. at 389, 728 S.E.2d at 475. As noted above, even though we concluded the trial court erred in admitting the testimony without first resolving the threshold reliability issue, we held this error was harmless because the witness's testimony could not have contributed to the verdict. *Id.* at 390, 728 S.E.2d at 476. We have not had the occasion to review a trial court's finding that a crime scene analysis expert's testimony was reliable.

The trial court found LaRosa's testimony to be "sufficiently reliable to be admitted," as required by Rule 702, SCRE, and *Tapp*. However, the court of appeals' majority found "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." *Prather*, 422 S.C. at 110 n.5, 810 S.E.2d at 426 n.5.

As noted, LaRosa testified as to the phases of staging and undoing and the purposes of those acts. This type of testimony has been admitted as reliable crime scene analysis testimony in other jurisdictions. *See Stevens*, 78 S.W.3d at 829, 831, 835 (upholding the trial court's decision to limit an FBI expert's testimony to his analysis of the evidence found at the crime scene, including testimony regarding the staging of the crime scene and the possibility that the homicides were committed by more than one offender); *People v. Jackson*, 165 Cal. Rptr. 3d 70, 75, 83-84 (Cal. Ct. App. 2013) (holding an FBI agent's testimony was "an indisputably admissible class of evidence," where the agent performed a crime scene assessment that was "irrespective of who committed the crime," and "[t]he purpose of his analysis was to behaviorally and forensically assess the crime and crime scene dynamics through the interaction of the offender or offenders, [the victim], and the location, in order to determine whether the crime scene had been staged, to focus on why the homicide occurred, and if an opinion could be rendered as to the offender's motive").

Prather argues LaRosa's testimony amounted to a "criminal profile" and that criminal profiling is useful only as an investigative tool and is not sufficiently reliable to be admitted as expert testimony. A criminal profile is "a collection of conduct and characteristics commonly displayed by those who commit a certain crime." *People v. Robbie*, 112 Cal. Rptr. 2d 479, 484 (Cal. Ct. App. 2001). "A profile is simply an investigative technique. It is nothing more than a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity." *United States v. McDonald*, 933 F.2d 1519, 1521 (10th Cir. 1991). "[T]he syllogism underlying profile evidence [is that]

criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal." *Robbie*, 112 Cal. Rptr. 2d at 485.

An example of a criminal profile can be found in *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999). In *Spann*, an expert in crime scene analysis and criminal personality profiling testified on behalf of the defendant and "profiled the killer of [] three women as a white male in his mid-20's to mid-30's with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of child abuse, and knowledge of the area." *Id.* at 621, 513 S.E.2d at 100. We did not approve profiling testimony in *Spann*; we simply noted in *Spann* that the defendant did not fit the expert's criminal profile.

LaRosa did not examine the mental health histories of either Prather or Phillips, nor did he create criminal profiles for them. He also did not offer an opinion as to what either man did or did not do at the scene. LaRosa's testimony cannot be construed as drawing conclusions regarding the type of person(s) who committed the murder or the type of persons who carved on Victim's back and covered his body. Such testimony has been excluded in other jurisdictions as unreliable. *See Stevens*, 78 S.W.3d at 835 (holding the portion of the crime scene analysis expert's conclusions as to the type of individual who committed the crime based on the physical evidence found at the scene was unreliable and therefore inadmissible). LaRosa testified in general terms regarding the number of persons "in there after the crime" and never mentioned Prather's, Phillips', or Rabon's names. His testimony demonstrated the conflicting personalities of someone who staged the crime scene (carving and placement of the dildo) and someone who undid the crime scene (covering Victim). Importantly, LaRosa acknowledged he could not tell who participated in the killing of Victim. We conclude LaRosa's testimony did not rise to the level of criminal profiling.

Unlike the court of appeals, we do not consider vital the fact that LaRosa did not visit the crime scene, reviewed only a portion of Phillips' statements to law enforcement, and did not review anyone's mental health history. The photographs and other information the State provided to LaRosa evidenced the superficial carving, the murdered Victim, and the placement of the pillow, blanket, and dildo—the pertinent information LaRosa needed to render his opinions. As we have stated several times, LaRosa's opinions went only to the number of personalities "in there after the crime." LaRosa did not offer an opinion as to whether either personality murdered Victim, and he did not offer an opinion as to whether Rabon, Prather, or Phillips were involved in the staging or undoing. The mental health histories of Rabon, Prather, and Phillips were of no consequence to LaRosa's testimony on this point.

