The Supreme Court of South Carolina

In the Matter of Oshun Cyrus Hinton, Deceased.

Appellate Case No. 2015-000774

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition advising the Court that Oshun Cyrus Hinton, Esquire, passed away on April 12, 2015, and requesting the appointment of Carl L. Solomon, Esquire, as Special Receiver to protect the interests of Mr. Hinton's clients pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In addition, ODC requests that the Court appoint Vanessa Cason, Esquire, to assist Mr. Solomon. The petition is granted.

IT IS ORDERED that Carl L. Solomon, Esquire, is hereby appointed to assume responsibility for Mr. Hinton's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Hinton maintained. Mr. Solomon shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Hinton's clients. Mr. Solomon may make disbursements from Mr. Hinton's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Hinton maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Hinton, shall serve as notice to the bank or other financial institution that Carl L. Solomon, Esquire, has been duly appointed by this Court.

This Order, when served on any office of the United States Postal Service, shall serve as notice that Carl L. Solomon, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Hinton's mail and the authority to direct that Mr. Hinton’s mail be delivered to Mr. Solomon's office.

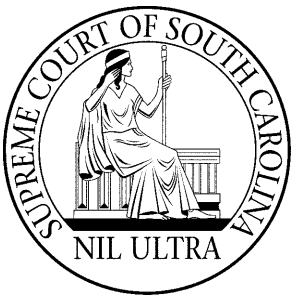
Finally, the Court appoints Vanessa Cason, Esquire, to assist the Special Receiver in performing the duties imposed by Rule 31, RLDE.

These appointments shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

April 14, 2015



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 22, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Derrick McDonald, Petitioner.

Appellate Case No. 2012-213686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27515
Heard December 11, 2014 – Filed April 22, 2015

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody J. Brown, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

JUSTICE KITTREDGE: Petitioner Derrick McDonald and two codefendants were convicted of murder and first-degree burglary. The court of appeals affirmed, rejecting McDonald's argument that his Confrontation Clause rights were violated when the trial court admitted the redacted confession of one of his nontestifying codefendants. We granted a writ of certiorari to review the court of appeals' decision in *State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012). We find the court of appeals erred, for the jury would readily infer from the face of the codefendant's confession that it referred to and incriminated McDonald. We nevertheless affirm McDonald's conviction, for the error was harmless in light of the overwhelming evidence of guilt.

I.

McDonald, Christopher Whitehead, Robert Cannon and Joshua Zoch (Victim) worked together at various times at a Sonic fast food restaurant in Columbia, South Carolina. On the evening of December 12, 2006, Victim was brutally murdered in his Kershaw County home. McDonald, Whitehead, and Cannon were charged, tried together, and convicted of burglarizing Victim's home and murdering him.

Earlier on the day of the murder, Whitehead called a co-worker looking for Victim. Whitehead wanted to know if Victim would be home that evening. According to the co-worker, Whitehead wanted to go over to Victim's home to fight him. Whitehead was upset because he believed Victim was a "snitch" who was cooperating with the police in various drug investigations.

At approximately 10:00 in the evening, Whitehead, McDonald and Cannon arrived together at Sonic in Whitehead's car. Cannon was wearing a ski mask, and the assistant manager on duty told all three men to leave the premises. The trio left Sonic together in Whitehead's car and drove to a Wal-Mart, where they purchased a ski mask and latex gloves.

Victim's brutally beaten body was discovered in his home the next day by his girlfriend. Victim was beaten to death by multiple objects. The forensic pathologist testified that he identified between six and eight injuries to Victim's head that were each independently capable of causing death.

The investigation quickly focused on Whitehead, McDonald, and Cannon (Defendants). Investigators spoke to Cannon, who gave a detailed confession implicating all of the Defendants in Victim's murder. Following Cannon's confession, McDonald and Whitehead were arrested. McDonald also confessed and admitted that the Defendants, after going to Wal-Mart, drove to Victim's home and broke in and killed him. Defendants punched and kicked Victim repeatedly and hit him with a baseball bat and a lamp.

II.

Defendants were indicted on charges of first-degree burglary and murder. The State chose to try the Defendants jointly and sought to introduce McDonald's and Cannon's confessions during its case-in-chief. Defense counsel and the State argued about how the confessions should be redacted in order to comply with the Confrontation Clause. The State contended redacting the confessions using the neutral phrase "another person" was sufficient, while defense counsel insisted on redacting all references to anyone other than the confessing defendant in each of the statements. The trial court overruled defense counsel's objections and instructed the State to redact the confessions using the phrase "another person." The confessions were admitted over counsel's objection.

According to Cannon's statement, with "another person" substituted for the names of the codefendants:

> On Tuesday the 12th December 2006 at 2:00 p.m. *another person* got off of work and picks me up. We go to the mall and I got a new cell phone and shoes. We then went to pick up *another person* and then we went to McDonalds in Blythwood and eat and from there we went to Sonic. I had on a ski mask and was joking around while *another person* talked to a girl in the back and *another person* was talking to Leroy. I don't know Leroys last name. We then left Sonic and went to the Two Notch Walmart and and *another person* got a ski mask. So we went riding and *another person* said you know we need to do something with these mask, and I ask and *another person* ask like what. And *another person* said like beat Josh's ass because he's a snitch, and I told *another person* I didn't think he was a snitch. *Another person* then ask if me and *another person* wanted to ride and we said whatever.

Because I had nothing else to do and no certain time to be home, that was about 11 p.m. *Another person* was real quiet in the car while we were going to Josh's house. We pulled up to Josh's about 11:30 p.m. *another person* knocked on the front door and Josh didn't answer. So *another person* said that he was going to pull one of my moves and kick the door. So *another person* went to the side door and he *another person* busted it in.

He went in first and me and *another person* followed him to watch the fight. Josh was asleep on the couch and *another person* yelled hey bitch, and when Josh looked up, *another person* hit him with a glass lamp. Right after that Josh was in a daze and *another person* drags him off the couch part of the way. Then *another person* started pressuring another person to hit Josh with the bat that was in the house and *another person* then hit Josh in the back of head. After that Josh was basicly crawling trying to get up, and the whole time *another person* was talking shit to him about being a snitch. At that time *another person* kicked Josh in the ribs and ask Josh where the weed was and Josh was just grunting. That when *another person* ask me to check the room and we started pulling draws and *another person* flipped the mattress and *another person* was just standing their. Then Josh went unconscious and I got Josh a towel and put it to his head. *Another person* said fuck we don't have anything and pushed the Christmas tree over on Josh. *Another person* then got mad again and took the house phone. But before *another person* left he got some frozen chicken from the freezer and put it on Josh's head to try and stop the bleeding. After that we went back out the same way we came in.

We left and *another person* dropped *another person* off 1st and me second and I guess he went home.

Q: Did you, *another person, and another person* have on gloves?
A: Yes.

Q: What kind of gloves?
A: Purple latex and I had on 2 pair white and purple ones on top.

Q: Where was the bat from that was used to hit Josh?
A: It was in Josh's house. I just looked over their and *another person* picked it up.

Q: What were you, *another person, and another person* wearing that night?
A: Black pants and shirts and ski mask.

Q: What color was the ski mask?
A: Mine was black and theirs was black or dark blue.

Q: Did you change cloths that night after the incident?
A: Yes and *another person* done something with them.

No defendant testified.

The jury found Defendants guilty of both charges. McDonald appealed,[1] contending that his Confrontation Clause rights were violated by the admission of Cannon's redacted confession, arguing that given the context, Cannon's written confession clearly implicated McDonald in the crimes. The court of appeals affirmed, "find[ing] that the neutral phrase 'another person' inserted into Cannon's statement avoided any [Confrontation Clause] violation."[2] *State v. McDonald*, 400 S.C. at 279, 734 S.E.2d at 170. We now review the court of appeals' Confrontation Clause determination.

[1] Whitehead also raised a Confrontation Clause challenge on appeal, and the court of appeals affirmed his conviction in an unpublished opinion. *State v. Whitehead*, Op. No. 2012-UP-526 (S.C. Ct. App. filed Sept. 12, 2012). This Court granted a writ of certiorari to review the court of appeals' decision.

[2] McDonald also argued in the court of appeals that the admission of Cannon's statement violated *Crawford v. Washington*, 541 U.S. 36 (2004). The court of appeals held that issue to be unpreserved. *State v. McDonald*, 400 S.C. at 279–80, 734 S.E.2d at 171. This Court denied certiorari as to the *Crawford* issue.

III.

"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 right "include[s] the right to cross-examine those witnesses." *Pointer v. Texas*, 380 U.S. 400, 401 (1965). In *Bruton v. United States*, the United States Supreme Court held that a defendant's Confrontation Clause rights are violated when a nontestifying codefendant's confession that implicates the defendant is admitted during a joint trial. 391 U.S. 123, 127–28 (1968). The Court noted that these "powerfully incriminating extrajudicial statements of a codefendant" are not only "devastating to the defendant but [also] their credibility is inevitably suspect." *Id*. at 135–136. "While appearing to establish a bright-line rule against the admission of a codefendant's confession which incriminates a defendant, the [*Bruton*] Court acknowledged there are alternatives which may allow the admission of a confession while still protecting a defendant's Confrontation Clause rights and in a footnote, mentioned redaction as one of those alternatives." *State v. Henson*, 407 S.C. 154, 162, 754 S.E.2d 508, 512 (2014) (citing *Bruton*, 391 U.S. at 133–34. 134 n.10).

