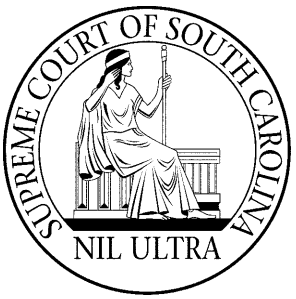

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
July 2, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Christopher Chad Wessinger, Appellant.

Appellate Case No. 2012-213064

Appeal from Cherokee County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 27404
Heard May 21, 2014 – Filed July 2, 2014

AFFIRMED

William G. Rhoden, of Gaffney, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General John Benjamin Aplin, both of Columbia, for Respondent.

JUSTICE PLEICONES: Appellant contends the trial court erred in denying his request for a full evidentiary hearing before the circuit court determined whether appellant's indecent exposure pleas should be classified as sexually violent offenses for purposes of the Sexually Violent Predator Act (the SVP Act). S.C.

Code Ann. §§ 44-48-10 *et seq*. (Supp. 2013). Under the facts of this case, we find no error in the circuit court's denial of appellant's request and therefore affirm.

FACTS

Appellant pled guilty to two counts of indecent exposure in violation of S.C. Code Ann. § 16-15-130 (Supp. 2013) and was sentenced to two consecutive three-year terms, with credit for 253 days already served. At the plea hearing, the solicitor stated that appellant had repeatedly exposed himself to the two female victims, ages 13 and 15, made numerous phone calls to the victims asking them to "do things of a sexual nature," and committed other acts of a sexual nature in their presence. When asked if he agreed with the solicitor's recitation of the facts, appellant, who had been sworn, acknowledged that he had exposed himself "to both victims one time" and denied the rest of the solicitor's recitation. Appellant then confirmed he was pleading guilty to one count of indecent exposure to each victim and that his answers were truthful and honest. Appellant also acknowledged that he had a 1994 conviction for lewd act on a minor and that he was on the sex offender registry as a result of that conviction.

Following appellant's affirmations, one of the victims and the girls' parents gave unsworn statements[1] which described numerous criminal sexual offenses committed by appellant against the girls. The solicitor then asked the judge to exercise his discretion and deem appellant's indecent exposure pleas "sexually violent" offenses pursuant to § 44-48-30(2)(o). This statute permits a judge to designate any offense as sexually violent for purposes of the SVP Act if he "makes a specific finding on the record that based on the circumstances of the case . . . ."

Appellant's counsel contended that the only circumstance of this case which could be considered in making the sexually violent offense decision was that appellant had, on one occasion, exposed himself to each victim. He argued that before making a finding under 2(o), the court must hold a "full evidentiary hearing" including testimony and an opportunity to cross-examine witnesses. He pointed out that the State was relying on the unsworn statements of the victims. In addition, the attorney noted that appellant's status as a registered sex offender was

[1] One victim spoke directly to the court while the father of the other read his daughter's statement. This father also spoke on behalf of himself and his wife and the other victim's mother made a statement to the court.

the result of an old conviction.[2] Appellant, still under oath, admitted his wrongful conduct and apologized, and pointed out he had been "clean" for almost twenty years, and stated, "I'd just like to take [sic] and have some help, be able to get some counseling from somewhere . . . ." He subsequently repeated his request for "some help."

Appellant's attorney reiterated his position that an evidentiary hearing was a necessary prerequisite for the determination whether appellant's offenses should be considered sexually violent under (2)(o). The judge then made this ruling:

> I agree with both the State and the defense. I think that if I were going to make factual determinations based upon what the victims have -- or what's said in court, I think the defendant would have a Constitutional Right to cross-examination. However, for purposes of sexual violent predator evaluation, I believe that the defendant's statements alone and also his history puts him into that category where somebody needs to take a look at it. He, himself, is asking me to give him help for his problem, and that's part of what the civil commitment process would do. It would allow professionals to evaluate him to do what type of civil treatment he would need. He may not qualify for that program, but, you know, when they go through that, they have multi-step processes they go through. They have the solicitors committee. They have a prosecutors committee. They have different people take a look at it. It may be that they believe that he does not fall within that definition, he does not need to be evaluated. They may feel that he does, but I have indicated on the sentencing sheet my desire that he be evaluated for the sexually violent predator program and let those people make that determination based on these charges.

Appellant's counsel asked as a matter of clarification: "Is the court making a specific finding under [§ 44-48-30(2)(o)] concerning this particular act as being a sexually violent offense?" The trial judge responded:

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[2] The predicate conviction was in 1994: appellant was pleading guilty in 2012 to offenses occurring in 2009-2010.

> Yes, based upon the information that's been presented to the court. This country [sic] probably [sic] does not even consider the actual statements that have been made by the victim. I believe that it's based on the allegations that he has admitted to; his own statements to me that he needs that help; his criminal history; the fact that he's already on the sex offender registry, these charges would place him on the sex offender registry. I think the State has met that burden;[3] that that's enough for me to make that finding for purposes for the evaluation process for the SVP statute.

This appeal followed.

ISSUE

> Did the circuit court judge err in denying appellant's request for a full evidentiary hearing before determining whether appellant's offense should be classified as sexually violent for purposes of the SVP Act?

ANALYSIS

Section 44-48-30(2) of the SVP Act lists numerous offenses which are designated "sexually violent offenses." In subsection (2)(o), the statute contains a catch-all provision which allows the judge to designate a crime not otherwise named in the statute as sexually violent "based on the circumstances of the case." Designation of an offense as sexually violent triggers the operation of the SVP Act. This Act requires that inmates convicted of sexually violent offenses be evaluated before expiration of their sentences, and if they are found to meet the SVP Act's criteria, permits the State to seek the inmate's civil commitment to the Department of Mental Health for an indefinite period of time after service of their criminal sentences.

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[3] It is unclear why the trial judge made this reference to the State's burden. As we read the statute, there is no burden of proof or persuasion placed upon either party and in fact the circuit judge placed no burden on the State. Indeed, the statute vests the trial/plea judge with the discretion to make a finding that an offense should be classified as sexually violent, even in the absence of a request by the State.

Appellant argues that we should require a full evidentiary hearing whenever an offense is sought to be classified as "sexually violent" under 2(o). We hold that the scope and necessity of a separate evidentiary hearing is to be determined on a case-by-case basis. Here, the judge stated his decision to classify appellant's offenses as sexually violent was based on the circumstances of the case, that is, appellant's status as a registered sex offender, his sworn admission that he exposed himself to the minor victims, and his requests for help, as well as his prior conviction for a lewd act on a minor. We find no error in the procedure utilized here where the circuit court's decision was based on the uncontested facts in the record, all of which were specificially acknowledged by appellant under oath. Under these circumstances, we find no error in the circuit judge's ruling declining appellant's request for a separate evidentiary hearing.

CONCLUSION

Appellant's convictions, sentences, and the circuit court judge's decision to classify appellant's indecent exposure offenses as sexually violent are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Lawrence Burgess, Petitioner.

Appellate Case No. 2011-194288

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 27405
Heard October 16, 2013 – Filed July 2, 2014

AFFIRMED AS MODIFIED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE BEATTY: Lawrence Burgess was convicted of possession of crack cocaine with intent to distribute and sentenced to three years in prison and ordered to pay a $25,000 fine. The Court of Appeals affirmed. *State v. Burgess*,

393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2011). Following the denial of his petition for rehearing, Burgess petitioned this Court for a writ of certiorari to review the decision. We granted the petition to analyze whether: (1) the multi-jurisdictional drug-enforcement agreement, which formed the purported basis of the arresting officer's authority to arrest Burgess outside of the officer's territorial jurisdiction, satisfied the statutory prerequisites to constitute a valid agreement; and (2) Burgess should have been permitted to cross-examine the arresting officer with his personnel records pursuant to Rule 608(c) of the South Carolina Rules of Evidence. Although we find the Court of Appeals correctly affirmed Burgess's conviction, we disagree with the court's conclusion regarding the multi-jurisdictional drug-enforcement agreement. Accordingly, we affirm as modified.

I. Factual / Procedural History

On March 2, 2006, officers with the Lexington County Narcotics Enforcement Team (NET) executed a search warrant for a trailer at 7120 Two Notch Road in Batesburg, South Carolina, which had been the site of several controlled drug buys. When Agent Billy Laney of the Lexington County Sheriff's Department and Officer Emmitt Gilliam of the Batesburg-Leesville Police Department pulled into the driveway, they saw Burgess and another individual standing by a trailer that was not the target of the search warrant. The officers then witnessed Burgess run around the back of the trailer. Officer Gilliam ran around the other side of the trailer "to cut him off." When Officer Gilliam got within five to six feet of Burgess, he commanded him to stop and put his hands up. Officer Gilliam placed Burgess under arrest and handcuffed him with the assistance of Agent Eric Kirkland of the Lexington County Sheriff's Department. Agent Laney "backtracked" Burgess's steps to where Burgess had been standing and discovered a pill bottle top and pieces of crack cocaine on the ground. The substance found on the ground was chemically tested and determined to be 5.67 grams of crack cocaine. As a result, a Lexington County grand jury indicted Burgess for possession of crack cocaine with intent to distribute.

In a pre-trial hearing, Burgess moved to dismiss the charge for lack of jurisdiction. Burgess asserted that Officer Gilliam lacked authority to arrest Burgess in an area outside the officer's territorial jurisdiction of the Batesburg-Leesville town limits. Although the State maintained that the Lexington County Multi-Agency Narcotics Enforcement Team Agreement (NET Agreement) conferred authority for extra-territorial jurisdiction, Burgess disputed its validity on

the ground it failed to comply with the statutory prerequisites of sections 23-1-210[1] and 23-1-215[2] of the South Carolina Code.

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[1] At the time of the agreement's execution, section 23-1-210 provided in relevant part:

> (A) Any municipal or county law enforcement officer *may be transferred on a temporary basis to work in law enforcement in any other municipality or county* in this State under the conditions set forth in this section, and when so transferred shall have all powers and authority of a law enforcement officer employed by the jurisdiction to which he is transferred.
>
> (B) Prior to any transfer as authorized in subsection (A), *the concerned municipalities or counties shall enter into written agreements* stating the conditions and terms of the temporary employment of officers to be transferred. The bond for any officer transferred shall include coverage for his activity in the municipality or county to which he is transferred in the same manner and to the same extent provided by bonds of regularly employed officers of that municipality or county.

S.C. Code Ann. § 23-1-210 (2007) (emphasis added). In 2007, subsection (A) was amended to provide that "[a]ny municipal or county law enforcement officer may be transferred or assigned on a temporary basis to work in law enforcement within *multijurisdictional task forces established for the mutual aid and benefit of the participating jurisdictions*." Act No. 3, 2007 S.C. Acts 4 (emphasis added).

[2] Section 23-1-215 provided in relevant part:

> (A) In the event of a crime where multiple jurisdictions, either county or municipal, are involved, *law enforcement officers are authorized to exercise jurisdiction within other counties or municipalities for the purpose of criminal investigation only if a written agreement between or among the law enforcement agencies involved has been executed*. This limitation on law enforcement activity shall not apply to any activity authorized by § 17-13-40.
>
> (B) Any law enforcement officer working under this agreement is vested with equal authority and jurisdiction outside his resident

Initially, Burgess argued that section 23-1-215 was the controlling statute because it provides authority for the institution of "agreements between multiple law enforcement jurisdictions." Because the governing bodies of Batesburg-Leesville and Lexington County were not provided written notice of the NET Agreement's execution as required by subsection (E) of section 23-1-215, Burgess claimed the agreement was invalid. Additionally, Burgess asserted that section 23-1-210 did not apply to the NET Agreement as that section is limited "to the temporary transfer of an officer." In the alternative, he argued that the agreement did not comply with section 23-1-210 because it was executed by law enforcement officers and not by "council members."

In response to Burgess's motion, the State presented a copy of the NET Agreement that was entered into by eleven law enforcement agencies in Lexington County[3] on September 18, 2001.[4] The NET Agreement, which referenced sections 23-1-210 and 23-1-215,[5] stated in relevant part:

> jurisdiction for the purpose of investigation, arrest, or any other activity related to the criminal activity for which the agreement was drawn.
>
> . . . .
>
> (E) The respective governing bodies of the political subdivisions, wherein each of the law enforcement agencies entering into the agreement authorized in subsection (A) is located, must be notified by its agency of the agreement's execution and termination. *The notification must be in writing and accomplished within seventy-two hours of the agreement's execution and within seventy-two hours of the agreement's termination.*

S.C. Code Ann. § 23-1-215 (2007) (emphasis added). In 2007, this code section was amended. Act No. 3, 2007 S.C. Acts 5. This amendment, however, does not affect the disposition of this case.

[3] The agencies included Batesburg-Leesville Police Department, Cayce Department of Public Safety, Chapin Police Department, Columbia Metropolitan Airport Police Department, Gaston Police Department, Irmo Police Department, Lexington County Sheriff's Department, Pine Ridge Police Department, South Congaree Police Department, Springdale Police Department, and West Columbia Police Department.

WHEREAS, it is the desire and intent of the parties to evidence their joint undertaking for the provision of mutual assistance in criminal narcotics investigations by the creation and operation of a multijurisdictional task force within Lexington County.

WHEREAS, the parties as set out above, by and through their representatives affixing their signatures below, consent and agree to span the geopolitical boundaries of all areas of Lexington County to the fullest extent allowed under South Carolina law for the express purpose of investigating the illegal use of controlled substances and related crimes by creating this Lexington County Multi-Agency Narcotics Enforcement Team [.]

. . . .

1. SCOPE OF SERVICES

   It is agreed that the law enforcement agency parties shall assign, on a temporary basis, officers to participate in the Lexington County Multijurisdictional Drug Enforcement Unit for the duration of this agreement or until this agreement is rescinded as set forth herein.

2. TERM AND RENEWAL

   This agreement is effective as to each party at the date and time of signing and will automatically renew one year from the above date unless a party exercises its right to terminate as further described herein.

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[4] The NET Agreement was amended in May 2002 and July 2005 to add other law enforcement agencies; however, the substantive provisions of the agreement remained the same.

[5] The NET Agreement also referenced Article VIII, Section 13 of the South Carolina Constitution and section 17-13-45 of the South Carolina Code. These sections, however, are not at issue in the instant case. *See* S.C. Const. art. VIII, § 13 (authorizing joint administration of functions and exercise of powers among counties, municipalities, or other political subdivisions of the State); S.C. Code Ann. § 17-13-45 (2003) (providing authority for law enforcement responding to distress call or request for assistant in an adjacent jurisdiction).

3. VESTING OF AUTHORITY AND JURISDICTION

To the fullest extent permitted by the Constitution and statutes of this State, officers assigned under this agreement and so transferred shall be vested with authority, jurisdiction, rights, immunities, and privileges to include the authority to execute criminal process and the power of arrest as any other duly commissioned officer of any other party.

. . . .

10. RESPONSIBILITY TO RESPECTIVE GOVERNING BODIES

Each party is responsible for any notice, reporting, or approval requirements to their respective governing body as may be required under South Carolina law.

11. OFFICERS ASSIGNED

Each party agrees to designate and transmit in writing, the names of those individuals assigned to perform duties under this agreement to the other parties. Upon receipt, such is to be made a part of and is incorporated by reference into this agreement.

In explaining the agreement, the State showed that it was signed by Chief Wallace Oswald on behalf of the Town of Batesburg-Leesville. According to the State, Chief Oswald entered into the NET Agreement based on the advice and consent of the Batesburg-Leesville Town Council (Town Council). The State introduced a videotape of an August 31, 2001 Town Council meeting during which Chief Oswald informed Town Council of "that pending matter between the solicitor and the town of Batesburg[-]Leesville forming a multi-jurisdictional agreement for continued narcotics work in Lexington County."

The State also introduced minutes from the January 8 and December 10, 2002, Lexington County Council (County Council) meetings through the Clerk of the County Council. The January 8 minutes show County Council considered grant application requests from the sheriff's department for a NET. The December 10 minutes reflect that County Council voted in favor of grant requests regarding additional staff positions in both the solicitor's and sheriff's office to focus on the NET.

In conjunction with the minutes, the State presented testimony from Marguerite Crapps, the mayor pro tem of the Batesburg-Leesville Town Council. When asked whether the Batesburg-Leesville Town Council was "on board with the chief of police [to] enter into this agreement on the behalf of Town Council of Batesburg-Leesville," Crapps responded, "Yes."

Lieutenant Byron Snellgrove, who was employed with the narcotics unit of the Lexington County Sheriff's Department, was the NET supervisor at all times relevant to this case. Lieutenant Snellgrove testified Chief Oswald and the Town of Batesburg-Leesville assigned Officer Gilliam, of the Batesburg-Leesville Police Department, to the NET. He then assigned Officer Gilliam to the Batesburg-Leesville area of Lexington County "to take care of cases inside the town limits as well as outside the town limits." After Officer Gilliam advised Lieutenant Snellgove that "there were drug [sales] going on at 7120 Two Notch Road," Lieutenant Snellgrove asked Gilliam "to try to make a case or get into that location one way or another." Lieutenant Snellgrove then requested that Officer Gilliam help with the drug problem at that location pursuant to the NET Agreement.

Based on this evidence, the State contended that the notice requirement of section 23-1-215 was met because both County Council and Town Council had actual notice of the NET Agreement and approved their respective law enforcement agencies' participation in the NET. In contrast to the defense, the State believed the notice provision of section 23-1-215 was "purely ministerial and administrative," similar to the ten-day notice requirement for the return of a search warrant to the magistrate upon the execution of the search warrant. Thus, the State asserted that section 23-1-215(E) should not be "strictly construed" to require written notice.

Additionally, the State maintained the NET Agreement satisfied the provisions of section 23-1-210. Because the governing bodies had actual notice of the NET Agreement and its terms, the State claimed that chief law enforcement officers were authorized to enter into these agreements "with the advice and consent of county council." The State explained that Chief Oswald "acting as agent for the corporate municipality of Batesburg[-]Leesville [had] apparent authority to bind them . . . because he had the total responsibility of law enforcement within that town."

After hearing arguments, the trial judge found the State failed to present evidence that written notification had been given within 72 hours of the agreement's execution as required by section 23-1-215(E). The judge, however,

ruled that the NET Agreement complied with section 23-1-210 because he found nothing in the statute "that would prohibit either a county or a municipality . . . from authorizing in some way the chief of police or the sheriff to enter into such agreements." Although the judge was unclear as to which code section the NET Agreement was based, he concluded the agreement was created pursuant to section 23-1-210. As a result, the judge denied Burgess's motion to dismiss.

Subsequently, the State made a motion *in limine* to exclude Officer Gilliam's personnel records. The judge sustained the State's motion, but indicated that he would consider the motion if Burgess "wanted to get into" these records.

During Officer Gilliam's testimony, Burgess sought to cross-examine him about why he was no longer with NET and to introduce his personnel records. The records, which describe three incidents that took place after Burgess's arrest but before trial, involved a disagreement with other officers about the use of confidential informants, his use of profanity, and his threat to harm another officer. The incidents resulted in a two-day suspension, a demotion to the rank of Corporal, and a ninety-day period of probation. The judge excluded the records, finding the personnel matters were irrelevant and highly prejudicial.

Ultimately, the jury found Burgess guilty of possession of crack cocaine with intent to distribute. Burgess appealed his conviction to the Court of Appeals, which affirmed. *State v. Burgess*, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2011). In so ruling, the court upheld the trial judge's decision that the NET Agreement complied with the requirements of section 23-1-210. *Id.* at 402, 712 S.E.2d at 4. Specifically, the court found: (1) the concerned municipalities and county entered into a written agreement to create multi-jurisdictional law enforcement authority; (2) the agreement complied with the requirements of section 23-1-210 by stating the employment conditions and maintaining compensation from permanent employment; and (3) the officers acting with the NET were transferred to it on a temporary basis. *Id.* The court further found Chief Oswald informed Town Council of the NET Agreement before its execution, and Town Council gave him the authority to enter into the agreement. *Id.*

Additionally, the court distinguished the case from *State v. Boswell*, 391 S.C. 592, 707 S.E.2d 265 (2011), which was decided by this Court during the pendency of Burgess's appeal.[6] The Court of Appeals found *Boswell* inapposite as

[6] In *Boswell*, the defendant was convicted of first-degree burglary. *Boswell*, 391 S.C. at 594, 707 S.E.2d at 265. On appeal, Boswell argued, among other issues,

the NET Agreement was not entered pursuant to the Law Enforcement Assistance and Support Act and, thus, section 23-20-50(A) of the Act did not apply. *Burgess*, 393 S.C. at 403, 712 S.E.2d at 4-5. Rather, the court found the NET Agreement was "made pursuant to section 23-1-210, part of a different chapter from the Law Enforcement Assistance and Support Act entitled 'General Provisions.' " *Id.*

Having found the NET Agreement was valid pursuant to section 23-1-210, the court declined to address its validity under section 23-1-215. *Id.* at 403-04, 712 S.E.2d at 5.

As to the judge's ruling regarding the admission of Officer Gilliam's personnel records, the Court of Appeals found the trial judge did not abuse his discretion in excluding these records. *Id.* at 404-05, 712 S.E.2d at 5. In so ruling, the court interpreted the judge's decision "as a finding that the records did not have a legitimate tendency to show bias on the part of the officer." *Id.* at 405, 712 S.E.2d at 5. The court noted that each incident in Officer Gilliam's personnel records occurred after Burgess's arrest and none of the incidents related directly to Burgess. *Id.* Additionally, the court concluded that while the personnel incidents "might show Gilliam to be hot-tempered and uncooperative with other officers, they do not show his bias against Burgess, or otherwise relate to Gilliam's credibility." *Id.*

Burgess petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals. This Court granted the petition.

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that the trial judge erred in declining to suppress his confessions as they were the direct result of an unlawful arrest by officers acting outside their territorial jurisdiction. *Id.* at 594, 707 S.E.2d at 266. Specifically, Boswell contended the Lexington County officers were without authority to arrest him for a crime that occurred in Calhoun County. *Id.* at 598, 707 S.E.2d at 268. The State offered evidence of a 1999 multi-jurisdictional agreement entered into between the Calhoun County and Lexington County Sheriff's Departments that purported to confer the authority of officers to arrest in the other county's jurisdiction. *Id.* In assessing the validity of the agreement, this Court applied section 23-20-50(A) of the Law Enforcement Assistance and Support Act. *Id.* at 601, 707 S.E.2d at 270. Because the agreement was "not voted on by the county council" as required by section 23-20-50(A) of the Act, this Court deemed it invalid. *Id.* at 602, 707 S.E.2d at 270.

II. Discussion

A. Multi-Jurisdictional Agreement

In advocating the reversal of the decision of the Court of Appeals, Burgess posits three arguments. First, he contends that *Boswell* is dispositive as he broadly construes the holding to require all multi-jurisdictional agreements to be voted on by the governing body of each jurisdiction pursuant to section 23-20-50(A). Second, he asserts the agreement failed to strictly comply with the provisions of section 23-1-210 as the "State presented no written verification that the Batesburg/Leesville town council authorized the Chief of Police to entered into the agreement [on] behalf of the council." Burgess further notes that "there is no mention of the County authorizing Sheriff Metts to enter into the agreement on behalf of the County." Finally, Burgess maintains that it is "questionable" whether section 23-1-215 is applicable to the facts of the instant case as he believes this code section only applies to situations where a crime has occurred in multiple jurisdictions.[7] Even if applicable, Burgess avers that law enforcement failed to comply with the statutorily required written notice provision of subsection (E). Because the validity of a multi-jurisdictional agreement is dependent upon strict compliance, he disputes the State's contention that actual notice is sufficient.

1. Implications of *Boswell*

We agree with the Court of Appeals that *Boswell* is not controlling as it is factually and legally distinguishable. However, as will be discussed, we find the interpretation of *Boswell* by the Court of Appeals was entirely too narrow.