We hold the trial court did not err in finding LaRosa's crime scene analysis testimony reliable. We share the reluctance of many courts to admit expert testimony in a criminal trial that rises to the level of a "criminal profile" of the perpetrator. We are also mindful that "[p]rofile' testimony and permissible expert opinion overlap, which underscores the necessity of objecting to questionable testimony during trial so that the trial court can limit any objectionable 'profile' aspect and channel the testimony toward admissible expert opinion instead." *State v. Avendano-Lopez*, 904 P.2d 324, 327 (Wash. Ct. App. 1995). Our holding shall in no way be considered as our approval of criminal profiling evidence in the courts of this State.

2. Scope of Reply Testimony

"The admission of reply testimony is a matter within the sound discretion of the trial judge." *State v. Stewart*, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984). "The admission of testimony which is arguably contradictory of and in reply to earlier testimony does not constitute an abuse of discretion." *Id.* Rather, "[a]n abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

"Reply testimony should be limited to rebuttal of matters raised by the defense." *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). "Any arguably contradictory testimony is proper on reply." *State v. South*, 285 S.C. 529, 535, 331 S.E.2d 775, 779 (1985).

In *State v. McDowell*, we held the trial court did not abuse its discretion in permitting the examining pathologist to testify on reply that the murder victim's head was resting against a hard, flat object at the time the third shot was fired. 272 S.C. 203, 206-07, 249 S.E.2d 916, 917 (1978). The defendant argued the State was required to introduce the pathologist's testimony during its case-in-chief, and therefore, the testimony was improper. We held the pathologist's testimony was proper reply testimony to the defendant's testimony that the victim was standing when he fired the third shot, which was in direct opposition to his earlier statements. *Id.* We reasoned the pathologist's testimony was unnecessary until the defendant contradicted his statement to law enforcement that the victim was lying on the floor when he (the defendant) fired the last shot. *Id.*

Here, the court of appeals' majority distinguished this case from *McDowell* and other cases, stating "[u]nlike [those] 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*, 422 S.C. at 106, 810 S.E.2d at 424. The majority cited Prather's testimony that he waited in his vehicle for Phillips for about ten minutes and that he denied carving anything into Victim's back or covering him with a blanket. The majority noted Prather did not testify to the number of perpetrators or as to anyone's motive for the carving, the placement of the dildo, or the covering of Victim. *Id.* at 107, 810 S.E.2d at 424. The majority also concluded LaRosa's "broad expert testimony" "explain[ing] the crime scene" could not reasonably be anticipated by Prather. *Id.* at 107, 810 S.E.2d at 424.

We disagree. Prather testified that when he and Phillips left Victim's residence, Victim was alive, walking around, not mutilated, not covered, and not face-down in the couch. Prather further testified that Phillips went back inside the residence to find his shoes, leaving Prather in the car. The inferences arising from Prather's testimony are obvious—when Phillips went back inside the dwelling, he was alone with Victim, thus placing blame for the crimes solely upon Phillips. LaRosa's testimony provided another explanation for the number of people present immediately after Victim was murdered. Consequently, until Prather testified that Victim was alive, was not mutilated, and was not covered just before Phillips went back inside, LaRosa's testimony was unnecessary, much like the pathologist's testimony in *McDowell*.

At the least, LaRosa's testimony was "arguably contradictory" to Prather's testimony. *See South*, 285 S.C. at 535, 331 S.E.2d at 779 ("Any arguably contradictory testimony is proper on reply."). Although Prather did not testify about the motivation for someone to carve "rapist" into Victim's back or to cover Victim's body, LaRosa's testimony of the motives for staging and undoing was necessary to his conclusion that the two separate behaviors evidenced two conflicting personalities. This provided the foundation for LaRosa's testimony that two people were present after the crime and countered Prather's testimony that only one person was present at that time. *See State v. Durden*, 264 S.C. 86, 90, 212 S.E.2d 587, 589 (1975) ("The reply testimony was made necessary by the evidence which the appellant had submitted. The reply testimony did not go beyond a refutation of that which the appellant's witness had asserted. It can hardly be argued that the appellant's counsel was taken by surprise.").

