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May 17 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
In the Court of General Sessions

The Honorable Frank Addy, Jr., Circuit Court Judge

Appellate Case No. 2019-001865

State of South Carolina . . . . . Respondent

v.

Terry Renee McClure . . . . . Appellant

APPELLANT'S INITIAL REPLY BRIEF

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ARGUMENT IN REPLY

Without restating the issues or readvancing arguments which have been thoroughly set forth in his opening brief, McClure offers the following points of clarification and rebuttal to the arguments raised by the State.

I. The redacted interrogation video contained hearsay and burden-shifting statements, and the South Carolina Supreme Court has flatly rejected the argument that such statements are admissible for purposes of "context" or their effect on the defendant.

A. The State's characterization of Appellant's quoted potions of the video.

At the outset, Appellant takes issue with the State's assertion that the quoted portions of the redacted interrogation video contain "inaccuracies" or are otherwise "misleading." (RIB p. 19). First, and most notably, the State immediately contradicts its assertion that the quoted dialogue contains inaccuracies by conceding that the referenced portions of the video "contain accurate portions of Trojanowski's statements." (RIB p. 19). Second, Appellant made no attempts to "mislead" this Court when quoting Trojanowski's statements in his opening brief. In fact, Appellant clearly indicated that, during publication of the video, "the jury heard the following questions and statements *made by Detective Trojanowski*." (AIB p. 14) (emphasis added). Moreover, Appellant limited the discussion of the video to include only statements that were improperly before the jury, which would not include his own statements. *See* Rule 801(d)(2)(A), SCRE ("A statement is not hearsay if[t]he statement is offered against a party and is[] the party's own statement."). Finally, Appellant included the video in the record so this Court would not rely solely on his summary of the interrogation and would review the video itself. With the understanding that this Court would review all of the exhibits included in the Record on Appeal, Appellant provided this recitation to assist this Court in its review by highlighting improper

statements made before the jury and noting the time at which they appear. Accordingly, Appellant expressly rejects the assertion that the quoted statements are either "inaccurate" or "misleading."

Notably, however, the State actually relies on an incomplete quote from the recorded interrogation as evidence that McClure had knowledge of VonKeith's shooting. The State includes the following back and forth in its brief:

Trojanowksi: The guy on the right . . . he's alive. He didn't die.

McClure: What's that supposed to mean . . . he got shot?

Trojanowski: He identified you as shooting him.

McClure: He identified me? Man, what the f*** is this today?!

(State's Ex. 4, 20:47-20:48; RIB p. 19-20). However, the State only includes part of McClure's final statement. McClure actually said, "He identified me? Man what the f*** is this today, *y'all done try me with everybody what the f****?" (State's Exhibit 4 20:48) (emphasis added). This quote, omitted by the State but heard by the jury, references an interview by Detective Brent Pucci, conducted immediately prior to Detective Trojanowski's, regarding McClure's alleged involvement in an unrelated shooting. (Transcript p. 103). Accordingly, the fact that McClure responded to Detective Trojanowski by questioning whether VonKeith had been shot after being accused of an unrelated shooting in the immediately preceding interrogation does not suggest that he was familiar with VonKeith's shooting. Rather, when considering McClure's complete statements, this back and forth suggests McClure accurately believed investigators were preparing to question him about, and accuse him of, a shooting for the second time in the course of an hour.

B. The redacted interrogation video is replete with hearsay statements.

"'Hearsay' is a statement, other than one made by the declarant while testifying in 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 these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. "An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant." *State v. King*, 422 S.C. 47, 67, 810 S.E.2d 18, 28 (2017) (quoting *Ruiz v. Commonwealth*, 471 S.W.3d 675, 681 (Ky. 2015)). "If it is relevant and probative *only* to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule." *Id*. (quoting *Ruiz*, 471 S.W.3d at 681). Crucially, the Supreme Court has held the argument that statements by law enforcement referencing information provided by out-of-court declarants "serve[] a nonhearsay purpose is patently without merit." *State v. Brewer*, 411 SC. 401, 407, 768 S.E.2d 656, 659 (2015).