The Supreme Court has revisited the issue twice since *Bruton*. In *Richardson v. Marsh*, the Court addressed the issue of whether the Confrontation Clause is violated "when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." 481 U.S. 200, 202 (1987). The Court held that there was no Confrontation Clause violation "by the admission of a nontestifying codefendant's confession with a proper limiting instruction" when "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id*. at 211. The Court expressly declined to opine "on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id*. at 211 n.5.

Eleven years later, the Supreme Court reached that issue in *Gray v. Maryland*, 523 U.S. 185 (1998). The defendant's name in *Gray* was redacted by using the word "deleted" or inserting a blank space, and the 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" as it "refers directly to the 'existence' of the nonconfessing codefendant." *Id*. at 192. The Court noted that "the obvious deletion may well call the jurors' attention specially to the removed name." *Id*. at 193. "By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference." *Id*. "In other words, the Court brought within *Bruton*'s prohibition those confessions which facially incriminate through inference." *Henson*, 407 S.C. at 164, 754 S.E.2d at 513.

This Court has followed *Gray*. First, in *State v. Holder*, the Court held that the admission of a nontestifying codefendant's oral statement which replaced the defendant's name with "she" violated the Confrontation Clause "because the jury could readily determine that the statement referred to [defendant] as she was the only female defendant." 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009). More recently, in *Henson*, we found that the State's use of a nontestifying codefendant's confession that replaced defendant's name with "the guy," "he," and "him" violated the Confrontation Clause because "the jury could infer from the face of [nontestifying codefendant's] confession without relying on any other evidence, that the confession referred to and incriminated [the defendant.]" 407 S.C. at 166, 754 S.E.2d at 514.

In the instant case, Cannon's confession was redacted using the phrase "another person." However, even a casual reading of the confession makes it apparent that the confession describes the actions of Cannon and two other male individuals. For example, Cannon's confession begins: "On Tuesday the 12th December [sic] 2006 at 2:00 p.m. *another person* got off of work and picks [sic] me up. We go [sic] to the mall and I got a new cell phone and shoes. We then went to pick up *another person* . . . ." Moreover, the redacted version of Cannon's statement repeatedly uses the pronouns "he" and "him," clearly indicating that the unnamed individuals in the confession were male. In light of the fact that there were three male defendants in the trial, the jury was left with the inescapable conclusion that Cannon's confession referred to McDonald and Whitehead, who were seated at counsel table.[3] Under *Bruton* and its progeny, this is insufficient to satisfy the

[3] We also note that immediately after the investigator read Cannon's confession to the jury, the solicitor asked, "What happened next in the investigation? What did you do next?" The investigator responded, "After obtaining [Cannon's] statement,

demands of the Confrontation Clause. *See Gray*, 523 U.S. at 196 ("The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately . . . ."); *Henson*, 407 S.C. at 164, 754 S.E.2d at 513 (stating that *Bruton* prohibits statements "which facially incriminate through inference").

Moreover, we reject the State's invitation to find no Confrontation Clause violation based on the trial court's limiting instruction. The presence of a limiting instruction is not curative here, as it was not in *Bruton*, for "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135 (citations omitted). We hold that the court of appeals erred in finding that the admission of Cannon's redacted confession did not violate McDonald's Confrontation Clause rights.

"The mere finding of a violation of [the Confrontation Clause] in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction." *Schneble v. Florida*, 405 U.S. 427, 430 (1972). "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Id*. In this case, we find that the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt.

We first note the presence of strong evidence of guilt, apart from the erroneous admission of Cannon's confession. On the evening of the murder, Whitehead informed a co-worker that he intended to go over to Victim's home to fight him. Later that evening, around 10:00 p.m., Defendants arrived at the Sonic, with Cannon donning a ski mask. The shift manager told the Defendants to leave. An on-duty employee then observed Defendants leave together. That employee testified that Whitehead drove a four-door sedan with a noticeably loud muffler sound. Investigators obtained a receipt from the Wal-Mart on Two Notch Road in Columbia, which confirmed that a ski mask and purple latex gloves were

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we then obtained an arrest warrant for Mr. Derrick McDonald." The inescapable conclusion is that Cannon's statement inculpated McDonald.

purchased at 10:43 p.m. on the night of the murder. At approximately 11:30 p.m., near the time of Victim's murder, Victim's neighbor took his dog outside and heard "a lot of knocking noise[s], loud, like somebody kicking something or slamming doors." About ten minutes later, the neighbor heard "a lot of noise" and "a lot of people getting excited." He then heard a loud muffler sound and observed headlights in the road. A short time later, at about 1:30 a.m., McDonald showed up at a co-worker's house and was visibly upset. The co-worker testified that, although McDonald did stay at his house from time to time, this was the first time McDonald had showed up so late. In addition, the morning after the murder, Whitehead showed up to work at the Sonic with a scratch under one of his eyes and a limp. He began acting strange and lied to his manager about the source of the injuries, claiming that he fell at work. Several days later, he walked out of work during a shift and told his manager that he's "got problems" and was "about to move to Aiken." We find this evidence of guilt, independent of Cannon's confession, compelling.

Beyond the independent evidence of guilt, McDonald gave a confession that was entirely consistent with Cannon's confession. McDonald's confession detailed going to the restaurant with Whitehead and Cannon, purchasing a ski mask and gloves from Wal-Mart, arriving at Victim's home, kicking in the door, hitting Victim repeatedly in the body and head with a baseball bat, and stealing various items from Victim's home. The properly admitted evidence at trial aligns with the details McDonald provided in his confession. In addition to the corroboration of the purchase at Wal-Mart, part of a purple latex glove was found at the crime scene. Victim's girlfriend further testified that Victim kept a baseball bat at his home, which investigators also found at the crime scene.

Given the extensive evidence of guilt, we conclude that the *Bruton* violation was harmless beyond a reasonable doubt. *See Schneble*, 405 U.S. at 431 (finding a *Bruton* violation to be harmless error when the "details of petitioner's [confession] were internally consistent, were corroborated by other objective evidence, and were not contradicted by any other evidence in the case").[4]

[4] Although we find the error in this case harmless, we take this opportunity to repeat our cautionary warning from almost three decades ago when we "urge[d] the [S]tate to carefully consider all the available alternatives before deciding to try co-defendants jointly." *State v. Bellamy*, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d

IV.

We conclude that the admission of Cannon's redacted confession violated McDonald's Confrontation Clause rights. However, in light of the overwhelming evidence of guilt, we determine that that the error in this case was harmless beyond a reasonable doubt. We affirm the court of appeals as modified.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

315, 328 n.5 (1991). "While we realize there will be circumstances in which a joint trial will be the best route to follow, the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise from joint trials." *Id.*

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ricky Rhame, Petitioner,

v.

Charleston County School District, Respondent.

Appellate Case No. 2012-213148

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 27516
Heard November 18, 2014 – Filed April 22, 2015

REVERSED AND REMANDED

Blake A. Hewitt and John S. Nichols, both of Bluestein Nichols Thompson & Delgado, of Columbia; Kenneth W. Harrell and Patrick L. Jennings, both of Joye Law Firm, of North Charleston, for Petitioner.

Stephen L. Brown, Catherine H. Chase, and Leslie M. Whitten, all of Young Clement Rivers, LLP, of Charleston, for Respondent.

JUSTICE KITTREDGE: We granted Ricky Rhame's petition for a writ of certiorari to review the court of appeals' decision in *Rhame v. Charleston County School District*, 399 S.C. 477, 732 S.E.2d 202 (Ct. App. 2012). We are presented with a legal question—whether an Appellate Panel of the Workers' Compensation Commission has the authority to entertain motions for rehearing. We hold an Appellate Panel of the Commission, on review of a single commissioner's decision, has such authority, and we reverse the contrary decision of the court of appeals. We remand to the court of appeals for consideration of Rhame's appeal from the Commission.

I.

Rhame filed a claim for workers' compensation benefits. The single commissioner found the claim compensable. Respondent sought review, and the matter was heard by an Appellate Panel of the Commission. The Appellate Panel reversed, denying the claim. Rhame filed a motion for rehearing before the Appellate Panel. He did not file his notice of appeal until after the Appellate Panel denied his motion for rehearing. The notice of appeal was filed more than thirty days after the Appellate Panel's initial denial of the claim.

The court of appeals dismissed Rhame's appeal because the notice of appeal was not filed within thirty days from the date the Appellate Panel denied his claim. *Rhame*, 399 S.C. at 482–83, 732 S.E.2d at 205. The court of appeals held that motions for rehearing are not permitted before the Commission on review of a single commissioner's decision. *Id.*

We granted Rhame's petition for a writ of certiorari, which asked this Court to reverse the court of appeals and reinstate his appeal.

II.

Whether the legislature has granted the Commission, on review of a single commissioner's decision, the authority to entertain motions for rehearing is a question of statutory interpretation, and this Court reviews that question de novo. *Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 556 (2013). Rhame argues section 1-23-380(1) of the South Carolina Code (Supp. 2014) grants him the right to seek rehearing before the Appellate Panel of the Commission following review of a single commissioner's decision. We agree.

III.

A.

Section 1-23-380(1) provides:

> Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, *if a rehearing is requested*, within thirty days after the decision is rendered. Copies of the notice of appeal must be served upon the agency and all parties of record.

(emphasis added).

"'The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.'" *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). "'When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.'" *Id.* (quoting *Sloan*, 371 S.C. at 498, 640 S.E.2d at 459). "In interpreting a statute, '[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *Id.* (quoting *Sloan*, 371 S.C. at 499, 640 S.E.2d at 459).

