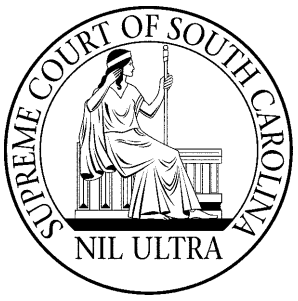

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 11, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5691-Eugene Walpole v. Charleston County	Pending
5696-The Callawassie Island v. Ronnie Dennis	Pending
5708-Jeanne Beverly v. Grand Strand Regional	Pending
5713-Jeffrey Kagan v. D. Renee Simchon	Pending
5714-Martha M. Fountain v. Fred's Inc.	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2019-UP-383-Lukas Stasi v. Mallory Sweigart (2)	Pending
2019-UP-393-The Callawassie Island Members Club v. Gregory Martin	Pending
2019-UP-396-Zachary Woodall v. Nicole Anastasia Gray	Pending
2019-UP-401-Stow Away Storage, LLC v. George W. Sisson (2)	Pending
2019-UP-412-Jacquelin Bennett v. Estate of James King	Pending
2019-UP-413-Andrew McIntire v. Seaquest Development	Pending
2019-UP-416-Taliah Shabazz v. Bertha Rodriguez	Pending
2020-UP-004-Emory J. Infinger and Assoc. v. N. Charleston Com. Ctr.	Pending
2020-UP-005-Burton Fire Dt. v. City of Beaufort (Port Royal)	Pending
2020-UP-012-State v. Kenneth S. Collins	Denied 03/09/20
2020-UP-013-Sharon Brown v. Cherokee Cty. School District	Pending
2020-UP-014-Ralph Williams v. Patricia Johnson	Pending
2020-UP-017-State v. Emory W. Roberts	Pending

2020-UP-018-State v. Kelvin Jones (2)	Pending
2020-UP-020-State v. Timiya R. Massey	Pending
2020-UP-021-Mario Escalante v. David L. Rodgers	Pending
2020-UP-026-State v. Tommy McGee	Pending
2020-UP-030-Sunset Cay. LLC v. SCDHEC	Pending
2020-UP-031-State v. Alqi Dhimo	Pending
2020-UP-033-Mykel Johnson v. State	Pending
2020-UP-038-State v. Vance Ross	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5614-Charleston Electrical Services, Inc. v. Wanda Rahall	Pending
5633-William Loflin v. BMP Development, LP	Pending
5636-Win Myat v. Tuomey Regional Medical Center	Pending
5639-Hugh Dereede v. Courtney Feeley-Karp	Pending
5641-Robert Palmer v. State et al.	Pending
5643-Ashley Reeves v. SC Municipal Insurance	Pending
5659-State v. Fabian Lamichael R. Green	Pending
5661-Palmetto Construction Group, LLC v. Restoration Specialists, LLC	Pending
5663-State v. Ahshaad Mykiel Owens	Pending
5669-Jeffrey Kennedy v. Richland School Dt. Two	Dismissed 03/09/20

5671-SC Lottery Commission v. George Glassmeyer	Pending
5681-Richard Ralph v. Paul D. McLaughlin	Pending
5683-State v. Ontario Stefon Patrick Makins	Pending
5684-Lucille Ray v. City of Rock Hill	Pending
5685-Nationwide Insurance v. Kristina Knight	Pending
2018-UP-432-Thomas Torrence v. SC Department of Corrections	Pending
2019-UP-133-State v. George Holmes	Pending
2019-UP-169-State v. Jermaine Antonio Hodge	Pending
2019-UP-172-Robert Gillman v. Beth Gillman	Pending
2019-UP-178-Arthur Eleazer v. Leslie Hughey	Pending
2019-UP-209-State v. Terrance Stewart	Pending
2019-UP-219-Adele Pope v. Alan Wilson (James Brown Legacy Trust)	Pending
2019-UP-233-State v. Aaron Young Sr.	Pending
2019-UP-266-Lynne Van House v. Colleton County	Pending
2019-UP-270-Deep Keel, LLC v. Atlantic Private Equity Group, LLC	Pending
2019-UP-272-State v. John M. Ghent, Jr.	Pending
2019-UP-284-The Bank of New York Mellon v. Cathy Lanier	Pending
2019-UP-293-Thayer Arredondo v. SNH SE Ashley River Tenant	Pending
2019-UP-295-State v. Anthony M. Enriquez	Pending
2019-UP-305-Billy Herndon v. G&G Logging	Pending
2019-UP-308-Edward Kelly v. Allen McCombs	Pending

2019-UP-381-SCDSS v. Andrea Benjamin	Pending
2019-UP-386-John Willie Mack, Sr. v. State of South Carolina	Pending
2019-UP-391-State v. Brian Everett Pringle	Pending
2019-UP-399-Tracy Pracht v. Gregory Pracht (2)	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Danny B. Crane, Petitioner,

v.

Raber's Discount Tire Rack, Employer, and South Carolina Uninsured Employers' Fund, Respondents.

Appellate Case No. 2018-000959

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 27951
Heard October 16, 2019 – Filed March 11, 2020

REVERSED AND REMANDED

Stephen Benjamin Samuels, Samuels Law Firm, LLC, of Columbia, for Petitioner.

Matthew Joseph Story and Daniel Paul Ranaldo, Clawson & Staubes, LLC, of Charleston; and Lisa C. Glover, of Columbia, for Respondent South Carolina Uninsured Employers' Fund.

JUSTICE FEW: Danny Crane sought workers' compensation benefits for hearing loss and brain injuries he alleged he suffered in a work-related accident. The

workers' compensation commission denied most of Crane's claims, finding he was not entitled to benefits for temporary total disability, permanent impairment, or future medical care. The primary basis for denying these three claims was the commissioner who initially heard the case found Crane was not credible. The court of appeals reversed the commission's denial of temporary total disability benefits, but otherwise affirmed. We now reverse the commission's denial of permanent impairment and future medical care benefits. We remand to the commission for a new hearing on all three claims.

Our courts have frequently held that when the commission makes a credibility determination based on substantial evidence, the credibility finding itself is substantial evidence, and factual findings properly based on the credibility finding are binding on the courts. *See, e.g.*, *Lee v. Bondex, Inc.*, 406 S.C. 97, 101, 749 S.E.2d 155, 157 (Ct. App. 2013) (holding the commission's finding that "four doctors' opinions were 'more persuasive on the issue of causation' than other medical evidence" was a "credibility determination" that "if supported by substantial evidence, is binding on the court," and affirming the commission's factual finding of compensability based on that credibility determination (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2019))). The commission may not, however, give artificial importance to a credibility determination when credibility is not a reasonable and meaningful basis on which to decide a question of fact. In this case, Crane's lack of credibility was not a reasonable and meaningful basis on which to ignore objective medical evidence. Therefore, the commissioner and the appellate panel improperly based the factual determination to deny Crane's claims on the commissioner's credibility finding.