3. Province of the Jury

We also reject Prather's argument that LaRosa's testimony invaded the province of the jury by improperly injecting evidence of Prather's intent. "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. Such testimony is admissible, "so 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).

Again, LaRosa testified there were two personalities present "after the crime." LaRosa did not directly or indirectly compare Prather's behavior to either of those personalities, and LaRosa did not offer an opinion as to who committed the murder. LaRosa's testimony allowed the jury to reach its own conclusion regarding Prather's state of mind.

We hold the trial court did not err in admitting LaRosa's testimony.

B. ADDITIONAL SUSTAINING GROUNDS

Since the court of appeals held the introduction of LaRosa's reply testimony was reversible error, the majority declined to address a number of other issues Prather raised on appeal. Prather has presented five of those issues to this Court as additional sustaining grounds.

1. Prosecutorial Misconduct and Due Process Violation

We find unpreserved Prather's argument that the State committed prosecutorial misconduct and violated his right to due process when it "sandbagged" the defense with LaRosa's rebuttal testimony. Prather never raised prosecutorial misconduct or due process concerns at trial. He had the opportunity to do so during the *in camera* hearing concerning the admissibility of LaRosa's testimony and at the time LaRosa testified at trial. The first time Prather raised these issues was during his post-trial motion for a new trial. *See State v. Holmes*, 320 S.C. 259, 266, 464 S.E.2d 334, 338 (1995) (providing new trial motions may not be used to raise evidentiary issues for the first time).

2. Confrontation Clause Violation

We find unpreserved Prather's arguments that the trial court abused its discretion in allowing the State to introduce into evidence portions of Phillips' statements to law enforcement because they were inadmissible hearsay, they were unreliable, and they were irrelevant. Phillips did not testify, and during trial, Prather asserted only a Confrontation Clause violation. We will therefore address only that

argument. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (internal citation omitted) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. . . . A party may not argue one ground at trial and an alternate ground on appeal.").

As noted above, the word "rapist"—correctly spelled—was carved into Victim's low back. The State introduced two one-word cutouts from Phillips' six-page handwritten statement to law enforcement. The cutouts showed he twice misspelled the word "rapist" as "rapeist." Nothing else from Phillips' statement was introduced into evidence. Captain Mark Jones testified he witnessed Phillips write the statement and neither asked Phillips to write the word nor told Phillips how to spell it. Captain Jones testified he did not inform Phillips of the import of the word, but Jones admitted he did not know if Phillips misspelled the word on purpose.

Phillips did not testify during Prather's trial. Prather argues Phillips' statement to law enforcement was testimonial and that the State's use of only the two one-word cutouts of the word "rapeist" did not diminish the overall testimonial nature of the cutouts. Prather contends the State used the cutouts to show he carved the word "rapist" on Victim's back. Prather argues a Confrontation Clause analysis does not depend on the character of the evidence, but on its purpose. We hold Prather's confrontation rights were not violated.

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const. amend. VI). This constitutional guarantee includes the right to cross-examine those witnesses. *State v. McDonald*, 412 S.C. 133, 139, 771 S.E.2d 840, 843 (2015). A defendant's rights under the Confrontation Clause are violated, even if a cautionary instruction is given, when a non-testifying codefendant's statement that expressly inculpatates a defendant is admitted at trial. *See Bruton v. United States*, 391 U.S. 123, 135-36 (1968).

"The [United States Supreme Court], in *Richardson v. Marsh*, specifically declined to extend this rule to the situation when a defendant's name or any reference to defendant is redacted, even though the statement's application to him is linked up by other evidence properly admitted against the defendant." *State v. Evans*, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994). However, in *Gray v. Maryland*, the United States Supreme Court found that "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, still falls within *Bruton's* protective rule" since it "refers directly to the 'existence' of the nonconfessing codefendant." 523 U.S. 185, 192 (1998).