The plain language of section 1-23-380(1) indicates that the legislature, by including the phrase "if a rehearing is requested," intended to allow motions for rehearing before all administrative agencies that are governed by the Administrative Procedures Act (APA). *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981) (noting that the APA was enacted "to provide *uniform* procedures before State Boards and Commissions" (emphasis added)). Section 1-23-380 is titled "Judicial review upon exhaustion of administrative remedies." *See Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972) ("It is 'proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.'" (quoting *Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966))). The plain and common sense interpretation envisions an expansive view of exhaustion of potential remedies before the agency and thus promotes judicial economy and avoids unnecessary

appeals. A timely motion for rehearing falls squarely within the remedies envisioned in section 1-23-380.[1] *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006) ("Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into . . . court." (quotations omitted)). Moreover, there is no statute that is in conflict with section 1-23-380 that precludes a motion for rehearing to an Appellate Panel, including sections 42-17-50 and -60.

While recognizing the right to file a motion for rehearing to an Appellate Panel, we do not construe the "*if* a rehearing is requested" language to mandate the filing of a motion for rehearing. This is consistent with general administrative law. *See* 73 C.J.S. *Public Administrative Law and Procedure* § 131 (2014) ("[I]f it is apparent from the statutes governing administrative proceedings that a motion for rehearing is optional, it need not be pursued in order to exhaust administrative remedies.").

B.

We further note that the agency promulgated regulations support our construction of section 1-23-380. Chapter 67 of the South Carolina Code of Regulations contains myriad regulations applicable to the Commission. For example, Articles 2 and 6 of Chapter 67 address the processing of a claim up to the hearing before a single commissioner. Motions practice before a single commissioner is limited, as merit-based motions are disallowed. S.C. Code Ann. Regs. 67-215 (2012).[2]

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[1] We recognize that many courts across the country follow the general rule that "[a]n administrative agency ordinarily has the inherent authority or power to reconsider, or to reopen, a prior decision provided that such occurs within a reasonable time after the decision was made." 2 Am. Jur. 2d *Administrative Law* § 362 (2014) (compiling cases); *see also In re Crawford*, 205 S.C. 72, 95, 30 S.E.2d 841, 850 (1944) (Stukes, J., concurring) (finding that the Commission has the "inherent and implied power" to grant rehearing). Given the clear statutory authority allowing a motion for rehearing, we do not reach the question of an administrative tribunal's inherent authority.

[2] We find a review of Article 2 compels the conclusion that it is primarily applicable to the filing and processing of a claim through the hearing before the single commissioner, often referred to as the "jurisdictional commissioner" by the Commission. Regulation 67-215 is plainly limited to motions to the single

Conversely, the procedure for review by an Appellate Panel of a single commissioner's decision is contained in Article 7 of Chapter 67, entitled "review and hearing." 8 S.C. Code Ann. Regs. 67-701(A) (2012). An Appellate Panel is considered the ultimate fact-finder. *See Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008) ("The final determination of witness credibility and the weight assigned to the evidence is reserved to the appellate panel. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive." (citations omitted)).[3]

Unlike Article 2, there is no provision in Article 7 disallowing merits-based motions to the Appellate Panel. Moreover, regulation 67-712 authorizes "higher court review" and expressly incorporates "Rule 203(b)(6), SCACR." Rule 203(b)(6), SCACR is titled "Appeals from administrative tribunals" and provides the notice of appeal shall be served "within thirty (30) days after receipt of the decision. If a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the decision granting or denying that motion." This rule, expressly incorporated into the regulations of the Commission, clearly envisions a procedure for seeking rehearing before the Appellate Panel.

IV.

We hold Rhame's motion for rehearing to the Appellate Panel was proper and stayed the time for serving the notice of appeal for thirty days from receipt of the

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commissioner. *See* 8 S.C. Code Ann. Regs. 67-215(G) (2012) ("The *jurisdictional commissioner* may consider the motion after the opposing party has had ten days notice of the motion and shall grant or deny the relief requested." (emphasis added)). The dissent misapprehends the reach of Article 2 in general and Regulation 67-215 in particular. As much as the dissent wants to create a conflict between the statute and the regulations, none exists.

[3] As noted, at the Commission, it is the Appellate Panel that makes the final agency decision and compensability determination. Moreover, and while perhaps paradoxical, credibility and factual determinations are also made by the Appellate Panel, not the single commissioner. It is for this reason that a motion for rehearing is proper before the Appellate Panel and not the single commissioner.

decision denying the motion. We remand to the court of appeals to consider Rhame's appeal.[4]

REVERSED AND REMANDED.

TOAL, C.J., BEATTY and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

[4] We overrule all cases that disallow a motion for rehearing to the full Commission or Appellate Panel.

JUSTICE PLEICONES: I respectfully dissent as in my view the Appellate Panel of the Workers' Compensation Commission has no authority to entertain petitions for rehearing. I would therefore affirm the Court of Appeals' dismissal of Claimant's appeal as untimely.

I. Section 1–23–380(1)

The majority holds that the "if rehearing is requested" language from § 1–23–380(1), a statute outlining the procedures for obtaining *judicial review* of an administrative decision, confers upon the Appellate Panel the authority to entertain petitions for rehearing. I disagree.

In my opinion, the majority's reliance on *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981) is misplaced. The uniformity addressed in *Lark* clarified that the standard of review applicable to a decision of the Workers' Compensation Commission is substantial evidence, rather than the previous "any evidence" standard. 276 S.C. at 135–37, 276 S.E.2d 306–07. *Lark* therefore established uniformity in the *judicial* review of an agency decision; it did not however establish procedures applicable in the practice before *every* administrative agency. Accordingly, *Lark* does not support the majority's broad interpretation of § 1–23–380.

Further, the majority does not explain how its interpretation of § 1–23–380 can be read in consonance with agency–specific statutes and regulations setting forth individualized procedures in the practice before different agencies. *See* S.C. Code Ann. § 58-27-2150 (1976) (granting the Public Service Commission the authority to rehear its decisions), S.C. Code Ann. Reg. 28-24 (West 2012) (conferring the same authority upon the Department of Consumer Affairs), S.C. Code Ann. Reg. 61-72.806 (West 2012) (doing the same for the Department of Health and Environmental Control). In contrast to these provisions, there is no statute or regulation granting the Commission the authority to entertain petitions for rehearing. *Cf.* S.C. Code Ann. Reg. 67-215 (West 2012) (stating the Workers' Compensation Commission "will not address a motion involving the merits").[5] In light of these agency–specific statutes and regulations, I decline to interpret § 1–23–380(1) in a manner that renders these provisions as surplusage. *See CFRE,*

[5] I can find no support for the majority's position that Regulation 67–215 applies only to proceedings before the single commissioner.

L.L.C. v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (declining to interpret a statute in a manner that rendered as surplusage any word, clause, sentence, provision, or part since the Legislature "obviously intended [the statute] to have some efficacy; or the [L]egislature would not have enacted it into law"). Since the Commission is a creature of statute and has only that authority granted to it by the Legislature, and since there is no statute or regulation granting the Commission the authority to entertain petitions for rehearing, I would hold the Court of Appeals properly dismissed Claimant's appeal. *See Med. Soc'y of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 275, 513 S.E.2d 352, 355 (1999) ("An agency created by statute has only the authority granted to it by the legislature.").

II. Regulation 67–712

The majority ascribes significance to the reference to Rule 203(b)(6), SCACR, in Regulation 67–712 to support its holding that the Commission has the authority to entertain petitions for rehearing. I disagree.

The reference to Rule 203(b)(6), SCACR, in Regulation 67–712 reflects an acknowledgment that judicial review of a decision by the Workers' Compensation Commission is now had at the Court of Appeals, rather than at the circuit court as was the case before the 2006 amendment to § 1–23–380. Like § 1–23–380(1), Rule 203(b)(6) simply acknowledges that some administrative agencies permit petitions for rehearing. When an agency has the authority to entertain such petitions, and rehearing is sought at that agency, the time for seeking judicial review of that agency's decision is not triggered until rehearing is granted or denied. Here, there is no grant of authority for the Commission to entertain petitions for rehearing. Therefore, the time for filing a notice of appeal began after the Appellate Panel denied the claim. *See* S.C. Code Ann. § 42–17–60 (Supp. 2014) (establishing thirty days as the time within which a party may seek review of a Commission's decision to the Court of Appeals). The Court of Appeals therefore properly dismissed the appeal since it was not filed within thirty days from the date the Appellate Panel denied the claim. Consequently, I would affirm the Court of Appeals' decision to dismiss Claimant's appeal as untimely.

III. Conclusion

The Legislature has not granted the Commission the authority to entertain petitions for rehearing. The Commission therefore has no such authority, and the Court of Appeals properly determined the timeline for seeking judicial review of the

Commission's decision was triggered when the Appellate Panel issued its decision. I would therefore affirm the Court of Appeals' dismissal of Claimant's appeal since it was not filed within thirty days of the Appellate Panel's decision.

The Supreme Court of South Carolina

RE: Limited Certificate of Admission for Judge Advocates

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Appellate Court Rules (SCACR) are amended as follows:

(1) Rule 427, SCACR, is added as shown in the attachment to this order.

(2) Rule 410(h)(2), SCACR, is amended by adding the following:

(D) Limited Member - Rule 427 (Limited Certificate of Admission for Judge Advocates). Any person who holds a limited certificate under Rule 427, SCACR.

(3) Rule 410(j)(8), SCACR, is amended to read:

(8) Limited Member. No fee shall be required for a person holding a limited certificate under Rule 415 (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program), SCACR, or Rule 427 (Limited Certificate of Admission for Judge Advocates), SCACR. The license fee for all other persons holding a limited certificate shall be $260.