I. Facts and Medical History

On February 19, 2014, Danny Crane was working as a mechanic at Raber's Discount Tire Rack in Barnwell, South Carolina. Crane heard a hissing noise coming from an air-powered tire changer. He and a coworker were investigating the cause of the noise when an air hose attached to the tire changer suddenly separated from its fitting, causing an explosion-like sound. Surveillance video shows Crane stepped away from the tire changer and covered his ears with his hands. Crane testified that immediately after the incident, his ears were ringing, he was in pain, and he could not hear. He texted his wife and asked her to pick him up to take him to the emergency room.

Crane's wife drove him to Barnwell County Hospital, where Crane complained of difficulty hearing in both ears and assessed his ear pain as an 8 out of 10. The emergency room doctor diagnosed Crane with conductive hearing loss and referred him to an ear, nose, and throat specialist.

The next morning, Crane saw Dr. John Ansley, an otolaryngologist at Carolina Ear Nose and Throat Clinic in Orangeburg. In his physical examination, Dr. Ansley observed both of Crane's eardrums had "perforations." Dr. Ansley conducted a hearing test, and the resulting audiogram[1] showed Crane had severe sensorineural hearing loss in both ears. Dr. Ansley wrote in his report, "Hopefully his thresholds will improve." At a follow-up appointment on March 6, however, Dr. Ansley conducted another hearing test that indicated Crane "actually had a shift downward" in his hearing. The March 6 test showed "profound hearing acuity loss in both ears." Because Crane's hearing loss had not improved, Dr. Ansley referred Crane to the Medical University of South Carolina for an auditory brainstem response test. However, Crane's medical insurance did not cover the test, the Uninsured Employers' Fund denied the entire claim and thus refused to pay for it,[2] and the commission did not require it. To this date, Crane has not received the test.

On May 19, 2014, Dr. David Rogers—a medical expert Crane retained—examined him. Dr. Rogers found both of Crane's eardrums were ruptured. He described a 60% tear in the right eardrum and an 80% tear in the left. Dr. Rogers diagnosed Crane with permanent and profound bilateral sensorineural hearing loss and concluded his hearing could not be restored by natural means.

Crane saw other doctors after his accident for problems such as dizziness, headaches, a fall resulting in a broken rib, and continuing pain from the broken rib. On February

---

[1] An audiogram is, "The graphic record drawn from the results of hearing tests with an audiometer, which charts the threshold of hearing at various frequencies against sound intensity in decibels." *Audiogram*, STEDMAN'S MEDICAL DICTIONARY (28th ed. 2006).

[2] Raber's was not insured, and for that reason the Uninsured Employers' Fund is responsible for Crane's claim. *See* S.C. Code Ann. § 42-1-415(A) (2015) ("The Uninsured Employers' Fund shall assume responsibility for claims within thirty days of a determination of responsibility made by the commission.").

25, 2014, Crane had a CT scan that showed normal results. After the initial hearing but before the commissioner issued a written order, the commissioner permitted Crane to supplement the record with the results of a third hearing test, conducted August 19, 2014, at Carolina Ear Nose and Throat. The audiogram from that test showed Crane suffers from "profound hearing loss" in the right ear and "profound to severe hearing loss" in the left ear. The otolaryngologist who saw him that day noted Crane "reads lips," and wrote, "He should be considered disabled because of this."

II. Proceedings at the Commission

Crane filed a Form 50 alleging "head injury and hearing loss" from being hit in the head by an object and from the explosion-like sound. In his pre-hearing brief, Crane alleged he "suffered head/brain injuries, severe hearing loss, and psychological overlay." As to the alleged brain injury, Crane argued he was not at maximum medical improvement, and thus "a determination of physical brain damage is premature and not before the Commission at this hearing." The employer and the Uninsured Employers' Fund each filed a separate Form 51 denying all claims.

Commissioner Susan Barden promptly held the initial hearing on June 26, 2014. The medical evidence described above was included in the record, and Crane was the only witness. In her April 30, 2015 order, the commissioner focused almost exclusively on Crane's credibility. She wrote, "Claimant's conduct/presentation at the hearing (including prior to opening the record) was more revealing than the substance of his actual testimony." She added, "Claimant's 'display' and evasiveness at the hearing . . . make me seriously question whether or not there was an actual injury" and "if Claimant had legitimate, causally-related hearing loss he would have felt no need to 'perform' at the hearing." She stated Crane's ability to hear or not hear questions was "selective" and "had no modicum of consistency." She again referred to Crane's testimony as an "inconsistent performance," and stated his acting was "very poor." She mentioned "other problematic issues," which she did not name. However, referring to the surveillance video of the incident as though this evidence obligated her to find some injury, the commissioner found Crane did "sustain[] an injury to his ears."

Based primarily on the finding Crane's testimony was not credible, the commissioner denied Crane's claims for temporary total disability, permanent impairment, and future medical care. The appellate panel affirmed. The court of appeals affirmed

the appellate panel as to permanent impairment and future medical care, but reversed as to temporary total disability. *Crane v. Raber's Discount Tire Rack*, Op. No. 2018-UP-085 (S.C. Ct. App. filed Feb. 14, 2018). We granted Crane's petition for a writ of certiorari.

III. Analysis

Our review of the decisions of the workers' compensation commission is governed by the Administrative Procedures Act. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 502 (2012); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). The Act provides, "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2019). As to questions of fact, "The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the . . . findings . . . are . . . (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Id.* When the commission makes a finding of fact that is properly supported by substantial evidence, the courts must uphold it. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

The commission often makes findings of fact based on credibility determinations. In numerous cases, our courts have upheld factual findings the commission made based on its credibility determination. *See, e.g.*, *Langdale v. Carpets*, 395 S.C. 194, 203, 717 S.E.2d 80, 84-85 (Ct. App. 2011) (upholding the determination that insurance coverage exists based on the commissioner's decision to believe one witness over another, "which we defer to on appeal"); *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009) (upholding the commission's findings regarding the extent of injury because the commission determined the claimant "was not credible"); *McGriff v. Worsley Cos., Inc.*, 376 S.C. 103, 113-14, 654 S.E.2d 856, 861-62 (Ct. App. 2007) (upholding the finding that an injury was compensable based in part on the commission's credibility determination).

The reason we consistently affirm these findings derives from a principle that applies beyond credibility to all factual determinations of the commission: "an award must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Hutson*, 399 S.C. at 387, 732 S.E.2d at 503 (quoting *Wynn v. Peoples Nat. Gas Co. of S.C.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961)). When the commission's factual determination is "founded on evidence of sufficient substance," and the evidence

"afford[s] a reasonable basis" for the commission's decision in the case, the evidence meets the "substantial evidence" standard and we are bound by the decision. This point is illustrated in the hundreds of cases in which our appellate courts have affirmed factual determinations by the commission.