The State argues that Detective Trojanowski's statements to McClure during the interrogation video do not constitute hearsay because Detective Trojanowski testified that he had no personal knowledge of McClure's alleged participation in the crime and because the statements were admissible for context and their effect on McClure.[1] Both arguments lack merit, and the Supreme Court has explicitly held so regarding Respondent's second argument.

Initially, contrary to the State's assertion, the fact that Detective Trojanowski testified to having no personal knowledge of the underlying case actually strengthens the argument that his

[1] The State asserts that the circuit court "made a specific finding that the statements of the investigators in the video were not being offered for the truth of the matter asserted." (RIB p. 21). Notably, the State provides no record cite to this specific finding. Contrary to the State's assertion, the circuit court found that the statements in the video actually "substantiate[d] a lot of . . . the evidence that's already been admitted [and] corroborate[d] a lot of the State's theory." (Transcript p. 631). Moreover, in response to McClure's argument that Detective Trojanowski's statements constituted hearsay because he received all of the information regarding the case from Detective Mefford, the circuit court asserted "even though it's hearsay, you have the opportunity to confront Mefford about all of that . . . [s]o even if it is hearsay, the confrontation clause issue, it's almost as if the officer in California steps into the shoes of Mefford." (Transcript p. 633).

statements to McClure constituted hearsay and were based on hearsay. Because Detective Trojanowski had no personal knowledge of the case, the overwhelming majority of the information he recited to McClure was based on information provided by Detective Mefford. *See King*, 422 S.C. at 67, 810 S.E.2d at 28 (quoting *Ruiz*, 471 S.W.3d at 681) ("An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant."). In *King*, the Supreme Court found that an officer's testimony constituted hearsay "as it was based exclusively on what the witnesses told her during the neighborhood canvas and was offered to prove that King fired more than one gunshot." *Id*. at 66, 810 S.E.2d at 28. Similarly, in *Brewer*, the Supreme Court noted that "[d]uring the interrogation, investigators frequently *referenced and quoted* many purported eyewitnesses to Brewer shooting both victims." 411 S.C. at 406, 768 S.E.2d at 659 (first emphasis added). The Court determined "[t]his evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." *Id*. at 406–07, 768 S.E.2d at 659. Thus, like the testimony in *King* and the statements in *Brewer*, Detective Trojanowski's statements were based exclusively on information provided by out-of-court declarants and were offered to prove McClure's guilt.[2] Accordingly, the statements constitute hearsay.

In addition to the statements based on information provided by out-of-court declarants, a multitude of additional hearsay statements appear in the redacted interrogation video. While the State argues that such statements were not offered for the truth of the matter asserted, McClure questions what other reason the State would have for offering statements such as: (1) "I'm not going to come at you with some BS that I don't know the answer to."; (State's Ex. 4; 20:33); (2)

[2] Notably, the circuit court explicitly stated that Detective Trojanowski's statements "substantiate[d]" the State's evidence and "corroborate[d] a lot of the State's theory." (Transcript p. 632).

"I'm not asking any questions that I don't know the answer to so it doesn't really help for you to lie."; (State's Ex. 4; 20:43); (3) "You know we got sh[**] on you."; (State's Ex. 4; 20:44); (4) "Bottom line is, we have you there. We have enough information to put you there."; (State's Ex. 4; 20:45); (5) "It's coast to coast, there ain't no way some dude back in South Carolina is going to pick you out."; (State's Ex. 4; 20:50); (6) "This work's already been done, ok."; (State's Ex. 4; 20:52); (7) "But what I do know, is brother they got you locked in."; (State's Ex. 4; 20:52); (8) "Either this is a self-defense issue and we deal with it now, or we're going to go with you don't know sh[**] I wasn't there and dude the world is going to unload on you."; (State's Ex. 4; 20:53); (9) "Dude we got you locked in."; (State's Ex. 4; 20:54); and (10) "It's mathematically impossible for it to have been anybody else."; (State's Ex. 4; 20:55). McClure posits that these out-of-court statements were "hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing [McClure]'s guilt to all charges." *Id.* at 406–07, 768 S.E.2d at 659.