(4) Rule 410(k)(8), SCACR, is amended to read:

(8) Limited Member. No fee shall be required for a person holding a limited certificate under Rule 415 (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program), SCACR, or Rule 427 (Limited Certificate of Admission for Judge Advocates), SCACR. The additional license fee for a person holding a limited certificate under Rules 405 (Limited Certificate of

Admission for In-House Counsel) and 414 (Limited Certificate of Admission for Clinical Law Program Teachers), SCACR, shall be $20.

These amendments shall be effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 20, 2015

RULE 427
LIMITED CERTIFICATE OF ADMISSION FOR JUDGE ADVOCATES

(a) Purpose. The purpose of this rule is to allow judge advocates to obtain a limited certificate to practice law to represent authorized clients before a court or administrative tribunal in South Carolina as part of legal assistance services authorized by 10 U.S.C. § 1044 and applicable military regulations.

(b) Definitions.

(1) Judge Advocate: an officer of the Judge Advocate General's Corps of the Army or the Navy; an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or a commissioned officer of the Coast Guard designated for special duty (law). (10 U.S.C. §801(13)).

(2) Administrative Tribunal: the South Carolina Administrative Law Court or other administrative agency of this State or its political subdivisions which determines contested cases.

(3) Authorized Clients: military personnel on active duty with the Armed Forces of the United States in the enlisted grades E-1 through E-4, and their dependents, who are under substantial financial hardship, to the extent that such representation is permitted by the supervisory staff judge advocate or commanding officer. Other military personnel and their dependents who are under substantial financial hardship may be represented if approved by the applicable Judge Advocate General or his or her designee. A dependent shall only include those persons eligible for legal assistance services under the applicable service regulation.

(c) Qualifications for Admission. An attorney may be granted a limited certificate to practice law in South Carolina if he or she:

(1) is at least twenty-one (21) years of age;

(2) is a person of good moral character;

(3) has received a JD or LLB degree from a law school which was approved by the Council of Legal Education of the American Bar Association at the time the degree was conferred;

(4) has been admitted to practice law in the highest court of another state, the District of Columbia, or a territory of the United States;

(5) is a member in good standing in each jurisdiction where the attorney is admitted to practice law;

(6) has not been disbarred or suspended from the practice of law and is not the subject of any pending disciplinary proceeding in any other jurisdiction;

(7) is a judge advocate serving on active duty either indefinitely or for a period of six (6) months or more, and is assigned to a military installation, unit or office located in South Carolina; and,

(8) has completed an Essentials Series Course administered by the South Carolina Bar. This course may be completed either live or on-line. The South Carolina Bar shall make this course available to judge advocates seeking admission under this rule either without a fee or for a minimal fee.

(d) Application. An attorney desiring a limited certificate of admission to practice law under this rule shall file an application with the Clerk of the Supreme Court. This application shall be on a form approved by the Supreme Court. The application shall be accompanied by a certificate of good standing from each jurisdiction in which the attorney has been admitted to practice law, and a statement on official letterhead signed by the supervisory staff judge advocate or other supervisory judge advocate in the grade of 0-5 or above stating that the attorney meets the requirements of (c)(7) above. No filing fee shall be required for the application.

(e) Reference to the Committee on Character and Fitness. Any questions concerning the fitness or qualifications of the attorney may be referred by the Supreme Court to the Committee on Character and Fitness for a hearing and recommendation.

(f) Confidentiality. The confidentiality provisions of Rule 402(n), SCACR, shall apply to all files and records of the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to a limited certificate to practice law under this rule.

(g) Scope of Representation and Adherence to Rules. An attorney issued a limited certificate under this rule may represent an authorized client before a court or administrative tribunal of this State in a civil action or proceeding. This rule does not authorize representation before a court or tribunal in a criminal case. In providing representation, the attorney shall comply with the rules of practice and procedure applicable to the court or tribunal, and shall adhere to the South Carolina Rules of Professional Responsibility and any other ethical rules applicable to the matter. The attorney shall also comply with the continuing legal education requirements of Rule 408, SCACR, and the failure to do so may result in administrative suspension under Rule 419, SCACR. No license fee or assessment shall be charged to these attorneys under Rules 410 and 411, SCACR. The attorney shall not accept any form of compensation from an authorized client.

(h) Notice of Appearance to Be Filed. In every case in which the attorney appears, the attorney shall complete and file a notice of appearance form. This form shall be approved by the Supreme Court. In addition to any other information which may be required by the form, this form shall contain the name of the attorney; the name, address and telephone number of the attorney's military unit or legal office; and information showing that a determination has been made that the client is an authorized client under this rule.

(i) Unauthorized Practice. If an attorney granted a limited certificate engages in the practice of law in excess of that permitted by this rule, the attorney may be subject to discipline under Rule 413, SCACR, a revocation of the limited certificate by the Supreme Court, or being held in contempt of the Supreme Court for engaging in the unauthorized practice of law.

(j) Misconduct and Incapacity. Except as otherwise provided in this rule, the procedures provided by Rule 413, SCACR, shall be used for resolving allegations that the attorney has committed ethical misconduct or suffers from a physical or mental condition which adversely affects the attorney's ability to practice law. If, however, the Supreme Court imposes a definite suspension or disbarment, or transfers the attorney to incapacity inactive status, the limited certificate shall be terminated as provided in (k) below. Unless otherwise ordered by the Court, the lawyer may not seek to be readmitted under this rule or any other rule until the period of suspension has expired or, in the case of disbarment, until five years after the date of the opinion or order imposing the disbarment.

(k) Termination of Certificate. The limited certificate of admission to practice law shall terminate if:

(1) The limited certificate is revoked by the Supreme Court under (i) above.

(2) The attorney is admitted to practice law in South Carolina under Rule 402, SCACR, or is granted another limited certificate of admission to practice law under this or any other rule, or is licensed as a foreign legal consultant under Rule 424, SCACR.

(3) The attorney is suspended or disbarred in this or any other jurisdiction. This does not include interim suspensions under Rule 17 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, or a similar rule in another jurisdiction. For an administrative suspension under Rule 419, SCACR, the attorney may seek reinstatement as provided in that rule.

(**4)** The attorney is no longer on active duty, is no longer assigned to perform legal assistance duties, or is no longer assigned to a military installation, unit or office located in South Carolina.

(l) Resignation. Any request by an attorney licensed under this rule shall be processed as provided by Rule 409, SCACR.

(m) Surrender of Certificate. Upon the termination of the limited certificate or acceptance of a resignation, the attorney granted the limited certificate shall immediately surrender the certificate to the Clerk of the Supreme Court. The failure to immediately surrender the certificate upon termination or the acceptance of a resignation may subject the attorney to discipline under Rule 413, SCACR, or to being held in contempt of the Supreme Court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rakeem D. King, Appellant.

Appellate Case No. 2012-213405

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5313
Heard November 18, 2014 – Filed April 22, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jenny L. Barwick, of Greenville, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

FEW, C.J.: Rakeem D. King appeals his convictions for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. We find the trial court erred by (1) charging the jury that a specific intent to kill is

not an element of attempted murder and (2) allowing hearsay testimony as to the number of shots King fired. These errors require reversal of King's conviction for attempted murder. However, we find the court's errors caused King no prejudice as to his convictions for armed robbery and possession of a firearm during the commission of a violent crime, and we affirm those convictions. We remand for a new trial for attempted murder.

I. Facts and Procedural History

On November 26, 2010 at 4:06 a.m., a customer called Yellow Cab requesting to be picked up at 1808 Carlton Street in North Charleston. The operator recorded the customer's telephone number from Yellow Cab's caller identification. At 4:11 a.m., Yellow Cab dispatched Dario Brown to that location. Brown was familiar with the Carlton Street area because his aunt had lived at 1809 Carlton—directly across the street from 1808 Carlton.

Brown testified he expected the customer to be his cousin because he lived in the area, and Brown had picked him up at the same location and time of night in the past. Brown saw a person coming from the yard of 1809 Carlton—his aunt's old house, which was abandoned at the time. When the person got into the back of the cab, Brown realized it was not his cousin. Brown turned around, looked the man in the face, and asked why he came from the abandoned house. Brown and the man began to argue about whether the man lived at 1809 Carlton.

Brown testified he drove toward the dead-end of Carlton Street so he could make a U-turn and take the man to his destination. Brown stated that before he reached the end of the street, "I heard his cocking a pistol. When I looked back he had raised the gun to my face and told me to give him the money." Brown handed the man "give away money." The man told Brown it was not enough, however, and pointed the gun at the back of Brown's head. Brown testified, "I made an attempt to move [the gun] with my elbow and my forearm trying to move it out of the way telling him he doesn't have to rob me." The man demanded more money. Brown opened the door to the cab and had "one foot on the ground and [his] other foot on the brake." Brown testified the gun was "[s]till placed at the back of my neck." With his hands over his head, Brown "gave him a look in his eye" and testified the man "looked as if he was going to shoot me." When Brown tried again "to move the gun away from [his] face," the man shot Brown in the arm.

Brown testified he jumped from the cab and ran toward the dead-end of Carlton Street. "I look[ed] back and I [saw] him in pursuit behind me"—"maybe two steps behind me." Brown explained he tried to jump over a fence at the end of the street, "but my arm gave out so I kind of flipped head first over [the fence] and landed on my back." Brown testified, "When I hit the ground . . . he was . . . holding the gate with one hand and reaching over with his other hand with the gun in it." Brown testified the man fired another shot at him. Brown crawled behind a van, and the man fired more shots. Brown testified the man was "[s]till outside the gate saying that he is not going to shoot me anymore if I just give him the money." Brown stated, "I want to say in all I heard maybe six or seven shots but I can't be exact."