The counterpoint is illustrated by *Hutson*, in which we reversed a factual determination by the commission. In *Hutson*, the claimant sustained an injury that prevented him from "continuing in his life's occupation as a crane operator." 399 S.C. at 387, 732 S.E.2d at 503. He sought to prove disability through wage loss under section 42-9-20 of the South Carolina Code (2015). 399 S.C. at 385, 732 S.E.2d at 502. Thus, we stated, "The sole question before us . . . [was] whether his injury will also prevent him from earning the same wages in another job." 399 S.C. at 387-88, 732 S.E.2d at 503.

The commission found the claimant failed to prove he suffered a wage loss that qualified him for disability under section 42-9-20. 399 S.C. at 385, 732 S.E.2d at 502. The evidentiary basis for this factual determination was the claimant's testimony he believed he could make money running a restaurant. 399 S.C. at 385, 388, 732 S.E.2d at 501-02, 503. The commissioner who conducted the initial hearing "concluded that because Hutson could not testify as to how much he would make as a restaurateur, there was no way to determine if he would suffer any loss of earning capacity." 399 S.C. at 385, 732 S.E.2d at 502. The commissioner specifically stated that but for this testimony by the claimant, he would have found the claimant disabled. *Id.* The court of appeals in *Hutson* affirmed, ruling substantial evidence supported the commission's factual finding that the claimant failed to prove his wage-loss claim. *Hutson v. State Ports Auth.*, 390 S.C. 108, 114, 700 S.E.2d 462, 466 (Ct. App. 2010).

This Court reversed. 399 S.C. at 390, 732 S.E.2d at 504. The Court explained two reasons the claimant's testimony did not qualify as "substantial evidence" under the Administrative Procedures Act. First, we stated "despite [the claimant]'s confidence in his own abilities, the record is clear that [he] had no experience running a restaurant or an understanding of what doing so entails." 399 S.C. at 388, 732 S.E.2d at 503. We found it "is abundantly clear from [the claimant]'s testimony . . . that he never worked in a restaurant in his life, much less operated one, and he clearly had no idea what income he might realize from such a venture." 399 S.C. at 390, 732 S.E.2d at 504. We criticized the commission's "use [of the claimant's] unsupported

and wildly optimistic goals" as evidence to support the denial of his wage loss claim. 399 S.C. at 388, 732 S.E.2d at 503.

Second, we considered the context of the testimony. We explained the testimony was not offered to prove he could make the same money running a restaurant that he made operating a crane, which was "approximately $90,000 per year." 399 S.C. at 385, 732 S.E.2d at 501. Rather, "the sole purpose for [the claimant's] testimony was to support [his] request that his award be paid to him in a lump sum." 399 S.C. at 388, 732 S.E.2d at 503. The claimant "desire[d] to continue to have a productive work life," and he made a "commendable" request that the commission give him the best chance to do so by awarding benefits in a lump sum. 399 S.C. at 390, 732 S.E.2d at 504. "In sum," we held, "the full commission's conclusion is based on rank speculation and cannot now be used as the basis for denying [the] claim for lost wages." 399 S.C. at 389-90, 732 S.E.2d at 504. Under *Hutson*, when the commission's factual finding is not "founded on evidence of sufficient substance to afford a reasonable basis" for the finding, we will not uphold it.

In cases in which we affirmed factual findings of the commission based on its credibility determination, we did so because it made sense for the commission to use credibility as the dispositive factor in deciding the particular issue. In *Langdale*, for example, the resolution of the insurance coverage question before the commission depended on whether the manager of an employment management agency's client told the agency that a particular employee was to be covered for workers' compensation. 395 S.C. at 202, 717 S.E.2d at 84. The evidence on the point was disputed, 395 S.C. at 203, 717 S.E.2d at 84-85, but the commission's determination to believe the manager's testimony logically resolved the factual dispute. Thus, the commission's credibility determination was a reasonable and meaningful basis for its decision.

Lee v. Bondex, Inc.—referenced above—also illustrates the important role credibility findings play when credibility reasonably and meaningfully relates to factual disputes to be decided by the commission. In *Lee*, the claimant was installing a large metal hood at his employer's plant when the hood fell on him. 406 S.C. at 99, 749 S.E.2d at 156. The claimant testified a sharp edge landed on his shoulder, resulting in immediate pain and difficulty working. 406 S.C. at 99-100, 749 S.E.2d at 156. The compensability of his injuries depended on "whether they were caused by the hood falling on his shoulder." 406 S.C. at 100, 749 S.E.2d at 156. The

commissioner denied the claim, finding he did not prove he suffered a compensable injury. *Id.*

The appellate panel found the injury was compensable and reversed. *Id.* "[T]he appellate panel specifically relied on four doctors who examined [the claimant], each of whom gave the opinion that the accident caused his injuries. The appellate panel specifically found the four doctors' opinions were 'more persuasive on the issue of causation' than other medical evidence indicating the injury was not work-related." 406 S.C. at 101, 749 S.E.2d at 156-57. The court of appeals affirmed because the appellate panel's reliance on the credibility of the four doctors made sense. The commission's credibility determination was a reasonable and meaningful basis on which to decide the dispositive factual question of whether the injury was work-related, and thus compensable. The court held, "This credibility determination by the appellate panel," which the court found was supported by substantial evidence, "is binding on the court." 406 S.C. at 101, 749 S.E.2d at 157.

In cases where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact. This case illustrates that point. Even if Crane was untruthful in his testimony at the hearing, his claims for future medical care, temporary total disability, and permanent impairment caused by hearing loss are based on objective medical evidence. The opinions of his treating physicians that he suffers from severe to profound hearing loss as a result of his work-related accident are similarly based on objective medical evidence. There is little in Crane's medical records—or anywhere in the record before us—that indicates Crane's credibility reasonably and meaningfully relates to whether he actually suffered hearing loss on February 19, 2014.

To make a proper review of a factual determination by the commission based on credibility, the appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to understand the reasons the evidence supports the credibility finding, and must be able to understand the reasons credibility supports the commission's decision. In most cases, this is obvious from context. In *Langdale*, for example, it required no explanation from the commission for the reviewing court to understand that the credibility determination—the manager did tell the agency a particular employee was to be covered—resolved the disputed factual question of insurance coverage.

In other cases—like this one—more explanation is required. In cases like this, the commission may not simply recite its finding that a witness is not credible, but must explain the basis for its credibility finding.[3] Then, the commission must explain how the credibility determination is important to making the particular factual finding. *See generally Pack v. State Dep't of Transp.*, 381 S.C. 526, 535, 673 S.E.2d 461, 466 (Ct. App. 2009) (reversing the commission because of "its failure to explain exactly why it denied Pack's claim"). Here, neither Commissioner Barden nor the appellate panel gave any explanation how Crane's lack of credibility can justify ignoring the medical evidence, or how his credibility even relates to whether he suffered hearing loss. Four physicians diagnosed Crane with severe to profound hearing loss. Those diagnoses appear to have been based on at least two objective observations by the physicians. First, Crane's eardrums were ruptured, with one doctor describing a 60% tear in the right eardrum and an 80% tear in the left. Second, Crane had at least three hearing tests that showed severe to profound hearing loss in both ears.