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[7] As a threshold matter, Burgess asserts that any argument regarding the applicability of section 23-1-215 is not preserved for appellate review because the State did not appeal the trial judge's decision as to this statute and raised it for the first time in its final brief to the Court of Appeals and in its return to Burgess's petition for a writ of certiorari. We find the issue is properly before this Court because the State challenged the trial judge's ruling on this issue as an additional sustaining ground to the Court of Appeals and to this Court. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

Initially, we note that Burgess did not argue to the trial judge or to the Court of Appeals that section 23-20-50(A) was applicable; therefore, any argument regarding this statute is not preserved for appellate review. *See State v. Sheppard*, 391 S.C. 415, 706 S.E.2d 16 (2011) (stating that an issue may not be raised for the first time on appeal). Furthermore, unlike the agreement in *Boswell*, the NET agreement in the instant case does not reference section 23-20-50 or contain a provision outlining the public safety situations identified in section 23-20-30.[8] Thus, we agree with the ultimate conclusion reached by the Court of Appeals regarding the inapplicability of *Boswell*.

However, we find the court interpreted *Boswell* too narrowly as it infers that section 23-20-50(A) either conflicts with or is mutually exclusive from sections 23-1-210 and 23-1-215. This is an incorrect reading of *Boswell*. Because all of these code sections are contained within Title 23, which is entitled "Law Enforcement and Public Safety," these sections cannot be read in isolation as the Court of Appeals appears to have done. *See Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992) (recognizing rule of statutory construction that statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction).

Although we question why the General Assembly has failed to consolidate these sections into one that would govern all multi-jurisdictional agreements, we believe the separate sections were enacted as a result of legislative progression. Specifically, section 23-1-210 was enacted in 1981 to address the temporary transfer of law enforcement officers to another jurisdiction, section 23-1-215 was enacted in 1987 to expressly address crimes that occur in multiple jurisdictions, and section 23-20-50 was enacted in 2000 to authorize law enforcement to assist other jurisdictions with certain public safety concerns.[9] Notably, the drafters of these agreements appear to recognize this interrelationship as the agreements usually include a reference to all of these sections.

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[8] The agreement in *Boswell* implicitly included section 23-20-50 as it notes that one of the purposes of the agreement is to "provide mutual aid in the event of natural disaster, disorder, or other emergency situations." It also expressly provided that the agreement does not affect any agreements regarding narcotics investigations.

[9] Act No. 109, 1981 S.C. Acts 402; Act No. 107, 1987 S.C. Acts 262; Act No. 382, 2000 S.C. Acts 2604.

2. Propriety of NET Agreement under sections 23-1-210 and 23-1-215

Even though *Boswell* is not dispositive of the instant case, it is nonetheless instructive because it stands for the proposition that statutes governing multi-jurisdictional agreements must be strictly complied with to ensure the validity of the agreement. *See Boswell*, 391 S.C. at 602, 707 S.E.2d at 270 (recognizing the significance of territorial jurisdiction and concluding that a "more stringent approach needs to be followed in order to confer this type of authority"). Applying this principle to the instant case, we hold the NET Agreement is invalid as it does not satisfy the statutory requirements of either section 23-1-210 or section 23-1-215.

a. Section 23-1-210

As a matter of state statute, the Town of Batesburg-Leesville and Lexington County operate and govern through Town Council and County Council. *See* S.C. Code Ann. § 4-9-30(3), (13) (1986 & Supp. 2013) ("[E]ach county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof: (3) to make and execute contracts . . . (13) to participate in multi-county projects and programs authorized by the general law and appropriate funds therefor . . . ."); S.C. Code Ann. § 5-7-160 (2004) ("All powers of the municipality are vested in the council, *except* as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law." (emphasis added)).

Consistent with this general authorization of power, subsection (B) of section 23-1-210 mandates that "the concerned municipalities or counties" enter into written agreements providing for the transfer of its law enforcement officers to another municipality or county. S.C. Code Ann. § 23-1-210(B) (2007). Certainly, there is evidence that County Council approved grant requests to fund additional staff positions associated with NET and Town Council was verbally informed of the "pending matter between the solicitor and the town of Batesburg[-] Leesville forming a multi-jurisdictional agreement." These procedures, however, did not constitute express approval by "the concerned municipalities or counties" as to the actual NET Agreement. In fact, the record reveals that the terms of the NET Agreement were never presented to the governing bodies for their approval. Instead, the only evidence is that Chief Oswald and Sheriff Metts entered into the

NET Agreement on behalf of their law enforcement agencies. Thus, without the express approval of Town Council and County Council, the NET Agreement failed to strictly comply with the statutory requirements of section 23-1-210.

Notwithstanding the lack of strict statutory compliance, the State contends the agreement is, nevertheless, valid as the governing entities provided Chief Oswald and Sheriff Metts with apparent authority to enter into the NET Agreement. We reject this contention as Town Council and County Council could not delegate this authority.

Because the authority to enter into these agreements was statutorily conferred upon the governing entities, these entities were prohibited from abdicating this power and delegating it to a law enforcement officer. *See* 2A Eugene McQuillin, *The Law of Municipal Corporations* § 10:46 (3d ed. 1996) ("Usually a power conferred without limitation upon the municipal corporation may be exercised by the common council or legislative body as the general agent of the corporation, and by no other authority. A fortiori, power conferred upon the council or legislative body in express terms cannot be delegated otherwise than in accordance with the expression of terms." (footnotes omitted)); 62 C.J.S. *Municipal Corporations* § 206 (Supp. 2013) ("The governing body of a municipal corporation, entrusted by the state with the police power, is prevented from delegating its high functions to any body or officer; instead, it may be discharged or exercised only by those to whom the state commits it." (footnotes omitted)); *see also Newman v. McCullough*, 212 S.C. 17, 25-26, 46 S.E.2d 252, 256 (1948) (recognizing that a municipal council, "acting as a governmental agency, . . . is bound always to act as trustee of the power delegated to it and may not surrender or restrict any portion of such power conferred upon it").

Thus, strictly construing section 23-1-210, we are constrained to find the NET Agreement was invalid as Town Council and County Council were the only entities authorized to enter into this multi-jurisdictional agreement. If law enforcement agencies are to have this authority, it is for the General Assembly and not this Court to grant them this authority. *See* 80 C.J.S. *Sheriffs & Constables* § 51 (Supp. 2013) ("Sheriffs and constables have all the powers and duties appertaining to their office at common law except as modified by a statute or the state constitution.").[10]

[10] Even assuming Chief Oswald was authorized to enter into the NET Agreement on behalf of the Town of Batesburg-Leesville, we find Officer Gilliam was not "transferred on a temporary basis to work in law enforcement in any other

b. Section 23-1-215

Although not addressed by the Court of Appeals, we find the trial judge correctly ruled the NET Agreement did not comply with the provisions of section 23-1-215 as the State presented no evidence that County Council or Town Council received written notification within seventy-two hours of the execution of the NET Agreement as required by subsection (E). S.C. Code Ann. § 23-1-215(E) (2007).

Furthermore, it is arguable that section 23-1-215 was factually inapplicable as one could construe this section to govern only the investigation of past crimes rather than to provide blanket extra-territorial jurisdiction to officers addressing potential criminal activity. As titled, the purpose of section 23-1-215 is to authorize "[a]greements between multiple law enforcement jurisdictions for purpose of criminal investigation." *Id.* § 23-1-215. Subsection (A) then states in the past tense, "[i]n the event of a crime" involving multiple jurisdictions;[11] thus, by implication, the statute authorizes agreements for the investigation of completed crimes spanning multiple jurisdictions.

In the instant case, Officer Gilliam was assigned to assist in the execution of a search warrant for a specific trailer at 7120 Two Notch Road. Because Burgess was not the subject of this investigation as he did not reside at this trailer and was arrested near a trailer that was not the target of the search warrant, we do not

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municipality or county in this State." *Id.* § 23-1-210(A). Notably, the agreement was executed in September 2001 and the arrest occurred in March 2006. There is also evidence that Officer Gilliam worked on NET for at least a year and a half. Thus, although he may have been assigned to assist in the execution of the search warrant, Officer Gilliam had relied on the provisions of the NET Agreement to claim extra-territorial authority for an extended duration. Accordingly, even though "temporary" is not defined by section 23-1-210, Officer Gilliam's extended service under the NET Agreement cannot be construed as a "temporary" transfer as intended by the statute. *See State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999) (acknowledging rule of statutory construction that when faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning).

[11] We note the 2007 amendment to section 23-1-215 expressly included past tense language stating, "In the event of a crime or crimes *that have occurred* . . . ." S.C. Code Ann. § 23-1-215(A) (Supp. 2013) (emphasis added).

believe section 23-1-215 could be interpreted to confer authority on Officer Gilliam to arrest Burgess.

c. Valid Conviction Despite Invalid Agreement

Despite our finding that the NET Agreement was invalid, we conclude that Burgess's conviction was, nevertheless, valid. Although Officer Gilliam lacked authority to arrest Burgess, Agents Laney and Kirkland, who were authorized with territorial jurisdiction in Lexington County, played an integral role in the arrest and discovery of the drugs that formed the basis of the conviction.

Section 44-53-375(B) of the South Carolina Code creates a permissive inference that possession of one or more grams of a "cocaine base" is "prima facie evidence" of possession with intent to distribute. S.C. Code Ann. § 44-53-375(B) (Supp. 2007).[12] "Possession may be actual or constructive." *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996). "Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." *Id.* (citation omitted).

Here, the evidence was sufficient to prove Burgess possessed crack cocaine with intent to distribute. Notably, Burgess fled when Agent Laney and Officer Gilliam arrived at the target location; thus, indicating consciousness of guilt. *See State v. Walker*, 366 S.C. 643, 655, 623 S.E.2d 122, 128 (Ct. App. 2005) ("Unexplained flight is admissible as indicating consciousness of guilt, for it is not as likely that one who is blameless and conscious of that fact would flee."). Officer Gilliam apprehended Burgess with the assistance of Agent Kirkland. Agent Laney then independently searched for and discovered 5.67 grams of crack cocaine and a pill bottle top in the area from which Burgess fled.

Even if we assume that Burgess's arrest was invalid, such an assumption would be of no consequence to Burgess as this Court has held that "the illegality of an initial arrest did not bar the accused person's subsequent prosecution and conviction of the offense charge." *State v. Biehl*, 271 S.C. 201, 204, 246 S.E.2d 859, 860 (1978). The *Biehl* Court pointed out that no evidence used in Biehl's trial was acquired as a result of the arrest. The same is true in Burgess's trial. The

[12] Because the offense occurred in March 2006, we cite to the code section in effect at that time.

recovery of the crack cocaine by Agent Laney was directly related to Burgess's conduct during his furtive flight. Burgess attempted to flee immediately when he saw the arrival of Agent Laney and Officer Gilliam. Agent Laney followed Burgess's furtive flight path and found the drugs in an area where Burgess had been standing. Thus, the crack cocaine, which formed the basis for Burgess's conviction, was not fruit of the arrest. Specifically, the drugs were not found on Burgess's person nor were they located as a result of anything Burgess said after he was arrested. Rather, the drugs were independently found by Agent Laney of the Lexington County Sheriff's Office.

Finally, Burgess's reliance on our decision in *Boswell* is unavailing. After Boswell was arrested, he confessed to the arresting officers. *Boswell*, 391 S.C. at 597, 707 S.E.2d at 267. Accordingly, we held that the confessions should have been excluded at trial as they were the fruit of the invalid arrest. *Id.* at 606, 707 S.E.2d at 272. However, in this case, Burgess did not confess nor were the drugs found on his person or his property.

In light of the foregoing, we find the invalid NET Agreement did not negate the authority of Agents Laney and Kirkland to charge Burgess with the offense for which he was convicted.

III. Cross-Examination

Burgess next asserts the trial judge erred in refusing to allow cross-examination about Officer Gilliam's personnel records as the records constituted evidence of bias and motive to misrepresent pursuant to Rule 608(c), SCRE.

Burgess maintains that Officer Gilliam's credibility as a witness was "a key issue at trial" because he was the only witness to testify that Burgess dropped a pill bottle that contained crack cocaine residue. Burgess also notes that neither Agent Laney nor Officer Gilliam witnessed Burgess in actual possession of the crack cocaine that was discovered on the ground. In view of this evidence, Burgess contends "the jury . . . had a right to know about Gilliam's disciplinary problems and removal from the NET because the information had a legitimate tendency to throw light on the accuracy, truthfulness and sincerity of Gilliam's testimony." Specifically, Burgess claims "[t]he records portray Gilliam as an overzealous narcotics officer who was willing to use unreliable confidential informants in order to make an arrest and who violated protocols of the NET concerning the use of confidential informants."

"Rule 608(c), SCRE, provides that bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." *State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002). "Rule 608(c) 'preserves South Carolina precedent holding that generally, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.' " *Id.* (*quoting State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001)).

"As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion." *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). An abuse of discretion occurs when the trial court's ruling either lacks evidentiary support or is based on an error of law. *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006).

We find the Court of Appeals correctly upheld the trial judge's decision prohibiting Burgess from cross-examining Officer Gilliam about his personnel records as we discern no abuse of discretion. Significantly, each of the disciplinary incidents occurred after Burgess's arrest and did not involve Burgess. Furthermore, Officer Gilliam's hostile actions were directed at co-workers rather than subjects of criminal investigation. Thus, Burgess failed to offer evidence that Officer Gilliam lacked credibility due to bias against Burgess. Accordingly, the trial judge properly limited Burgess's cross-examination of Officer Gilliam. *Cf. Baldez v. State*, 386 S.W.3d 324 (Tex. Ct. App. 2012) (discussing Rule 608 and holding that trial judge did not err in prohibiting defendant from cross-examining the arresting officer concerning his disciplinary suspension for the sole purpose of showing the officer's lack of credibility as the defendant never argued that the officer was untrustworthy due to bias or interest against the defendant).

IV. Conclusion

Based on the foregoing, we hold the NET Agreement was invalid and, thus, did not confer extra-territorial jurisdiction upon Officer Gilliam. *See State v. Harris*, 299 S.C. 157, 159, 382 S.E.2d 925, 926 (1989) ("The jurisdiction of a municipal police officer, absent statutory authority, generally does not extend beyond the territorial limits of the municipality."). Our decision should not be construed as invalidating all multi-jurisdictional agreements. Instead, we recognize the import of these agreements and emphasize that they are not invalid per se. The validity of these agreements, however, is dependent upon strict compliance with the applicable statutes. Because the NET Agreement in the

instant case failed to satisfy the statutory requirements, we are constrained to find that it is invalid.

However, despite the invalidity of the NET Agreement, we find the Court of Appeals correctly affirmed Burgess's conviction as Officer Gilliam's lack of authority did not negate Agents Laney's and Kirkland's authority in Lexington County. Thus, Officer Gilliam's lack of authority did not vitiate the valid conviction. Moreover, we find the Court of Appeals correctly upheld the trial judge's decision prohibiting Burgess from cross-examining Officer Gilliam regarding his personnel records as we discern no abuse of discretion.

Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Crossland, Respondent,

v.

Shirley Crossland, Petitioner.

Appellate Case No. 2012-212190

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
George M. McFaddin, Jr., Family Court Judge

Opinion No. 27406
Heard March 18, 2014 – Filed July 2, 2014

REVERSED

Brian Dumas, of Columbia, for Petitioner.

Melvin D. Bannister, of Columbia, for Respondent.

ACTING JUSTICE JAMES E. MOORE: In this appeal from a divorce action, Appellant Shirley Crossland ("Wife") contends the court of appeals erred in reversing the family court's alimony award, in modifying the equitable division of the marital estate, and in remanding the issue of attorney's fees. We agree and reverse.

I.

Respondent Robert Crossland ("Husband") and Wife were married in 1997 and separated for the final time on September 6, 2006. Husband filed for divorce on August 17, 2007. Both parties were previously married and had adult children from those marriages; however, no children were born of this marriage. At the time of the divorce hearing on March 1, 2010, Husband was seventy-six years old and Wife was sixty-two years old.

At the time of marriage, Husband was sixty-three years old and had been retired for twenty years. His income during his marriage consisted of social security retirement benefits, Air Force retirement benefits, and veterans disability benefits. At the time the parties married, Husband owned two mobile homes, the marital residence—a house Husband purchased in 1955,[1] and savings in the form of stocks, savings accounts, certificates of deposit, and mutual funds (collectively "savings accounts"). Shortly after the couple married, Husband added Wife's name to all of the savings accounts; however, after the parties separated, he transferred the money from the savings accounts to an annuity fund in his name only.[2] Directly prior to the transfer, the savings accounts contained approximately $180,000.

Before the marriage, Wife worked in a bookstore making minimum wage and lived with her daughter because she was unable to support herself financially. At the time the parties married, Wife was fifty years old and had just returned from an extended mission trip to Ukraine. She testified the bookstore held her position open during her mission trip, but upon her return, Husband asked her not to return to her job so they could travel together. Wife owned no assets at the time of the

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[1] Husband paid off the loan on the house sometime during the 1960s. The house and the mobile homes remained solely in Husband's name during the marriage, and Wife never claimed the marital residence or the two mobile homes were part of the marital estate.

[2] Husband admitted withdrawing the overwhelming majority of the funds from the savings accounts, leaving each account with a nominal balance of five dollars so as to prevent Wife from receiving notification of the withdrawals. Husband also admitted moving the funds into various new accounts in his name only, in order to make it harder for Wife to trace the money.

marriage and did not work during the marriage except for period of employment with the Census Bureau in 1998 and 1999 during which she earned approximately $26,000. During the marriage, Wife also received $5,632.84 in proceeds resulting from an automobile accident. Wife testified she deposited both her Census Bureau earnings and the auto accident proceeds into the parties' joint accounts. Additionally, Wife testified she was eligible for social security retirement benefits, but had not applied to receive them because she did not wish to do so before reaching the official retirement age.

Both Husband and Wife suffered from various health problems, Wife to a greater degree. Husband has hearing problems and underwent two knee replacements and surgeries for heart and prostate issues. Wife has suffered from degenerative neck and back pain and has undergone two separate back surgeries. Additionally, Wife has undergone shoulder surgery and has been diagnosed with fibromyalgia and arthritis. In 2001, Wife was in an automobile accident and injured her back, shoulder, and right arm. Thereafter, Wife re-injured her shoulder and arm when she fell down a flight of stairs. In August 2005, Wife was diagnosed with breast cancer, which was successfully treated and continued to be in remission at the time of the divorce hearing. Wife testified she was unable to work because of her health problems. She also testified she stood to lose her medical insurance as a result of the divorce and would need to procure new insurance at a cost of at least $330 per month.

In his divorce complaint, Husband claimed Wife left their marital home on September 6, 2006, and did not return. Husband stated Wife had previously left the home three times, but eventually returned each time. Husband estimated they lived together for only five years of their ten-year marriage due to various separations initiated by Wife. In her Answer, Wife contended she was forced from the marital home by Husband's erratic and overly controlling behavior, especially in regards to the couple's finances.[3] Wife further requested equitable division of

[3] In her affidavit and at the divorce hearing, Wife and her daughter testified Husband required Wife: learn how to read the electric meter to insure usage never exceeded 400 kilowatts per month in order to limit the electric bill to $18 a month; wash clothes in cold water only and only on certain days; take "military showers" where Wife "could have the water on to get wet and rinse off only"; never drive above 55 miles per hour on the interstate and drive extremely close behind eighteen-wheelers so as to cut the wind resistance in order to conserve gasoline;

the marital property, alleging Husband had secreted assets and denied her access, and she requested separate support and maintenance, alimony based on Husband's fault, and attorney's fees and costs.

The family court granted Husband a divorce based on one year of continuous separation. The family court found it was clear the parties "entered into a traditional marriage, with the Husband to be the major, if not sole financial contributor to the financial stability of the marriage with the Wife mainly taking care of the household duties, until the point at which her health deteriorated," and both had regularly saved through "frugal living" and contributed to the marital estate. Thus, the family court awarded Wife forty percent of the marital estate, represented by the annuity[4] in Husband's name and the amount of $20,442, which the court found Husband had taken from the savings accounts to purchase an automobile after he filed for divorce, in violation of the family court's preliminary order.

Further, the family court noted it was clear from Husband's testimony he never expected Wife to contribute financially to the marriage, and although Wife "may have at some point been able to contribute to her own support, it is clear that during the marriage, her health deteriorated to the point she could no longer financially contribute to [the] marriage through gainful employment." Thus, the family court awarded Wife alimony in the amount of $958.50 per month. Finally, after considering the relevant factors, the family court awarded Wife $16,024.50 in attorney's fees.

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limit trips to visit friends and family unless Wife had other errands to complete nearby; and limit long-distance telephone calls to ten minutes at a time. Wife further stated there were times when she "would have to regularly leave the house and 'visit' relatives for the last week of the month to keep the power and water usage below the levels [Husband] demanded." Husband admitted limiting the monthly electricity usage, but denied he made Wife leave the home and stay with family in order to keep the electric bill at a certain level.

[4] The family court found the annuity fund Husband had opened in his name only was marital property because the source of funds was the savings accounts, which were transmuted into marital property. The court of appeals affirmed as to this issue, and Husband did not appeal that issue to this Court.

Husband appealed, and the court of appeals reversed the family court's alimony award and remanded the issue for a recalculation of alimony, finding Wife's eligibility for social security retirement benefits should have been imputed as income. The court of appeals also modified the family court's sixty-forty division of the marital estate, finding Husband should have received seventy percent of the marital assets and that Wife was entitled only to thirty percent. Additionally, the court of appeals reversed the family court's award of attorney's fees to Wife and remanded the issue for reconsideration because the substantive results achieved by Wife's counsel were reversed on appeal. This Court granted Wife's petition for a writ of certiorari to review the court of appeals' decision.

II.

In appeals from the family court, this Court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414–415, 709 S.E.2d 666, 667 (2011). Thus, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence; however, this broad scope of review does not require the Court to disregard the findings of the family court, which is in a superior position to make credibility determinations. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011).

A. Alimony

Wife argues the court of appeals erred in holding that, for the purposes of awarding alimony, income should be imputed to her based on her eligibility for social security retirement benefits she has not applied to receive. We agree.

Alimony is a substitute for the support normally incidental to the marital relationship. *Spence v. Spence*, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

In deciding whether to award alimony, the family court must consider and give appropriate weight to the following factors:

> (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce . . . ; (2) the

> physical and emotional condition of each spouse; (3) the educational background of each spouse . . . ; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated earnings of both spouses; (7) the current and reasonably anticipated expenses and needs of both spouses; (8) the marital and nonmarital properties of the parties . . . ; (9) custody of the children . . . ; (10) marital misconduct or fault of either or both parties . . . ; (11) the tax consequences to each party as a result of the particular form of support awarded; (12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and (13) such other factors the court considers relevant.

S.C. Code Ann. § 20-3-130(C) (2014). An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. *Dickert v. Dickert*, 387 S.C. 1, 8, 691 S.E.2d 448, 451 (2010). "[T]he inartful use of an abuse of discretion deferential standard of review merely represents the appellate courts' effort to incorporate the two sound principles underlying the proper review of an equity case." *Lewis*, 392 S.C. at 391, 709 S.E.2d at 655. "[T]hose two principles are the superior position of the trial judge to determine credibility and the imposition of a burden on an appellant to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court." *Id.*

At the hearing, Wife testified that she was sixty-two years old and, thus, eligible to receive social security retirement benefits but that she had not applied to receive those benefits because she had "always heard that if you start drawing it earlier, you won't receive as much as if you wait until later." Wife said that she was not sure, but she thought she would receive "a little over $200" per month if she applied to receive social security benefits at age sixty-two instead of postponing her application until she reached age sixty-five.

The court of appeals held the family court erred in calculating alimony without considering Wife's eligibility for social security benefits and remanded for a determination of Wife's "income," to be derived from her future, yet-unclaimed social security benefits and a recalculation of alimony in light of such benefits.

Essentially, the court of appeals equated Wife's decision to postpone applying for social security benefits with voluntary underemployment such that Wife's *eligibility* to receive benefits should be imputed as income. This was error.