Brown eventually called the police from his cell phone. Officer Jennifer Butler testified she arrived at 4:21 a.m. and saw Brown's empty cab "that had run into a pole on the side of the road." Shortly thereafter, she made contact with Brown and called emergency medical services. She did not see anyone else. After Brown was taken to the hospital, Officer Butler and a detective walked door-to-door "in the immediate area . . . to speak with the people to see if they heard anything or happened to see anything." Over King's hearsay objection, Officer Butler testified she "learned there was more than one shot"—"[a]pproximately three or four shots" were fired.

Kelly Murphy—a crime scene technician—testified she found "a .25 auto shell casing" in the cab. Murphy also testified she and four other officers searched the Carlton Street area for two hours and found no other shell casings. Murphy conceded on cross-examination that "if there were shells there [I] needed to find them," and "if there were any of those anywhere [I] would have collected those."

Three days later, officers showed Brown a photographic lineup without a photograph of King, and Brown did not identify anyone from the lineup. Officers then traced the number recorded by the Yellow Cab operator and learned the phone was registered to a person who had given a falsified address. Using DMV records, officers located King, who had the same date of birth and a very similar address to those used to register the phone. Officers then prepared a second photographic lineup with a photograph of King, and Brown identified King as the man who shot and robbed him.

The jury found King guilty of attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. The trial court sentenced King

to thirty years in prison for armed robbery and five years for possession of a firearm, with those sentences to run consecutive. For the attempted murder conviction, the trial court sentenced King to ten years in prison, concurrent with the other sentences.

II. Jury Charge

King argues the State must prove as an element of attempted murder that King acted with specific intent to kill Brown. We agree, and thus we find the trial court erred when it charged the jury, "A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm."

Section 16-3-29 of the South Carolina Code (Supp. 2014) defines attempted murder: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." Because the crime is defined by statute, we first look to the language of the statute to determine what the Legislature intended the elements of the crime to be—including the level of intent required. *See Guinyard v. State*, 260 S.C. 220, 227, 195 S.E.2d 392, 395 (1973) ("The power of the Legislature to declare what acts shall constitute crimes . . . includes the power to make the commission of the act criminal without regard to the intent or knowledge of the accused . . . . Therefore, whether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute . . . ." (citing *State v. Manos*, 179 S.C. 45, 49-50, 183 S.E. 582, 584 (1936))).

If the language of a statute is "unambiguous and conveys a clear meaning," the court must determine the intent of the Legislature exclusively from that language, and other "rules of statutory interpretation are not needed." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal punctuation omitted). The phrase "with intent to kill" in section 16-3-29 does not clearly indicate what level of intent the Legislature meant to require the State to prove because the word "intent" can mean anything from purpose to negligence. *See State v. Jefferies*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) ("The required [intent] for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence."). Therefore, we must look beyond the words of the statute and use our rules of statutory construction to determine what the Legislature intended. *Cf. State v.*

Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008) ("Whenever possible, legislative intent should be found in the plain language of the statute itself. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed . . . .").

Section 16-3-29 was enacted in 2010 as part of the Omnibus Crime Reduction and Sentencing Reform Act. *See* Act No. 273, 2010 S.C. Acts 1947. Before 2010, our courts held attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime. *See, e.g.*, *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (stating "[a]ttempt is a specific intent crime" and "[t]he act constituting the attempt must be done with the intent to commit that particular crime" (first alteration in original) (quoting 21 Am. Jur. 2d *Criminal Law* § 176 (1998))); *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery."); *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) ("Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense. In other words, the completion of such acts is the defendant's purpose." (citations omitted)).

In *Sutton*—decided before the Legislature enacted section 16-3-29—our supreme court faced the question "whether attempted murder [was] an offense in this state." 340 S.C. at 396, 532 S.E.2d at 285. To answer the question, the court compared the elements of assault and battery with intent to kill (ABWIK) and the elements of attempted murder. 340 S.C. at 396-98, 532 S.E.2d at 285-86. Though the court "decline[d] to recognize a separate offense of attempted murder," 340 S.C. at 398, 532 S.E.2d at 286, it stated, "Attempted murder would require the specific intent to kill," and "specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense." 340 S.C. at 397, 532 S.E.2d at 285.

With this history of our courts requiring the State to prove specific intent as an element of attempt crimes, the Legislature chose to include the phrase "with intent to kill" in section 16-3-29. The Legislature is presumed to know how the terms and phrases it uses in a statute have been interpreted in the past. *See State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997) ("The General Assembly

is presumed to be aware of the common law, . . . and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." (citation omitted)); *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 570, 743 S.E.2d 778, 783 (2013) (stating "this Court must presume the legislature knew of and contemplated [existing legislation] in enacting [an act]"); *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (stating "Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind" (citation and internal quotation marks omitted)); *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("The Legislature is presumed to be aware of this Court's interpretation of its statutes."); *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012) ("[W]ords undefined in a statute are to be interpreted and applied according to their common-law meanings.").

The Legislature's use of the phrase "with intent to kill," considered in light of our courts' prior rulings that specific intent is required for attempt crimes—particularly the supreme court's statement in *Sutton*, "Attempted murder would require the specific intent to kill"[1]—indicates the Legislature intended to require the State to prove the specific intent to kill as an element of attempted murder. *See also Elwell*, 403 S.C. at 612, 743 S.E.2d at 806 (stating "penal statutes will be strictly construed against the state"); Jeffrey F. Ghent, Annotation, *What Constitutes Attempted Murder*, 54 A.L.R.3d 612, 622 (1973) (describing "the general rule that the . . . elements of . . . attempted murder [include] a specific intent to commit murder" (footnote omitted)).

The State argues, however, the Legislature intended to codify the common law crime of ABWIK when it enacted section 16-3-29, and because a specific intent to kill was not an element of ABWIK, the Legislature did not intend to require a specific intent to kill as an element of attempted murder. To support its argument that section 16-3-29 is a codification of ABWIK, the State points to the following

[1] 340 S.C. at 397, 532 S.E.2d at 285.

language in the Omnibus Crime Reduction and Sentencing Reform Act: "The common law offenses of [ABWIK and others] are abolished," and, "[W]herever in the 1976 Code reference is made to [ABWIK], it means attempted murder as defined in Section 16-3-29." Act No. 273, 2010 S.C. Acts 1949-50.

We disagree with the State's argument. First, the statement that ABWIK is "abolished"—with no reference to the abolished crime being codified as attempted murder—is inconsistent with the State's position. Second, we find the Legislature included the statement "[ABWIK] . . . means attempted murder" to avoid any confusion as to how the new crime of attempted murder affects the operation of other statutes that contain the phrase "assault and battery with intent to kill." For example, subsection 17-30-70(A)(1) of the South Carolina Code (2014) authorizes a circuit judge to sign "an order authorizing or approving the interception of wire, oral, or electronic communications" for the investigation of certain crimes, including "assault and battery with intent to kill." The language relied on by the State simply makes clear that a judge may sign such an order for the investigation of attempted murder even though that crime is not specifically listed in the subsection. Similarly, section 17-19-40 of the South Carolina Code (2014) provides that in indictments for certain crimes such as murder and ABWIK, "when the crime is charged to have been committed with a deadly weapon . . . , there shall be a special count in the indictment for carrying concealed weapons." The language relied on by the State simply makes clear that section 17-19-40 also applies to attempted murder.

We find the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.

III. Hearsay Testimony

King argues the trial court erred in admitting Officer Butler's testimony that she "learned there was more than one shot" and "[a]pproximately three or four shots" were fired. We agree the testimony contained hearsay and should have been excluded.

After Officer Butler described going door-to-door to speak to neighbors, the assistant solicitor asked, "Did you make contact with anyone in the area?" She initially answered, "[W]e were able to speak to I believe it was two people and

they were able to confirm . . . ." At that point, King objected on the basis of hearsay, and the trial court sustained the objection. The assistant solicitor rephrased the question, asking, "What did you learn as you [talked to those neighbors]?" King again objected, but the trial court overruled the objection, stating, "I'll -- she can testify to what she learned." Officer Butler answered, "I learned there was more than one shot"—"[a]pproximately three or four shots."

Officer Butler did not see or hear any shots, and thus she did not have personal knowledge of the number of shots fired. Rather, her knowledge was based exclusively on statements made to her by neighbors when she walked the area after Brown was taken to the hospital. By testifying to the number of shots fired, Officer Butler testified to the content of the neighbors' out-of-court statements. The State offered her testimony to prove the truth of the neighbors' statements. Therefore, her testimony as to the number of shots fired was hearsay. *See* Rule 801(c), SCRE ("'Hearsay' is 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.").

The State argues the testimony was not hearsay because, "Testimony of a police officer regarding [her] conclusions from an investigation is not hearsay." The State contends "Officer Butler merely testified about what her investigation . . . revealed," and, "She did not repeat any specific statements made by the people she interviewed." The State relies on *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) and *State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004), *aff'd as modified*, 374 S.C. 313, 649 S.E.2d 479 (2007). Neither opinion supports the State's position.

In *Kromah*, two State witnesses "testif[ied] regarding the actions they took as a result of hearsay statements made by the three-year-old Child." 401 S.C. at 354, 737 S.E.2d at 497. Kromah asserted one witness "was permitted to testify that following her conversation with the child, she turned the information over to law enforcement," and the second witness—the arresting officer—"was permitted to testify that following his conversation with the child, he arrested petitioner the next day." *Id.* Kromah argued the trial court erred in admitting the officer's testimony because it revealed the content of the child's hearsay statements, and thus the live testimony itself "constituted inadmissible hearsay." 401 S.C. at 355, 737 S.E.2d at 498.