Moreover, the statements were not admissible for "context" or for the effect they had on McClure, particularly when McClure consistently denied the allegations leveled against him. The State argues the circuit court properly admitted the redacted interrogation video because it "is consistent with other jurisdictions that have allowed out of court statements offered to show context or the effect on the listener." (RIB p. 21). Notably, however, the admission of such statements under this rationale is not consistent with South Carolina law. In *Brewer*, after determining that officers' statements referencing and quoting eyewitnesses constituted hearsay, the Supreme Court found that "[t]he suggestion that this evidence served a nonhearsay purpose is patently without merit." *Id.* at 407, 768 S.E.2d at 659. The Supreme Court held there is "*no support in the law* for the State's argument that the interrogators' statements were admissible for purposes of context or for the effect the statements had on Brewer." *Id.* (emphasis added). The

Court explained, "[t]he only effect these statements had on Brewer was to make him repeatedly deny shooting anyone[,]" and "*[t]he meaning of these repeated denials is obvious and requires no explanatory context*." *Id*. (emphasis added). The Court asserted that "[t]he effort by the State to rescue the admission of this unmistakable hearsay *must be rejected*." *Id*. (emphasis added). However, despite the clearly defined law set forth in *Brewer*, the State once again attempts to justify the admission of rampant hearsay under a non-existent context exception. *See State v. Washington*, 431 S.C. 619, 623, 848 S.E.2d 794, 796 (Ct. App. 2020) ("Undeterred, the State recycles the argument before us, still unaccompanied by any authority to support it."). As the *Brewer* Court explained, this attempt must be rejected.

C. The redacted interrogation video contains numerous burden-shifting statements.

In addition to the hearsay statements in *Brewer*, the Supreme Court took issue with law enforcement questions that improperly shifted the burden to the defendant. *Brewer*, 411 S.C. at 408, 768 S.E.2d at 659. The Supreme court explained that "[l]aw enforcement's *ad nauseam* insistence that Brewer prove his innocence has *no* place before the jury." *Id*. Similarly, this Court found that the admission of law enforcement's "repeated requests that [a defendant] explain why he was not guilty amounted to a 'grave constitutional error.'" *Washington*, 431 S.C. at 623, 848 SE.2d at 796 (quoting *Brewer*, 411 S.C. at 408, 768 S.E.2d at 659).

The State misconstrues McClure's argument regarding the burden-shifting statements appearing in the redacted interrogation video. The State understands McClure to be taking issue with investigators' statements calling him a liar or accusing him of lying. This is not so. As clearly established in his opening brief, McClure takes issues with investigators' statements demanding that he explain his way out of the allegations leveled against him or otherwise prove his innocence. (AIB p. 23). Throughout the interrogation, Detective Trojanowski asked McClure to explain his

innocence or discrepancies in his story multiple times, including (1) "So you're either going to be able to explain this, or you're not."; (State's Ex. 4; 20:45); (2) "If you can explain your way out of this, I'm here to listen."; (State's Ex. 4; 20:51); (3) "I'm trying to give you the opportunity to explain it away."; (State's Ex. 4; 20:53); (4) "Then explain to me why that phone number followed the airplane."; (State's Ex. 4; 20:55); and (5) "How do you explain that? It's mathematically impossible for it to have been anybody else."; (State's Ex. 4; 20:55). It is exactly these types of questions that this Court and our Supreme Court have held do not belong before a jury.[3]

II. The Circuit Court's jury instruction on inferred malice was improper as it related to each charge separately and under distinct rationales.