Initially, it is well-established that social security benefits a party is *actually receiving* would be properly considered as income in awarding alimony. *See, e.g.*, *Kennedy v. Kennedy*, 389 S.C. 494, 501, 699 S.E.2d 184, 187 (Ct. App. 2010) (identifying the husband's income as being comprised of, inter alia, social security benefit payments). However, the question here is a different one: whether social security benefits should be imputed as income where a person is eligible to receive benefits but has not yet applied for or received them.

Wife seems to ask this Court to create a rule that income should *never* be imputed on the basis of eligibility for government benefits; however, a bright-line rule is not only unnecessary in light of existing case law, but also inadvisable. *See Rimer v. Rimer*, 361 S.C. 521, 527, 605 S.E.2d 572, 575 (Ct. App. 2004) ("We leave it largely to the family court judge's discretion, however, to determine what is [an] appropriate [alimony award] in light of the circumstances of each individual case. Formulaic principles and bright-line rules will only hinder the ability of family court judges to reach an equitable result in this individualized, fact-intensive area of law."). Indeed, the family court may, but is not in all cases required to, consider eligibility for government benefits, and under the circumstances of this case, the family court did not commit reversible error.

Thus, the court of appeals erred in finding the family court was required to impute income to Wife based on social security benefits she is eligible to receive at age sixty-two. Although voluntary decreases in income may prompt a family court to consider a party's earning capacity instead of actual income, it is clear that "the failure to reach earning capacity, by itself, does not automatically equate to voluntary underemployment such that income must be imputed." *Kelley v. Kelley*, 324 S.C. 481, 488–89, 477 S.E.2d 727, 731 (Ct. App. 1996). "[C]ourts are reluctant to invade a party's freedom to pursue the employment path of their own choosing or impose unreasonable demands upon parties." *Id*. at 489, 477 S.E.2d at 731. "[T]he common thread in cases where actual income versus earning capacity is at issue is that courts are to closely examine the [party's] good-faith and reasonable explanation for the decreased income." *Id*. Here, there is no evidence of any bad faith on Wife's part, and Wife articulated a rational reason for delaying her application for social security benefits—namely, that she will receive a greater

benefit if she postpones her application until she reaches age sixty-five. Accordingly, the family court did not err in declining to impute wife's eligibility for social security benefits at age sixty-two.

Husband argues the family court should have been required to consider Wife's eligibility for social security benefits based on the language of section 20-3-130(C)(6). However, the language of that section requires the family court to consider "the current and *reasonably anticipated earnings* of both spouses." Thus, were the family court to prospectively account for Wife's future, reasonably anticipated receipt of social security benefits in its initial alimony award, the correct amount for the family court to consider would be the amount Wife *actually anticipates receiving* when she reaches age sixty-five—not the lesser amount Wife is eligible to receive at age sixty-two. The record is devoid of any evidence of the amount of benefits Wife might expect to receive at age sixty-five. Because the family court must have sufficient evidence upon which to base a determination of a person's earning potential for purposes of awarding alimony, the family court was not presented with sufficient evidence to prospectively consider the amount of benefits Wife reasonably anticipates receiving at age sixty-five in awarding alimony and, thus, did not err in refusing to engage in such speculation.[5] *See Sexton v. Sexton*, 308 S.C. 37, 42, 416 S.E.2d 649, 653 (Ct. App. 1992) (reversing

[5] We note Husband is not foreclosed from seeking to modify alimony when Wife actually begins receiving social security benefits after her sixty-fifth birthday. *See* S.C. Code § 20-3-170 (2014) (allowing for a modification of alimony based on a substantial change in circumstances of the parties); *Serowski v. Serowski*, 381 S.C. 306, 313–15, 672 S.E.2d 589, 593–94 (Ct. App. 2009) (affirming reduction in the husband's alimony obligation based on the wife's increase in monthly income due, in part, to her receipt of social security benefits). Although "[c]hanges in circumstances within the contemplation of the parties at the time the divorce was entered generally do not provide a basis for modifying alimony," where the date and amount of the anticipated changes are not ascertainable and the original decree does not prospectively account for the future circumstance, a modification may be appropriate. *Id*. at 313, 672 S.E.2d at 593; *see Eubank v. Eubank*, 347 S.C. 367, 374, 555 S.E.2d 413, 417 (Ct. App. 2001) (finding that although the likelihood that the wife would receive an inheritance was known to the parties prior to the divorce, her actual inheritances could serve as changed circumstances warranting a review of alimony because the parties could not have ascertained the amount of the wife's inheritances or when she would receive them at the time of the divorce).

the family court's alimony award because it was based on an unsupported finding of the husband's earning capacity), *rev'd on other grounds*, 310 S.C. 501, 427 S.E.2d 665 (1993); *see also Nelson v. Nelson*, 651 So.2d 1252 (Fla. Dist. Ct. App. 1995) ("As a general rule, trial courts may not consider future or anticipated events in setting current alimony and child support amounts due to the lack of evidentiary basis or the uncertainty surrounding such future events."); *cf. Cox v. Cox*, 882 P.2d 909 (Alaska 1994) (affirming the trial court's refusal to consider future social security benefits due to their "speculative nature"). In sum, family courts may, in some cases, but are not required in every instance, to impute income based on a party's eligibility to receive social security benefits as a matter of law.

Based on the facts of this case, we find the court of appeals erred in vacating the family court's alimony award based on its failure to consider Wife's eligibility to receive social security benefits at age sixty-two. Further, because there is insufficient evidence as to the amount of social security benefits Wife reasonably anticipates receiving after age sixty-five, the family court did not err in refusing to consider Wife's future, reasonably anticipated receipt of social security benefits in its initial alimony award. Accordingly, we reverse as to this issue and reinstate the family court's alimony award.

B. Equitable Division

Wife next argues the court of appeals erred in modifying the family court's decision to award her forty percent of the marital estate. We agree.

The division of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. *Craig v. Craig*, 365 S.C. 285, 617 S.E.2d 359 (2005). As previously noted, "the inartful use of an abuse of discretion deferential standard of review" in this context represents two underlying principles of appellate review: "the superior position of the trial judge to determine credibility and the imposition of a burden on an appellant to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court." *Lewis*, 392 S.C. at 391, 709 S.E.2d at 655. In reviewing a division of marital property, an appellate court looks to the overall fairness of the apportionment. *Deidun v. Deidun*, 362 S.C. 47, 606 S.E.2d 489 (Ct. App. 2004). If the end result is equitable, the fact the appellate court would have arrived at a different apportionment is irrelevant. *Id.*

Equitable distribution of marital property "is based on the recognition that marriage is, among other things, an economic partnership." *Morris v. Morris*, 335 S.C. 525, 517 S.E.2d 720 (Ct. App. 1999). "Upon dissolution of the marriage, marital property should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." Section 20-3-620 of the South Carolina Code provides factors for the family court to consider in apportioning marital property and instructs the family court to "give weight in such proportion as it finds appropriate" to each of the following factors:

> (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce . . . ; (2) marital misconduct or fault of either or both parties . . . ; (3) the value of the marital property . . . ; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6) the need of each spouse or either spouse for additional training or education in order to achieve that spouse's income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for each or either spouse; (9) whether separate maintenance or alimony has been awarded; (10) the desirability of awarding the family home . . . ; (11) the tax consequences to each or either party . . . ; (12) the existence and extent of any support obligations, from a prior marriage . . . ; (13) liens and any other encumbrances upon the marital property . . . ; (14) child custody arrangements and obligations . . . ; and (15) such other relevant factors as the trial court shall expressly enumerate in its order.

S.C. Code Ann. § 20-3-620 (2014).

This Court has held "[w]hile there is certainly no recognized presumption in favor of a fifty-fifty division, we approve equal division as an appropriate starting point for a family court judge attempting to divide an estate of a long-term marriage." *Doe v. Doe*, 370 S.C. 206, 634 S.E.2d 51 (2006). The purpose of the general fifty-fifty division is to protect the non-working spouse who undertook the household duties, and to prevent an award "solely based on the parties' direct financial contributions." *Avery v. Avery*, 370 S.C. 304, 634 S.E.2d 668 (Ct. App. 2006).

As to equitable division, the family court examined the factors contained in section 20-3-620, in addition to considering: (1) Husband's knowledge, prior to the marriage, that he would be providing Wife's sole financial support; (2) Husband's concession that Wife's actions assisted in adding to the parties' saving; (3) Husband claiming no fault against Wife as to the breakup of the marriage; (4) Husband's concession that he took steps to hide the marital assets; (5) Husband's failure to present any evidence to the family court regarding the value of any of the savings accounts prior to the marriage; (6) Wife's declining health throughout the marriage, which the family court determined had deteriorated to the point she could no longer financially support herself through gainful employment; and (7) Wife's contribution to the savings accounts in the form of her Census Bureau salary and automobile accident proceeds. The family court determined that by Wife complying with the "very harshly frugal rules set by the Husband," the parties contributed equally to the joint marital estate and stated "[i]t is clear to this Court that the fault of the ultimate dissolution of this marriage rests with the Husband." Based on these considerations, the family court apportioned sixty percent of the marital estate to Husband and forty percent to Wife.

On appeal, the court of appeals found the family court erred in awarding Wife forty percent of the marital estate, and modified the lower court's order and award to thirty percent. The court of appeals noted the legal principle that equitable division should not be based solely on the parties' direct financial contributions; nevertheless, the court found the record demonstrated Husband made disproportionately greater contributions to the marriage than Wife, and "Wife brought no assets to the marriage and brought in no assets during the marriage." Further, the court of appeals held Wife contributed only a negligible amount during the marriage to the parties' joint accounts through her position with the Census Bureau and the proceeds from her automobile accident, and the "vast majority of the contributions to the parties' accounts during the marriage were made from Husband's social security, retirement, and disability benefits." In addition, the court noted the bulk of the funds in the savings accounts were earned by Husband prior to the marriage and as a result of "decades of living frugally and saving his earnings." Finally, the court of appeals noted both parties were unemployed for the majority of the marriage and contributed to household duties.

We find the court of appeals erred in modifying the family court's division of assets, as its decision impermissibly relied *solely* on the parties' direct financial

contributions to the marital estate to the exclusion of other relevant statutory factors. Although greater direct financial contributions may properly be considered in apportioning a marital estate, that factor is but one of many factors to be considered and does not alone overshadow all of the other relevant factors examined by the family court.[6] *See Pittman v. Pittman*, 407 S.C. 441, 754 S.E.2d 501, 507 (2014) (noting the proper way to reflect one party's disproportionately greater direct financial contribution is in the overall division of the marital estate); *see, e.g.*, *Myers v. Myers*, 391 S.C. 308, 705 S.E.2d 86 (Ct. App. 2011) (affirming a division of marital assets apportioning fifty-two percent to husband and forty-eight percent to wife where the parties were married for nine years and both were in their sixties at the time of divorce, divorce was granted on the basis of one year's continuous separation, wife earned an income but did not contribute it towards the family expenses, instead using it exclusively for her own benefit, and the parties lived in a home owned by husband for the duration of the marriage); *Doe v. Doe*, 370 S.C. 206, 634 S.E.2d 51 (Ct. App. 2006) (finding a seventy-thirty apportionment in favor of the husband was reversible error even where the wife did not make direct financial contributions during the last eighteen years of the marriage, she admitted a twenty-year-long affair with a former boss, and wife's paramour, not the husband, was the biological father of the parties' only child).

Although this Court is free to make its own findings of fact and conclusions of law, we are not required to disregard the family court's factual findings, which in this case favor Wife—not Husband. We find the family court's apportionment fairly reflects the relative contributions of the parties, as well as the other relevant statutory factors, and therefore, we reverse the decision of the court of appeals and reinstate the family court's equitable division of the marital estate, apportioning forty percent to Wife and sixty percent to Husband.

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[6] Specifically, the family court found that Husband actively concealed assets and knew at the outset of the marriage that Wife would not contribute financially to the marriage, and that before Wife's health deteriorated to the point that she was unable to work, she contributed all of her earnings to the parties joint accounts—over $30,000 during the course of the marriage. Unlike the court of appeals, we do not view this as a "negligible" amount, particularly in light of the parties' agreement that Husband would be the primary financial provider. The family court also concluded that the parties contributed equally to the joint marital estate and found "the fault of the ultimate dissolution of this marriage rests with the Husband and that the Wife only left due to the Husband's requests."

C. Attorney's Fees

Lastly, Wife argues the court of appeals erred in remanding the issue of attorney's fees to the family court. We agree.

The family court may order one party to pay a reasonable amount to the other party for attorney's fees and costs incurred in maintaining an action for divorce. S.C. Code Ann. § 20-3-130(H) (2014). In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) effect of the attorney's fee on each party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 415 S.E.2d 812 (1992). In determining the amount of reasonable attorney's fees, a court should take six factors into consideration: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991).

As previously noted, the family court awarded Wife $16,024.50 in attorney's fees after determining: (1) Wife had no ability to pay her attorney's fees; (2) Wife's counsel achieved beneficial results, "particularly in tracing the marital assets despite Husband's attempts to conceal the same"; (3) Husband was in a far better position to pay Wife's attorney's fees, costs and expenses, and the award would not impact Husband as severely as it would Wife; and (4) the matter was unnecessarily made more difficult by Husband's actions in attempting to conceal the joint nature and extent of the parties' marital assets, thereby requiring additional time and effort on the part of Wife's counsel to locate, identify, and value the assets.

Where beneficial results in a divorce action are reversed on appeal, the case should be remanded for reconsideration of attorney's fees awarded. *See Rogers v. Rogers*, 343 S.C. 329, 540 S.E.2d 840 (2001) ("[S]ince the beneficial result obtained by counsel is a factor in awarding attorney's fees, when that result is reversed on appeal, the attorney's fee award must also be reconsidered.").

On appeal, the court of appeals reversed and remanded the issue of attorney's fees for redetermination because it reversed and modified in part the family court's original order. Because we reverse the decision of the court of appeals and

reinstate the family court's alimony award and division of the marital estate, we reverse also as to this issue and reinstate the family court's award of attorney's fees.

III.

For the foregoing reasons, we reverse the decision of the court of appeals regarding alimony, equitable division, and attorney's fees and reinstate the family court's order as to those issues.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Donta Reid, Appellant.

Appellate Case No. 2011-204288

Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 27407
Heard December 5, 2013 – Filed July 2, 2014

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Assistant Attorney General Mark R. Farthing, and Assistant Attorney General Jennifer E. Roberts, all of Columbia, for Respondent.

Deputy Public Defender Christopher D. Scalzo, of Greenville, for Amicus Curiae, South Carolina Public Defender Association.

JUSTICE HEARN: In this criminal appeal, Donta Reid challenges the trial court's failure to suppress his confession, arguing it was obtained in violation of his Sixth Amendment right to counsel. We disagree and find the facts of Reid's case fall within the purview of *Montejo v. Louisiana*, 556 U.S. 778 (2009), in which the United States Supreme Court held a valid *Miranda*[1] given waiver prior to a custodial interrogation sufficed to waive a defendant's Sixth Amendment right to counsel regardless of whether he retained representation at a prior arraignment. *Id.* at 795. Reid further contends the trial court erred in failing to grant a directed verdict of acquittal on the charges for possession of a firearm during the commission of a violent crime because the State failed to prove he actually or constructively possessed a firearm. We find those charges were properly submitted to the jury and therefore affirm his convictions.

FACTUAL/PROCEDURAL BACKGROUND

On the evening of October 1, 2009, Maurice Jackson, Tyrone King, and Kenny Cunningham, the victims, were sitting on Jackson's front porch when Jackson received a text from Reid inquiring about buying marijuana. When Jackson informed Reid he did not have any marijuana, Reid said he would stop by Jackson's house regardless. Upon arriving, Reid invited Jackson to accompany him to "midtown," stating he had located some marijuana. Jackson declined because he could not leave his company on his porch. Reid asked to use Jackson's cell phone and during the course of his conversation Jackson and Cunningham overheard him say "There's two" or "It's two of them." Reid indicated he would come back and left, but he never returned.

Jackson and his companions remained on the porch and roughly fifteen to thirty minutes later a man and a woman approached the porch, neither of whom the victims recognized. The woman ran up the steps and announced that it was a robbery. The man, who wore a mask, pulled a rifle from his pants, echoed the woman's pronouncement that this was a robbery, and threatened to shoot if any of them moved.

The woman went through the victims' pockets and collected the contents. The man and woman started to leave, but the man turned around and began

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

shooting at the victims. Cunningham was struck through his left leg and between his toes. King was shot in the head and later died from the wounds.

After interviewing the victims, the police investigation focused on Reid, and the day after the robbery, detectives questioned him about the incident. Reid informed law enforcement that he stopped by Jackson's house to use Jackson's phone to call a female friend, who he then went to visit. Reid agreed to accompany the detectives to this friend's apartment so she could corroborate his story; however, once they arrived at the address Reid gave them, he indicated the detectives needed to question a different woman. That woman's mother denied that Reid had been there the night before.

Thereafter, Reid was handcuffed and taken to the police station where he was read his *Miranda* rights, which he waived. Over the next few days, Reid made four different statements to law enforcement. Reid gave the first statement at 1:45 p.m. indicating a man named Darius Jeter acted alone in the robbery and was both the shooter and instigator. Reid admitted he assisted Jeter by reconnoitering Jackson's porch prior to the robbery. He also stated he did not witness the robbery, but heard the shots. Reid was then taken to a jail cell in the police department.

A few hours later Reid asked to speak with the detectives again to provide additional information. Prior to the interview, Reid was Mirandized again and after waiving his rights he gave a second statement at 4:10 p.m. In this statement, he maintained Jeter was the lone robber and shooter; however, this time Reid described witnessing the events of the robbery, although he still stated he only heard the shots as he walked away and did not see the gunfire.

Prior to midnight that same day, detectives approached Reid again for questioning. After waiving his *Miranda* rights, Reid made another statement, this time indicating a female–Samantha Ervin–was also involved in the robbery. Reid still maintained Jeter was the shooter but now stated Ervin helped plan the robbery and drove the three of them to Jackson's house. He also indicated Ervin accompanied Jeter to Jackson's house while he waited in her truck for them. Reid stated after he heard gunfire, Jeter and Ervin ran back to Ervin's truck, and Jeter said he thought he shot one of them.

During his arraignment the following day, Reid filed a request for counsel and a supporting affidavit of indigency. He was approved for appointment of

counsel that day. Over the course of the next few days, law enforcement interviewed Ervin and she eventually disclosed that in addition to herself and Reid, Davontay Henson and Aileen Newman were also involved in the crimes. Based on this information, Henson and Newman were both arrested. Thereafter, detectives questioned Reid on October 6 at 9:40 a.m., informing him they knew he had not been truthful in his prior statements. Although Reid had not yet met with his appointed counsel, he again waived his *Miranda* rights and gave a fourth statement.

In his fourth statement, Reid stated he was with Henson and Newman at Ervin's house earlier in the evening on October 1 when Henson pulled out a rifle and said he wanted to rob someone. Ervin asked if Reid would assist in robbing Jackson and he assented. Reid then walked over to Jackson's home and called Ervin to inform her there were two other people at Jackson's house. After Reid left Jackson's home, he met up with Henson, Ervin, and Newman, who had all been riding around in Ervin's truck. Reid informed them there were three people on the porch and he could not convince Jackson to leave with him. Henson then stated he would just rob all three of them. Reid and Ervin waited in Ervin's truck while Henson and Newman walked to Jackson's home. Reid heard gunshots and shortly thereafter, Henson and Newman returned to the truck. Henson then threatened to "come back and get" anyone who disclosed the events of the evening.

Based on law enforcement's investigations, Reid, Henson, Newman, and Ervin were subsequently charged with murder, assault and battery with intent to kill (ABWIK), criminal conspiracy, armed robbery, and possession of a firearm during the commission of a violent crime. Ervin and Newman both pled guilty, but Henson and Reid proceeded to a joint trial.[2]

Prior to trial, Reid moved to suppress his fourth statement to the police on the grounds it was obtained in violation of his Sixth Amendment right to counsel. During the *Jackson v. Denno*[3] hearing, Reid argued he requested and was appointed counsel at his arraignment on October 3, and therefore, it was a violation of his constitutional rights for police to question him on October 6 without his

[2] Ervin pled guilty to three counts of armed robbery and one count of criminal conspiracy, and Newman pled guilty to one count of ABWIK, one count of criminal conspiracy, and three counts of armed robbery.

[3] 378 U.S. 368 (1964).

attorney present. The State contended Reid's argument was no longer viable because *Montejo* held a valid *Miranda* waiver prior to a custodial interrogation is not rendered constitutionally inadequate simply because the defendant was appointed counsel at a prior arraignment. The trial court denied the motion to suppress and the case proceeded to trial.

At trial, Cunningham and Jackson both testified about their encounter with Reid prior to the incident and indicated he was not one of the perpetrators present during the robbery. Additionally, Newman and Ervin testified about the particulars of the plan to rob Jackson and how it was executed. They described Reid's participation in scouting out the porch and his attempt to lure Jackson away from the home. They also indicated Reid knew Henson had a rifle he planned to employ, but Reid himself did not take part in the commission of the robbery.

Ultimately, the jury found Reid not guilty of murder, but guilty of assault and battery of a high and aggravated nature, three counts of armed robbery, three counts of possessing a firearm during the commission of a violent crime, and criminal conspiracy. Reid appealed, and the Court certified the case pursuant to Rule 204(b), SCACR.

ISSUES PRESENTED

I. Did the trial court err in allowing the introduction of Reid's fourth statement to law enforcement?

II. Did the trial court err in failing to grant a directed verdict in favor of Reid on the three charges of possession of a firearm during the commission of a violent crime?

LAW/ANALYSIS

I. SIXTH AMENDMENT RIGHT TO COUNSEL

Reid argues the trial court erred in failing to suppress his fourth statement because the police obtained it in violation of his Sixth Amendment right to counsel. We disagree.

The Sixth Amendment to the United States Constitution guarantees that "[i]n

all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. IV.[4] "[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo*, 556 U.S. at 786. This right to counsel may be waived by a defendant provided relinquishment of the right is voluntary, knowing, and intelligent. *Id.* However, the decision to waive counsel need not itself be counseled. *Id.* Generally, "an accused who is admonished with the warnings prescribed [in *Miranda*] has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." *Patterson v. Illinois*, 487 U.S. 285, 296 (1988).

Reid contends his Sixth Amendment right to counsel was implicated at the arraignment when he requested appointment of counsel. He therefore argues the subsequent police-initiated interview violated that right and his waiver was invalid. We find the United States Supreme Court foreclosed this argument in *Montejo*.

Prior to *Montejo*, the Court established the rule in *Michigan v. Jackson*, 475 U.S. 625 (1986), that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Id.* at 636. The Court expounded this holding as an extension of the rule in *Edwards v. Arizona*, 451 U.S. 477 (1981), that "an accused person in custody who has 'expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *Jackson*, 475 U.S. at 626 (quoting *Edwards*, 451 U.S. at 484–85).

However, in *Montejo* the Court expressly overruled *Jackson*, finding the protections afforded in *Miranda*, *Edwards*, and *Minnick*[5] sufficiently safeguard a defendant's Sixth Amendment right to counsel. *Montejo*, 556 U.S. at 794. In that

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[4] The protections of the Sixth Amendment have been extended to the states through the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45, 61, 53 (1932).

[5] *Minnick v. Mississippi*, 498 U.S. 146 (1990).

case, Jesse Montejo was arrested in connection with a robbery and murder. *Id.* at 781. He waived his right to counsel under *Miranda* and gave various accounts of the incident. *Id.* Several days later, Montejo was brought before a court for a "72-hour hearing," a preliminary hearing required in Louisiana during which the court automatically appointed him an attorney as part of the course of the proceeding. *Id.* Prior to meeting with his newly retained attorney, detectives visited Montejo in prison and requested he accompany them in searching for the murder weapon. *Id.* The detectives read Montejo his *Miranda* rights again and he agreed to go on the excursion, during which time he wrote an inculpatory letter of apology to the victim's widow. *Id.* at 782.