We can discern no basis—either from context or from the commission's orders—on which the commission could find Crane lied to make his eardrums appear ruptured. Similarly, neither the context of the commission's decision nor any explanation in the commission's orders give us any meaningful basis on which to understand that Crane's lack of credibility justifies ignoring the results of three different hearing tests—conducted by two different ear, nose, and throat specialists—each of which showed severe to profound hearing loss. As we required in *Hutson*, the

---

[3] To some extent, Commissioner Barden did explain the basis for her credibility finding. Her explanation, however, reads as though she decided to find Crane not believable and then searched for reasons to justify her preconception. For example, the commissioner found Crane's testimony he cannot work because it is too loud to be inconsistent with his testimony he has to turn up the radio in the car to hear it. It is true he testified to those things, but the commissioner's conclusion he lacked credibility does not flow from the testimony. Crane testified he has almost been run over at work several times because he cannot hear cars and other vehicles. To hear these vehicles and avoid being run over, he must turn up his hearing aids so loud that the background noise gives him headaches. He also testified he must set the car radio volume very high or he cannot hear it. Those statements are clearly not inconsistent with each other. They are consistent with his claim of hearing loss. The commissioner relied on several other alleged inconsistencies that do not seem all that significant when taken in context. Nevertheless, there is some evidence to support the commissioner's finding Crane lacked credibility.

commission's factual determinations "must be founded on evidence of sufficient substance to afford a reasonable basis for it." 399 S.C. at 387, 732 S.E.2d at 503.

IV. Conclusion

Credibility can be important in resolving factual disputes before the commission. When credibility is a reasonable and meaningful basis on which to make a factual determination, and when there is evidence of sufficient substance to afford a reasonable basis for the credibility finding, we will uphold the commission's factual determinations on the basis of credibility. However, that was not the case here. The commission erred in denying Crane's claims for hearing loss based on credibility without explaining any basis on which credibility could justify ignoring objective medical evidence. We remand to a different commissioner for a new hearing. The commissioner must reconsider the date of maximum medical improvement and make de novo findings on Crane's claims for temporary total disability, permanent impairment, and future medical care based on his alleged hearing loss, head or brain injury, and psychological overlay.

BEATTY, C.J., KITTREDGE, HEARN and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Arthur M. Field, Respondent.

Appellate Case No. 2018-001042

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
J. Cordell Maddox Jr., Circuit Court Judge

Opinion No. 27952
Heard January 15, 2020 – Filed March 11, 2020

AFFIRMED

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Samuel Creighton Waters, and Senior Assistant Attorney General Brian T. Petrano, of Columbia, for Petitioner.

James Todd Rutherford, The Rutherford Law Firm, LLC, of Columbia, for Respondent.

PER CURIAM: The State indicted Arthur M. Field for multiple counts of securities fraud, forgery, and criminal conspiracy for defrauding investors out of almost $3 million. The State stressed in the indictment and in subsequent hearings that Field's crimes deprived hard-working men and women of savings for their children's education and their own retirement. "It is the kind of crime," the State told the sentencing court, "that spans generations, that has lasting effects -- not just on the 688 [investors] -- but on their children, their grandchildren, and their great-grandchildren."

Field pled guilty to all charges pursuant to a plea agreement under which the State promised not to argue for any specific sentence. The sentencing court sentenced him to ten years in prison, but suspended the sentence on the service of twenty-six months, with restitution to be paid during five years of probation. The court specifically provided Field should receive sixteen months of credit for time served. Eight days later, after applying the sentencing court's credit for time served order, the department of corrections released Field from prison.[1] The same day, the State filed a motion to reconsider, which the sentencing court later denied.

The State now appeals the decision of the sentencing court to grant Field credit for approximately ten months of post-indictment time when Field was not in jail and—the State argues—not "under monitored house arrest." Section 24-13-40 of the South Carolina Code (Supp. 2019) permits a sentencing court to award credit against a sentence of incarceration for pretrial time not served in jail but on "monitored house arrest" as a condition of bond. S.C. Code Ann. § 24-13-40 (Supp. 2019) ("In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and *may be given for any time spent under monitored house arrest*." (emphasis added)). The court of appeals affirmed. *State v. Field,* Op. No. 2017-UP-455 (S.C. Ct. App. withdrawn, substituted, and refiled Apr. 4, 2018). We granted the State's petition for a writ of certiorari.

The State presents a strong argument on the merits. After Field served a month in jail, the bond court amended his original bond order to permit him to leave jail on house arrest. Approximately five months later, however, Field's attorney asked the

[1] The sentencing court granted Field's request to not be taken into custody immediately and permitted him to report to prison three days later. Thus, Field served only five of the eight days.

bond court to "take him off house arrest." The bond court stated on the record "I'll take the house arrest off so he can go, but I'll leave the [electronic monitor] on." The bond court wrote in the bond modification order "motion to amend bond as to house arrest is granted." Field spent approximately ten months under this arrangement before pleading guilty and being sentenced. At a subsequent hearing, the sentencing court agreed with the State's argument that "being on a monitor is not house arrest."

Nevertheless, we decline to reach the merits of the State's appeal. At the time Field's sentence was imposed, the State knew the bond court removed the house arrest restriction approximately ten months earlier. Thus, the State knew Field was entitled to credit only for the one month he spent in jail, but also knew Field could ask for credit for the five months he actually spent on house arrest. Field specifically asked the sentencing court to "give him credit for the fifteen months that he's served on house arrest." When the sentencing court announced on the record it was giving credit for the one month in jail "and for the fifteen months," the State did not object. The sentencing sheets clearly show credit for "33 days + 15 months house arrest."

We are inclined to agree that the sentencing court did not have the authority to give Field credit for the entire fifteen months. We agree with Field, however, that the State did not preserve the issue for appeal. We focus not on the lack of any objection at the sentencing hearing, but on the position the State took in its motion to reconsider the sentence. When the State filed the motion, the State did not argue the sentencing court committed error. Instead, the State merely asserted "pursuant to the plea agreement any sentence is in the discretion of the court, so the State has simply filed this motion to reconsider to preserve jurisdiction in case the sentencing result is inconsistent with [the] court's intent." At the hearing on the motion, the State again did not argue the court committed error, stating, "I wanted to file a motion to preserve jurisdiction so your honor could -- or not, whatever your honor decides -- correct that, um, matter if your honor decides."