Initially, the State misconstrues McClure's arguments regarding inferred malice. The State represents that both of McClure's arguments regarding the inferred malice instruction relate only to the attempted murder charge. This is not the case. McClure's argument that there was positive evidence of express malice rendering the instruction an unnecessary comment on the facts was presented in the context of the murder charge, as the entire discussion of the facts related to this argument centers around VonKeith's testimony detailing the shooting of Tycus Toland. (AIB pp. 29-30). Moreover, McClure specifically argued an inferred malice instruction was inconsistent with the finding that a conspiracy to commit murder existed upon which the circuit court allowed the admission of Justin Butler's text messages. (AIB p. 30). As a separate and distinct argument,

[3] Additionally, the State's attempts to distinguish this case from *Brewer* are meritless. The State notes that the defendant in *Brewer* attempted to end the interview numerous times but was told he had to prove his innocence to end the questioning. Thus, the State argues this case is distinguishable because McClure's interrogation was consensual and he knew he did not have an obligation to prove his innocence. This distinction is irrelevant to the issue. The Supreme Court in *Brewer* did not address the impropriety of the interview in its analysis. Rather, the Supreme Court took issue with the admission of the statements themselves. There is nothing in *Brewer* that would suggest law enforcement's demands that a defendant prove himself innocent are admissible so long as the defendant isn't improperly precluded from ending the interrogation.

McClure argues the inferred malice instruction improperly lowered the State's burden of proof for attempted murder. Notably, the State argues that any error in the inferred malice instruction was harmless only as it relates to the attempted murder charge.

A. The inferred malice instruction was unnecessary as it related to the murder charge because there was positive evidence of express malice in the record.

"Malice may be either express or implied." *State v. Wilds*, 355 S.C. 269, 276, 584 S.E.2d 138, 142 (Ct. App. 2003). However, "[t]he words 'express or implied' add nothing to the meaning of the word 'malice.' They do not imply different kinds of malice, but merely the manner in which the only kind known to the law may be shown to exist—that is, *either by positive evidence or by inference*." *Id*. (emphasis added) (quoting *State v. Milam*, 88 S.C. 127, 130, 70 S.E. 447, 449 (1911)). "Express malice is when there is a deliberate intention to unlawfully take the life of another." *Id*. "Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life' or 'a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.'" *Id*. at 276–77, 584 S.E.2d at 142 (quoting 40 C.J.S. *Homicide* § 35 (1991)). Our Supreme Court has indicated that malice need be implied *only if there is no positive evidence of express malice*. *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020) (emphasis added). When the circuit court "tells the jury it may use evidence of [a total disregard for human life] to establish the existence of malice, a critical element of the charge of murder, *the [circuit] court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury*." *State v. Burdette*, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019) (emphasis added).

Here, when testifying about the shooting of his brother, VonKeith Toland asserted that a man he later learned to be McClure shot Tycus in the back of the head at point blank range. This testimony undoubtedly constitutes positive evidence of express malice. *Wilds*, 355 S.C. at 276,

584 S.E.2d at 142 ("Express malice is when there is a deliberate intention to unlawfully take the life of another."). Thus, because there was positive evidence of express malice, there was no need for the jury to infer malice from the circumstances, rendering the circuit court's instruction an unnecessary judicial comment on the facts.

The State attempts to distinguish this case from *State v. Smith* on the ground that McClure did not claim self-defense. In *Smith*, our Supreme Court found that because Smith claimed self-defense, he admitted that he had an express intent to kill. *Smith*, 430 S.C. at 233, 845 S.E.2d at 498. Therefore, "the jury was faced with the choice of either believing Smith's story and finding he acted in self-defense, or believing Smith had a self-admitted intent to kill that was *not* legally justified—the very definition of express malice." *Id*. Accordingly, the State argues that because McClure contests his guilt and participation in the crime, malice was not undisputed and the implied malice charge was appropriate. However, the State's distinction is not meaningful. Between McClure's position that he did not participate in the shootings and VonKeith's testimony, the jury was faced with the choice of either believing that McClure was not responsible for Tycus's death, or that McClure shot Tycus in the back of the head at point blank range. Thus, "[i]n either case, an implied malice charge was wholly unnecessary to the jury's decision." *Id*.