At trial, Montejo argued the letter must be excluded under *Jackson* because counsel was appointed at his arraignment and therefore his subsequent waiver was presumptively invalid. *Id.* The trial court rejected his argument and allowed admission of the letter. *Id.* The jury convicted Montejo of first-degree murder and sentenced him to death. *Id.* On appeal, the Louisiana Supreme Court affirmed his conviction. *Id.* In rejecting his reliance on *Jackson*, that court found the

> prophylactic protection of *Jackson* is not triggered unless and until the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel. Because Montejo simply stood mute at his 72–hour hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

Id.

On certiorari to the United States Supreme Court, Montejo argued Louisiana's application of *Jackson* produced an arbitrary and unworkable standard that could not be applied consistently nationwide because some states automatically appoint counsel to indigent defendants while others require affirmative action by the defendant to obtain counsel. *Id.* at 783–84. Montejo contended the Sixth Amendment's right to counsel should not turn on whether a defendant *requested* counsel but whether he was *represented* by counsel, and once represented the defendant could not constitutionally be approached by law enforcement for questioning while in custody. *Id.* at 786. The majority of the Court rejected both interpretations. *Id.* at 792. Although agreeing Louisiana's interpretation invited mischief in determining whether a defendant adequately "invoked" his right to counsel, the Court found Montejo's reading was inconsistent

with the *Jackson* holding. *Id.* at 783. Specifically, the Court noted that the evil *Jackson* sought to redress was the potential for police badgering defendants into changing their minds and waiving their right to counsel after that right was asserted. *Id.* at 798. However, under Montejo's construction of *Jackson*, if a defendant is automatically appointed counsel, the police cannot initiate questioning of him despite the fact he never asserted the right to have his attorney present. *Id.* This, the majority found, was an inconsistent expansion from the antibadgering rationale that drove the decision in *Jackson*, for a defendant could not be coerced into changing his mind if he never actually invoked his right to counsel in the custodial setting. *Id.*

In light of what it considered equally untenable interpretations, the Court determined the rule enunciated in *Jackson* had proved unworkable and should be abandoned. *Id.* at 792. Furthermore, the Court observed the limited benefits of *Jackson* in light of the safeguards provided by *Miranda*, *Edwards*, and *Minnick*:

> Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney."

Id. at 794 (citations omitted). Accordingly, the Court reasoned that "[i]f that regime suffices to protect the integrity of a suspect's voluntary choice not to speak outside his lawyer's presence before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached." *Id.* at 795 (citations and quotations omitted). Ultimately, the Court overruled *Jackson* and remanded Montejo's case to allow him to invoke any *Edwards*' protections he might claim, such as arguing he clearly asserted his right to counsel when officers approached him. *Id.* at 797.

Turning to our case, we find *Montejo* bars Reid's claim that his Sixth Amendment right to counsel was violated. Although Reid makes much of the factual distinctions between the cases—Montejo was automatically appointed

counsel while Reid elected to file a form requesting counsel—it is exactly this type of argument *Montejo* meant to preclude by overruling *Jackson*. The Court did more than merely remove the presumption of invalidity of a waiver after a defendant's Sixth Amendment rights were invoked. It held that where, as here, a defendant claimed a violation of his Sixth Amendment right to counsel in the context of a custodial interrogation, the relevant inquiry was what happened the moment police initiated contact. Therefore, the question is no longer, as Reid posits, whether the defendant invoked his right to counsel at arraignment, but whether he waived his rights prior to the interrogation. *See id.* at 797 ("What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.").

We accordingly find that under *Montejo*, Reid waived his right to counsel by signing the *Miranda* waiver prior to giving his fourth statement. Because he made no allegations that he requested his counsel be present or that this waiver was otherwise not knowing and voluntary, we affirm the admission of his statement.[6]

II. DIRECTED VERDICT

Reid also argues the trial court erred in failing to direct a verdict of acquittal on the charges for possession of a firearm during the commission of a violent crime. We disagree.

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[6] Although Reid makes allusions to the fact that a state can provide more expansive protection than that mandated by the federal Constitution, he never raised before the trial court any South Carolina constitutional provision or other state law upon which to ground such an extension. Instead, he argued only a violation of his Sixth Amendment rights under the United States Constitution and this Court must apply those rights as interpreted by the United States Supreme Court. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." (internal citations omitted)). We therefore confine our analysis to Reid's rights under the United States Constitution.

On appeal from the denial of a motion for a directed verdict, the Court views the evidence in the light most favorable to the State. *State v. Buckmon*, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001). To survive a directed verdict motion, the State must provide direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002).

In his motion for a directed verdict, Reid argued the State failed to prove he ever possessed the rifle. The State countered that he could be convicted under the theory of "the hand of one is the hand of all." The trial court denied the motion.

The doctrine of accomplice liability arises from the theory that "the hand of one is the hand of all." 23 S.C. Jur. Homicide § 22.1 (2014). Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). A person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act to be guilty under a theory of accomplice liability. *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999). Accordingly, proof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct. *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987). If "a person was 'present abetting while *any* act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal—even 'though [that act was] *not the whole thing necessary*.'" *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014) (alteration in original) (quoting 1 J. Bishop, Commentaries on the Criminal Law § 649, p. 392 (7th ed. 1882)).

Just as Reid could be convicted of assault and battery of a high and aggravated nature and armed robbery under a theory of accomplice liability even though he did not wield the offending weapon, so could he be found guilty for possession of that firearm. Although there was no evidence presented Reid assisted Henson in possessing the firearm, the State presented evidence Reid helped orchestrate the robberies and reconnoitered the scene. Furthermore, Reid knew Henson had a rifle in his possession for use during the robberies. Reid then

waited at the getaway vehicle for Henson to return with the proceeds.[7] We find the State presented direct or substantial circumstantial evidence Reid facilitated the robbery and knew Henson intended to use a firearm during the commission of the crime. We therefore hold the trial court properly denied Reid's motion for a directed verdict on the charges for possession of a firearm during the commission of a violent crime.[8]

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[7] This Court has previously held that a participant need not witness the crime to be "present at the scene" and guilty under a theory of accomplice liability. *See State v. Chavis*, 277 S.C. 521, 522, 290 S.E.2d 412 (1982) (affirming a defendant's conviction as a principal where the defendant helped plan the robbery, but was three miles away from the scene when the crime actually occurred).

[8] This holding is in accord with other jurisdictions that have considered guilt under an accomplice liability theory in similar circumstances. *See, e.g.*, *Rosemond*, 134 S. Ct. at 1243 (holding a defendant can be convicted as a principal for aiding and abetting the crime of "us[ing] or carr[ying] a firearm" during a crime if the "defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission," even if the defendant did not use or carry a gun himself); *Battle v. United States*, 515 A.2d 1120, 1128 (D.C. 1986) (holding an unarmed aider and abettor is subject to a sentence enhancement where the principal was armed); *Com. v. Humphries*, 991 N.E.2d 652, 658 (Mass. 2013) ("[T]o establish liability for firearm possession under a theory of joint venture, it is not necessary that the Commonwealth prove that a defendant had actual or constructive possession of a firearm, but only that such a defendant was accessory to another identified defendant in possessing a firearm." (internal quotation marks omitted)); *State v. White*, 484 A.2d 691, 695 (N.J. 1984) (finding that the Graves Act, which allows sentence enhancement based on use or possession of a firearm, applies to an unarmed accomplice); *but see Dailey v. State*, 675 P.2d 657, 661 (Alaska Ct. App. 1984) (holding that Alaska's sentence enhancement statute for possession of a firearm during the commission of a felony should apply "only to a defendant who personally uses or possesses a firearm during the commission of an offense"); *Garringer v. State*, 909 P.2d 1142, 1149 (Haw. 1996) (interpreting Hawaii's sentencing enhancement statute to preclude the imposition of enhanced sentencing where defendant did not personally possess, threaten to use, or use a firearm while engaged in the commission of that felony).

CONCLUSION

Based on the foregoing, we affirm both the trial court's denial of Reid's motion to suppress his fourth statement and its denial of his directed verdict motion on the charges of possessing a firearm during the commission of a violent crime.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Anthony Nation, Appellant.

Appellate Case No. 2011-199726

Appeal From Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 27408
Heard February 5, 2014 – Filed July 2, 2014

AFFIRMED

Ernest Charles Grose, Jr., of Grose Law Firm, and Shane Edwin Goranson, both of Greenwood, and Chief Appellate Defender Robert Michael Dudek, of the South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Matthew C. Buchanan, of the South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Anthony Nation (Appellant) appeals the circuit court's decision to statutorily impose lifetime global positioning satellite (GPS) monitoring on him due to his prior guilty plea for a sex offense with a minor and

subsequent probation violations. *See* S.C. Code Ann. § 23-3-540 (Supp. 2010) (enumerating the circumstances in which a court may impose GPS monitoring on a person convicted of a sex offense with a minor). On appeal, Appellant asserts various constitutional challenges to section 23-3-540 and contests the validity of five of our previous decisions involving the South Carolina Sex Offender Registry and statutory authorization of GPS monitoring of sex offenders.[1] We affirm.

FACTS/PROCEDURAL BACKGROUND

In 2000, when Appellant was twenty-nine years old, he engaged in a sexual relationship with a fifteen-year-old female (Victim). Victim reported the relationship to the police, and a grand jury subsequently indicted Appellant for both second-degree criminal sexual conduct with a minor (CSCM-Second) and committing a lewd act on a child under the age of sixteen (CSCM-Third).[2] In 2003, Appellant pled guilty to CSCM-Third in exchange for the State dismissing the CSCM-Second charge. The circuit court sentenced Appellant to fifteen years' imprisonment, suspended on the service of twelve years, followed by five years' probation with the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS).

In 2005—after Appellant's guilty plea, but prior to Appellant's release from the Department of Corrections—the General Assembly amended South Carolina's sex offender registration requirements by enacting the Sex Offender Accountability and Protection of Minors Act of 2006, commonly referred to as "Jessie's Law."

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[1] These cases are: *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013), *cert. denied*, 134 S. Ct. 1496 (2014); *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013), *cert. denied*, 134 S. Ct. 1937 (2014); *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003); *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003); and *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002). Together, these cases affirm that South Carolina's Sex Offender Registry—including the GPS monitoring requirement—is a civil remedy and is not penal in nature.

[2] At the time of Appellant's indictment, section 16-15-140 codified the crime of "lewd act upon a child under sixteen." S.C. Code Ann. § 16-15-140 (1996). However, the General Assembly later renamed this crime CSCM-Third and re-codified it in S.C. Code Ann. § 16-3-655(C) (Supp. 2010). For ease of reference, we refer to "lewd act upon a child under sixteen" as CSCM-Third.

See S.C. Code Ann. § 23-3-540 (2005). In its original form, Jessie's Law read, in relevant part:

> (C) A person who is required to register [as a sex offender] pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16–3–655(A)(1), or *committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16–15–140, and who violates a term of probation*, parole, community supervision, or a community supervision program *must* be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.
>
> (D) A person who is required to register [as a sex offender] pursuant to this article for *any other* [*sex*] *offense* [*with a minor*] *listed in subsection (G),* [*including CSCM-Second*,] *and who violates a term of probation*, parole, community supervision, or a community supervision program, *may* be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

Id. (emphasis added); *see also State v. Dykes*, 403 S.C. 499, 502–04, 744 S.E.2d 505, 507–08 (2013) (explaining the requirements of section 23-3-540).

In 2009, upon his release from the Department of Corrections, Appellant began his probation; however, within two years, Appellant accrued several unexplained probation violations. At Appellant's probation revocation hearing, the State recommended imposing mandatory lifetime GPS monitoring on Appellant in accordance with the requirements of Jessie's Law. *See* S.C. Code Ann. §23-3-540(C). In response, Appellant challenged the constitutionality of Jessie's Law and offered testimony in mitigation,[3] but did not deny he had violated his probation.

[3] Specifically, Appellant introduced evidence that he qualified for one of the lowest levels of supervision that SCDPPPS provided.

The circuit court rejected Appellant's constitutional challenges and found Appellant in willful violation of his probation. Therefore, the court found that Jessie's Law mandated that it impose lifetime GPS monitoring on Appellant.

This appeal followed. *See* Rule 203(d)(1)(A)(ii), SCACR.

ISSUE

Whether the mandatory imposition of GPS monitoring on a sex offender convicted prior to a statute's effective date violates:

a. the Ex Post Facto, Equal Protection, Due Process, or Double Jeopardy Clauses of the United States or South Carolina Constitutions?

b. the Fourth Amendment's prohibition on unreasonable searches and seizures?

c. the Eighth Amendment's prohibition on cruel and unusual punishment?

STANDARD OF REVIEW

All statutes are presumed constitutional, and when possible, courts must construe statutes so as to render them valid. *In re Justin B.*, 405 S.C. 391, 395, 747 S.E.2d 774, 776 (2013) (citing *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001)). "A statute will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt." *Id.* (citing *In re Lasure*, 379 S.C. 144, 147, 666 S.E.2d 228, 229 (2008)). "The party challenging the statute's constitutionality bears the burden of proof." *Id.* (citing *In re Treatment of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002)).

ANALYSIS

Although Appellant raises numerous challenges to the constitutionality of Jessie's Law, we have explicitly rejected each of these challenges in two of our recent opinions. *See Justin B.*, 405 S.C. at 391, 747 S.E.2d at 774, *cert. denied*, 134 S. Ct. 1496 (2014); *Dykes*, 403 S.C. at 499, 744 S.E.2d at 505, *cert. denied*, 134 S. Ct. 1937 (2014).

In *State v. Dykes*, Dykes—similar to Appellant—committed CSCM-Third prior to the enactment of Jessie's Law, but violated her probation after its enactment. 403 S.C. at 503–05, 744 S.E.2d at 507–08. The circuit court imposed GPS monitoring pursuant to Jessie's Law. *Id.* at 505, 744 S.E.2d at 508. Dykes appealed, contending that the statute violated the Ex Post Facto, Equal Protection, and Due Process Clauses of the United States and South Carolina Constitutions, as well as her Fourth Amendment right to be free of unreasonable governmental searches and seizures. *Id.* at 505, 510 n.9, 744 S.E.2d 508, 511 n.9.

A majority of this Court rejected Dykes's arguments, holding that mandatory GPS monitoring did not violate Dykes's right to substantive due process. *Id.* at 503, 744 S.E.2d at 507; *see also id.* at 510 n.9, 744 S.E.2d at 511 n.9 (rejecting Dykes's remaining arguments). Specifically, we disagreed with Dykes's assertion that, as a convicted sex offender, she had a *fundamental* right to be "let alone." *Id.* at 505–06, 744 S.E.2d at 508–09 ("The United States Supreme Court has cautioned restraint in the recognition of rights deemed to be fundamental in a constitutional sense." (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997))).[4] However, notwithstanding the absence of a fundamental right, we found that lifetime GPS monitoring "implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." *Id.* at 506, 744 S.E.2d at 509. In light of the General Assembly's intent to protect the public from sex offenders and aid law enforcement,[5] we held that an initial, mandatory imposition of GPS monitoring for certain sex crimes involving children was rationally related to the law's stated purpose. *Id.* at 507–08, 744 S.E.2d at 509–10.

Despite generally upholding the constitutionality of Jessie's Law, we found the final sentence of subsection (H) unconstitutional as arbitrary and not rationally related to the statute's purpose. *Id.* at 508, 744 S.E.2d at 510 (citing S.C. Code Ann. § 23-3-540(H)). Prior to our decision, subsection (H) permanently foreclosed

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[4] "Our rejection of Dykes'[s] fundamental right argument flow[ed] in part from the premise that [GPS] monitoring is predominantly civil." *Dykes*, 403 S.C. at 506, 744 S.E.2d at 509 (citing *Smith v. Doe*, 538 U.S. 84 (2003)); *see also Justin B.*, 405 S.C. at 405–09, 747 S.E.2d at 781–83 (applying the factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963), and finding that GPS monitoring of sex offenders is a civil remedy).

[5] *See* S.C. Code Ann. § 23-3-400 (2003).

persons convicted of CSCM-First or -Third, such as Dykes, from seeking judicial review of the necessity of continued GPS monitoring. *See* S.C. Code Ann. § 23-3-540(H). However, we determined that all sex offenders monitored pursuant to Jessie's Law were entitled to periodic judicial review and thus could "avail themselves of the . . . judicial review process as outlined for the balance of the offenses enumerated in section 23-3-540(G)." *Dykes*, 403 S.C. at 508–10, 744 S.E.2d at 510–11; *see also* S.C. Code Ann. § 23-3-540(H) (outlining the judicial review process and relevant lengths of time for review). Accordingly, we found that Dykes and others convicted of CSCM-First or -Third could petition the courts ten years after the initial imposition of the monitoring, and every five years thereafter. *Dykes*, 403 S.C. at 510, 744 S.E.2d at 511.

To address Appellant's remaining arguments, we next look to *In re Justin B.*, in which Justin B.'s adoptive mother witnessed him sexually molest his adoptive sister and notified the police. 405 S.C. at 394, 747 S.E.2d at 775.[6] Justin B. subsequently pled guilty to CSCM-First, and the family court ordered him to comply with the lifetime GPS monitoring requirement set forth in Jessie's Law. *Id.* at 394, 747 S.E.2d at 775–76. Justin B. appealed, arguing that GPS monitoring constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 394–95, 747 S.E.2d at 776.

We unanimously disagreed. After examining the legislative intent behind Jessie's Law and applying the *Mendoza-Martinez* factors,[7] we held that "electronic monitoring is *not a punishment*," but a civil requirement. *Id.* at 394, 404–08, 747 S.E.2d at 775, 781–83 (emphasis added). We also reaffirmed that all sex offenders subject to GPS monitoring in accordance with Jessie's Law may periodically petition for judicial review of the necessity of continued monitoring. *Id.* at 408, 747 S.E.2d at 783.

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[6] Like Justin B., the adoptive sister was also a minor at the time of the molestation. *See Justin B.*, 405 S.C. at 394, 747 S.E.2d at 775 (stating that the minor was indicted for CSCM-First); *see also* S.C. Code Ann. §16-3-655(A)(1) ("A person is guilty of [CSCM-First] if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . . .").

[7] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (listing seven factors that aid in distinguishing between civil and penal remedies).

In light of our previous holdings in *Dykes* and *Justin B.*, we find that we have fully addressed and rejected each of Appellant's constitutional challenges to Jessie's Law.[8] Further, we decline to overrule either *Dykes* or *Justin B.*, especially given that Appellant does not raise any new questions of law; indeed, Appellant's case so closely parallels *Dykes* as to be factually and legally indistinguishable. Thus, we find that Appellant has not carried his burden to show that Jessie's Law is unconstitutional beyond a reasonable doubt. *Justin B.*, 405 S.C. at 395, 747 S.E.2d at 776 (citing *Luckabaugh*, 351 S.C. at 135, 568 S.E.2d at 344).

Accordingly, we affirm the circuit court's imposition of GPS monitoring on Appellant for his probation violations. We likewise note that, although Appellant must comply with the GPS monitoring, he is entitled to avail himself of the judicial review process required by *Dykes* and *Justin B.* *See* S.C. Code Ann. § 23-3-540(H) (providing for judicial review at periodic intervals).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is

AFFIRMED.

PLEICONES and KITTREDGE, JJ., concur. HEARN, J., dissenting in a separate opinion in which BEATTY, J., concurs.

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[8] We acknowledge that *Dykes* and *Justin B.* did not explicitly reject Appellant's Double Jeopardy challenge; however, the prohibition on double jeopardy protects against, *inter alia*, "multiple *punishments* for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (emphasis added), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). As *Dykes* and *Justin B.* both hold that the GPS monitoring requirement is a civil penalty and not a punishment, Appellant's argument that Jessie's Law "increas[es] and expand[s] his punishment as a violation of double jeopardy" is without merit. *See Justin B.*, 405 S.C. at 394, 747 S.E.2d at 775; *Dykes*, 403 S.C. at 506, 744 S.E.2d at 509.

JUSTICE HEARN: Respectfully, I dissent. For the reasons discussed in my dissent in *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013), I believe the initial imposition of satellite monitoring without an individualized determination of Nation's likelihood of reoffending violates his right to substantive due process. I would therefore find Section 23-3-540(C) of the South Carolina Code (Supp. 2013) unconstitutional, and would reverse and remand for a hearing to determine whether satellite monitoring should be imposed.

BEATTY, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth B. Massey, Respondent.

Appellate Case No. 2014-000912

Opinion No. 27409
Submitted May 20, 2014 – Filed July 2, 2014

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Kenneth B. Massey, of Calabash, North Carolina, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a letter of caution, admonition, or public reprimand. In addition, he agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the issuance of a sanction and to complete the Legal Ethics and Practice Program Ethics School within nine (9) months of the imposition of a sanction. We accept the Agreement and issue a public reprimand and order respondent to pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter within thirty (30) days of the date of this opinion and to complete the Legal Ethics and Practice Program Ethics School

within nine (9) months of the date of this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

On September 3, 2013, respondent appeared in family court on a motion for temporary relief on behalf of his client, the father of the child involved in the custody matter. During the hearing, respondent submitted an affidavit from his client which contained a material misrepresentation regarding the current custody of the child involved in the case. Specifically, the affidavit stated that the child had been living with respondent's client since June 6, 2013. During the hearing, the child's mother informed the court that the child had been residing with her since July 4, 2013.

Respondent represents that the affidavit was prepared for a hearing that was originally scheduled for July 8, 2013, but was rescheduled because the mother of the child could not be served. Respondent further represents that he was under the impression that his client had amended the affidavit, but respondent admits he did not review the affidavit prior to submitting the affidavit to the court on September 3, 2013.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal or fail to correct false statement of material fact previously made to tribunal by lawyer) and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rules 7(a)(1) (it is ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.[1] Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter and, within nine (9) months of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School and shall provide the Commission with certification of completion of the program no later than ten (10) days after he has completed the program.

PUBLIC REPRIMAND.

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

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[1]In 2004, the Court definitely suspended respondent from the practice of law for two years. In the Matter of Massey, 357 S.C. 439, 594 S.E.2d 159 (2004). He was reinstated to the practice of law on June 21, 2012. In the Matter of Massey, 398 S.C. 592, 730 S.E.2d 855 (2012). The Court confidentially admonished respondent in 2007. See Rule 7(b)(4), RLDE (admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon issue of sanction to be imposed).

The Supreme Court of South Carolina

In the Matter of Kathleen Devereaux Cauthen,
Respondent.

Appellate Case No. 2014-001386; Appellate Case No. 2014-001387

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, pursuant to Rule 31, RLDE. Respondent consents to the issuance of an order of interim suspension and to the appointment of the Receiver.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

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

Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

June 27, 2014

The Supreme Court of South Carolina

In the Matter of George Randall Taylor, Petitioner.

Appellate Case No. 2013-001664

ORDER

The Court grants petitioner's Petition to Transfer from Incapacity Inactive Status to Active Status and reinstates petitioner as a regular member of the South Carolina Bar.

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

June 30, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Matthew Ryan Hendricks, Appellant.

Appellate Case No. 2011-203730

Appeal From Pickens County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5225
Heard March 4, 2014 – Filed April 23, 2014
Withdrawn, Substituted and Refiled June 30, 2014

AFFIRMED

Appellate Defenders Dayne C. Phillips and Carmen Vaughn Ganjehsani, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

FEW, C.J.: Matthew Ryan Hendricks appeals his convictions for kidnapping and two counts of criminal sexual conduct in the first degree. He argues the trial court erred in admitting a recording of the victim's mother's 911 call, in which the mother's statement to the 911 operator repeated the victim's statement of what Hendricks did to her. We find the trial court correctly admitted the victim's

statement, but erroneously admitted the mother's statement. However, we find Hendricks suffered no prejudice from the error, and therefore we affirm.