The State's careful choice of its words is important here. Pursuant to the plea agreement, the State was not permitted to argue for a specific sentence. Similarly, the State was not permitted to argue on reconsideration that the sentence was too lenient. It is abundantly clear the sentencing court did not mistakenly give Field a sentence that would require him to serve only a few more days. The court stated, "I will tell you [the sentence], to me, is unbelievably lenient. I will take any criticism that I get on that. Any questions?" The court was clear its intent was not to keep Field in prison, but to seek restitution. The court stated, "The main thing I want here,

and I know that it is never going to happen, but there is a shred of hope that at some point some of these victims might get their money back. . . . I am hoping that [the five years probation] will . . . allow them to continue to investigate where the money is." The sentencing court later stated, "Ultimately, what I want to come out of here with is an order that is clear and requires Mr. Field to pay money *or* he's going to prison." (emphasis added).

The State was well aware that if it pushed too hard arguing the sentencing court committed error as to credit for time served, the court could simply reduce the amount of active time from twenty-six months to something that would accomplish the same goal: get Field out now so he could start working on restitution. With this concern in mind, the State chose its words carefully, arguing only that the sentencing court could do "whatever your honor decides." This is what the sentencing court referred to when it stated, "We're all dancing on the head of a pin." On appeal, however, the State squarely argues the sentencing court committed error in giving the disputed ten months of credit. As we have repeatedly held, "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citations omitted).

For these reasons, we decline to address the merits of the State's appeal.

AFFIRMED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Philip Ethier and Jeanne Ethier, Petitioners,

v.

Fairfield Memorial Hospital; Guy R. Bibeau, M.D.; Tuomey Medical Professionals, Inc.; and Pee Dee Emergency Medical Associates, PA, Defendants,

Of whom Guy R. Bibeau, M.D. is the Respondent.

Appellate Case No. 2018-001435

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Fairfield County
Roger L. Couch, Circuit Court Judge

Opinion No. 27953
Heard September 24, 2019 – Filed March 11, 2020

REVERSED AND REMANDED

Ronald Brian Cox and Robert David Proffitt, of Proffitt & Cox, LLP, of Columbia, for Petitioners.

David Cornwell Holler, of Lee, Erter, Wilson, Holler & Smith, LLC, of Sumter, Stanley Lamont Myers, Sr., of Moore Taylor Law Firm, P.A., of West Columbia, Andrew

F. Lindemann, of Lindemann, Davis & Hughes, PA, of Columbia, and G. Murrell Smith, Jr., of Smith Robinson Holler DuBose Morgan, LLC, of Sumter, all for Respondent.

JUSTICE HEARN: In this medical malpractice action, Petitioners Phillip and Jeanne Ethier appeal a verdict in favor of Respondent Dr. Guy Bibeau, who misdiagnosed a popliteal aneurysm as a probable spider bite. Petitioners contend the court of appeals erred in affirming the trial court's decision to deny granting a new trial based on intentional juror concealment and premature deliberations. We reverse and remand for a new trial.

FACTUAL BACKGROUND

I. Facts

In April 2011, Philip Ethier went to the emergency room at Fairfield Memorial Hospital after he felt a sudden, excruciating pain jolt up his leg as he walked to a shed in his backyard. Rather than drive to a nearby hospital in Chester County, Ethier traveled to Fairfield Memorial because he recently had been hired as a licensed practical nurse in its emergency department. Upon arrival, a certified nurse assistant examined his vitals, and Ethier informed her that his leg and foot were in severe pain—about a 7 or 8 on a scale of 10. She noted on a medical intake form that his "feet started to turn ecchymotic."[1] According to the nurse's notes, she examined Ethier's pedal and post-lib pulses, but the corresponding section was left blank.[2]

Thereafter, Bibeau examined Ethier, diagnosing him with a probable spider bite—a "ridiculous" diagnosis according to the plaintiff's expert at trial, especially since neither Ethier nor the nurse assistant mentioned that as a possible scenario and no one ever identified a bite mark. Bibeau informed Ethier to follow-up with his

---

[1] Related to ecchymosis, which is "a discoloration due to extravasation of blood, as in a bruise." *See* Ecchymosis, Dictionary.com, https://www.dictionary.com /browse/ecchymosis.

[2] These pulses are taken in a patient's foot, where according to the Ethiers' expert, an abnormal reading may indicate a vascular issue.

primary physician if symptoms changed and was given similar information upon discharge that afternoon.

Over the next six weeks, Ethier's symptoms gradually improved, allowing him to return to work at the hospital. However, during that time, the tip of one of the toes on his right foot turned black, and according to Ethier, he spoke with Bibeau and another doctor a couple of times during his shifts at the hospital. The occurrence and extent of these "curbside consultations" were disputed at trial. Ethier's initial symptoms returned in late May 2011, requiring him to return to the emergency room. This time, however, Ethier went to a hospital in Chester County, and doctors immediately realized Ethier was suffering from an aneurysm. Shortly thereafter, Ethier was transported by ambulance to a hospital in Charlotte, where vascular surgeons first attempted noninvasive measures to alleviate the blood clots caused by the vascular injury. After these measures failed, surgeons elected to perform invasive surgery, requiring them to cut an incision from his hip to above his ankle.

Due to the severity of the surgery, Ethier suffered intense pain, and trial testimony indicated he is no longer as active as before. Further, while Ethier attempted to return to work as a nurse, the pain eventually prevented him from doing so. Additionally, his wife testified that his disability strained the close companionship they previously enjoyed in their marriage.

The jury found Bibeau negligent and awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Philip Ethier. Additionally, the jury awarded $250,000 in damages to Jeanne Ethier for loss of consortium. However, because the jury apportioned only 30% of the fault to Bibeau and the remaining 70% to Philip Ethier, the trial court entered a defense verdict on both claims. The Ethiers filed a motion to alter or amend the judgment, asserting Jeanne Ethier was entitled to recover the full amount on her loss of consortium claim, but the trial court disagreed, finding Philip Ethier's comparative negligence barred recovery for both claims.

II. Allegations of Juror Misconduct

During voir dire, the court asked prospective jurors whether they ever had a "close social or a personal relationship" with either the Ethiers or Dr. Bibeau. After no one indicated they did, the court asked the same question about the list of potential witnesses, which included Jerilyn Wadford and Rhonda Gwynn, two nurses who examined Ethier, and the CEO of Fairfield Memorial, Mike Williams. To this

question, juror Teresa Killian informed the court, "I used to work at Fairfield Memorial Hospital with Mike Williams." The court responded, "[s]o you knew him from that employment," which Killian confirmed. Killian never disclosed that she also worked with Bibeau or the two nurses.

After trial, the Ethiers' counsel learned Killian previously worked with Bibeau and the nurses, and that Killian had discussed her knowledge of them with other jurors. One of the jurors, Sandra Carmichael, attested Killian stated she knew the nurses as well as Bibeau, and that both "were very careful and thorough, and if they said they did something, they did it." Carmichael also noted that during jury breaks, Killian repeatedly discussed Bibeau's skills as a doctor.