The supreme court found the testimony was not hearsay. *Id.* The court stated the officer "testified in detail about his investigative process and the numerous individuals he spoke to, including the Child, and that he made his decision to arrest Kromah based on *all* of this information." *Id.* The court found the officer's "testimony referencing his interview of the Child . . . was only one part of the information he recited in his investigative process leading up to his [decision] to arrest Kromah, and we find his testimony . . . did not repeat what the Child said to him." *Id.*

This case is distinguishable from *Kromah*. There, the officer had an entire "investigative process" on which to base his decision to make an arrest, and the child's out-of-court statements were "only one part of the information" the officer obtained in that investigation. *Id.* Because the officer might have relied on any part of his investigation in deciding to arrest Kromah, his testimony did not necessarily reveal the content of the child's statements. Officer Butler, however, had only the neighbors' out-of-court statements on which to rely as the basis of her testimony. Therefore, her testimony was based exclusively on hearsay statements, and she necessarily revealed the content of those statements when she testified as to the number of shots fired.

The State also relies on *Weaver*, where an investigating officer testified, "All of the witnesses that I talked to led me to believe . . . [the defendant] was the only suspect that really was involved . . . ." 361 S.C. at 85, 602 S.E.2d at 792. Weaver argued the testimony was inadmissible because it "was based on what witnesses told" the officer, and thus was hearsay because it revealed the content of their out-of-court statements. *Id.* This court found the testimony was not hearsay for two reasons. First, we stated the officer "never repeated statements made to him." 361 S.C. at 86, 602 S.E.2d at 792. Second, we explained that the "testimony was in response to the questions asked on cross-examination as to why [the officer] did not perform a gunshot residue test on everyone at the crime scene." 361 S.C. at 86, 602 S.E.2d at 792-93. Therefore, the evidence was not offered to prove the truth of the matter asserted, but "was offered to explain this part of his investigation." 361 S.C. at 86, 602 S.E.2d at 793.

The *Weaver* court found the officer's live testimony was not hearsay because it was not offered to prove the truth of the out-of-court statements, and the *Kromah* court found the officer's live testimony was not hearsay because it did not necessarily reveal the content of out-of-court statements. But both courts recognized live

testimony—such as Officer Butler's—can be hearsay under certain circumstances. Numerous other courts have reached the same conclusion. In *Weems v. State*, 501 S.E.2d 806 (Ga. 1998), for example, the Supreme Court of Georgia considered an objection to testimony from an "investigating detective [who] testified . . . that a police canvass of the area where the shooting took place resulted in police learning 'that a possible suspect was Fernando.'" 501 S.E.2d at 808. The court found the officer's live testimony was hearsay because the officer "testif[ied] . . . to what other persons related to [him] during the investigation."[2] *Id.*

Similarly, in *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005), the Eleventh Circuit considered an objection to testimony from an officer who "testified that his investigation . . . 'revealed' [the identity of] the gunman." 432 F.3d at 1206. The court held the officer's live testimony was hearsay "even though [the testimony did] not explicitly paraphrase the words of others, [because] the only conceivable explanation for how [the officer] discovered this information is through listening to the statements of others." *Id.* (citing *United States v. Shiver*, 414 F.2d 461, 463 (5th Cir. 1969) (finding a detective's testimony that his investigation "revealed" a certain car was stolen was "pure hearsay, since he could not have known the facts of his own knowledge")).

The Tenth Circuit addressed a situation similar to ours in *United States v. Hinson*, 585 F.3d 1328 (10th Cir. 2009). A police detective "testified . . . she began investigating [another person] based on her suspicion that he was selling drugs." 585 F.3d at 1336. She explained the other person's "initial interview . . . confirm[ed her] earlier investigation that [his] source of supplies was a person by the name of Kevin," and "the 'Kevin' she had heard about earlier was Kevin Hinson, the defendant." *Id.* (first alteration in original). The Tenth Circuit found the detective's live testimony "violated the hearsay rules." *Id.* Like this court did in *Weaver*, the Tenth Circuit analyzed the purpose for which the government offered the evidence. 585 F.3d at 1336-37. The court noted, "Testimony which is not offered to prove the truth of an out-of-court statement, but is offered instead for *relevant* context or background, is not considered hearsay." 585 F.3d at 1336

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[2] *Weems* was decided under former Official Code of Georgia Annotated section 24-3-2. *Id.* Section 24-3-2 was part of the Georgia Code that defined hearsay. *See Momon v. State*, 294 S.E.2d 482, 484 (Ga. 1982) (explaining "Code [section] 38-302 [predecessor to section 24-3-2] should be understood not as an exception to the rule against hearsay but as an explanation of what is not hearsay").

(quoting *United States v. Becker*, 230 F.3d 1224, 1228 (10th Cir. 2000)). The court then found "the only purpose [the detective]'s hearsay testimony served was to [prove] . . . that Hinson was, in fact, [the] drug supplier." 585 F.3d at 1337. The court held, "That purpose is impermissible, and this evidence should not have been admitted." *Id.*

Here, the State had no purpose for offering Officer Butler's testimony except to prove the truth of the neighbors' statements that more than one shot was fired. The State did not argue at trial or on appeal that her testimony on this subject was necessary to explain her conduct or to give context to other testimony. *Cf. State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (explaining "an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken" and "these statements were not entered for their truth but rather to explain why the officers began their surveillance");[3] *see also Caprood v. State*, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (stating "officers' statements . . . were similar to those in *Brown* in that . . . the officers were explaining their actions . . . and the statements were not offered for their truth"). The State appears to concede it offered the testimony to prove the number of shots King fired by arguing "Officer Butler merely testified about what her investigation . . . revealed." We find Officer Butler's testimony was hearsay because it was based exclusively on what other witnesses told her—thereby necessarily revealing the content of out-of-court statements—and the State offered her testimony to prove the truth of those statements. Therefore, the trial court erred by admitting the testimony.

IV. Prejudice and Harmless Error

The State contends the trial court's errors did not prejudice King and were harmless beyond a reasonable doubt. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the

[3] *Brown* was tried before we adopted the Rules of Evidence. *See* Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995."). However, our definition of hearsay did not change with the adoption of the Rules. *See* Rule 801, SCRE, "Notes" (stating "[s]ubsection (c) is consistent with South Carolina law").

result of the trial." (citations and internal quotation marks omitted)); 398 S.C. at 389-90, 728 S.E.2d at 475 ("Engaging in this harmless error analysis, we . . . question . . . whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."); *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."); *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006) ("The improper admission of hearsay is reversible error only when the admission causes prejudice.").

We find the trial court's errors prejudiced King as to his attempted murder conviction, affected the result of his trial on that charge, and thus were not harmless beyond a reasonable doubt. One of the key issues at trial was whether King continued to shoot at Brown after they exited the cab. Brown testified "six or seven" shots were fired, all but one of which were fired outside the cab. However, there are specific facts in this case that could lead a jury to find King fired only one shot. In particular, Brown was dispatched to Carlton Street at 4:11 a.m. He testified it took him "[a] minute, two minutes" to get there. Officer Butler testified she arrived on the scene at 4:21 a.m. Officers searched the area for hours and found only one shell casing. Under these circumstances, it seems highly unlikely King could have robbed and shot Brown in the cab, chased him down Carlton Street while shooting at him, and then retrieved all the shell casings in the dark before Officer Butler arrived.

Brown's testimony that he repeatedly pushed King's gun away supports the inference that when King shot Brown in the cab, he did so in a struggle and did not intend to kill Brown. It is more difficult to imagine, however, that King could have chased Brown down Carlton Street while shooting at him unless he specifically intended to kill Brown. Thus, the State presented a stronger case for attempted murder from the shots fired during the chase. These circumstances made Officer Butler's testimony as to the number of shots fired critical to the State's ability to prove King continued to shoot at Brown after they exited the cab, and thus made her testimony important to the State's ability to prove King guilty of attempted murder.

Therefore, we find Officer Butler's inadmissible testimony as to the number of shots King fired affected the jury's verdict on attempted murder, and we cannot say that either the admission of the evidence or the erroneous jury charge are harmless beyond a reasonable doubt.

We find beyond a reasonable doubt, however, the trial court's errors did not prejudice King as to his armed robbery and possession of a firearm convictions because the errors did not affect the result of his trial on those charges. Obviously, the jury charge on attempted murder did not affect King's conviction for armed robbery. As to the armed robbery itself, there is no evidence contradicting Brown's testimony that King shot Brown *in* the cab during an attempt to rob him. Brown testified he handed "give away money" to King while they were still in the cab. Thus, King has not shown that either the jury charge on attempted murder or the admission of Officer Butler's testimony as to the number of shots fired had any effect on the armed robbery or the possession of a firearm charges. Because King failed to demonstrate prejudice from the trial court's errors as to those convictions, we affirm. *See State v. Black*, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012) ("To warrant reversal [for the admission of evidence], an error must result in prejudice to the appealing party."); *Gaines*, 380 S.C. at 31, 667 S.E.2d at 732 ("To warrant reversal, a trial court's . . . jury charge must be both erroneous and prejudicial to the defendant.").

V. Other Issues On Appeal

We affirm as to King's remaining issues pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the trial court's charge to the jury that "[m]alice may be inferred . . . when the deed is done with a deadly weapon": *see Belcher*, 385 S.C. at 612, 685 S.E.2d at 810 (holding "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon"); *id.* ("The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed [attempted] murder . . . ."). We find no basis for reducing, mitigating, excusing, or justifying King's conduct. *See State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011) ("Because [the defendant] was acting unlawfully, he was not entitled to an accident charge.").