I. Facts and Procedural History

The State indicted Hendricks for kidnapping and two counts of criminal sexual conduct in the first degree in connection with his alleged rape of the victim. At trial, the victim testified she had known Hendricks for almost four years, and they had an "off and on" romantic relationship during which they often lived together. On the night of September 15, 2010, she heard her house shaking and thought somebody was breaking in. She realized it was Hendricks, who "was not himself at all. He was way out of character." Hendricks accused her of cheating on him, and then hit her on the arm, "jerked [her] up by the hair on [her] head," and took her to a bedroom. Once in the bedroom, Hendricks slammed her head on the floor and told her to undress. She testified, "He tells me to turn over, he doesn't want to see my face." Hendricks then held her down on a bed while he "anally sexually assaulted" her. After the assault, she went to the bathroom, but Hendricks "told [her] to get back in" the bedroom. Hendricks again held her down and "[v]aginally" sexually assaulted her. Afterwards, Hendricks tried to "cuddle," but she refused and he left her house.

The victim testified she could only remember "bits and pieces" of what happened after Hendricks left. She did remember going to the bathroom because she was vaginally and anally bleeding. She took a shower because "there was blood everywhere." After showering, she woke her children and drove them to her mother's house.

Before the victim's mother—Lisa Gilstrap—testified, the State asked the trial court to address the admissibility of the recording of Gilstrap's 911 call. The State argued the recording was admissible as either a present sense impression or an excited utterance. Hendricks objected, but the trial court indicated it would allow the recording into evidence. The State did not play it for the jury at that time.

Gilstrap then testified she received a phone call from her daughter, who was crying and distraught. Her daughter told her Hendricks "had beaten her up and raped and sodomized her." Gilstrap testified that when her daughter arrived at her house, she was shaking and crying, had injuries on her face and arms, and looked like she had been in a fight. Gilstrap explained they first put the children to bed because they

were her daughter's "paramount concern." Gilstrap then drove her daughter to the hospital because her daughter "was not able" to drive. Gilstrap called 911 on the way.

The State then moved to introduce the recording of the 911 call into evidence. Hendricks renewed his objection, but the trial court admitted the recording. The State then played a portion, which contained the following dialogue:

> Operator: Pickens County Sheriff's Office.
>
> Gilstrap: Yes, sir. This is Lisa Gilstrap.
>
> Operator: Um-hum.
>
> Gilstrap: My daughter's boyfriend just broke into her house, and beat her up and raped her. And we're on the way to Easley Hospital. And I was wondering if you could send an officer up there.
>
> Operator: Where did it happen?
>
> Gilstrap: [provides her daughter's address and states her daughter is in the car]
>
> Operator: She's already at the hospital?
>
> Gilstrap: No, I'm fixing to take her. We live—I live in Forest Acres. She's got bruises all over and he sodomized her.
>
> Operator: And what is your daughter's name?
>
> Gilstrap: [provides her daughter's name] She's twenty-two. Her two boys were there. [six-second pause] And his name is Matthew Hendricks.

Hendricks testified in his defense, asserting he and the victim had consensual anal and vaginal intercourse. The jury found Hendricks guilty of kidnapping and two counts of criminal sexual conduct in the first degree, and the trial court sentenced him to eight years in prison.

II. Hearsay

"'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" in the statement. Rule 801(c), SCRE. "Hearsay is not admissible" unless an exception applies, or "as provided by . . . other rules . . . or by statute." Rule 802, SCRE. The State argues the recording of Gilstrap's 911 call was admissible under the present sense impression and excited utterance exceptions. *See* Rule 803(1), SCRE (defining present sense impression as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); Rule 803(2), SCRE (defining excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). Hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule. Rule 805, SCRE.

A. Issue Preservation

Hendricks did not state his objection to the 911 recording with specificity, which raises concerns about issue preservation. *See* Rule 103(a)(1), SCRE ("Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection . . . appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."). We find, however, the hearsay basis for Hendricks' objection is apparent from the context. The State immediately responded to the objection by citing a case dealing with hearsay exceptions, and specifically argued the recording was admissible under the present sense impression and excited utterance exceptions in Rule 803(1) and (2). Therefore, the objection preserved the issue because it is clear from the record that both the State and the trial court immediately understood Hendricks' objection was based on hearsay. *See State v. Kromah*, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013) (holding an issue was preserved when "[t]he trial court immediately appeared to understand the objection as a . . . hearsay argument").

B. The Victim's Statement to Gilstrap

Hendricks is correct the 911 recording contains two levels of hearsay. The first level is the victim's statement to Gilstrap reporting the details of the sexual assault and identifying Hendricks as the perpetrator. We find the victim's statement is hearsay because it is an out-of-court statement offered to prove the truth of the matter asserted in the statement—that Hendricks twice sexually assaulted her. *See* Rule 801(c), SCRE.

However, we believe the trial court acted within its discretion to admit this statement as an excited utterance. *See State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (stating the admission of an excited utterance "is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion"). As our supreme court has explained, "the intrinsic reliability of an excited utterance derives from the statement's spontaneity[,] which is determined by the totality of the circumstances surrounding the statement when it was uttered." *State v. Ladner*, 373 S.C. 103, 119-20, 644 S.E.2d 684, 693 (2007); *see also State v. Sims*, 348 S.C. 16, 20, 558 S.E.2d 518, 521 (2002) (explaining "[t]he rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication"); Fed. R. Evid. 803(2) advisory committee's note (stating "[s]pontaneity is the key factor" for admissibility of an excited utterance).

The supreme court has identified three elements a trial court must consider when determining whether a statement has the spontaneous quality necessary for admission as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." *Washington*, 379 S.C. at 124, 665 S.E.2d at 604.

The victim's statement satisfies these requirements for admission as an excited utterance. Her statement related to Hendricks kidnapping, beating, and raping her. The victim's testimony about her physical and emotional state and Gilstrap's testimony her daughter was shaking, crying, and distraught both show the victim was under the stress of excitement when she made her statement. Gilstrap further testified her daughter was crying, "Momma, Momma, Momma" on the telephone and "just lost it" when she got to Gilstrap's house. Finally, the evidence supports the conclusion the sexual assault caused her stress. *See Sims*, 348 S.C. at 22, 558

S.E.2d at 521 (noting the declarant's demeanor and the severity of the startling event are factors a trial court should consider in determining whether a statement qualifies as an excited utterance). Thus, we find the trial court acted within its discretion to admit the victim's statement.

C. Gilstrap's Statement to the 911 Operator

The second level of hearsay is Gilstrap's statement to the 911 operator repeating her daughter's statement, specifically that her daughter's "boyfriend just broke into her house, and beat her up and raped her. . . . [H]e sodomized her. . . . And his name is Matthew Hendricks." During oral argument, the State argued Gilstrap's statement is not hearsay because it did not offer the statement to prove the truth of the matter asserted in the statement, but rather to explain why the police came to the hospital. We acknowledge there may have been some minimal probative value in admitting the statement for that purpose. However, the reason the police arrived at the hospital was not a significant issue at trial. The probative value in Gilstrap's statement was in the truth of what is asserted in the statement—that Hendricks raped and sodomized her daughter. Consequently, we find Gilstrap's statement is hearsay. *See* Rule 801(c), SCRE.

The State argues Gilstrap's statement is nevertheless admissible as a present sense impression or as an excited utterance. We disagree. There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event. *See* Rule 803(1), SCRE; *see also United States v. Mitchell*, 145 F.3d 572, 576 (3d Cir. 1998) (listing the "three principal requirements" for a statement to be admissible as a present sense impression).

We find the evidence does not support the admission of Gilstrap's statement as a present sense impression. The "event" Gilstrap described in her statement was the rape, which Gilstrap did not perceive. *See generally State v. Davis*, 371 S.C. 170, 180-81 n.9, 638 S.E.2d 57, 63 n.9 (2006) (noting the declarant's statement about a shooting was not admissible as a present sense impression because there was no evidence the declarant saw the shooting). Moreover, though Gilstrap's statement might have been contemporaneous with her daughter's statement, it was not contemporaneous with the rape.

The State also argues Gilstrap's statement was admissible as an excited utterance. We recognize Gilstrap must have had an intense emotional reaction when she first heard her daughter had been raped. However, the State has not shown the nature of her reaction was such that it generated the spontaneity that gives an excited utterance its inherent reliability. *See Ladner*, 373 S.C. at 119-20, 644 S.E.2d at 693. Moreover, the State did not show Gilstrap was still under the required stress of excitement when she actually made her statement. *See Davis*, 371 S.C. at 180, 638 S.E.2d at 62 (finding the State elicited no evidence the declarant "was still under the stress or excitement of [the victim's] shooting," and "[t]herefore, the State did not meet its burden of establishing a foundation for the excited utterance").

First, Gilstrap did not immediately call 911 when her daughter called and told her what happened. Instead, she waited for her daughter to arrive at her house, giving her time to reflect on what her daughter told her. *Contra State v. McHoney*, 344 S.C. 85, 94-95, 544 S.E.2d 30, 34-35 (2001) (concluding the declarant's statement was an excited utterance and "inherently reliable" because "[t]here was no time for the [declarant] to reflect on the event"). Second, Gilstrap helped her daughter put the children to bed before calling 911. Third, Gilstrap testified she drove the car because her daughter "was not able." Gilstrap *was* calm enough to drive, and her voice sounds calm on the audio recording of the 911 call.

Finally, the statement itself indicates Gilstrap was not speaking spontaneously, and her process of reflective thought had not been suspended. *See Sims*, 348 S.C. at 20, 558 S.E.2d at 521. Her request that the 911 operator send an officer to the hospital demonstrated the purpose of her call was in large part to initiate criminal prosecution against Hendricks. Gilstrap also told the 911 operator, "He has beat her up before but he has never raped her"; "He has charges pending"; and "I have a trespassing notice on him here."[1] These comments have nothing to do with her daughter's welfare or need for medical attention, but show Gilstrap reflected on these past events and then attempted to convince the 911 operator Hendricks deserved to be prosecuted. *Cf.* Fed. R. Evid. 803(2) advisory committee's note ("The theory of [the excited utterance exception] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."); Rule 803,

[1] The three comments quoted in this sentence are from a portion of the 911 recording that was not played for the jury.

SCRE, note (providing South Carolina's exception for excited utterances is identical to the federal rule). Thus, we find the record does not support the admission of the statement as an excited utterance, and the trial court did not act within its discretion when it admitted Gilstrap's statement to the 911 operator.

III. Admission of Gilstrap's Statement Caused No Prejudice

Despite the error in the admission of Gilstrap's statement, we find Hendricks suffered no prejudice. *See 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."). The substance of Gilstrap's out-of-court statement was already in evidence through her and the victim's trial testimony, before the trial court admitted the 911 recording. Specifically, Gilstrap testified her daughter called and told her Hendricks "had beaten her up and raped and sodomized her." This testimony contained only one level of hearsay and was properly admitted because the victim's statement to Gilstrap qualified as an excited utterance. The victim also testified she called her mother and told her what Hendricks did to her. The victim's testimony was admitted without objection before the admission of the 911 recording.

Hendricks argues the admission of Gilstrap's statement caused him prejudice because it corroborated the victim's trial testimony. He relies on *State v. Whisonant*, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), in which we stated, "'Improper corroboration testimony that is *merely cumulative to the victim's testimony* . . . cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" 335 S.C. at 156, 515 S.E.2d at 772 (emphasis in original) (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)). However, this case is distinguishable from *Jolly* and *Whisonant* because the evidence that Hendricks argues impermissibly corroborated the victim's testimony was properly admitted in evidence through Gilstrap's trial testimony. Thus, the corroboration that Hendricks contends was improperly achieved by Gilstrap's statement had already been properly accomplished by live testimony. The admission of Gilstrap's statement, therefore, did not prejudice Hendricks because it was cumulative to properly admitted evidence that corroborated the testimony of the victim. Any further corroboration of the victim's trial testimony by Gilstrap's statement on the 911 recording was minimal. *See State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011)

("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.").

Accordingly, we find Hendricks has not demonstrated prejudice from the erroneous admission of Gilstrap's statement. *See State v. Brockmeyer*, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013) (holding "the improper admission of hearsay constitutes reversible error only when it results in prejudice, [and because the appellant] failed to show he was prejudiced, [he] failed to show reversible error").

IV. Conclusion

The trial court acted within its discretion to admit the victim's statement on the 911 recording, but erred in admitting Gilstrap's statement. However, we find Hendricks suffered no prejudice from this error. Accordingly, we **AFFIRM**.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Fore, Employee, Appellant,

v.

Griffco of Wampee, Inc., Employer, and Chartis Claims, Inc., Carrier, Respondents.

Appellate Case No. 2012-212939

Appeal From The Workers' Compensation Commission

Opinion No. 5242
Heard February 5, 2014 – Filed June 30, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, and Peter P. Leventis, IV, of McKay Cauthen Settana & Stubley, PA, both of Columbia, for Appellant.

Weston Adams, III, and James H. Lichty, both of Columbia, and Helen Faith Hiser, of Mt. Pleasant, all of McAngus Goudelock & Courie, LLC, for Respondents.

THOMAS, J.: This is a workers' compensation case. The single commissioner awarded Patricia Fore compensation based on his finding that Fore's work-related injury resulted in a forty percent disability to the back. Fore appealed to the

appellate panel, which affirmed the award. Fore now appeals to this court. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

In 2005, Fore began working as a meat cutter in a Griffin IGA in Myrtle Beach. Her responsibilities included unloading trucks, rotating and cleaning coolers, and carrying items weighing forty to eighty pounds.

On February 21, 2008, Fore was injured when she bumped into some machinery while carrying about sixty pounds of meat. After March 31, 2008, Fore ceased working at IGA and moved to Leesburg, Georgia, with her husband.

After a hearing on August 12, 2009, a single commissioner found Fore suffered compensable injuries to her back and right hip and her back injury affected her right leg. Fore's employer, Griffco of Wampee, Inc., and its carrier, Chartis Claims, Inc. (collectively Respondents), were ordered to assume responsibility for all causally related treatment and to pay Fore temporary total disability commencing on March 31, 2008, Fore's final day of employment at IGA.

On May 19, 2010, Fore underwent a lumbar fusion. The surgery was not successful, resulting in a non-union and failed back syndrome. In August 2010, Dr. Wolgin, Fore's treating physician, after consulting with Fore's case manager, referred Fore to therapy and allowed her to perform sedentary work with restrictions regarding weightlifting and movement.

Fore commenced part-time work as a clerk for ABC Bail Bonds (ABC). In September, Fore told Dr. Wolgin she was working only three hours per day and three days per week in an "office setting"; however, she actually worked twenty or more hours per week for ABC. She also performed courier services for a towing service owned by Steve McGowan, the owner of ABC. McGowan paid Fore eight dollars per hour in cash for her work, and Fore never completed a time card in her own name.

By October 2010, Fore completed a month of physical therapy; however, her condition did not improve, and she reported increased pain in her hip and back from sleeping in a bed. As a result of these circumstances, Dr. Wolgin wrote a work slip in which he stated Fore was unable to work until further notice.

Fore left ABC on January 21, 2011, maintaining she could not perform her duties because of excessive pain from having to alternate between sitting and standing positions. McGowan, however, alleged Fore wanted to work more hours and even went to Atlanta to obtain her certification as a bail bond agent. According to McGowan, Fore increased her hours, eventually working thirty to thirty-five hours per week, and told him she was leaving ABC because she needed to earn more money to pay for her child's daycare.

Dr. Wolgin suggested additional surgery, but Fore declined this option for several reasons: her chance of improvement was only fifty percent, her prior surgery had been painful, and she was busy caring for a young child. After consulting both Fore and her attorney, Dr. Wolgin closed Fore's case on February 14, 2011, and declared she reached maximum medical improvement on that date. Dr. Wolgin also assigned Fore a thirty-six percent whole person impairment rating.

Sometime in February 2011, Fore was approached by Tony Owens, a longtime friend and the operator of A-1 Bail Bonding (A-1), one of ABC's competitors. Owens requested Fore's permission to use her name and license because she was well known in the community. Fore transferred her license to A-1 and completed one bond herself for A-1 to make the transfer effective. Fore also allowed Owens, at his expense, to place advertising for A-1 on the back window of her truck. The advertising included a telephone number for A-1 that could be called any time of the day.

In July 2011, Owens developed serious health problems and was unable to work. Fore claimed that because of Owens's difficulties, she agreed to complete a few bonds for A-1 without compensation until Owens could train someone else for the work. Fore was responsible for obtaining five bonds in July 2011, twelve bonds in August 2011, and one bond in September 2011. She maintained her only physical exertion in obtaining the bonds was to travel to the courthouse to sign for them. Eventually, Owens hired someone to do the work that Fore had been doing, and Fore assisted that person to obtain the necessary credentials.

On July 6, 2011, McGowan called the South Carolina Workers' Compensation Commission (the Commission) to report that Fore was committing insurance fraud by working for A-1 and being paid "off the books." According to notes taken by Garry Smith, the Director of the Commission's Compliance Division, McGowan accused Fore of obtaining and serving bonds, which included traveling to the lockup in Leesburg to get her clients released. McGowan also alleged Fore took

her niece with her, and he surmised the niece was initialing the release sheets as a subterfuge.

Smith included this information in a letter he wrote on July 18, 2011, to the Insurance Fraud Division of the Office of the South Carolina Attorney General. This letter was written on Commission letterhead and detailed Smith's conversation with McGowan. It also included notes about A-1 taken by an investigator for the Commission. Although acknowledging Chartis Claims, the carrier, was not an "authorized agency" entitled to receive information about the alleged fraud from the Commission, Smith wrote: "I suggest the carrier needs to know an allegation of fraud has been made so it can conduct an investigation, should it deem an investigation is warranted."

On July 20, 2011, an assistant deputy attorney general forwarded Smith's letter to Chartis for review and appropriate action along with a cover letter requesting Chartis to inform the South Carolina Attorney General's Office of any findings concerning insurance fraud. Neither Fore nor her attorney received copies of either the cover letter or Smith's letter.

On August 30, 2011, McGowan took video footage of Fore sitting with a client at the jail in Lee County, Georgia. This event prompted Fore to obtain a restraining order against McGowan.

The record on appeal also includes surveillance footage obtained on September 7 and 8, 2011. This footage shows (1) an A-1 sign near Fore's residence, (2) Fore entering, driving, and exiting an SUV without any noticeable difficulty, and (3) Fore squatting down numerous times to pick up merchandise from a low shelf in a department store. The record also includes a copy of Fore's Facebook page dated September 19, 2011, in which Fore gave her occupation as a "Professional Bondsman." She also described herself "Self Employed and Loving It!" and indicated her services were available.

On September 12, 2011, Vocational Consultant Glen Adams performed a vocational assessment on Fore based on Fore's medical records, work history, and statements she made during a telephone interview. In his report, Adams stated that based on Fore's limited sitting and standing tolerances, he considered Fore to be "totally vocationally disabled" as a result of the injuries she sustained while working at IGA. Adams also found there was no reasonably stable labor market compatible with Fore's vocational profile and resulting residual physical capacities.

On June 27, 2011, Fore filed a request for hearing with the Commission, in which she asked for a lump sum award to be prorated over her lifetime. Fore asserted she was totally and permanently disabled from her injury or, in the alternative, she had sustained a greater than fifty percent loss of use of her back, which would entitle her to a partial disability award based on five hundred weeks. On July 27, 2011, Respondents filed their answer to Fore's request. They admitted Fore was entitled to temporary total disability from the time she left her employment at IGA through the date she reached maximum medical improvement, but denied her 2008 injury caused a permanent and total disability.

On September 12, 2011, Fore served her Pre-hearing Brief and Notice of Witnesses. Respondents served their Pre-hearing Brief and Notice of Witnesses on September 19, 2011, including in their list of exhibits "[c]orrespondence from the S.C. Attorney General's Office." The following day, Fore served an amended Pre-hearing Brief and Notice of Witnesses, in which she added Owens, who was not listed on her earlier notice.

The single commissioner heard the matter on September 27, 2011. When the hearing began, Fore objected to Respondents' first exhibit, which contained both Smith's July 18, 2011 letter and the July 20, 2011 letter from the Attorney General's Office to Chartis. Fore argued this evidence was inadmissible as an *ex parte* communication and hearsay. She also contended the letters were inadmissible evidence of a pending criminal prosecution. In addition to asking the single commissioner to exclude the evidence, she requested that the entire South Carolina Workers' Compensation Commission be recused from adjudicating her case and that a circuit court judge or other impartial referee, such as a former commissioner, be appointed to hear the matter. The single commissioner removed the letter from the Attorney General's Office from the record, but overruled Fore's objection to Smith's letter. He also denied Fore's request to appoint someone outside the Commission to hear her case.

The hearing then proceeded on the merits. When Fore called Owens to testify as a rebuttal witness on her behalf, Respondents objected, arguing that Owens was not named in Fore's original Pre-hearing Brief and Notice of Witnesses and that Fore's amended documents, which included Owens as a witness, were untimely. The single commissioner allowed Fore to proffer Owens as a witness, but left the hearing room when Owens testified.

On January 18, 2012, the single commissioner issued an order finding Fore's injury resulted in a forty percent disability to the back. The single commissioner noted he made this finding "[a]fter considering all of the evidence." He also stated he did not find Fore to be a credible witness and stated he believed she could work.

Based on his finding that Fore suffered a forty percent permanent partial disability to the back, the single commissioner granted Respondents a credit for overpayment of temporary total benefits from February 14, 2011, the date Fore reached MMI. Fore appealed to the appellate panel, which affirmed the single commissioner's order, modifying it only to include additional findings of fact and conclusions of law that addressed Fore's allegations of *ex parte* communication. Fore now appeals to this court.

ISSUES ON APPEAL[1]

I. Did the single commissioner and appellate panel err in failing to recuse themselves on the ground that the Commission engaged in improper *ex parte* contact with Respondents by instructing the Attorney General's Office to forward Smith's letter to Respondents without notifying Fore?

II. Should the single commissioner have excluded Smith's letter because it (1) constituted an *ex parte* communication, (2) contained inadmissible hearsay, (3) was more prejudicial than probative, and (4) denied Fore the opportunity to conduct meaningful discovery to rebut Respondents' evidence against her?

III. Should Fore have been allowed to call Owens as a rebuttal witness in response to the testimony of Steve McGowan?

STANDARD OF REVIEW

[1] Fore has also raised challenges to the decision to base Fore's final award on a finding that her injury resulted in a forty percent disability to her back and to an alleged procedural irregularity during the hearing before the appellate panel. We decline to address these questions in view of our disposition of the other issues Fore has raised in her appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

Under the South Carolina Administrative Procedures Act, an appellate court can reverse or modify a decision of the South Carolina Workers' Compensation Commission "where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole." *Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 293 (2011).

LAW/ANALYSIS

I. Allegation of *Ex Parte* Communication and Recusal of the Commission

Fore first argues the Commission engaged in *ex parte* communication with McGowan and Chartis and, as result of these interactions, deprived her of a fair trial. She further maintains that all sitting commissioners should have been disqualified from hearing the matter because of the alleged *ex parte* communication. We disagree.

"*[E]x parte* communication is defined as 'prohibited communication between counsel and the court when opposing counsel is not present.'" *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003) (quoting *Black's Law Dictionary* 597 (7th Ed. 1999)). The Code of Judicial Conduct prohibits a judge from initiating, permitting, or considering *ex parte* communications unless the judge takes certain precautions, including but not limited to notifying the other parties of the substance of the *ex parte* communication and giving them the opportunity to respond. Rule 501, SCACR, Canon 3(B)(7)(a)(ii).