The Ethiers' counsel filed an affidavit with the trial court, which then held a hearing pursuant to *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), to determine the scope of Killian's conduct. The court first called Killian, who denied making any of the alleged statements. She also indicated that she only disclosed knowing Mike Williams because he had treated her son nearly sixteen years earlier. Further, she added that because the question only called for a close social or personal relationship, she did not include Bibeau or the nurses when she mentioned Williams at trial. Thereafter, the court called the remaining members of the jury, and nine testified they specifically recalled Killian informing them she had worked with Bibeau and the nurses. Four jurors said Killian vouched for the skill, proficiency, and truthfulness of all three during jury breaks. Carmichael testified that Killian's statements affected her vote, as she initially believed Bibeau was more negligent. Nevertheless, while the trial court found Killian had engaged in premature deliberations, it found no prejudice. The court also believed Killian did not intentionally conceal that she knew Bibeau and the three nurses through her previous employment, contending the question was ambiguous because it only addressed "close personal or social relationships." Accordingly, the trial court denied the Ethiers' motion for a new trial.

The Ethiers appealed to the court of appeals, which, in an unpublished opinion, affirmed the denial of a new trial based on juror misconduct and the trial court's decision that Philip Ethier's comparative negligence barred Jeanne Ethier's loss of consortium claim. We granted the Ethiers' petition for a writ of certiorari.

ISSUE

Did the court of appeals err in affirming the trial court's denial of Petitioner's motion for a new trial based on juror misconduct for premature deliberations?

LAW/ANALYSIS

The Ethiers contend Killian's premature deliberations affected the fundamental fairness of the trial. Conversely, Bibeau asserts evidence of premature deliberations is inadmissible and regardless, the trial court did not abuse its discretion in denying the motion for a new trial.

Ordinarily, juror testimony concerning juror misconduct is not admissible unless the allegations of misconduct pertain to external influences. *Shumpert v. State*, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008) ("For a considerable period of history, the rule in South Carolina was that a juror's testimony was not admissible to prove either a juror's own misconduct or the misconduct of fellow jurors."). Rule 606, SCRE, also favors exclusion over inclusion of juror testimony pertaining to internal misconduct. However, a well-recognized exception exists where the misconduct affects the fundamental fairness of the trial. *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995) ("Normally, juror testimony involving internal misconduct is competent only when necessary to ensure due process, i.e. fundamental fairness."). Premature deliberations fall within this exception. *State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) ("[W]e hold premature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations."). Once the court determines that premature deliberations occurred, the moving party bears the burden of demonstrating prejudice, which involves an analysis as to whether the juror misconduct actually affected the verdict. *Id.* at 315, 509 S.E.2d at 815 ("[W]e hold the burden is on the party alleging premature deliberations to establish prejudice."). Finally, the trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Id.*

Because premature deliberations may affect the fundamental fairness of the trial, the affidavit and juror testimony are admissible. Accordingly, our inquiry concerns whether the trial court abused its discretion in finding Killian's conduct did not prejudice the Ethiers. In *Aldret*, we imposed the burden to prove prejudice on the party alleging premature deliberations. *Id.* We did so in part because we previously required a showing of prejudice in the context of external influences and based on

the fact that the majority of jurisdictions have imposed prejudice on internal influences. *Id.* at 313–15, 509 S.E.2d at 814–15. While the burden to demonstrate prejudice is high, when evidence strongly supports the fact that votes were changed as a result of a juror's impermissible conduct, we cannot countenance such a tainted verdict.

We have previously upheld a trial court's finding of no prejudice even when there was direct evidence that votes were changed. *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 384 S.C. 441, 682 S.E.2d 489 (2009). In *Vestry*, a church filed suit against an exterminating company for breach of contract after members discovered termite damage following an inspection. *Id.* at 443, 682 S.E.2d at 490–91. The jury returned a verdict in favor of the exterminating company, but the trial court soon learned of potential juror misconduct. *Id.* at 443–44, 682 S.E.2d at 491. As a result, the court held a hearing, where it questioned jurors about the alleged misconduct. It became apparent that a juror violated virtually every instruction given by the trial court. *Id.* For example, the juror ignored the court's instruction not to discuss the case during the trial with anyone, including fellow jurors. Specifically, the juror informed her fellow jurors early and often of her view of the case, referring to the church members as "historic people" with money who should "clean up their own mess." *Id*. The juror did not understand why she had to hear both sides of the case, and she mentioned that she had consulted with a painter about the termite damage. Stunningly, she even drove to the church to look at the damage prior to deliberations and based on her own inspection, determined it was in good condition. *Id.* The trial court actually held her in criminal contempt of court; yet nevertheless, the court denied the church's motion for a new trial, inexplicably finding the church was not prejudiced—a decision which this Court upheld. *Id.* at 445, 448–49, 682 S.E.2d at 491, 493–94. Because *Vestry* stands for the principle that less than twelve fair and impartial jurors is perfectly acceptable and is an anomaly in our jurisprudence, we overrule it.

In many ways, Killian's behavior mirrors that of the juror in *Vestry*. The trial court initially recognized the seriousness of Killian's conduct, and therefore, held an *Aldret* hearing to probe the extent of her statements. At the hearing, nine jurors testified they heard Killian state during breaks at trial that she worked at the hospital with Bibeau and the nurses. Four jurors testified Killian vouched for the skill of all three by stating they were "good, careful, or thorough," and if Bibeau did not take foot pulses, then "the nurse" did. Further, four jurors noted Killian vouched for the

truthfulness and credibility of all three, asserting Killian informed the jury during breaks that if they "said they did something, they did it."

Despite this testimony, Killian denied discussing the case prematurely and noted her relationship with Bibeau and the nurses did not impact her vote. The trial court found Killian engaged in premature deliberations, but it concluded the Ethiers failed to prove the requisite prejudice in order to grant a new trial. While we commend the trial court for its thorough post-trial evidentiary hearing, it is clear Killian's conduct severely hampered the fundamental fairness of the trial, and that the circumstances here demonstrate prejudice. Carmichael testified that Killian's comments directly affected her vote, as she initially believed Bibeau was more negligent. Indeed, in response to the court's prejudice inquiry, Carmichael stated,

> **Carmichael:** Because when we got back there . . . several of us was leaning towards in favor of [Philip Ethier] and she kept on repeating the reputation and some of the jurors changed their minds and left only two of us with [Philip Ethier], and basically was like, well, if she worked with [Bibeau] and she knew that he was a good doctor . . .
>
> **The Court:** Okay, so it did have some effect on your ultimate decision?
>
> **Carmichael:** Yeah. She stated several times that she knew him and he was a good, reliable doctor.