B. The implied malice charge is inconsistent with a finding that a conspiracy to commit murder existed.

The State does not address McClure's argument that the inferred malice instruction was wholly inconsistent with the circuit court's admission of Justin Butler's text messages as statements of a co-conspirator under Rule 801(d)(2)(E) of the South Carolina Rules of Evidence, discussed further *infra* Section III.

In admitting the statements, the circuit court had to determine whether there was evidence demonstrating that Butler and McClure agreed to kill the Tolands. *See State v. Sims*, 387 S.C. 557,

564, 694 S.E.2d 9, 13 (2010) (defining "conspiracy" as "a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful" (quoting *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001))). Evidence that Butler and McClure conspired to kill the Tolands would constitute positive evidence of express malice, as one cannot conspire to kill someone with total disregard for human life.[4] Rather, the very essence of conspiracy is an agreement that intends to bring about a criminal result. Accordingly, an agreement to commit murder would be predicated on express malice. *See Wilds*, 355 S.C. at 276, 584 S.E.2d at 142 ("Express malice is when there is a *deliberate intention to unlawfully take the life of another*." (emphasis added)). Thus, if malice must be inferred from McClure's conduct, there is not sufficient evidence of an agreement to kill the Tolands from which it could be determined that a conspiracy to commit murder existed. *See Smith*, 430 S.C. at 233, 845 S.E.2d at 498 (indicating that malice need be implied *only if there is no positive evidence of express malice* (emphasis added)).

C. The implied malice charge lowered the State's burden of proof for attempted murder and the error was not harmless.

McClure concedes that section 16-3-29 of the South Carolina Code provides that "A person who, with intent to kill, attempts to kill another person with malice aforethought, *either expressed or implied*, commits the offense of attempted murder." (2015) (emphasis added). However, McClure disagrees with the State's assertion that "this Court cannot simply ignore the statute for

[4] A person cannot *conspire* to commit murder with implied malice because there is no such criminal offense as an agreement to achieve an unintended result. *Cf. King*, 422 S.C. at 57, 810 S.E.2d at 23 ("One cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result." (internal quotation marks omitted) (quoting *Keys v. State*, 766 P.2d 270, 273 (Nev. 1988))).

attempted murder and its allowance of implied malice," because the Supreme Court has already held that implied malice is inconsistent with the specific intent required to prove attempted murder. Citing the Supreme Court of Nevada, the Supreme Court explained "[a]ttempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact. One cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result." *See King*, 422 S.C. at 57, 810 S.E.2d at 23 (internal quotation marks omitted) (quoting *Keys*, 766 P.2d at 273). Accordingly, pursuant to *King*, this Court has held that "the State need[s] to prove [a defendant] acted *with express malice and the specific intent to kill* in order to be found guilty of attempted murder." *State v. Shands*, 424 S.C. 106, 131, 817 S.E.2d 524, 537 (Ct. App. 2018) (first and third emphases added); *see also King*, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5 ("[I]f there is no evidence that one charged with attempted murder had *express malice and a specific intent to kill*, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses. (emphasis added)).

In instructing the jury that it could find McClure guilty of attempted murder by inferring malice, the circuit court eliminated the State's requirement to prove express malice beyond a reasonable doubt. This error cannot be harmless. *See Sandstrom v. Montana*, 442 U.S. 510, 512 (1979) ("[T]he Fourteenth Amendment[] require[s] that the State prove *every element* of a criminal offense beyond a reasonable doubt." (emphasis added)); *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law *as instructed to them*." (emphasis added)); *State v. Patterson*, 367 S.C. 219, 232, 625 S.E.2d 239, 245–46 (Ct. App. 2006) (indicating that erroneous "jury instructions [constitute] prejudicial error whe[n] the instructions

given [do not] afford the proper test for determining issues" (quoting *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002))).

III. There is no independent evidence of an agreement to murder the Tolands that would justify the admission of Justin Butler's text messages as the non-hearsay statements of a co-conspirator.