According to Fore, the *ex parte* communication occurred when Smith, in his capacity as Director of the Compliance Division of the Commission, sent the information he received from McGowan to the South Carolina Attorney General's Office and included "explicit instructions to forward it to a party in this case." However, in contacting the Fraud Division of the Office of the South Carolina Attorney General about McGowan's accusations against Fore, Smith was only discharging duties required of the Commission by statute. *See* S.C. Code Ann. § 38-55-570(A) (2002) (requiring "any . . . authorized agency having reason to believe that another has made a false statement or misrepresentation" to "notify the Insurance Fraud Division of the Office of the Attorney General of the knowledge or belief and provide any additional information within his possession relative thereto"). Furthermore, contrary to Fore's version of the facts, Smith merely

suggested that the carrier be made aware of McGowan's allegation and did not instruct the Attorney General to convey this information to Chartis. Finally, in making the suggestion, Smith was advising the Attorney General's Office of a course of action that it had a right to follow and never expressed a desire that the Attorney General take any action on the Commission's behalf. *See* S.C. Code Ann. § 38-55-580(D) (2002) (providing immunity for "persons identified as designated employees whose responsibilities include the investigation and disposition of claims related to suspected fraudulent insurance acts" when they share information about such acts with properly designated employees of "the same or other insurers whose responsibilities include the investigation and disposition of claims related to fraudulent insurance acts").

We therefore hold that Fore has not established that any *ex parte* communication occurred between Respondents and the Commission. Furthermore, because Fore's assertion of *ex parte* communication is the only ground she advanced to support her argument that the Commission should have recused itself from hearing her claim, we need not address her argument that an independent hearing officer not currently affiliated with the Commission should have been appointed to decide this matter.[2]

II. Inclusion of Smith's Letter in the Record

Fore also contends that Smith's letter should have been removed from the record before the single commissioner because it was an *ex parte* communication, contained inadmissible hearsay, was more prejudicial than probative, and was presented in such a way as to deprive Fore of the opportunity to conduct meaningful discovery. Although we have held the letter was not an *ex parte* communication, we agree with Fore that the letter should have been removed from the record because it contained hearsay and was unduly prejudicial to her. Furthermore, because of the nature of the communication, Fore was deprived of sufficient opportunity to investigate the evidence Respondents presented to support their position that she was capable of working.

[2] In any event, we found no authority to support Fore's argument that recusal of the Commission would have been the only appropriate remedy if she had established that the Commission engaged in *ex parte* communication with Chartis, and Fore has not cited any binding precedent to support her position.

When Fore objected to Smith's letter, Respondents' attorney argued the letter was "simply evidence that there is a fraud investigation ongoing by the A.G.'s office in this claim." The single commissioner agreed and denied Fore's motion to remove the letter from the record, stating the letter was "in the commission file" and had "been made a part of the record or will be made a part of the record."

The inclusion of Smith's letter among the materials before the single commissioner, however, whether this occurred before or during the hearing, was in violation of sections 38-55-510 through -590 of the South Carolina Code (2002), otherwise known as the Omnibus Insurance Fraud and Reporting Immunity Act. As to the availability of information about fraudulent insurance claims under investigation, the Act provides:

> Except as otherwise provided by law, any information furnished pursuant to this section *is privileged and shall not be part of any public record*. Any information or evidence furnished to an authorized agency pursuant to this section is not subject to subpoena or subpoena duces tecum in any civil or criminal proceeding unless, after reasonable notice to any person, insurer, or authorized agency which has an interest in the information and after a subsequent hearing, a court of competent jurisdiction determines that the public interest and any ongoing investigation will not be jeopardized by obedience of the subpoena or subpoena duces tecum.

S.C. Code Ann. § 38-55-570(D) (2002) (emphasis added). Therefore, although Smith's letter may have been part of the Commission's file, it should have been segregated from those portions of the file that could be viewed by members of the public.

We also agree with Fore that this letter was hearsay evidence of an as-yet unproven allegation that she had committed insurance fraud. Furthermore, without a final determination of the truth of this allegation, we hold the prejudice to Fore from admitting the letter exceeded any probative value to be gained from its inclusion in the record. *Cf. S.C. Dep't of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct. App. 2008) (finding that testimony that law enforcement had probable cause to proceed with a criminal investigation against a parent was prejudicial because the evidence suggested the parent was guilty of sexual

misconduct toward his child). Moreover, because the letter was most likely not accessible to Fore or any other member of the public and Fore was thus unaware of the letter until only eight days before her hearing, she was deprived of the opportunity to conduct meaningful discovery that may have enabled her to refute Respondent's allegations that her claims were spurious.

Considering all these circumstances, we hold the single commissioner should have granted Fore's request to remove Smith's letter from the record. We acknowledge there may have been substantial evidence to support a finding that Fore was capable of working and suffered only a partial disability; however, Fore's testimony about her condition, the work restrictions imposed by Dr. Wolgin, and the vocational assessment prepared by Glen Adams would have been substantial evidence supporting a different finding. Fore's credibility, then, was an important factor, and the single commissioner expressly found Fore was not a credible witness. Contrary to a statement in the appellate panel's order that there was no evidence that the single commissioner considered Smith's letter in determining Fore's award, the single commissioner himself indicated otherwise when, after denying Fore's motion on the ground that the letter was already an exhibit in the commission file, he stated in his order that (1) his findings of fact were "[b]ased upon the testimony and exhibits submitted" and (2) he found Fore had suffered only a forty percent permanent partial disability to the back "[a]fter considering all of the evidence."

We therefore agree with Fore that the single commissioner's order was affected by an error of law because of the single commissioner's refusal to exclude from the record an exhibit that Respondents readily admitted was evidence of an ongoing fraud investigation. Nevertheless, "[t]he final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." *Hamilton v. Martin Color-Fi, Inc.*, 405 S.C. 478, 487, 748 S.E.2d 76, 81 (Ct. App. 2013) (citing *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)). Here, although we disagree with the appellate panel's interpretation of the single commissioner's order, the appellate panel clearly stated in its own order that it "does not rely on any information contained in the letter from the Commission to the Attorney General." Considering this unequivocal statement along with Respondents' evidence that Fore was not permanently and totally disabled, we hold Fore failed to establish that her substantial rights were prejudiced as a result of either an error of law in the appellate panel's decision or clearly erroneous findings of fact by the appellate panel.

III. Testimony of Tony Owens

Fore further argues the single commissioner should not have refused to hear Owens's rebuttal testimony solely because he was not listed on her original Pre-hearing Brief and Notice of Witnesses and her attempt to amend these documents to include him was untimely. We agree.

State regulations require an attorney representing a party at a workers' compensation hearing to file and serve a Pre-hearing Brief (Form 58). 8 S.C. Code Ann. Regs. 67-611.B (2012). The attorney must "[f]ile a Form 58 and proof of service at least ten days before the hearing with the Hearing Commissioner's office identified on the hearing notice." 8 S.C. Code Ann. Regs. 67-611.B(1) (2012). The Form 58 must "give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case . . . ." *Id.* Furthermore, a party must "promptly supplement a response with respect to any question directly addressed on the form and amend a response if the party obtains information upon the basis of which the party knows the response was incorrect when made . . . ." *Id.*

Fore served her original Pre-hearing Brief and Notice of Witnesses on September 12, 2011, more than ten days before the hearing on September 27, 2011. On September 20, 2011, the day she received Respondents' Pre-hearing Brief and Notice of Witnesses, Fore immediately filed and served her Amended Pre-hearing Brief and Notice. Regulation 67-611, though expressly imposing a deadline for filing and serving the Pre-hearing Brief, also requires parties to supplement their responses when warranted. This regulation, however, does not impose a deadline for disclosure of new information when that information is provided in an effort to amend a prior response. Absent any express time constraint for amending a Pre-hearing Brief, we hold that Fore, in promptly supplementing her Pre-hearing Brief to include Owens as a witness, complied with Regulation 67-611 and that the single commissioner erred in refusing to allow Fore to call Owens as a rebuttal witness. *See Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 130 n.2, 623 S.E.2d 860, 864 n.2 (Ct. App. 2005) (recognizing "the informal nature of administrative proceedings before the Commission").

CONCLUSION

We hold the single commissioner should not have refused to hear Owens's rebuttal testimony and therefore remand this matter to the Commission for a

redetermination of Fore's benefits with the directive that full consideration be given to Owens's testimony. We further hold the letter from Garry Smith to the Insurance Fraud Division of the Office of the South Carolina Attorney General was not an *ex parte* communication between Respondents and the Commission and Fore is therefore not entitled to have an independent tribunal appointed to determine her benefits. Although we hold that Fore did not show prejudice from the single commissioner's refusal to remove Smith's letter from the record, we agree with Fore that this refusal was error. In view of our decision to remand the matter to allow Fore to call Owens as a rebuttal witness, then, we also direct that on remand Garry Smith's letter be removed from the record. If Smith's letter remains in the Commission's file, it shall be segregated from the publicly available portions of the file as required by subsection 38-55-570(D) of the South Carolina Code (2002).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kerry Levi, Appellant,

v.

Northern Anderson County EMS, and Berkshire Hathaway Homestate Insurance Company, Respondents.

Appellate Case No. 2012-212631

Appeal From The Workers' Compensation Commission

Opinion No. 5243
Heard May 6, 2014 – Filed June 30, 2014

VACATED AND REMANDED

John S. Nichols and Blake Alexander Hewitt, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Chadwick Dean Pye, of Chadwick D. Pye, LLC, of Spartanburg, for Appellant.

David Hill Keller, of Constangy Brooks & Smith, LLP, of Greenville, for Respondents.

KONDUROS, J.: In this workers' compensation case, Kerry Levi appeals the dismissal of her claim by the Appellate Panel of the Workers' Compensation Commission (Appellate Panel). She contends the single commissioner's denial of Northern Anderson County EMS (EMS) and its carrier's, Berkshire Hathaway Homestate Insurance Company, (collectively, Employer) motion to dismiss was

not immediately appealable. Levi also argues the question of whether she settled her third-party claim is not ripe for review. We vacate the Appellate Panel's decision and remand to the Appellate Panel for it to dismiss the appeal.

FACTS/PROCEDURAL HISTORY

Levi worked as a paramedic for EMS. On March 10, 2011, she injured her back while moving a patient. Later that month, on March 29, she was riding in an ambulance as part of her employment when another driver (the third party) rear-ended the ambulance. Levi filed workers' compensation claims for both injuries, which Employer accepted. Levi began receiving temporary disability in May of 2011 and had back surgery in July of that year.

On September 14, 2011, Employer filed a motion to dismiss both claims. It asserted Levi had accepted a $550 check from the third party's insurance company three weeks after the car accident. It contended this was a settlement of her third-party claim.[1] It maintained because she had not notified Employer or the Workers' Compensation Commission (the Commission) of the settlement as provided by section 42-1-560 of the South Carolina Code, she had elected her remedy. It asserted her right to recover workers' compensation benefits was therefore barred.[2]

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[1] A letter from the third party's insurance company, dated April 10, 2011, stated: "I will be sending a check to you . . . in the amount of $550.00 for full and final settlement o[f] your injury claim. Please understand that signing and cashing this check settles your claim from the above accident. Any medical expenses incurred by you from this loss will be presented to us from your Workman Compensation Adjuster." On September 9, 2011, Allstate sent a letter to Employer's attorney stating, "We have yet to receive any medical bills or reports with respect to the injury sustained by . . . Levi." On December 29, 2011, the insurance company sent a letter to Levi's attorney, which stated: "This will confirm that Allstate paid and Ms. Levi cashed a settlement check for $550.00. This was for her pain an[d] suffering only with the understanding we would pay for the reasonable and related medical bills."

[2] "[T]he settlement of a third party claim without notice to the employer and carrier bars a workers' compensation action." *Kimmer v. Murata of Am., Inc.*, 372 S.C. 39, 52, 640 S.E.2d 507, 513-14 (Ct. App. 2006).

Levi contended she had not settled her claim against the third party. She maintained the $550 payment was limited to compensation for her pain and suffering from the accident and she had not signed a document releasing anyone from liability. She contended she had informed Employer of the $550 payment and both the owner of EMS and the worker' compensation insurance adjuster had advised her to accept the money.

On January 20, 2012, the single commissioner denied the motion to dismiss. It found the $550 payment was for pain and suffering and ordered a hearing to determine if Levi had reached maximum medical improvement (MMI) or if she needed additional medical treatment.

Employer appealed to the Appellate Panel, which reversed the single commissioner and dismissed Levi's claims in an order dated July 2, 2012. The Appellate Panel found Levi had settled with the third party and had not notified Employer or the Commission. It determined that therefore Levi had elected her remedy. It found because Levi did not comply with the statute, she had deprived the Commission of jurisdiction of the claim. It also determined her injuries were solely due to the car accident. This appeal followed.[3]

LAW/ANALYSIS

Levi argues this court should vacate the Appellate Panel's decision. She maintains the single commissioner's ruling was not immediately appealable because it was not an award but instead a denial of a motion to dismiss. Although she did not raise this to the Appellate Panel, she contends appealability can be raised at any time. We agree.

"Only issues raised [to] and ruled on by the commission are cognizable on appeal." *Stone v. Roadway Express*, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006).

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[3] On March 5, 2013, after the filing of the Appellate Panel's order, Levi filed a lawsuit against the third party in the court of common pleas. That suit, *Levi v. Proell*, 2013-CP-23-01287, is pending in Greenville County court of common pleas. It is scheduled for a roster meeting on December 8, 2014. *See* http://www.greenvillecounty.org/scjd/publicindex/CaseDetails.aspx?County=23&CourtAgency=23002&Casenum=2013CP2301287&CaseType=V (last visited June 17, 2014).

However, "[a]n appellate court may dismiss an appeal or error proceeding on its own motion where it appears from the record that the court is without jurisdiction or that the judgment sought to be reviewed is not final, among numerous other reasons, even though no objection is raised by the opposite party." *Berry v. Zahler*, 220 S.C. 86, 89, 66 S.E.2d 459, 460 (1951) (internal quotation marks omitted).

"An appellate court may determine the question of appealability of a decision from a lower court as a matter of law." *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 571, 698 S.E.2d 856, 858 (Ct. App. 2010) (citing S.C. Code Ann. § 14-3-330 (1976 & Supp. 2009) (creating appellate jurisdiction in law cases); S.C. Code Ann. § 14-8-200(a) (Supp. 2009) (setting forth the appellate jurisdiction of the court of appeals)). "Even if not raised by the parties, this court may address the issue of appealability *ex mero motu*." *Id.*; *see also St. Francis Xavier Hosp. v. Ruscon/Abco*, 285 S.C. 584, 586, 330 S.E.2d 548, 549 (Ct. App. 1985) (providing this court can raise the issue of appealability *ex mero motu* even when no party raises any question concerning the appealability of an order).

"The right to appeal is a jurisdictional matter and, even if the parties do not raise the issue of appealability, we must dismiss the appeal on our own motion if we conclude we do not have jurisdiction." *Dorothy J. Pierce Family Mineral Trust v. Jorgenson*, 816 N.W.2d 779, 781 (N.D. 2012) (internal quotation marks omitted). "[W]hether a matter is appealable is a jurisdictional matter and may be raised by an appellate court even if not noted by the parties." *Barnes v. Barnes*, 956 A.2d 770, 779 (Md. Ct. Spec. App. 2008) (internal quotation marks omitted). "Before an order can support an appeal, it must be a final judgment. The issue of whether a judgment is final is jurisdictional, which means that if the reviewing court determines that the judgment appealed from is not final, that court is obligated to dismiss the appeal on its own motion." *Hardy v. State ex rel. Chambers*, 541 So. 2d 566, 567 (Ala. Civ. App. 1989) (citation omitted). "Matters of jurisdiction are of such importance that a court may consider them ex mero motu." *Trousdale v. Tubbs*, 929 So. 2d 1020, 1022 (Ala. Civ. App. 2005).

South Carolina, as well as other states, has made clear appellate jurisdiction can be raised by appellate courts even if none of the parties have raised it. Other states have found the concept to apply not just to supreme courts and courts of appeal but also when a district court is reviewing a real estate review board's decision. Because appealability can be raised at any point, we can consider whether

Employer could immediately appeal to the Appellate Panel the denial of its motion to dismiss.

> If an application for review is made to the Commission within fourteen days from the date when notice of the *award* shall have been given, the Commission shall review the *award* and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the *award*.

S.C. Code Ann. § 42-17-50 (Supp. 2013) (emphases added). "[T]he intention of the legislature was to provide for the disposition of a claim made to the . . . Commission by the orderly process of a hearing before a single commissioner . . . [and] a review, by the [Appellate Panel], of the single commissioner's *award* . . . ." *Janhrette v. Union Camp Paper Corp.*, 293 S.C. 59, 60, 358 S.E.2d 704, 705 (1987) (emphasis added) (internal quotation marks omitted).

> The commission or any of its members shall hear the parties at issue and their representatives and witnesses and shall determine the dispute in a summary manner. The *award*, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue, must be filed with the record of the proceedings and a copy of the award must immediately be sent to the parties in dispute.

S.C. Code Ann. § 42-17-40(A) (Supp. 2013) (emphasis added).

The Code does not define award. However, *Black's Law Dictionary* defines it as "[a] final judgment or decision." *Black's Law Dictionary* 164 (10th ed. 2014).

The applicable regulation provides: "Either party or both may request Commission review of the Hearing Commissioner's *decision* by filing the original and three copies of a Form 30, Request for Commission Review, with the Commission's Judicial Department within fourteen days of the day the Commissioner's order is received." S.C. Code Ann. Regs. 67-701(A) (2012) (emphasis added). "Regulations authorized by the legislature have the force of law." *Goodman v.*

City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995). However, a regulation "may not alter or add to a statute." *Id.*

> Under section 1-23-380(A) of the [Administrative Procedures Act (APA)], [a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review. An agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Bone v. U.S. Food Serv., 404 S.C. 67, 73-74, 744 S.E.2d 552, 556 (2013) (second alteration by court) (ellipses, footnote, citations, and internal quotation marks omitted).

> Section 1-23-390 of the APA, governing further appellate review, provides: "An aggrieved party may obtain a review of a *final judgment* of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases."

Id. at 74, 744 S.E.2d at 556. "[T]he meaning of a 'final judgment' as used in section 1-23-390 is not defined by using the exceptions that are present in the general appealability statute, whether or not the statute is specifically referenced." *Id.* at 76, 744 S.E.2d at 557. "[T]he general appealability statute allowing appeals from decisions 'involving the merits' has no place in the APA, which established a different appellate scheme." *Id.* at 77, 744 S.E.2d at 558.

Courts "cannot review a decision that has not been made." *Lee v. Bondex, Inc.*, 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013).

> Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be

> raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable . . . .

McLendon v. S.C. Dep't of Highways & Pub. Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (citation omitted). The denial of a motion to dismiss (1) under Rule 12(b)(6), SCRCP, (2) based on statute of limitations, or (3) for lack of subject matter jurisdiction, as well an order denying a motion to change venue are all not immediately appealable. *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012). In *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 173, 624 S.E.2d 439, 442 (Ct. App. 2005), "the circuit court held a hearing to determine the merits of the Hospital's exclusivity defense. The circuit court rejected this defense, but the merits of the Cookes' action ha[d] yet to be determined." This court accordingly found the circuit court's order interlocutory. *Id.*

In *Allison v. W.L. Gore & Associates*, an employee appealed the single commissioner's order to the Appellate Panel two days after the fourteen-day deadline for filing an appeal. 394 S.C. 185, 187, 714 S.E.2d 547, 549 (2011). The employer moved to dismiss the appeal, arguing it was untimely and thus the Appellate Panel lacked subject matter jurisdiction. *Id.* The Appellate Panel denied the motion to dismiss and upheld the denial of benefits to the employee. *Id.* The employee appealed to the circuit court, and the employer raised the fact that the appeal to the Appellate Panel was untimely. *Id.* The circuit court determined that because the Employer failed to take an immediate appeal, the ruling that the Appellate Panel had subject matter jurisdiction over the employee's appeal was the law of the case. *Id.* On appeal, the supreme court determined the circuit court erred in holding the Appellate Panel's denial of Employer's motion to dismiss was immediately appealable. *Id.* at 188, 714 S.E.2d at 549. The court also clarified that the issue is properly couched as one of appellate jurisdiction rather than subject matter jurisdiction. *Id.*

In an unpublished North Carolina case, the deputy commissioner (similar to our single commissioner) entered an order denying a claimant's motion to dismiss the guaranty association's request for a final hearing. *Pait v. Se. Reg'l Hosp.*, 675 S.E.2d 154 (N.C. Ct. App. 2009). The claimant filed a notice of appeal to the Full Commission (similar to our Appellate Panel). *Id.* The Guaranty Association filed a motion to dismiss the claimant's appeal. *Id.* The Full Commission denied the

claimant's request to be allowed to take an interlocutory appeal from the deputy commissioner's order, finding the right to appeal the interlocutory order was preserved until the issuance of a final opinion and award by a deputy commissioner, at which time the claimant could raise any issues on appeal to the Full Commission. *Id.* "An order declining to allow an interlocutory appeal to the [F]ull Commission from an order entered by a [d]eputy [c]ommissioner denying a dismissal motion is quintessentially interlocutory, since it contemplate[s] further proceedings . . . at the trial level." *Id.* (fourth and fifth alteration by court) (internal quotation marks omitted).

In a New York case, "a Workers' Compensation Law Judge [(WCLJ)] found that claimant had submitted prima facie medical evidence of an injury and set the claim down for a hearing to determine, among other things, the question of causal relationship." *Garti v. Salvation Army*, 914 N.Y.S.2d 799, 800 (N.Y. App. Div. 2011).

> The employer sought review from the Workers' Compensation Board, arguing that claimant had not submitted prima facie medical evidence. The Board refused to consider the employer's application, pointing out that a finding of prima facie medical evidence after a prehearing conference "is an evidentiary determination that the case may proceed and is interlocutory and is not reviewable by the Board."

Id. (citation omitted). The employer appealed to the Supreme Court, Appellate Division; the claimant asserted the appeal was from an interlocutory decision and must be dismissed; and the court agreed with the claimant. *Id.*

In another New York case, the Supreme Court, Appellate Division, noted:

> The Board made no final rulings and declined review of the WCLJ's decision based upon 12 NYCRR 300.38[(h)(5)](i), which provides that WCLJ "[d]ecisions containing only orders or directions made . . . in connection with the pre-hearing conference and expedited hearing process in controverted cases . . . shall not be reviewable by the Board . . . *until a decision has*

> *been made by a [WCLJ] establishing or disallowing the claim*."

Gibbs v. N.Y. City Health & Hosp. Corp., 980 N.Y.S.2d 172, 173 (N.Y. App. Div. 2014) (second alteration, ellipses, and emphasis added by court).

The North Carolina Supreme Court has held, "If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Love v. Moore*, 291 S.E.2d 141, 144 (N.C. 1982). The supreme court found, "The threshold question which should have been considered by the [c]ourt of [a]ppeals, although not presented to that court, was whether an immediate appeal lies from the trial court's orders." *Id.* The supreme court determined "the appeal was premature and the case should first run its course in the trial court." *Id.* It therefore, "neither consider[ed] nor address[ed] the questions discussed by the [c]ourt of [a]ppeals." *Id.* The court noted, "Any procedural matters about the issues which defendant attempted to raise in this purported appeal may later be considered on appeal of this cause in its entirety should the matter again be brought before the appellate division." *Id.* at 147. The court vacated the court of appeals' decision and remanded the case to it with instructions to enter an order dismissing the appeal. *Id.*

The Idaho Supreme Court has found a district court did not have jurisdiction to hear a petition for judicial review from the Real Estate Appraiser Board's decision to deny a motion to dismiss. *Williams v. State, Bd. of Real Estate Appraisers*, 239 P.3d 780, 782, 784 (Idaho 2010). The supreme court thus vacated the district court's decision. *Id.* at 784. The court additionally determined it did "not have jurisdiction to decide the issues raised and must dismiss this appeal." *Id.*

The appeal from the single commissioner to the Appellate Panel was not from a final judgment and was interlocutory. The applicable statute provides for appeals from an award, which *Black's Law* defines as a final decision, mandating that appeals only be from a final decision. Although the applicable regulation uses the term decision instead of award, a regulation cannot add to the statute. Therefore, an appeal must be from an award, not simply any decision.