2. As to the trial court allowing the State to publish King's detention center phone call: *see* Rule 403, SCRE (stating "[a]lthough relevant, evidence may be excluded

if its probative value is substantially outweighed by the danger of unfair prejudice"); *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014) ("Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case."); *id.* ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." (citation omitted)); *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011) ("The admission of evidence is within the [trial] court's discretion and will not be reversed on appeal absent an abuse of that discretion."); *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) ("A trial court has particularly wide discretion in ruling on Rule 403 objections.").

3. As to the trial court's admission of King's cell phone records: *see State v. Robinson*, 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014) (stating "the Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy"); *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 2582, 61 L. Ed. 2d 220, 229 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."); *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624, 48 L. Ed. 2d 71, 79 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.").

VI. Conclusion

We find the trial court erred in charging the jury that a specific intent to kill is not an element of attempted murder and in admitting Officer Butler's hearsay testimony. Because we find these errors prejudiced King as to his conviction for attempted murder, we reverse and remand for a new trial. We affirm King's convictions for armed robbery and possession of a firearm.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, J., concurs.

WILLIAMS, J., concurs in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Walter M. Bash, Respondent.

Appellate Case No. 2013-001430

Appeal From Berkeley County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5314
Heard March 3, 2015 – Filed April 22, 2015

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Scarlett A. Wilson, of Charleston, for Appellant.

Appellate Defender Susan Barber Hackett, of Columbia, for Respondent.

KONDUROS, J.: The State appeals the circuit court's decision granting Walter M. Bash's motion to suppress drug evidence relating to charges against him for trafficking in cocaine greater than 400 grams and trafficking in cocaine base. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Officers in the Berkeley County Sheriff's Office received an anonymous tip that drug activity was occurring in the backyard of a particular home on Nelson Ferry Road in Moncks Corner. Narcotics officer Sergeant Lee Holbrook and his partner, Sergeant Kimberly Milks, were in the area and decided to go to the location. According to the officers' testimonies at the suppression hearing, they went to the property to speak with the owner and investigate the tip. Sergeant Milks testified she radioed to other officers in the area that she and Sergeant Holbrook were going to the location. She also testified she and Sergeant Holbrook put on their hats and vests marked "Sheriff" prior to approaching the scene.

Sergeant Holbrook testified he and Sergeant Milks drove to the property and observed the home was surrounded by a chain link fence.[1] They turned onto Shine Bash Road, a public road beside the house that provided a view into the backyard. Sergeant Holbrook testified they observed several people along with an old shed in a grassy area immediately outside the fence. A black truck, owned by Bash, was parked there as well.

Sergeant Holbrook pulled his vehicle, an unmarked brown Ford Expedition, off the road into the grassy area behind Bash's truck. As he and Sergeant Milks exited their vehicle, he observed one of the men drop a baggie containing a white powdery substance. He testified another man exited the passenger side of Bash's truck and fled toward the adjacent wooded area. That individual was chased by the other officers present while Sergeant Holbrook remained at the scene with the other individuals. Bash exited the driver's side of his truck, and Sergeant Holbrook asked him to step to the tailgate area of the vehicle where the others were gathered. Sergeant Holbrook stated that upon the return of the other officers, law enforcement proceeded to arrest the man observed dropping the powdery substance. Sergeant Holbrook testified he looked in the window of Bash's truck to ensure no other occupants were hiding. When he looked through the window, he

[1] Photographic exhibits depict the front gate being chained and padlocked. However, the photographs provided were taken approximately two years after the subject incident. Neither party was able to confirm at oral argument if the gate was locked at the time of police entry onto the property.

saw scales of the type typically used in weighing drugs and a large plastic baggie containing a white powdery substance.

At trial, Bash moved to suppress the drug evidence found in his vehicle, arguing officers entered and searched the curtilage of the property without a warrant and without meeting any of the exceptions to the warrant requirement. The State contended the grassy area outside the fence was not within the curtilage of the property but was an open field, thereby falling without the protection of the Fourth Amendment. The State further argued even if the grassy area beyond the fence was within the curtilage of the property, police had the right to enter to conduct a "knock and talk"[2] and their further actions were justified once they observed one of the men drop what appeared to be drugs and another fled the scene.

The circuit court granted Bash's motion to suppress the drug evidence seized from his truck. The circuit court concluded "the tip was not enough to roll up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there." This appeal followed. [3]

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only, and are therefore bound by the trial court's factual findings unless clearly erroneous." *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). "Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion." *Id.* "An 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. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (internal quotation marks omitted). "On appeals from a motion to suppress

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[2] "A knock and talk . . . is a procedure used by police officers to investigate a complaint where there is no probable cause for a search warrant. The police officers knock on the door, try to make contact with persons inside, and talk to them about the subject of the complaints." *State v. Dorsey*, 762 S.E.2d 584, 588 n.6 (W.Va. 2014) (alteration by court) (internal quotation marks omitted).

[3] The issue of whether Bash had an expectation of privacy on someone else's property was briefly raised to the circuit court but was never fully developed and was never ruled upon by the circuit court. The issue is not raised on appeal.

based on Fourth Amendment grounds, [an appellate court] applies a deferential standard of review and will reverse if there is clear error." *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (internal quotation marks omitted). "However, [an appellate court] reviews questions of law de novo." *Id*.

LAW/ANALYSIS

The State contends the circuit court erred in finding the police conduct in this case violated the Fourth Amendment prohibition against unreasonable searches and seizures and suppressing the drug evidence against Bash.[4] We agree.

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[4] After reviewing the record, it is unclear whether the circuit court ruled on whether the grassy area at issue was part of the curtilage of the subject property. While such a finding was arguably implicit in its ultimate decision, the circuit court indicated "[t]his isn't an open field's question." Additionally, the circuit court failed to address any of the *Dunn* factors used in a curtilage analysis. *U.S. v. Dunn*, 480 U.S. 294, 301 (1987) ("[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."). Finally, the circuit court cited to a non-curtilage Fourth Amendment case, *State v. Taylor*, in ultimately suppressing the drug evidence against Bash. 401 S.C. 104, 106-13, 736 S.E.2d 663, 664-67 (2013) (finding an investigatory stop and frisk of a defendant riding a bicycle on a public road based on an anonymous tip and police observations did not violate the Fourth Amendment). Because we conclude the conduct of police in this case did not violate the Fourth Amendment even if the grassy area was part of the curtilage, we decline to address the curtilage issue. *See Spartanburg Cnty. Dep't of Soc. Servs. v. Little*, 309 S.C. 122, 126, 420 S.E.2d 499, 502 (1992) (declining to address the appellant's additional reasons for reversal when the first issue compelled reversal and was dispositive of the appeal); *Ringer v. Graham*, 286 S.C. 14, 20, 331 S.E.2d 373, 377 (Ct. App. 1985) ("Because a new trial is granted, discussion of the other issues raised by the [appellants] is unnecessary."). Our remaining analysis assumes arguendo that police entered the curtilage of the property.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment does not proscribe all contact between police and citizens, but is designed to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *State v. Corley*, 383 S.C. 232, 240, 679 S.E.2d 187, 191 (Ct. App. 2009) (internal quotation marks omitted), *aff'd as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011). "We should construe the Fourth Amendment in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Covey v. Assessor of Ohio Cnty.*, 777 F.3d 186, 194 (4th Cir. 2015) (alteration omitted) (internal quotation marks omitted).

"A policeman may lawfully go to a person's home to interview him. . . . In doing so, he obviously can go up to the door. . . . A police officer without a warrant is privileged to enter private property to investigate a complaint or a report of an ongoing crime." *State v. Wright*, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011) (alterations by court) (citation and internal quotation marks omitted).

In *Wright*, police received an anonymous tip dogfighting was occurring at a particular location. *Id*. at 440, 706 S.E.2d at 325. Because the tip came in close to time for a shift change, officers were instructed to stay and congregate in a church parking lot near the subject property. *Id.* Two deputies drove past the location and observed lights shining next to a mobile home located at the address as well as a number of vehicles. *Id*. Law enforcement then paired up in several cars and drove to the address to investigate further. *Id*. at 440, 706 S.E.2d at 326. The deputies initially had their car headlights off as they drove down the private road toward the mobile home. *Id*. When deputies turned their lights on, they saw people and dogs running away from the mobile home, a portable dogfighting ring, and other indicia of dogfighting. *Id*. at 440-41, 706 S.E.2d at 326.

In finding the initial entrance of the officers onto the property did not violate the Fourth Amendment, the Supreme Court of South Carolina stated:

> [T]he deputies responded to an anonymous tip by first driving by the residence on a public road. From this road, deputies observed a large number of vehicles at the mobile home and saw spotlights shining next to the

> mobile home. These observations were not subject to any Fourth Amendment protection because they were knowingly exposed to the public. Moreover, these observations would give a reasonable police officer in the deputies' position cause to go forward. *However, even absent these observations, the police had the investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip*. . . . If the deputies could properly drive up the dirt driveway to get to the front door, then their observations of the dogfighting pit and fleeing people and dogs did not exceed their investigative authority.

Id. at 445, 706 S.E.2d at 328 (emphasis added).

In the present case, officers' observations of several individuals in the backyard at the subject property corroborated the anonymous tip. This is less corroboration than the lights and cars observed in *Wright*. Nevertheless, *Wright* indicates police had investigatory authority to enter the property, even in the absence of corroboration, and go to the front door to investigate the tip.

Here, police did not approach the front door but instead drove into the grassy area behind the residence where they had observed the individuals. While no South Carolina cases have addressed this point, the Fourth Circuit has adopted the position police may bypass the front door of a residence and proceed to the backyard or other entrance for a knock and talk provided they have reason to believe the person they are attempting to contact will be found there.