Pursuant to Rule 801(d)(2)(E) of the South Carolina Rules of Evidence, "A statement is not hearsay if [t]he statement is offered against a party and is[] a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." "A conspiracy is 'a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. *The essence of a conspiracy is the agreement*.'" *Sims*, 387 S.C. at 564, 694 S.E.2d at 13 (emphasis added) (quoting *Buckmon*, 347 S.C. at 323, 555 S.E.2d at 405). "Under the Federal Rules of Evidence, this same rule has been interpreted to allow admission of a co-conspirator's statement only where there is evidence of the conspiracy *independent* of the statement sought to be admitted." *State v. Gilchrist*, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000).

The State argues the text messages were properly admitted as statements of a co-conspirator because there was independent evidence that Butler and McClure entered into a conspiracy to commit murder. The State relies on the following as independent evidence of such a conspiracy: (1) Butler contacted VonKeith about test driving and potentially purchasing a vehicle; (2) LaDondra Ellis testified that McClure arranged for her to pick Butler up from the Greyhound Station in Atlanta; (3) Butler and McClure rode from Atlanta to South Carolina; (4) Butler and McClure arrived at VonKeith's mother's home; and (5) VonKeith testified that after shots were fired, Butler retrieved a gun and the men burglarized his house.

The evidence relied on by the State does not support the conclusion that a conspiracy to commit murder existed. Notably, the first four pieces of evidence cited by the State do not suggest anything other than that Butler and McClure met up in Atlanta and rode to South Carolina so that Butler could test drive and potentially purchase a car. *See State v. Crawford*, 362 S.C. 627, 637, 608 S.E.2d 886, 891 (Ct. App. 2005) ("The mere fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a conspiracy." (quoting William Shepard McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina*, 476 (4th ed. 2002))). Similarly, VonKeith's testimony that Butler armed himself *after* shots were fired does not support the conclusion that the two men had previously agreed to murder the Tolands. Moreover, VonKeith described Butler as "scrambling" and "confused" after shots were fired.

Additionally, and as further discussed above, *supra* Section II(B), the finding that a conspiracy to commit murder existed is inconsistent with the circuit court's decision to instruct the jury on inferred malice. Any conspiracy to commit murder would be predicated on an agreement between Butler and McClure to kill the Tolands, and such an agreement would constitute positive evidence of express malice. *See Wilds*, 355 S.C. at 276, 584 S.E.2d at 142 ("Express malice is when there is a *deliberate intention to unlawfully take the life of another*." (emphasis added)); *see also Smith*, 430 S.C. at 233, 845 S.E.2d at 498 (indicating that malice need be implied *only if there is no positive evidence of express malice* (emphasis added)). Thus, if malice must be inferred from McClure's conduct, there was not sufficient evidence of an agreement to kill the Tolands from which it could be determined that a conspiracy to commit murder existed.

IV. McClure's argument regarding Officer Zwolak's qualifications as an expert is preserved and Officer Zwolak's qualification as an expert in "street culture, language, and slang" was unfairly prejudicial.

A. McClure's argument challenging Officer Zwolak's education and experience is preserved for appellate review.

The State argues that McClure did not object to Officer Zwolak's qualification on the basis of his educational background or experience. However, the record reveals that McClure did raise the issue to the circuit court. During arguments regarding the qualification of Officer Zwolak as an expert, the circuit court explained to McClure, "I understand you're objecting to him testifying[] and perhaps you have issues with his qualification, and if that's the case I'd be more than happy to let you Voir Dire him." (Transcript p. 797). McClure ultimately conducted a *voir dire* of Officer Zwolak. (Transcript pp. 800–807). Following the *voir dire*, McClure asked if the circuit court would note his objections and the court responded, "You are protected for the record, *so you do not need to renew that you're objecting both on relevance and qualification and even the need for the expert's testimony in the first place*." (Transcript p. 810) (emphasis added). Accordingly, the issue of Officer Zwolak's qualification was raised by McClure and ruled upon by the circuit court. Thus, the issue is preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (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]."); *see also State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595–96 (2010) ("[A] litigant is only required to fairly raise the issue to the [circuit] court, thereby giving it an opportunity to rule on the issue.").