The New York cases of *Garti* and *Gibbs* support that appeals from the single commissioner must be from final order, but New York's statute is more specific

than our state's, stating explicitly decisions containing only orders or directions made shall not be reviewable by the Appellate Panel until a decision has been made establishing or disallowing the claim. In the case of *Pait* from North Carolina, after which our workers' compensation system was originally modeled, the court affirmed the Appellate Panel's dismissal of the appeal from the single commissioner for the order being interlocutory until the single commissioner issues a final opinion and award. Our supreme court has made clear in recent years with *Bone* that the circuit court (under the former statute), this court, and the supreme court cannot hear appeals from the Appellate Panel if it does not constitute a final decision. A plain reading of the statute supports that appeals from the single commissioner to the Appellate Panel must be from final orders as well. The denial of a motion to dismiss has been consistently held not to be a final decision. That principle should also apply in the workers' compensation context.[4] Accordingly, we vacate the Appellate Panel's order and remand this matter to it for it to enter an order vacating Employer's appeal to it.

CONCLUSION

We reverse the Appellate Panel's order because the order from the single commissioner was not immediately appealable.[5] Accordingly, we vacate the Appellate Panel's order and remand for it to dismiss Employer's appeal.

VACATED AND REMANDED.

WILLIAMS and LOCKEMY, JJ., concur.

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[4] In terms of appealability, the denial of a motion to dismiss is much like a denial of a motion for summary judgment. *See McLendon*, 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2. Accordingly, the single commissioner's order does not establish the law of the case and can be appealed from if an award is issued. *See id.* ("[T]he denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings.").

[5] We need not determine Levi's remaining issue regarding ripeness. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clifford Thompson, Appellant,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-161446

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

Opinion No. 5244
Submitted September 1, 2013 – Filed June 30, 2014

AFFIRMED

Clifford Thompson, pro se.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General David A. Spencer, Assistant Attorney General Geoffrey Kelly Chambers, and Assistant Attorney General Kristin M. Simons, all of Columbia, for Respondent.

FEW, C.J.: Clifford Thompson appeals the circuit court's order dismissing his declaratory judgment action. In that action, he sought a declaration that his kidnapping convictions did not include a criminal sexual offense and would not require him to register as a sex offender. Thompson argues the circuit court erred

in ruling (1) no justiciable controversy existed;[1] (2) it did not have subject matter jurisdiction to change Thompson's prison classification based on *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999); and (3) Thompson's claims were moot. We affirm.[2]

Thompson pled guilty to four kidnapping and six armed robbery offenses in 2001, and the court sentenced him to twenty-five years in prison. At that time, a person convicted of kidnapping was required to register as a sex offender when released from prison "except when the court makes a finding . . . the offense did not include a criminal sexual offense." S.C. Code Ann. § 23-3-430(C)(15) (Supp. 2000); *see also* S.C. Code Ann. §§ 23-3-430(A), -440(1) (Supp. 2000). The sentencing court did not determine whether any of the kidnappings included a criminal sexual offense. Thompson appealed, and this court affirmed all of his convictions except one kidnapping and one armed robbery. *State v. Thompson*, Op. No. 2003-UP-252 (S.C.Ct.App. filed Apr. 3, 2003).

In 2009, Thompson filed this action. We find the circuit court properly determined no justiciable controversy existed and dismissed the action because the question of whether Thompson should be required to register as a sex offender is not ripe for adjudication. *See Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) ("Before a court may render a declaratory judgment, an actual, justiciable controversy must exist. A justiciable controversy is a real and substantial controversy [that] is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute."). This case does not present a justiciable controversy because the current statutes requiring registration do not contemplate that Thompson will register until he is released from prison.[3] *See* S.C. Code Ann. § 23-3-430(A) (2007) ("Any

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[1] Thompson presented this issue as two separate issues, but we believe combining them into one enables us to more accurately address the point he raises.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

[3] Thompson's projected release date is August 5, 2020, and he is not currently registered on the sex offender registry. Offender Search, S.C. Law Enforcement Div., http://www.icrimewatch.net/index.php?AgencyID=54575&disc= (agree to terms and conditions; then follow "Continue" hyperlink; then follow "Name" hyperlink; then search Clifford Thompson's name) (last visited Jun. 30, 2014).

person . . . who . . . has been convicted of . . . an offense described below . . . shall be required to register pursuant to the provisions of this article."); S.C. Code Ann. § 23-3-430(C)(15) (Supp. 2013) (listing "kidnapping" as an offense requiring registration "except when the court makes a finding . . . the offense did not include a criminal sexual offense"); S.C. Code Ann. § 23-3-440 (1) (2007) ("The Department of Corrections . . . shall provide verbal and written notification to the offender that he must register with the sheriff of the county in which he intends to reside within one business day of his release."). Moreover, "the applicable statute [for determining whether a person must register] is the statute that exist[s] at the time of [that person's] release from prison," and thus it is unknown whether Thompson will be required to register. *Hazel v. State*, 377 S.C. 60, 64, 659 S.E.2d 137, 139 (2008).[4] Because the law does not require Thompson to register as a sex offender until he is released from prison, and because the sex offender registry statute may be amended between now and Thompson's release, we find the circuit court properly dismissed Thompson's action. Therefore, we do not reach the merits of Thompson's claim.

Thompson's claim will become ripe for adjudication when he is released from prison, if he is then required by law to register. The plaintiff in *Hazel* was

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Although the record contains a printout from the Department of Corrections' website indicating Thompson is to be included in the sex offender registry, the Department of Corrections recently updated its website, and the website no longer indicates Thompson will be required to register. Inmate Search Detail Report, S.C. Dep't of Corr. Incarcerated Inmate Search, http://public.doc.state.sc.us/scdc-public/inmateDetails.do?id= 00274805 (last visited Jun. 30, 2014).

[4] The sex offender registry statutes have been amended many times since their enactment. *See* § 23-3-430(C) (enacted by Act No. 497, § 112A, 1994 S.C. Acts 5794-98; amended by Act No. 444, § 16, 1996 S.C. Acts 2684-90; Act No. 384, § 1, 1998 S.C. Acts 2302-2311; Act No. 74, § 1, 1999 S.C. Acts 244-45; Act No. 363, § 2, 2000 S.C. Acts 2444; Act No. 208, § 14, 2004 S.C. Acts 1930-31; Act No. 141, § 2, 2005 S.C. Acts 1608-11; Act No. 212, § 3, 2010 S.C. Acts 1517-19; Act No. 289, § 8, 2010 S.C. Acts 2112-13; and Act No. 255, § 5, 2012 S.C. Acts 2043-45). Many of the amendments have related to the status of kidnapping as a registration-triggering offense. *See Hazel*, 377 S.C. at 63-64, 659 S.E.2d at 139 (analyzing amendments to the sex offender registry statutes and noting kidnapping has been deleted from and added to the list of offenses that require registration).

convicted of kidnapping in 1979 and released from prison on parole in 2002. 377 S.C. at 62, 659 S.E.2d at 138. "Upon release, he was informed that he would be required to register on the Sex Offender Registry." *Id.* He later filed an action in circuit court claiming he should not be required to register. *Id.* "The court granted [Hazel]'s motion for declaratory judgment and found that [he] is not required to register as a sex offender." 377 S.C. at 63, 659 S.E.2d at 138. The supreme court held the circuit court had jurisdiction to hear the dispute and affirmed. 377 S.C. at 65, 659 S.E.2d at 140. Under *Hazel*, therefore, if Thompson is required upon release from prison to register as a sex offender, he may file a declaratory judgment action at that time to litigate the propriety of the requirement.[5]

As to Thompson's other issues on appeal, the circuit court properly determined any issue relating to Thompson's classification as a sex offender by the Department of Corrections must first be addressed through administrative proceedings. *See Al-Shabazz*, 338 S.C. at 375-78, 527 S.E.2d at 753-55 (noting an inmate must initiate a grievance within the Department of Corrections to challenge his custody status, and holding an inmate can seek judicial review only after the administrative law court has issued a final decision). Thompson also argues the circuit court erred in finding his claims were moot. We do not address this issue because the circuit court did not make such a finding in its order.

AFFIRMED.

KONDUROS, J., concurs.

THOMAS, J., dissenting: The majority maintains the circuit court correctly dismissed this action because no justiciable controversy existed and any issue relating to Thompson's classification as a sex offender by the Department of

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[5] We recognize the sex offender registry, specifically section 23-3-430(C)(15), did not exist when Hazel pled guilty in 1979. Therefore, the sentencing court in *Hazel*, unlike here, did not have the opportunity to determine whether the kidnapping included a criminal sexual offense. The difference is not significant, however, because in both cases the only version of the statute applicable to the requirement for registration is the one in effect on the date of release. *See Hazel*, 377 S.C. at 64, 659 S.E.2d at 139 (holding "[s]ection 23-3-430[(C)(15)] had no effect . . . until [the person] was released from prison").

Corrections must be addressed through administrative proceedings. I respectfully dissent.

Initially, I disagree with the majority's position that Thompson failed to present a ripe issue because no justiciable controversy existed at the circuit court. "Before any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Id.* at 430-31, 468 S.E.2d at 864. Specifically, the majority maintains this case does not present a justiciable controversy because the substance of the statute requiring registration is unknown until an inmate is released from incarceration. In my view, the controversy in this case does not arise from whether or not Thompson must register as a sex offender, but rather whether he should be classified as a sex offender.[6] Undoubtedly, Thompson will not be affected by having to register as a sex offender until he is released from prison, since an inmate is not required to register until their release. *See Hazel*, 377 S.C. at 64, 659 S.E.2d at 139 (noting a defendant is not required to register as a sex offender pursuant to section 23-3-430 until the defendant is released from prison). However, an inmate's classification as a sex offender, which in the case of kidnapping under the current statute is the default when the circuit court fails to make a finding regarding the sexual nature of the kidnapping, could have immediate and harmful ramifications.[7] *See* S.C. Code Ann. § 23-3-430 (Supp.

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[6] I distinguish *Hazel v. State*, 377 S.C. 60, 659 S.E.2d 137 (2008), from the current case because unlike *Hazel*, where the supreme court faced the question of the applicable statute as to sex offender registration, the instant case deals with the immediate ramifications of being labeled a sex offender. Hazel did not face such ramifications because, as the majority notes, the sex offender registry did not exist when Hazel pled guilty in 1979.

[7] While not in the record on appeal, a simple review of the South Carolina Department of Corrections's website reveals an individual with a "current or past sex crime[] conviction" is ineligible for substance abuse services and the "90 Day Pre-Release Program." *See Division of Behavioral Health & Substance Abuse Services*, S.C. Dep't of Corr., http://www.doc.sc.gov/pubweb/programs/substance.jsp (last visited June 20, 2014).

2013). Accordingly, I respectfully disagree with the majority and would hold the circuit court erred in finding Thompson failed to present a justiciable controversy.

I would also hold the circuit court erred in finding any issue relating to Thompson's classification must be addressed through administrative proceedings. Generally, issues regarding custodial status within the Department of Corrections are administrative in nature and therefore are properly determined before the administrative body. *See Al-Shabazz v. State*, 338 S.C. 354, 368-69, 527 S.E.2d 742, 749-50 (2000). However, in my view, classification as a sex offender is not a custodial status; therefore, the current challenge was properly brought before the circuit court. Moreover, even if such a classification is considered a "custodial status," at least in the case of kidnapping, that status is a direct result of the circuit court's finding or failure to make any finding, that the offense was a criminal sexual offense. *See* S.C. Code Ann. § 23-3-430 (Supp. 2013). Thus, any attempt by Thompson to challenge his status as a sex offender through the inmate grievance process would be futile in that the Department of Corrections is bound by the effect of the circuit court's decision[8] regarding whether his kidnapping conviction was sexual in nature. Based on the foregoing, I would reverse and remand because the circuit court erred in finding the instant case does not present a justiciable controversy and Thompson must institute administrative proceedings to challenge his status as a sex offender. Accordingly, I respectfully dissent.[9]

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[8] I use the term "decision" loosely because, as previously noted, pursuant to section 23-3-430(C)(15), the circuit court's failure to make a sex offender determination in the kidnapping context results in the defendant's designation as a sex offender.

[9] While the majority does not reach the mootness issue, based on the record, I would hold this case is not moot. The majority cites a recent update to the Department of Corrections's website; however, this update is not evidence in the record on appeal. Rather, there is no evidence in the record indicating Thompson is no longer considered a sex offender, and therefore that "a judgment rendered by the court [would] have no practical legal effect upon an existing controversy." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allegro, Inc., Respondent,

v.

Emmett J. Scully, Synergetic, Inc., George C. Corbin and Yvonne Yarborough, Appellants.

Appellate Case No. 2008-099926

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 5245
Submitted May 28, 2014 – Filed June 30, 2014

REVERSED AND REMANDED

Amy Lohr Gaffney, of Gaffney Lewis & Edwards, LLC, and Charles Mitchell Brown, William C. Wood, Jr., Brian Patrick Crotty, and Allen Mattison Bogan, all of Nelson Mullins Riley & Scarborough, of Columbia, for Appellants.

Robert L. Widener and Richard J. Morgan, both of McNair Law Firm, PA, of Columbia, for Respondent.

LOCKEMY, J.: In this civil action, Emmett Scully, Synergetic, Inc. (Synergetic), George Corbin, and Yvonne Yarborough (collectively, Appellants) contend the trial court erred in (1) admitting into evidence the order granting a temporary injunction; (2) admitting into evidence Allegro, Inc.'s (Allegro) expert report; (3) certifying Daniel McHenry as an expert; (4) excluding evidence relating to the

issue of Allegro's damages; (5) failing to grant motions for directed verdict and judgment notwithstanding the verdict (JNOV) as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation; (6) reforming the jury's damages verdicts without providing the option of a new trial; and (7) failing to require an election of remedies. We reverse and remand.[1]

FACTS

Allegro is a professional employer organization (PEO) that was formed in the late 1990s by its initial owner, Mary Etta McCarthy. A PEO provides human resource services for companies wanting to outsource that function. Scully joined Allegro in August of 1998 as president and a member of its board of directors. He was also given thirty percent of Allegro's stock. The remaining directors consisted of McCarthy, who was the majority owner, and one of Allegro's clients, Frank Brown. Between 1998 and 2001, Scully's ownership interest in Allegro increased to forty-nine percent and McCarthy held the remaining fifty-one percent interest.

Allegro and Scully never executed an employment contract or non-compete agreement. Furthermore, Allegro did not have an employee handbook that was issued to or utilized by its employees. However, when Scully joined Allegro, Scully and McCarthy negotiated a Partnership/Buy-Sell Agreement that governed the percentage and change in ownership of Allegro.[2]

McCarthy was actively involved in Allegro's management until Scully joined and took over the day-to-day operations. Scully testified that as president, he was entrusted with managing the operations in the best interest of Allegro along with financial oversight of the company. Beginning in late 2002 or early 2003, Scully expressed frustrations about the business to his friend, Corbin, who was also a certified public accountant (CPA). Additionally, Corbin's company, Merritt, was a client of Allegro. Corbin advised Scully regarding three possible options: (1) Scully could buy out McCarthy; (2) McCarthy could buy out Scully; or (3) Scully could start his own business. Scully then consulted with Corbin about how to make an offer to purchase McCarthy's interest in Allegro. In March of 2003,

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[1] This case was previously decided by this court; our supreme court remanded it for a decision on the issues involving the directed verdict and JNOV motions. *Allegro, Inc. v. Scully*, 400 S.C. 33, 733 S.E.2d 114 (2012) *remanded by* Op. 27391 (S.C. Sup.Ct. filed May 28, 2014) (Shearouse Adv. Sh. No. 21 at 29).

[2] Brown was not a party to this agreement.

Corbin issued a letter to Scully outlining three approaches for determining a fair purchase price for McCarthy's shares in Allegro. In concluding the letter, Corbin stated:

> The overall issue here is that something needs to happen. The ongoing tension between you and Mary Etta is obvious. That has to be tiring for both of you. It is also probably obvious to employees. Either way, it is not healthy for the business. The business has a better chance of success without that tension. If one of you has to sell out to relieve it, then that is what needs to happen.

In the spring of 2003, Scully informed McCarthy that he wanted to purchase her ownership interest in Allegro. Scully also discussed his proposal with Allegro's third director, Brown. During his conversation with Brown, Scully stated that if he could not purchase McCarthy's shares, he would set up his own PEO business. Over the course of a series of discussions with McCarthy in 2003, Scully told her that if they could not agree upon a price at which she would sell her ownership interest in Allegro, he would leave the company and form a competing company, taking employees and clients with him. In response to these conversations, McCarthy suggested having Allegro valued to determine the price of her interest. After McCarthy hired the Geneva Corporation (Geneva) to conduct a valuation study, Corbin reviewed the study and provided feedback to Scully at Scully's request.

On December 24, 2003, McCarthy received a letter from Scully offering to purchase her shares, setting forth two options as to the purchase price, and asking for her response by January 23, 2004. Prior to sending McCarthy the offer, Scully had asked Corbin to review it and Corbin advised that it was a fair offer. McCarthy received a subsequent letter from Scully on January 23, 2004, restating his offer. On January 29, 2004, McCarthy responded with a written counteroffer. Scully replied in a February 2, 2004 letter, stating, "if we are unable to come to terms the result is a lose, lose, lose for everyone involved. If I leave Allegro and start a new PEO we will be in competition for the same customers and employees."

Having failed to reach an agreement regarding the purchase of Allegro, Scully gave his letter of resignation to McCarthy on February 16, 2004. McCarthy then told Scully she would accept his last offer to purchase her ownership interest in Allegro. They agreed her lawyers would draw up the necessary paperwork by the end of that week. After that conversation, Scully left town on a business trip for

Allegro. While Scully was out of town, McCarthy decided she did not want to sell her ownership interest after all and focused her efforts on retaining Allegro. During Scully's absence, McCarthy met with Jim Everly, whom she hired to replace Scully as Allegro's president. McCarthy met with Scully on February 23, 2004, and presented Scully with a letter accepting his resignation. Immediately following Scully's departure from the company, McCarthy and Everly held a meeting with all Allegro employees and informed the employees that they must sign non-compete contracts. Yarborough was an employee of Allegro from 2000 until 2004. At the meeting with McCarthy and Everly, Yarborough and another employee, Lisa Milliken, refused to sign the non-compete contracts.

McCarthy and Everly contacted all of Allegro's clients to inform them Scully was no longer employed by Allegro and made arrangements to meet with each client. They first met with Corbin of Merritt, who told them that due to his personal friendship with Scully, Merritt's business would likely move to Scully's new company, Synergetic. Pursuant to Merritt's contract with Allegro, Corbin sent a thirty day notice in the form of a letter on February 27, 2004, announcing its termination of their contract as of March 31, 2004. Letters from other clients terminating their contracts with Allegro shortly followed.

After his departure from Allegro, Scully formed his new company, Synergetic. On March 1, 2004, Yarborough resigned as an employee of Allegro and began working for Synergetic on March 2, 2004. Millikin also resigned from her position with Allegro on March 1, 2004, and subsequently became an employee of Synergetic.

On April 15, 2004, Allegro initiated this action by filing a complaint against Scully, Yarborough, Corbin, and Synergetic. On that same date, Allegro filed a motion for a temporary injunction, seeking to enjoin Scully, Yarborough, and Synergetic from soliciting business from Allegro's clients. That motion was granted in an eleven page order after a hearing on October 14, 2004.

At the close of Allegro's case, as well as at the close of all evidence, both sides moved for directed verdicts. These motions were denied. The trial court then submitted to the jury eleven of the claims asserted by Allegro.[3] Nine of the claims

[3] Allegro acknowledges no claims against Synergetic were submitted to the jury; Synergetic joins this appeal because the issue was not addressed in the trial court's orders denying the Appellants' post-trial motions.

applied to Scully alone,[4] one claim applied to Yarborough alone,[5] and one claim applied jointly to Scully, Yarborough, and Corbin.[6] The jury's special verdict form listed each of the eleven causes of action and asked two questions for each charge: (1) whether the plaintiff had proven that claim; and (2) if the claim had been proven, the amount of actual damages and punitive damages (where appropriate) the jury awarded as to each claim.

During deliberations, the jury sent a question to the trial court asking whether they should list the damages specific to each cause of action individually, or place the overall total amount the jury decided to award. In discussing the verdict with the foreperson, using apples as the hypothetical award, the trial court stated, "You give a certain number of apples for each cause of action. And that's all you are worried about. And there are some law related matters that I will take care of as a Judge . . . ." The foreperson stated she understood the concept, and the trial court continued:

> So, for each cause of action depends on the breach of duty or [contract or] whatever you may find give a number, assign a value that you have been -- if the [p]laintiff's have [proven] to you by the greater weight of preponderance of evidence they are entitled to two apples on this one or three on that one or four on that one, that's the way you do it and don't worry about the total.[7]

The jury returned a verdict for Allegro on all eleven causes of action. The jury awarded actual damages in the amount of $160,000 for each of the causes of action. Furthermore, the jury awarded $75,000 in punitive damages on the breach of loyalty claim against Yarborough, and $175,000 in punitive damages on the

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[4] Scully was the sole defendant on charges of breach of contract, breach of contract with fraudulent intent, fraud, negligent misrepresentation, breach of fiduciary duty, breach of duty of loyalty, gross negligence, violation of section 33-8-310 of the South Carolina Code, and violation of section 33-8-420(a) of the South Carolina Code.

[5] Yarborough was the sole defendant on one breach of loyalty charge.

[6] Scully, Yarborough, and Corbin were jointly charged with civil conspiracy.

[7] It is unclear whether the trial court addressed the issue of the jury's verdict solely with the foreperson, or in the presence of the entire jury. This court strongly warns the trial bench of the danger of interacting with only the foreperson on substantive matters.

civil conspiracy claim against Scully, Yarborough, and Corbin jointly. The jury's verdict form shows that an award of $1,760,000 had initially been entered in the designated space for actual damages for the first cause of action, but it was struck through and replaced with $160,000.

Once the jury verdict was announced, the foreperson was questioned as to the total number of "apples" they intended to award Allegro, and their response was $1,760,000. The court then asked "What about punitive damages in terms of the total number of apples you wanted to give to [Allegro]?" The foreperson said the jury wanted to give $250,000 total to Allegro. The court finally stated, "We can add it up but your mathematician says it was the intent of this jury to award [Allegro] $2,010,000," to which the foreperson agreed. As a final review, the trial court said, "Actual damage 1.7 million and the remainder of that sum is punitive damages totaling in the amount of $2,010,000." Subsequently, no change was made to the verdict form by either the jury or the judge and no change was requested by Allegro.

The trial court completed a Form 4 order, which stated the total amount of actual and punitive damages and their grand total of $2,010,000. The Form 4 order did not state that these amounts applied to all, or any, of the individual Appellants, but the special verdict form was attached showing the specific damages awards. Further, the Form 4 order gave no indication that the jury's verdict, as stated on the special verdict form, had been changed, altered, or modified in any way.

In their post-trial motions, Appellants moved for an election of remedies and asserted grounds for JNOV and a new trial. On July 14, 2008, the trial court denied all of Appellants' post-trial motions.[8] In denying the motion for an election of remedies, the trial court stated:

> Based upon the verdict form and the conversations with the jury before and after its verdict, I am convinced the jury intended to award $1.76 Million Dollars in actual damages for each cause of action, and that it intended to award $250,000 in punitive damages on the two causes of action. I am further convinced that the jury's apportionment of the verdict amongst the various causes of action does not reflect a finding that the Plaintiff suffered only $160,000.00 in actual damages. Thus,

[8] Prior to this order, Appellants submitted their objections to the proposed order.

> entering judgment for the Plaintiff in the total amount of $1.76 Million Dollars in actual damages and $250,000.00 in punitive damages does not give rise to a double recovery.

On July 23, 2008, Appellants filed a motion to amend and/or set aside the July 14, 2008 order. This motion was also denied in an order by the trial court on April 5, 2010.[9] The trial court stated that in its May 5, 2006 Form 4 order, it reformed the jury's verdict, changing it from eleven separate actual damages awards of $160,000 and two punitive damages awards of $75,000 and $175,000, which resulted in different totals against different defendants, to one total verdict of $2,010,000 against all the defendants. The trial court further stated any issue regarding this "reformation" of the jury's verdict not being coupled with the option of a new trial was waived because the issue "was not raised in Defendants' post-trial motions." This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in admitting the order granting a preliminary injunction to Allegro into evidence?