In *State v. Evans*, the defendant was convicted of charges arising from a deadly automobile accident. 316 S.C. at 306, 450 S.E.2d at 49. A State's witness testified the only passenger in the defendant's vehicle discussed the accident with him and made the statement, "I wasn't driving anyway." *Id.* The defendant argued the statement implicated him as the driver and, because the passenger did not testify at trial, the admission of this testimony was a violation of the Confrontation Clause. *Id.* at 306-07, 450 S.E.2d at 49-50. We disagreed, holding the admission of the statement was not a Confrontation Clause violation because "[t]he statement did not 'on its face' incriminate [the defendant], although its incriminating import was certainly inferable from other evidence that was properly admitted against him." *Id.* at 307, 450 S.E.2d at 50.

Most of our State's recent jurisprudence regarding Confrontation Clause violations focuses on the admissibility of a co-defendant's full-confession implicating another party with insufficient redactions. See *McDonald*, 412 S.C. at 141, 771 S.E.2d at 844 (finding a nontestifying codefendant's confession insufficiently redacted by replacing a defendant's name with the phrase, "another person"); *State v. Henson*, 407 S.C. 154, 158, 166, 754 S.E.2d 508, 510, 514 (2014) (finding the State's use of a nontestifying codefendant's confession that replaced the defendant's name with "the guy," "he," and "him" violated the Confrontation Clause because it was inferable without relying on other evidence that the confession referred to and incriminated the defendant).

We hold the redaction of Phillips' statement to the point where only the word "rapeist" remained rendered the evidence nontestimonial. See *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (providing testimony is generally a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828))). The word "rapeist" did not infer anything about what specifically transpired that night or who killed Victim. Like the statement in *Evans*, the word "rapeist" did not incriminate Prather on its face. Although the incriminating nature of the single misspelled word could be inferred in light of the other evidence presented at trial (specifically that the word was spelled correctly as carved on Victim's back), the word did not facially incriminate Prather. We therefore reject Prather's Confrontation Clause argument.

3. Directed Verdict

Prather argues the trial court erred in denying his motion for a directed verdict as to the murder charge because the evidence did not rise above a "mere suspicion" that Prather caused Victim's death. Prather contends Victim could have died at any

time despite Prather's physical assault on Victim; in support of this proposition, Prather cites the presence of drugs and alcohol in Victim's system and Victim's obesity, enlarged heart, and cirrhosis of the liver.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "In an appeal from the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State." *State v. Cope*, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013). We must affirm the trial court's decision to submit the case to the jury if there is any direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt. *Id.* However, we must reverse if the evidence only gives rise to a mere suspicion of the defendant's guilt. *See Hernandez*, 382 S.C. at 625, 677 S.E.2d at 605. "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001).

In *State v. Burton*, 302 S.C. 494, 397 S.E.2d 90 (1990), we discussed the issue of proximate cause in homicide cases. "The 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 that it be a proximate cause actually and contributing to the death of the deceased." *Id.* at 496-97, 397 S.E.2d at 91. A person "is deemed to be guilty of the homicide if the injury inflicted contributes immediately to the death of the deceased." *Id.* at 498, 397 S.E.2d at 92.

Here, Victim's numerous injuries included cuts to his lower back, two fractured ribs, a fractured nose, bruising to his face, head, and body, and a burn mark on his finger. The pathologist testified the beating Victim endured caused him to die, though she could not rule out smothering as a contributing factor because of the position of Victim's body on the couch. The evidence as a whole raises the inference that he was left in that position as a result of the beating. ER nurse Sharpe testified Prather told her he beat Victim, that Victim was "probably still laying there," and that Victim was alive, "maybe barely though." Sergeant Kleckley and Officer Suber both testified they interviewed Prather at the ER and that Prather told them: "I beat the shit out of [Victim]" with "devastating blows."

The State presented sufficient evidence to establish Victim's death was caused by a severe beating perpetrated by Prather. The trial court properly denied Prather's motion for a directed verdict as to the murder charge.