As to the basis of McClure's challenge to Officer Zwolak's qualifications, the State misconstrues his argument. McClure does not argue that Officer Zwolak was required to have a degree in linguistics, sociolinguistics, or lexicography. To the contrary, McClure argued that Officer Zwolak's experience as a police officer did not provide him with the requisite experience to be qualified as an expert in defining words which he testified were constantly changing and different around the country. As part of this argument, McClure pointed out that "Officer Zwolak did not testify to having *any experience* in the fields of linguistics, sociolinguistics, or

lexicography." (AIB p. 38) (emphasis added). *See State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020) ("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." (emphasis added) (internal quotation marks omitted) (quoting *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997)). McClure does not contend that a relevant degree is required to be qualified as an expert.

B. Qualifying Officer Zwolak as an expert in street culture, language, and slang was unfairly prejudicial.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

The State argues qualifying Officer Zwolak as an expert in street culture, language, and slang was not unfairly prejudicial because (1) street can carry a neutral connotation, and (2) it was the exact topic on which Officer Zwolak testified.

Initially, the State misconstrues McClure's argument regarding the word "street." Despite the State's assertion to the contrary, McClure did not suggest that the word "street" always carries a negative connotation. (RIB p. 37, n. 10). Rather, McClure specifically argued that the word street carried a negative connotation "in this context." (AIB p. 42). In taking issue with McClure's reference to a "street pharmacist," the State actually strengthens his point. As the State points out, a "street pharmacist" would be viewed less favorably than a pharmacist because "an average juror would know a pharmacist should work in a controlled environment and that *working on a street*

means that a pharmacist is likely not in compliance with the law or medical guidelines." (RIB p. 37, n. 10) (emphasis added).

Moreover, the State's attempt to provide a more neutral comparison is disingenuous. The State suggests that "street" can be viewed in a neutral light when describing an expert in "street construction and maintenance." (RIB p. 37, n. 10). However, in making such an assertion, the State overlooks a key fact. A street actually requires construction and maintenance. Obviously, "street construction and maintenance" would carry no negative connotation because a jury would be patently aware that streets do not simply appear and maintain themselves. As such, a reference to "street construction and maintenance" would be a reference to a legitimate profession. Conversely, a street does not require pharmaceuticals, nor does a street have its own culture, language, or slang. Accordingly, the word "street" *in these contexts* would imply an alternate meaning. As the State points out in reference to a pharmacist, the word street "*means that a pharmacist is likely not in compliance with the law or medical guidelines*." (RIB p. 37, n. 10) (emphasis added). Similarly, the word "street" in reference to culture would suggest a culture that "is likely not in compliance with the law." Thus, qualifying Officer Zwolak as an expert in street culture, language, and slang to define words used by McClure suggested that McClure was a criminal. *See Wilson*, 345 S.C. at 7, 545 S.E.2d at 830 ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.").

The State additionally asserts that this specific qualification was necessary for the jury to have a basic understanding of Officer Zwolak's background and qualifications before it could fairly weigh his testimony. Notably, despite asserting that Officer Zwolak had the qualifications to testify as an expert regarding the terms in the text message log, the State argues that had references to street culture and slang been removed, Officer Zwolak "would have appeared to be someone

completely unequipped to provide the[jury] with the relevant expert testimony" because he would have been "a person qualified as an expert in 'Non-King's English' who listens to rap music and performed interviews." (RIB p. 38). However, the State does not explain why a person qualified as an expert in "street culture, language, and slang" who listens to rap music and performed interviews would appear any more qualified to the jury.