"The textual touchstone of the Fourth Amendment is reasonableness." *Alvarez v. Montgomery Cnty.*, 147 F.3d 354, 358 (4th Cir. 1998) (internal quotation marks omitted). "When applying this basic principle, the [United States] Supreme Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Id*. (internal quotation marks omitted).

"In line with this reasonableness approach, [the Fourth C]ircuit has permitted law enforcement officers to enter a person's backyard without a warrant when they have a legitimate law enforcement purpose for doing so." *Id*. An agent does not exceed "the scope of his legitimate purpose for being there by walking around to

the back door when he was unable to get an answer at the front door." *Id*. (internal quotation marks omitted). Furthermore, an officer may "bypass the front door (or another entry point usually used by visitors) when circumstances reasonably indicate that the officer might find the homeowner elsewhere on the property." *Covey*, 777 F.3d at 193.[5]

In *Alvarez*, police received a complaint of underage drinking at a party. 147 F.3d at 356. Officer Romack approached the front door of the residence to make contact with the homeowner, but, before knocking, another officer noticed a sign indicating the party was in the back of the house. *Id*. at 356-57. The officers proceeded to the backyard, where Officer Romack asked to speak with the host and encountered an underage drinker whom he asked for identification. *Id.* at 357. In determining whether the warrantless entry into the backyard violated the Fourth Amendment, the Fourth Circuit stated:

> The officers' entry into the backyard satisfied the Fourth Amendment's reasonableness requirement. They were responding to a 911 call about an underage drinking party and, based on the alcohol containers and the awkwardly parked cars, believed they had found the party. They entered the Alvarezes' property simply to notify the homeowner or the party's host about the complaint and to ask that no one drive while intoxicated. Thus, like the agents in *Bradshaw*[[6]], the officers in this case had a

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[5] "Other circuits likewise have found that the Fourth Amendment does not invariably forbid an officer's warrantless entry into the area surrounding a residential dwelling even when the officer has not first knocked at the front door." *Alvarez*, 147 F.3d at 358.

[6] In *U.S. v. Bradshaw*, law enforcement officers entered defendant's property to ask him about an abandoned car near his property. 490 F.2d 1097, 1100 (4th Cir. 1974). After knocking on the front door of the residence and receiving no response, one officer proceeded to the rear of the residence to knock on a back door. *Id*. at 1099. While en route, the officer noticed Bradshaw's truck exuded a strong odor of moonshine. *Id*. He peered through a crack in the closed, rear, swinging doors of the truck and saw multiple gallon jugs containing a white liquid which was in fact moonshine. *Id.* at 1099-100. The court stated: "[T]he agents had a legitimate reason for this incursion unconnected with a search of such

> legitimate reason for entering the Alvarezes' property unconnected with a search of such premises. . . . In furtherance of this purpose, they obviously could approach the front door in an attempt to contact the Alvarezes. And in light of the sign reading "Party In Back" with an arrow pointing toward the backyard, it surely was reasonable for the officers to proceed there directly as part of their effort to speak with the party's host.

Id. at 358-59 (second alteration by the court) (citations and internal quotation marks omitted).

In this case, Sergeant Holbrook and Sergeant Milks testified they saw several individuals in the backyard as they arrived at the property. That observation provided a reasonable basis for believing they would find the homeowner in the backyard. Therefore, we conclude entering the grassy area behind the house to investigate the anonymous tip did not violate the Fourth Amendment.

Finally, the circuit court concluded the officers' stated intent of going to the property simply to talk to the homeowner was implausible and therefore police entry onto the property violated the Fourth Amendment as a warrantless search.[7] However, the Supreme Court of South Carolina has recognized "[t]he Fourth Amendment's concern with reasonableness allows certain actions to be taken in

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premises directed against the accused. They were clearly entitled to go onto defendant's premises in order to question him concerning the abandoned vehicle near his property. Furthermore, we cannot say that [the officer] exceeded the scope of his legitimate purpose for being there by walking around to the back door when he was unable to get an answer at the front door." *Id.* at 1100 (footnote omitted). Nevertheless, the court ultimately suppressed because the moonshine was not in the officer's plain view and the warrantless search of the truck was not necessitated by any other circumstances. *Id.* at 1101-04.

[7] We recognize findings of credibility are generally left to the circuit court. *See Gowdy v. Gibson*, 381 S.C. 225, 233, 672 S.E.2d 794, 798 (Ct. App. 2008) (acknowledging while this court is not bound by credibility determinations, "we generally defer to the findings of the trial judge in that regard") *aff'd* 391 S.C. 374, 706 S.E.2d 495 (2011).

certain circumstances, *whatever* the subjective intent." *Wright*, 391 S.C. at 444, 706 S.E.2d at 328 (internal quotation marks omitted). "Moreover, a police officer's subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *State v. Vinson*, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012) (internal quotation marks omitted). "'[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Wright*, 391 S.C. at 443, 706 S.E.2d at 327 (quoting *Horton* v. *California*, 496 U.S. 128, 138 (1990)). "An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify [the] action." *State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (alteration by court) (internal quotation marks omitted).

We conclude the circuit court's injection of the officers' subjective intent into its analysis was an error of law.[8] While the circuit court may have found the officers' underlying intent was to search the premises, that intent is not impermissible provided the officers had a reasonably objective basis for their actual conduct. Sergeant Holbrook and Sergeant Milks testified they entered the grassy area because they saw several individuals there, they exited their vehicles, and they began to speak to the individuals based on an anonymous tip.[9] Therefore, we are

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[8] We share the learned circuit court's apparent concern regarding the lack of specificity as to the source and manner of conveyance of the anonymous tip in this case. Additionally, we recognize the use of the knock and talk procedure is sometimes pretextual. Nevertheless, we confine our review to the relevant case law and specific facts in the record before us.

[9] The record is unclear as to how many officers were ultimately on the scene, when those officers arrived, or where they were located when Sergeant Holbrook and Sergeant Milks parked in the grassy area. Sergeant Holbrook testified "quite a few" officers chased after the fleeing individual and Sergeant Milks testified they "let the other agents" know on the radio they were going to investigate this tip. Notably, in *Wright*, the opinion indicates that after receiving an anonymous tip, "law enforcement gathered at [a nearby] church, paired up in several cars, and drove to the address to investigate further." 391 S.C. at 440, 706 S.E.2d at 326. This suggests the number of officers involved is not dispositive of whether police contact is a knock and talk or a de facto search. Additionally, Sergeant Milks testified the officers put on their vests and hats indicating they were part of the Sheriff's Office. The circuit court found this conduct to be "suiting up" and that it

compelled to reverse the circuit court's finding the initial police entry onto the property violated the Fourth Amendment.[10]

The circuit court did not reach the issues of whether the discovery of drug evidence in Bash's truck violated the Fourth Amendment (1) because no exigent circumstances existed or (2) because it was not in plain view. However, because the suppression of the evidence could still be upheld based on these points, we will address them. *See Solanki v. Wal-Mart Store No. 2806*, 410 S.C. 229, 235, 763 S.E.2d 615, 618 (Ct. App. 2014) ("According to Rule 220(c), SCACR, an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal.").

"A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. In such circumstances, a protective sweep of the premises may be permitted." *Herring*, 387 S.C. at 210, 692 S.E.2d at 495 (citation omitted). The plain view doctrine justifies seizure of evidence when the seizing officer is lawfully present at the place from which the evidence can be plainly viewed and the evidence's incriminating character is immediately apparent. *Wright*, 391 S.C. at 443, 706 S.E.2d at 327.

Once in the backyard, Sergeant Holbrook observed an individual drop a baggie containing a white powdery substance. Next, the officers observed another individual jump out of Bash's truck and flee the scene. The person did not simply leave or request to go but ran toward a wooded area. These occurrences, coupled with the anonymous tip, gave officers probable cause to believe criminal activity was ongoing and the individuals might flee or otherwise attempt to evade law enforcement. According to Sergeant Holbrook's testimony, in securing the scene,

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undercut the nature of this encounter as a knock and talk. However, it is a more open policy for officers to identify themselves during such an investigatory encounter, and it is not unreasonable for officers to consider their own safety in such circumstances.

[10] Had officers entered the grassy area and demanded to search the individuals or their vehicles, it would have exceeded the parameters of a knock and talk type encounter. Likewise, had the individuals asked the officers to leave, any continuing police presence on the property would have gone beyond the scope of a knock and talk.

he looked inside the window of Bash's truck and observed drug weighing scales and cocaine. The photographic exhibits in the record support this testimony. Additionally, the incriminating nature of the evidence was readily apparent to an experienced narcotics officer like Sergeant Holbrook. Because we have concluded Sergeant Holbrook was in a place he was lawfully permitted to be, the incriminating evidence was in plain view, and its criminal nature was readily apparent, we conclude its seizure did not violate the Fourth Amendment.

CONCLUSION

Assuming arguendo, police entered the curtilage of the property at issue, we conclude that conduct did not violate the Fourth Amendment prohibition against unreasonable searches and seizures. Police were permitted to enter the property to investigate an anonymous tip and had reason to believe they would locate the owner in the grassy area at the rear of the property. Even if the officers hoped to find evidence of drug activity upon entry, that subjective intent does not convert the police conduct in this case into a Fourth Amendment violation. Once at the scene, the actions of the individuals present gave officers probable cause to believe criminal activity was ongoing and that the suspects might flee or otherwise try to avoid police action. Sergeant Holbrook's looking into Bash's truck window was permissible as part of a protective sweep of the area, and the drug evidence was in plain view and readily identifiable as contraband. Consequently, we reverse the circuit court's grant of Bash's motion to suppress and remand this matter to the circuit court for trial.

REVERSED AND REMANDED.

THOMAS and GEATHERS, JJ., concur.