Killian's intentional disregard of the trial court's repeated instructions not to engage in premature deliberations directly affected the verdict. Killian discussed matters that were not introduced as evidence, and bolstered other evidence that had been admitted. Further, Killian's conduct is egregious, as she repeatedly discussed the case after being instructed not to do so. *Aldret*, 333 S.C. at 311, 509 S.E.2d at 813 (holding premature deliberations may affect the fundamental fairness of a trial in part because the Court has "routinely held instructions which invite jurors to engage in premature deliberations constitute reversible error"). Moreover, the content of her statements is equally troubling, as it concerns the most hotly disputed fact at trial—whether Bibeau checked Ethier's foot pulses. Ethier's expert testified his symptoms presented a classic indication of a vascular issue, which a simple check of his foot pulse would have revealed, and the medical forms do not indicate these pulses were taken. In essence, Bibeau received the benefit of having a character witness on the jury who could attest to his skill without being subjected to cross-examination. This benefit is not speculation, as Killian directly affected

Carmichael's vote. Although we have been reluctant to reverse a trial court's denial of a motion for a new trial based on juror misconduct, Killian's disregard of her oath, with resulting prejudice, heightens the error and necessitates the step we take here.

Because we find this issue dispositive, we decline to address the Ethiers' remaining issues.[3] *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address additional arguments after reaching a dispositive issue). While we do not reach the effect of Philip Ethier's negligence on his wife's consortium claim, we do note that South Carolina has historically aligned itself with the minority of jurisdictions which hold a loss of consortium claim and the underlying negligence action are two separate claims. *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007) ("In South Carolina, claims for personal injuries and for loss of consortium are separate and distinct."). However, the majority of jurisdictions recognize that a spouse's negligence reduces the damages award for loss of consortium. *See Tuggle v. Allright Parking Sys., Inc.*, 922 S.W.2d 105, 108–09 (Tenn. 1996) ("The clear majority of jurisdictions. . . hold that a loss of consortium award must be reduced, and may be barred, by the comparative fault of the physically injured spouse."). We do not reach this issue today because the juror misconduct infected both actions, and a new trial as to both claims is warranted.

CONCLUSION

We reverse the court of appeals' decision and remand for a new trial as to all of the Ethiers' claims.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, FEW and Acting Justice James Edward Lockemy, concur.

[3] The Ethiers also contended the trial court erred in failing to grant a new trial based on juror concealment when Killian did not disclose during voir dire her working relationship with Bibeau and the two nurses, and it erred in barring recovery for Wife's loss of consortium claim when the jury found her husband 70% at fault.

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 inculpates 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),

---

[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.

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 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 presence 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

Christine LeFont, Appellant,

v.

City of Myrtle Beach; Myrtle Beach Convention Center Hotel Corporation, Respondents.

Appellate Case No. 2017-001258

Appeal From Horry County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5715
Heard February 4, 2020 – Filed March 11, 2020

REVERSED AND REMANDED

Stephen Lewis Goldfinch, Jr., and Thomas William Winslow, both of Goldfinch Winslow LLC, and Ryan P. Compton, of Inlet Law Group, LLC, all of Murrells Inlet, for Appellant.

Christian Stegmaier, of Collins & Lacy, PC, of Columbia, and Amy Lynn Neuschafer, of Collins & Lacy, PC, of Murrells Inlet, for Respondent City of Myrtle Beach.

LOCKEMY, C.J.: In this premises liability action, Christine LeFont argues the circuit court erred in granting a directed verdict to the City of Myrtle Beach (the City). We reverse and remand.

FACTS

This premises liability action arises out of LeFont's trip and fall in a parking lot behind the Myrtle Beach Convention Center[1] (the Convention Center) on August 13, 2014. LeFont and her husband were vendors participating in a trade show at the Convention Center. The Convention Center has a large lot dedicated to public parking. A small gated employee parking lot is located immediately behind the Convention Center. On the morning of the incident, LeFont entered the employee parking lot and dropped off her husband near the loading docks to allow him to carry boxes of product into the Convention Center. LeFont then asked the security guard at the gate if she could briefly park in the employee lot while she went inside the Convention Center to determine whether she needed to return to the warehouse for more product. After receiving permission to park, LeFont walked toward the Convention Center and tripped over a small pothole[2] and fell. LeFont sustained injuries in the fall, including a broken wrist, a broken forearm, and two broken elbows.

On January 5, 2015, LeFont filed a complaint against the City and the Convention Center asserting a negligence cause of action against both defendants. The City filed an answer denying liability and raising several affirmative defenses alleging, in part, that LeFont's action was subject to certain provisions of the South Carolina Tort Claims Act[3].

Prior to trial, the parties stipulated to the dismissal of the Convention Center. The case proceeded to trial on September 6, 2016. At trial, following the close of LeFont's case, the City moved for a directed verdict. The circuit court denied the motion. Subsequently, following the close of all evidence, the City moved again for a directed verdict. The circuit court granted the City's motion and directed a verdict on multiple grounds, finding: (1) LeFont was a licensee; (2) there was no evidence the City breached its duty owed to LeFont as a licensee; and (3) there was no evidence the City had constructive notice of the pothole.

---

[1] The City owns the Convention Center.

[2] The hole was approximately four to six inches in diameter and one and a half inches deep.

[3] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2019).

On September 20, 2016, LeFont filed a Rule 59(e), SCRCP, motion to alter or amend. The circuit court denied LeFont's motion in April 2017. This appeal followed.

STANDARD OF REVIEW

When reviewing the circuit court's ruling on a directed verdict motion, this court must apply the same standard as the circuit court "by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). An appellate court will reverse the circuit court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006). "On the other hand, the [circuit] court must deny a motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt." *Id.* "When considering a directed verdict motion, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188-89, 691 S.E.2d 170, 173 (Ct. App. 2010).

LAW/ANALYSIS

I. Circuit Court Ruling

As an initial matter, the parties disagree as to the circuit court's basis for granting a directed verdict.

The City argues the circuit court granted its motion for a directed verdict on multiple grounds, including a lack of evidence establishing liability under section 15-78-60(15) of the South Carolina Tort Claims Act (the Act)[4] and under a

[4] Pursuant to section 15-78-60(15), a governmental entity is not liable for a loss resulting from

> a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity

traditional premises liability analysis. The City contends LeFont failed to appeal the court's ruling based on application of the Act, and, therefore, the court's ruling on that ground is the law of the case.

LeFont contends the circuit court did not rule on section 15-78-60(15). LeFont admits the court and the parties discussed the Tort Claims Act during arguments on the directed verdict motion, but she asserts the court did not rule upon every issue discussed.

Pursuant to the record, the circuit court held the following after a lengthy discussion with counsel:

> [S]o that creates a twofold—a two barrel appeal if you want to take it . . . .
>
> I'm finding in this particular factual situation my conclusion is these people meet the definition of a being a—your lady, the Plaintiff met the definition of a licensee, not an invitee, and was on the premises certainly not as a trespasser. She had every right to be there. And she had every right to expect the premises to be—not contain any latent defects or any problems that would have been hidden, and be on notice of that . . . .
>
> But primarily I don't find that there's any evidence that would establish constructive notice of the pothole and therefore require that the City to take any action independent of what was done.