While the State takes issue with one of the circuit court's suggestions of "Non-King's English," the State does not provide any rationale for why a qualification in one of the other suggested fields, such as "uncommon expressions," would not have been appropriate. Moreover, the State offers no rationale for why Officer Zwolak could not have simply been qualified as an expert in "slang." A person qualified as an expert in "slang" who listens to rap music and performed interviews would appear equally as qualified to the jury as the same person qualified as an expert in "street culture, language, and slang," but the former would not carry the same prejudicial taint. *See id*. ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one."). Accordingly, a qualification in "street culture, language, and slang," did not make Officer Zwolak any more qualified or his testimony more reliable, it only added unfair prejudice to his testimony.

V. The delay in McClure's trial was not solely attributable to McClure.

The State argues that decisions made by McClure and his trial counsel were responsible for nearly all of the delays in McClure's trial. However, the record reveals that significant periods of delay were attributable to the State.

McClure was released into South Carolina custody on July 25, 2016. (Transcript p. 43). At trial, the State asserted that McClure was not assigned an attorney until December 1, 2016. (Transcript p. 43). The State argued at trial, and implies on appeal, that this period of delay should

be attributable to McClure. However, to hold this period against McClure would be inconsistent with the Sixth Amendment of the United States Constitution. *See State v. Dial*, 429 S.C. 128, 133, 838 S.E.2d 501, 504 (2020) ("The Sixth Amendment to the United States Constitution guarantees an accused's right to the assistance of counsel."). Between July 25, 2016, and December 1, 2016, McClure had the choice to proceed without counsel or wait for counsel to be appointed, as was his Sixth Amendment right. As such, a finding that this period is attributable to McClure is tantamount to a determination that if McClure wanted a speedier trial, he should have proceeded without representation. To the contrary, McClure is guaranteed both the right to a speedy trial and the right to counsel, and he is not required to sacrifice one of these rights to enjoy the other. Accordingly, this period of delay should not be attributable to McClure.

Notably, in its discussion of the facts surrounding this issue, the State omits its role in the delay between October 2018 and July 2019. At the September 6, 2019 Speedy Trial Hearing, the State represented to the circuit court that the State's involvement with a death-penalty case contributed to the delay in McClure's case. (September 6, 2019 Hearing Transcript p. 7). The State asserted that the death-penalty case was originally set for October 15, 2018, but was moved to April 29, 2019. (September 6, 2019 Hearing Transcript p. 7). The State claimed that it considered trying McClure's case in December 2018, but McClure planned to call Justin Butler as a witness and Butler was scheduled for trial in Alabama. Butler ultimately pled guilty to his Alabama charges on January 2, 2019, and was returned to South Carolina on January 3, 2019. However, the State explained that, on January 3, 2019, it informed McClure that if the parties "were unable to resolve this case, we needed to look at trying the case in the fall of 2019," due to the State's involvement in the death penalty case. (September 6, 2019 Hearing Transcript p. 9). The State further explained, "I knew I wouldn't be able to get to [McClure's case] before, but would

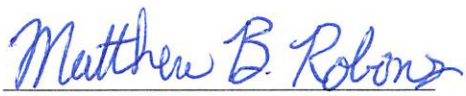
be able to get to it afterwards." (September 6, 2019 Hearing Transcript p. 9). The State was involved with the death-penalty case until June 3, 2019. Accordingly, the State acknowledged that it could not try McClure's case during this period of time because of its involvement with the death-penalty case. Thus, this period of delay is attributable to the State. *See State v. Hunsberger*, 418 S.C. 335, 346, 794 S.E.2d 368, 374 (2016) ("[N]egligence or overcrowded dockets weigh less heavily against the State, *but are ultimately its responsibility*." (emphasis added)); *State v. Reaves*, 414 S.C. 118, 130, 777 S.E.2d 213, 219 (2015) ("Neutral reasons, such as overcrowded dockets or negligence, should be weighed less heavily; however, *the State is still ultimately responsible for bringing a criminal defendant to trial*." (emphasis added)).

CONCLUSION

Based on the foregoing, as well as the arguments raised in his opening brief, McClure's conviction should be reversed.

Respectfully submitted:

May 17, 2021



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