4. The State's Supposed Pursuit of Inconsistent Theories

Phillips pled guilty to voluntary manslaughter and armed robbery one week after Prather was convicted.¹ Prather claims the State presented facts during Phillips' plea hearing that were inconsistent with the State's presentation of evidence and theories during Prather's trial. Prather primarily claims the State advanced inconsistent theories as to who carved "rapist" on Victim's back. We find this argument unpreserved. We acknowledge Prather could not have raised this issue to the trial court until after Phillips pled. However, Prather also failed to raise this issue in his post-trial motion for a new trial and supporting memorandum, the latter of which was filed over a month after Phillips' guilty plea. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

5. Statement from an Unavailable Witness

During trial, Prather attempted to introduce into evidence a written statement given to law enforcement by Ralph Jody Webb Becknell, a purported witness who died prior to Prather's trial. The document itself is not in the record, but the colloquy between defense counsel and the trial court indicates Becknell gave a statement to law enforcement on April 22, 2005. Becknell evidently stated he had a phone conversation with Victim between 9:15 p.m. and 10:00 p.m. on the night of the killing. The colloquy further indicates Becknell stated Victim told him his ribs were hurting. Prather contends this would establish Victim sustained significant blows to his ribs several hours before Prather struck Victim with his fists.

The trial court ruled the statement was inadmissible hearsay. Prather contends the statement was admissible as a present sense impression under Rule 803(1) of the South Carolina Rules of Evidence or as an excited utterance under Rule 803(2), SCRE, and would have corroborated his defense that he was not responsible for Victim's death. We hold the trial court properly excluded Becknell's statement.

Hearsay is defined 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." Rule 801(c), SCRE. "Hearsay is not admissible except as provided by [the South Carolina Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. Here, we have hearsay included

¹ Phillips pled under the theory of accomplice liability, with Prather as the principal actor. We detect no inconsistency in the core facts presented during Phillips' plea.

within hearsay, as Victim's statement to Becknell was hearsay, and Becknell's statement to law enforcement was hearsay. Hearsay included within hearsay is not necessarily inadmissible; such may be admitted if each part of the combined statements satisfies an exception to the hearsay rule. *See* Rule 805, SCRE.

Rule 803, SCRE, contains many exceptions to the rule against hearsay, regardless of whether the declarant is available as a witness. Prather argues Victim's statement to Becknell that his ribs were hurting was admissible under Rule 803(1) as a present sense impression. Rule 803(1) defines a 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." To qualify 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, 533, 759 S.E.2d 434, 438 (Ct. App. 2014).

Prather argues Victim's statement to Becknell was also admissible under Rule 803(2) as an excited utterance, which the rule defines 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." For 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. Washington*, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "[T]he intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of the circumstances surrounding the statement when it was uttered." *Ladner*, 373 S.C. at 119-20, 644 S.E.2d at 693.

Even if Victim's statement to Becknell was a present sense impression under Rule 803(1) or an excited utterance under Rule 803(2), Becknell's statement to law enforcement clearly does not fall within either exception. As for Rule 803(1), Becknell, as the declarant to law enforcement, did not personally perceive the event causing Victim's pain and his statement to law enforcement was not contemporaneous with the event. As for Rule 803(2), there is no evidence whatsoever that Becknell gave his statement to law enforcement while he was under stress or excitement of any kind. Therefore, the trial court did not err in excluding Becknell's written statement.

III. CONCLUSION

We hold the trial court did not err in admitting Agent LaRosa's reply testimony, and we reject each of Prather's additional sustaining grounds. We therefore reverse the court of appeals and reinstate Prather's convictions and sentences.

REVERSED.

BEATTY, C.J. and KITTREDGE, J., concur. FEW, J., dissenting in a separate opinion in which HEARN, J., concurs.

JUSTICE FEW: I agree with the majority that the subject matter of Agent LaRosa's testimony—that two different people acted on this crime scene—was a proper subject of reply testimony after Prather clearly suggested in his testimony that Phillips acted alone. I also agree the State presented sufficient evidence to support the trial court's conclusion that LaRosa is qualified as an expert in crime scene analysis. I disagree, however, that the opinions LaRosa actually gave—which go far beyond the subject of crime scene analysis—should have been admitted into evidence in this case. I would affirm the court of appeals in result.