We agree with LeFont that the circuit court did not rule on the Tort Claims Act issue. Although the court discussed the Act with counsel prior to ruling, it did not state it was granting a directed verdict based on the Act.

> responsible for the maintenance within a reasonable time after actual or constructive notice.

S.C. Code Ann. § 15-78-60(15) (2005).

II. LeFont's Status

LeFont argues the circuit court erred in finding she was a licensee, not an invitee, while at the Convention Center the day of her injury. We agree.

"To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008).

The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury. *Sims v. Giles*, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). "A landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities." *Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc.*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994). "Unlike a licensee, an invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there." *Id.* (quoting *Bryant v. City of North Charleston*, 304 S.C. 123, 128, 403 S.E.2d 159, 161 (Ct. App. 1991)). "A landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks." *Id.*

A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent. *Neil v. Byrum*, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). "When a licensee enters onto the property of another, the primary benefit is to the licensee, not the property owner." *Hoover v. Broome*, 324 S.C. 531, 535, 479 S.E.2d 62, 64 (Ct. App. 1996). "A licensee is a person whose presence is tolerated, a person not necessarily invited on the premises, but one who is privileged to enter or remain on the premises only by the property owner's express or implied consent." *Sims*, 343 S.C. at 720, 541 S.E.2d at 863-64.

By contrast, an invitee is a person who enters onto the property of another "by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." *Id.* at 716-17, 541 S.E.2d at 862 (quoting 62 Am.Jur.2d *Premises Liability* § 87 (1990)). "The law

recognizes two types of invitees: the public invitee and the business visitor." *Id.* at 717, 541 S.E.2d at 862. "A public invitee is one who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public." *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997). In contrast, a business visitor is an invitee whose purpose for entering the property is either directly or indirectly connected with the purpose for which the property owner uses the land. *Sims*, 343 S.C. at 717, 541 S.E.2d at 862.

> [T]he class of persons qualifying as business visitors is not limited to those coming upon the land for a purpose directly or indirectly connected with the business conducted thereon by the possessor, but includes as well those coming upon the land for a purpose connected with their own business, which itself is directly or indirectly connected with a purpose for which the possessor uses the land.

Singleton, 377 S.C. at 199, 659 S.E.2d at 203-04 (quoting 62 Am.Jur.2d *Premises Liability* § 88 (1990)). "The basic distinction between a licensee and an invitee is that an invitee confers a benefit on the landowner." *Landry*, 317 S.C. at 204, 452 S.E.2d at 621.

The circuit court concluded LeFont was a licensee as a matter of law and not an invitee because: (1) "the [C]onvention [C]enter leases to somebody for their benefit, and the benefit is certainly indirectly;" and (2) "because they don't control who comes or goes or who's asked to come or go."

LeFont argues the circuit court erred in granting a directed verdict on the ground that she was a licensee at the time of her injury because there was sufficient evidence in the record for the jury to infer that she was an invitee. Specifically, LeFont contends (1) her entry onto the City's premises was to her benefit and that of the City; (2) she entered the City's premises, and specifically the parking lot, through an express invitation and an implied invitation; and (3) she entered the City's premises for her own business connected to the purpose for which the Convention Center was held open.

We agree with LeFont. We find sufficient evidence was presented for the jury to infer that LeFont was an invitee.

First, the record contains sufficient evidence for the jury to infer that LeFont provided a benefit to the City. LeFont testified she and her husband paid between $1,800 and $2,500 to HT Hackney, the distributor hosting the trade show, as vendors to attend the trade show in August 2014. In turn, Susan Skellett, the Convention Center's convention services manager, testified HT Hackney paid to lease Convention Center space to host its show.

Second, the record contains sufficient evidence for the jury to infer that LeFont was on the Convention Center premises as a result of an express and implied invitation. Skellett testified vendors are invited to the Convention Center to display their goods. In addition, LeFont also testified the security guard working in the employee parking lot opened the gate for her to enter and gave her permission to park.

Finally, the record contains sufficient evidence for the jury to infer that LeFont's entry onto the Convention Center premises was for business connected to the purpose for which the Convention Center was held open. The Convention Center was open for a trade show. LeFont and her husband were vendors participating in the trade show.

"Ordinarily, when conflicting evidence is presented as to whether someone is a licensee or invitee, the question becomes one of fact and as such, is properly left to the jury." *Vogt v. Murraywood Swim & Racquet Club*, 357 S.C. 506, 511, 593 S.E.2d 617, 620 (Ct. App. 2004). Based on the record in this case, we find a conflict in the evidence exists regarding LeFont's status at the time of the incident. Accordingly, we reverse the circuit court's finding that LeFont was a licensee.[5]

III. Notice

LeFont argues the circuit court erred in finding the record contains no evidence that the City had constructive notice of the pothole. We agree.

---

[5] Based upon our reversal of the circuit court's finding that LeFont was a licensee, the court need not address LeFont's second argument on appeal that the circuit court erred in finding the City did not breach its duty of care. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

> To recover damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff 'must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.'

Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009) (quoting *Anderson v. Racetrac Petroleum, Inc.*, 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988)).

Here, the circuit court held there was no evidence the City had constructive notice of the pothole in the Convention Center parking lot. "Constructive notice is a legal inference, which substitutes for actual notice." *Major v. City of Hartsville*, 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014). "Constructive notice . . . is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts." *Strother v. Lexington Cty. Recreation Comm'n*, 332 S.C. 54, 63 n.6, 504 S.E.2d 117, 122 n.6 (1998).

LeFont asserts conflicting evidence was presented as to whether the City had constructive notice of the pothole. Conversely, the City maintains there is no evidence in the record that the pothole existed at any time prior to the date of LeFont's injury.

Viewing the evidence in the light most favorable to LeFont, we find the record contains sufficient evidence for the jury to infer that the City had constructive notice of the pothole. Dr. Bryan Durig testified at trial as an expert in the field of mechanical engineering. Dr. Durig testified the employee parking lot where LeFont's injury occurred is in a loading zone and receives frequent traffic not only from employees and vendors, but also from tractor trailers carrying heavy loads that cause wear and tear on the parking surface. Dr. Durig further testified the hole was in violation of the International Property Maintenance Code that was adopted by the City and requires parking lots to be maintained free from hazardous conditions. In addition, the record contains testimony that Convention Center employees were regularly in the parking lot and could have detected the hole and that the City had procedures in place for fixing holes. Dr. Durig noted the hole contained dirt and debris—evidence from which the jury could infer the hole had existed long enough for the City's employees to discover it.

In light of the foregoing, we find there was sufficient evidence of constructive notice to allow the jury to resolve the question of the City's liability. Accordingly, we reverse the circuit court's grant of a directed verdict.

CONCLUSION

We reverse the circuit court's grant of a directed verdict to the City and remand for trial.

REVERSED AND REMANDED.

GEATHERS and HEWITT, JJ., concur.