When the State called LaRosa to testify in reply, it informed the trial court it was doing so "just to explain the crime scene." However, the State also told the trial court LaRosa would "describe[] the behavior and the motives of the people who have committed a crime." Testimony regarding the "behavior" of the person who committed the crime is crime scene reconstruction. *See State v. Ellis*, 345 S.C. 175, 177-78, 547 S.E.2d 490, 491 (2001) (officer qualified as an expert in crime scene processing and fingerprint identification was qualified to testify to measurements taken at the scene, recovery of shell casings, and identification of blood stains, but was not qualified to testify regarding the location and position of the victim's body at the time of the injury based on crime scene reconstruction). Testimony regarding the motives of the person who committed the crime is forensic psychology, and no expert may testify to the state of mind of a criminal defendant. *See State v. Commander*, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011) (holding an "expert [may] not opine on the criminal defendant's state of mind or guilt").

In his actual testimony, LaRosa gave opinions that go far beyond crime scene analysis. For example, he testified that carving "rapist" in the victim's back shows what the perpetrator was thinking. He testified,

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. I want the world to know that this guy is a rapist." Whether or not that is what they believe, I can't say, but they want to project that to the first responders that this guy's a rapist.

He also gave his opinion that the perpetrator intentionally placed the dildo under the victim's armpit with the intent of creating "shock value to show what type of rapist he is." He then testified that, in his opinion, a different person engaged in "undoing" with the intent of "symbolically erasing what has occurred." He then went on to give his opinion that the two different actors at this crime scene were different personalities with different emotions.

They are in absolute conflict with each other. You have this . . . 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 different offenders within that scene at the same time.

The subject matter of Agent LaRosa's testimony was a proper subject of reply testimony, and the State presented sufficient evidence to qualify him as an expert in crime scene analysis. However, the opinions LaRosa actually testified to went well beyond crime scene analysis to the state of mind of a criminal defendant.

HEARN, J., concurs.

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

The State, Respondent,

v.

Robert Jared Prather, Appellant.

Appellate Case No. 2014-001500

Appeal From Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 5514
Heard April 11, 2017 – Filed September 6, 2017
Withdrawn, Substituted, and Refiled December 6, 2017

REVERSED AND REMANDED

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

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General W. Jeffrey Young, 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

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

fight broke up, but when they came back inside Phillips hit Victim twice again 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.

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").

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 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); *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) (finding admission of rebuttal testimony appropriate when "[t]he Commission properly limited the rebuttal evidence strictly to a reply to [the appellant]'s evidence, and the Commission's Order demonstrates clearly that [the respondents'] rebuttal evidence was related only to the specific issues raised by [the appellant's witness]").

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 one person committed the crime and associated acts, regardless of what the jury may have inferred from it.

He did not testify they happened in a specific manner or for a specific reason but simply denied doing them or being present when they occurred. Such broad expert testimony on reply "explain[ing] the crime scene" could not reasonably be anticipated by Prather. See *McGaha v. Mosley*, 283 S.C. 268, 277, 322 S.E.2d 461, 466 (Ct. App. 1984) ("Since reply testimony is limited to issues raised by the defense, the element of surprise is eliminated when reply is properly restricted."); *Durden*, 264 S.C. at 90, 212 S.E.2d at 589 (finding "reply testimony did not go beyond a refutation of that which the appellant's witness had asserted[,] and therefore it could "hardly be argued that the appellant's counsel was taken by surprise").

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 requires us not to question whether the State proved its case beyond a reasonable

"[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 inside. The remaining testimony cited by the dissent is a basic denial of the crime. Additionally, the record demonstrates Victim's roommate remained in the house after Prather claims to have left.

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 testimony regarding prior statements by Prather 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. *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.

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. Florida*, 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.⁵

REVERSED AND REMANDED.

LEE, A.J., concurs.

WILLIAMS, J., dissenting.

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

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.

⁵ 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). 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.

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. When examining his claims in the context of his entire testimony, Prather inferred that only one person committed these acts.⁶ Conversely, the

⁶ 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.

[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?

State's reply testimony contradicted Prather's notion 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."⁷ Accordingly, I do not find that the circuit court abused

[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.

⁷ 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.

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

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

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 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.⁸ 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 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

⁸ The majority did not address these issues because its holding was dispositive.

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.⁹ 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 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.

⁹ Phillips spelled the word "rapeist."

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.