2. Did the trial court err in admitting McHenry's report into evidence?

3. Did the trial court err in qualifying McHenry as an expert in the field of "damages"?

4. Did the trial court err in excluding evidence that Appellants maintain was relevant to the issue of Allegro's damages as well as Allegro's failure to mitigate those damages?

5. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to civil conspiracy?

6. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to the contract claims?

7. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to the fraud and negligent misrepresentation claims?

[9] The Appellants objected to the 2010 order prior to its entry as well.

8. Did the trial court err in reforming the jury verdict?

9. Did the trial court err in not requiring an election of remedies?

LAW/ANALYSIS

I. Evidentiary Errors

"'The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.'" *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011) (quoting *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "'An abuse of discretion occurs when the trial court's ruling is based on an error of law.'" *Id.* at 444, 710 S.E.2d at 58 (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). A finding of abuse of discretion does not end the analysis, however, "because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

1. Preliminary Injunction Order

Appellants argue the trial court erred in admitting the temporary injunction order into evidence. We agree.

First, we will address the threshold issue of preservation. For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). Further, it must be made with sufficient specificity "to inform the trial court of the point being urged by the objector." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). However, when the evidence is inherently prejudicial, the grounds for the objection are patent, and the issue will be found preserved. *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 43-47, 426 S.E.2d 756, 757-58 (1993) (holding a request that a voir dire question regarding insurance coverage "not be charged" was sufficient to preserve the issue, because even though specific grounds were not stated, the grounds were patent because the voir dire question was so inherently prejudicial).

We will examine whether the introduction of a preliminary injunction order into evidence is inherently prejudicial, thus making the grounds of the objection to its admittance patent. An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *Cnty. of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). One of the elements the applicant must establish is that he has a likelihood of success on the merits. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); *see Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) ("It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits."). A temporary injunction is granted without prejudice to the rights of either party pending a hearing on the merits, and "when other issues are brought to trial, they are determined without reference to the temporary injunction." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (citing *Alston v. Limehouse*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) (stating "no fact decided upon such motion [for a temporary injunction] is concluded thereby, and when the other issues are brought to trial they are to be determined without reference to said orders")). The purpose of a temporary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

In the case at bar, the order included approximately four and a half pages of "Findings of Fact" by the trial court, as well as this statement by the trial court:

> The Court carefully considered the pleadings, documents, and argument of counsel at a hearing . . . and finds that despite Defendants' denials of wrongdoing, there is sufficient evidence to indicate that the Defendants were engaged in the activities alleged by the Plaintiff.

After Appellants' objection to the admission of the preliminary injunction order, the trial court stated, "I think subject to your earlier objection, is that fair enough, that I've already ruled upon?" The Appellants concurred with the trial court, and the trial court continued, stating, "Very well. We might go into a little more detail later but it is over your objection."

It is hard for this court to determine an instance where admission of a preliminary injunction order into the trial record would not be highly prejudicial. While Appellants did not state specific grounds for their objection, we find the introduction of the order for temporary injunction into evidence was inherently prejudicial, and thus, the grounds for the objection were patent. *See Dunn*, 311 S.C. at 43-47, 426 S.E.2d at 757-58. We believe admitting this order had a high possibility of influencing the jury due to its numerous findings of fact and statements concluding defendants' liability for the alleged charges. The trial court abused its discretion in admitting the order into evidence. Thus, we reverse and remand in accordance with this decision.

2. McHenry's Expert Report

Appellants argue McHenry's written report and its attachments were cumulative of his subsequent testimony and contained impermissible and highly prejudicial hearsay, making its admission into evidence reversible error. We agree to the extent that the written report included the preliminary injunction order, but find the remainder of the testimony did not prejudice Appellants.

"Rule 703, SCRE, allows an expert giving an opinion to rely on facts or data that are not admitted in evidence or even admissible into evidence." *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct. App. 2010) (citing *Jones v. Doe*, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006)). However, Rule 703 does not allow the admission of hearsay evidence simply because an expert used it in forming his opinion; the rule only provides the expert can give an opinion based on facts or data that were not admitted into evidence. *Jones*, 372 S.C. at 62-63, 640 S.E.2d at 519.

As stated previously, for an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Further, it must be made with sufficient specificity "to inform the trial court of the point being urged by the objector." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

At trial, Appellants objected to McHenry's report after Allegro moved to put it into evidence. The Appellants stated, "Same objection," purportedly in reference to a previous objection on the record that was based on matters discussed in camera. While the in camera discussion was either not placed on the record or not given to us in the record on appeal, the trial court's 2008 order states,

> I overruled this general objection which was insufficient as a matter of law to present any objection, upon the ground that experts are permitted to base their opinion on hearsay if it is the type generally relied upon by experts. The Defendants never objected that the hearsay, to the extent there was any, was not this permissible type of hearsay.

In light of the trial court's 2008 order, it is apparent the objection was a general hearsay objection. In their 2006 post-trial motion, the Appellants objected again to the admission of McHenry's report "because this report was cumulative of his testimony, contained impermissible hearsay, and contained matters that were irrelevant and which served only to unfairly prejudice Defendants, confuse the issues, and mislead the jury." They further stated the report contained a document that gave "a purported timeline replete with multiple layers of impermissible hearsay, self-serving statements, conclusions of fact and law, Plaintiff's own opinions, and references to impermissible damages such as Plaintiff's litigation costs and attorneys' fees in this action."

We believe the specific issue of impermissible hearsay in the expert's report is preserved for appellate review, as the issue was raised with sufficient specificity, and ruled upon by the trial court. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding that to be preserved for appellate review, an issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity). There is nothing in the record on appeal that indicates the trial objection included arguments that the report was cumulative and contained matters that were irrelevant; thus, we find those issues are not preserved for our review. *See McCall v. IKON*, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (Ct. App. 2008) (holding that the appellant has the burden of providing a record sufficient for appellate review).

Here, McHenry was allowed to rely on hearsay in his report when giving his expert opinion. However, the admission of the report itself simply because McHenry used it in forming his expert opinion was in error. The report contained many instances of hearsay, including numerous statements by Scully. However, "the admission in evidence of inadmissible hearsay affords no basis for reversal where the out-of-court declarant later testifies at trial and is available for cross-examination." *Clark v. Ross*, 284 S.C. 543, 551, 328 S.E.2d 91, 97 (Ct. App.

1985), *abrogated by Sherer v. James*, 290 S.C. 404, 351 S.E.2d 148 (1986). Further, we do not find any of the remaining impermissible hearsay to be reversible error.

We address the fact that a copy of the temporary injunction order was attached to the report, which we find highly prejudicial to the Appellants. We found admission of the temporary injunction order was improper, and it was error to admit it with the expert's report as well. We find that portion of the expert's report to be highly prejudicial; thus, we reverse the decision of the trial court to the extent it allowed the temporary injunction order into the record.

3. Exclusion of Damages Evidence and McHenry's Qualification

Because we reverse and remand based upon the above evidentiary issues, we need not reach Appellants' remaining evidentiary arguments regarding the trial court's exclusion of damages evidence and McHenry's qualification as an expert. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. Denial of Directed Verdict and JNOV

"In ruling on motions for directed verdict or [JNOV], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. S.C. Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). "'In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence.'" *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002) (quoting *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001)). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* This court will reverse the trial court's ruling on a directed verdict or JNOV motion only where there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Clark v. S.C. Dep't of Public Safety*, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003)).

For preservation purposes, when a defendant moves for a directed verdict under Rule 50, SCRCP at the close of the plaintiff's case, he must renew that motion at

the close of all evidence. *Wright v. Craft*, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006) (citing *Hendrix v. E. Distribution, Inc.*, 316 S.C. 34, 37, 446 S.E.2d 440, 442 (Ct. App. 1994), *aff'd in result*, 320 S.C. 218, 464 S.E.2d 112 (1995)). "[If] a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Id.* A motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion and cannot raise grounds beyond those raised in the directed verdict. *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88, 610 S.E.2d 852, 856 (Ct. App. 2005).

1. Civil Conspiracy

Appellants contend the trial court should have granted their directed verdict and JNOV motions on the civil conspiracy claim because there were no special damages, and, as to appellant Corbin, because there was no evidence of an intent to harm Allegro. We find part of this argument was not preserved for our review, and we disagree with the remainder of Appellants' argument.

a. Special Damages

First, we review Appellants' argument that there was no evidence of special damages and, thus, the trial court erred in denying their directed verdict and JNOV motions. At the close of Allegro's evidence, Appellants moved for their directed verdict and stated:

> With regard to the civil conspiracy cause of action against Ms. Yarborough and Mr. Corbin, as Your Honor's well aware, you have to show a combination of two or more people for the purpose of harming, in this case Allegro, and that there has to be some special damages, not just, the normal damages that are incident to other claims but special damages unique to that conspiracy and the Plaintiff has offered no evidence of any special damages other than the general damages that their expert testified to yesterday. So because of that absence we would submit the civil conspiracy claim should be dismissed.

In Appellants' directed verdict motion at the close of all evidence, they failed to renew their previous directed verdict motion and also failed to argue that there was

a lack of evidence as to special damages. Thus, we find Appellants did not preserve this portion of their argument. *See Wright*, 372 S.C. at 19, 640 S.E.2d at 496.

b. Intent to Harm

In contrast to their argument discussed above, Appellants did specifically renew their contention that Corbin did not have the requisite intent to harm, which is a requirement to be found liable for civil conspiracy. We determine that this portion of the argument is preserved for our review.

"'A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff.'" *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010) (quoting *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006)); *see also Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage."). "'In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.'" *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005) (quoting *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998)). The gravamen of the tort of civil conspiracy is "the damage resulting to [the] plaintiff from an overt act done pursuant to a common design." *Vaught*, 300 S.C. at 208, 387 S.E.2d at 95.

Here, Corbin admitted he had a general knowledge about Allegro's clients because he previously did accounting work for the company. Corbin also admitted he spoke in an advisory capacity with Scully about Scully's interest in Allegro without informing McCarthy of the conversations. In this advisory capacity, Corbin stated he outlined the option of setting up a competitive company and explained there was a letter that outlined that option along with other options. Specifically, Corbin agreed he was "intimately" involved in all conversation regarding Scully's interest in buying Allegro or setting up his own competing business. The credibility of statements evidencing Corbin only had the intent to help and not injure Allegro are for a jury to decide. Viewing the evidence in the light most favorable to the non-moving party, Allegro, we find evidence exists to go before a jury to weigh. For the foregoing reasons, we affirm the trial court's denial of Appellants' directed verdict on this ground.

2. Contract Claims

Scully argues the trial court erred by failing to grant his directed verdict and JNOV as to the claims for breach of contract and breach of contract accompanied by a fraudulent act. Specifically, Scully contends there was no evidence of any contract between Allegro and Scully, no evidence of any terms of the alleged contract, and no evidence of a breach of the alleged contract. We find a portion of Scully's argument was not preserved for our review, and we disagree with the remaining argument.

a. Breach of Contract

We find Scully preserved the issue of the existence of a contract for our review. However, we do not think he preserved the argument that the terms of the contract were not proven. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 60, 691 S.E.2d 135, 155 (2010) (holding when an issue is not raised as a ground for a directed verdict, raising the issue in a JNOV motion will not preserve it for appellate review); *see also In re McCracken*, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (stating only issues raised at directed verdict can properly be raised in a JNOV).

At the close of Allegro's case, Scully made the motion for a directed verdict on the claims of breach of contract and breach of contract with fraudulent intent and argued there was no contract between Scully and Allegro, oral or written. Specifically, Scully argued:

> The Court: You don't think there was an oral understanding between these two parties in this litigation, between Ms. McCarthy and Mr. Scully?
> [Scully's Counsel]: There's been no evidence that there's been any oral understanding between.
> The Court: So, are you saying there is no written contract? There is no oral contract?
> [Scully's Counsel]: Exactly . . . .

At the close of all the evidence, Scully made a motion for a directed verdict, arguing again that there is no evidence of any contract, oral or written, and so the claims for breach of contract and breach of contract with fraudulent intent could

not stand. In his post-trial JNOV motion, Scully stated, "[Allegro] failed to prove the existence of a contract between Scully and [Allegro], the terms of any such contract between Scully and Plaintiff, and the breach of any such contract by Scully."

We hold Scully preserved the issue of the existence of a contract, but he did not preserve the issue of defining the terms of the alleged contract. *See Stokes-Craven*, 387 S.C. at 60, 691 S.E.2d at 155.

"Under the common law, a trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference." *Small v. Springs Indus., Inc.*, 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987); *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 101 S.E. 838 (1920); *Benya v. Gamble*, 282 S.C. 624, 627-29, 321 S.E.2d 57, 59-61 (Ct. App. 1984). General contract law provides that a "'contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.'" *Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (quoting *Benya*, 282 S.C. at 628, 321 S.E.2d at 60). A contract may arise from oral or written words or by conduct. *Rushing v. McKinney*, 370 S.C. 280, 290, 633 S.E.2d 917, 922 (Ct. App. 2006).

We find there is evidence in the record for the jury to weigh the issue of the existence of a contract. While there may not have been a written contract, there is evidence on the record to suggest an oral contract, or a contract created by conduct. Scully was hired as President of Allegro, and he stated his general responsibilities as president of Allegro were "[t]he daily operations of the business." Scully also admitted he had financial duties as well as the responsibility to act in a good faith manner for the benefit of the company. In addition to those admissions, the record reflects there was testimony regarding a written partnership buy/sell agreement, which included terms about changing ownership and percentage of ownership. Viewing the facts in the light most favorable to Allegro, there is evidence in the record for a jury to weigh whether an offer was communicated to Scully that he accepted, thus creating an employment contract. Therefore, we affirm the trial court on this issue.

b. Breach of Contract with Fraudulent Intent

Scully's only argument on appeal regarding this issue is that the trial court erred in denying his motion for a directed verdict and JNOV because there was no evidence of the existence of a contract. We disagree.

Because we find there was evidence for a jury to weigh in determining the existence of a contract, we affirm the trial court on this issue.

3. Fraud and Negligent Misrepresentation

Scully argues the trial court erred in failing to grant his directed verdict and JNOV as to the claims for fraud and negligent representation. We agree.

"Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003). "To prevail on a cause of action for fraud, a [p]laintiff must prove by clear, cogent and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010) (citing *Regions Bank*, 354 S.C. at 672, 582 S.E.2d at 444-45).

To prove a claim for the common law tort of negligent misrepresentation, a plaintiff is required to establish the following elements: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *West v. Gladney*, 341 S.C. 127, 133-34, 533 S.E.2d 334, 337 (Ct. App. 2000). '"There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence.'" *Quail Hill, LLC v. Cnty. of Richland,*

387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting *AMA Mgt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "'Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation.'" *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766 at 769-70 (2011) (quoting *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003)).

"'The failure to prove any element of fraud or misrepresentation is fatal to the claim.'" *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010) (quoting *Schnellmann v. Roettger*, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007)).

Allegro argues silence when there is a duty to speak can constitute fraud. *See Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) (stating "parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud"). However, while our court recognizes "[n]ondisclosure is fraudulent when there is a duty to speak," this discussion relates to the separate and distinct claim of fraudulent concealment, not a claim of fraud. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 334, 574 S.E.2d 502, 509 (Ct. App. 2002) (quoting *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993)). Therefore, the element of "false misrepresentation" cannot be premised upon an omission or silence of a party. *See id.*

Here, McCarthy, on behalf of Allegro, testified Scully told her of his plans. Specifically, she stated:

> [H]e told me one day and he told me this three or four times if you do not take the money I'm offering you, I'm leaving Allegro. I am taking Yvonne and Lisa. I am taking 50 percent of the clients. I already know which ones I want and it will be 50 percent of your business and I am going to tear Allegro apart.

Allegro offers no other evidence of false representations made by Scully. McCarthy, on behalf of Allegro, admitted she knew of Scully's desire to purchase Allegro and his intent to start his own business with the possibility of damaging Allegro's business should he not be able to purchase Allegro. Thus, we reverse the trial court on this issue, as there was no evidence to support a showing of a false representation by Scully, and a failure to prove any element of fraud or misrepresentation is fatal to the claim.

III. Remaining Arguments

Appellants contend the trial court erred in reforming the jury's verdict when the trial court should have either required an election of remedies based upon the jury's verdict or granted a new trial nisi additur.[10] Because we reverse the trial court on the issues noted above, we need not review this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Based on the foregoing reasons, the trial court's decision is

REVERSED AND REMANDED.

HUFF and PIEPER, JJ., concur.

[10] We reiterate that we do not approve the practice of asking a question or responding only to the foreperson regarding a substantive issue about the law or the verdict. When a question arises regarding the law or the verdict form, the better practice is to confer with counsel outside the presence of the jury to discuss the proper response, and then instruct the entire jury in court or in writing and return them to the jury room to act in accordance with the court's instructions. *See Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 203-04, 730 S.E.2d 890, 902-03 (Ct. App. 2012) (Thomas, J., concurring) (providing the best practice to ensure a valid verdict is for the court to address any questions that arise in front of the entire jury). If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused. *Id.*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jason Alan Johnson, Appellant.

Appellate Case No. 2012-207549

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 5246
Heard March 6, 2014 – Filed June 30, 2014

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., of Columbia, for Respondent.

THOMAS, J.: Jason Alan Johnson appeals his conviction for trafficking methamphetamine in an amount of twenty-eight grams or more, but less than one hundred grams. Johnson argues the circuit court erred in (1) denying his motion to suppress evidence stemming from a warrant he alleges was obtained without probable cause after an illegal entry and warrantless search, and (2) ruling as a matter of law that all of the mixture that contained methamphetamine would count

towards its weight, admitting such evidence, and ordering defense counsel not to argue that fact to the jury, which Johnson contends violated statutory intent and the Sixth Amendment. We affirm.

FACTS/PROCEDURAL HISTORY

On February 27, 2011, an arrest warrant was issued for Brandi Quinn for malicious injury to property. That morning, York County Sheriff's Deputy John Stagner located Quinn's car at the Best Way Inn in Rock Hill. Deputy Stagner kept watch on Quinn's car and called for backup, after which Deputies Rachel Gladden and Tony Bolin arrived at the hotel. The deputies verified with hotel management which room Quinn was staying in and learned that she had checked into the hotel the previous day. Before approaching Quinn's room, Deputy Gladden informed the other deputies that there would probably be drugs in the room.[1] The deputies then approached Quinn's room and knocked. Quinn did not immediately come to the door; instead, the deputies heard movement and whispering within the room. After a few minutes, Quinn partially opened the door but remained largely concealed behind it, which caused the deputies to worry that Quinn was concealing something or someone behind the door.

Quinn backed further into the room and the deputies entered the room to execute the arrest warrant. Upon entering the room, the deputies observed two persons under the covers of the beds, possibly trying to hide. The deputies ordered the two individuals under the bed covers to show their hands. One individual, Corey Catoe, complied with the deputies' orders and showed his hands, while the other individual, Johnson, showed his hands twice but put them back under the covers. The deputies testified they became increasingly concerned for their safety because of the possibility Johnson was concealing a weapon. At that point, the deputies detained Catoe and Johnson and observed gang-related tattoos on Johnson.

After detaining Catoe and Johnson, Deputies Bolin and Stagner performed a protective sweep of the hotel room, which included the bathroom and under the beds. The deputies testified the purpose of the protective sweep was to look for

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[1] Deputy Gladden testified that prior to her arrival at the hotel, she received information from a family member of Quinn that Quinn might be under the influence of methamphetamine.

weapons or other individuals in the room out of concern for officer safety. During the protective sweep of the room, Deputies Bolin and Stagner observed computer equipment throughout the room, much of it disassembled.[2] The deputies also observed syringes, razor blades, a white ash substance on the floor, and aluminum foil consistent with drug packaging. Deputy Stagner testified he observed a digital scale during the protective sweep. According to Deputy Stagner, the deputies did not open, move, or manipulate anything during the protective sweep. Quinn's arrest, the detention of Catoe and Johnson, and the protective sweep all occurred in a short amount of time. Deputy Stagner testified these events happened simultaneously.

Deputy Gladden called another deputy in order to obtain a search warrant from a magistrate, and the procured search warrant stated the following reason for searching the hotel room:

> Deputies arrested a female suspect from this room on a warrant for malicious injury to property. While deputies were in the room, deputies observed numerous laptop computers and electronic equipment, two unused capped syringes, a package of razor blades, and multiple small tin foil packages consistent with that of drug packaging. The female suspect taken into custody also has a prior drug related conviction.

It took approximately one hour for the search warrant to arrive at the scene, and during that time the deputies remained at the room but did not fully search it. After the warrant arrived, law enforcement found a bottle containing a mixture of liquid and methamphetamine. The mixture within the bottle was being processed in the

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[2] From our reading of Deputy Bolin's testimony, these computers were immediately visible upon the deputies' initial entrance into the room. According to Deputy Bolin, he believed the computers might be stolen, as the deputies had information that people were stealing computers and obtaining personal information from the computers' hard drives. Deputy Stagner testified the number of computers in the room was suspicious considering that Quinn had checked into the room the previous day, and he thought the individuals may have been using computer parts in narcotics production.

"Shake and Bake" method of methamphetamine production, under which some of the materials within the bottle are strained off during the production process. Investigator Nick Schifferle testified a reaction within the bottle had already produced methamphetamine; however, further steps were needed to create usable methamphetamine. According to Schifferle, the mixture within the bottle was treated as hazardous waste, as it was in an "extremely dangerous" state that could have caused an explosion.

Johnson was indicted for trafficking methamphetamine and the case proceeded to a jury trial in York County. Initially, Johnson was tried with Catoe. Johnson joined his co-defendant's pretrial motion to suppress evidence obtained in the search of the hotel room, contending that the search was illegal. During the suppression hearing, the State offered testimony regarding the search warrant and the underlying basis for the deputies' entry into the hotel room. At the end of the hearing, the circuit court ruled the evidence should not be suppressed and was admissible, finding the protective sweep was justified to ensure the deputies' safety. The circuit court also found the plain view exception applied to the evidence in the hotel room. Catoe entered a guilty plea amidst the suppression hearing.

Johnson joined Catoe's motion *in limine* contending that only the weight of the finished product of methamphetamine should count towards the weight of the substance. During the State's case, Johnson reiterated that argument in objecting to testimony concerning the weight of the mixture of liquid and methamphetamine and asserting the weight of the mixture should not come into evidence. The circuit court stated that, as it read the relevant statutes concerning methamphetamine, the legislature intended for the weight of methamphetamine to include the weight of any material, compound, mixture, or preparation containing methamphetamine. Subsequently, the circuit court ruled that all of the mixture would count as methamphetamine. After the circuit court's ruling, defense counsel objected on the ground that the statute was overly broad and unconstitutional; this objection was overruled. Additionally, the circuit court prohibited defense counsel from making any argument to the jury that all of the mixture could not be considered methamphetamine. The jury found Johnson guilty of trafficking methamphetamine in an amount of twenty-eight grams or more, but less than one hundred grams, and the circuit court sentenced him to twenty-eight years' imprisonment. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in denying Johnson's motion to suppress evidence stemming from a warrant he alleges was obtained without probable cause after an illegal entry and warrantless search?

II. Did the circuit court err in ruling as a matter of law that all of the mixture which contained methamphetamine would count towards its weight, admitting such evidence, and ordering defense counsel not to argue that fact to the jury?

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010) (quoting *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "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. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

LAW/ANALYSIS

I. Circuit Court's Denial of Johnson's Motion to Suppress Evidence

Johnson argues the exigent circumstances and search incident to arrest exceptions do not apply to this case, as Quinn had been arrested and posed no threat prior to the deputies' search of the hotel room. He maintains that even if the deputies' claims regarding potential danger had merit, any danger was precipitated by their needless, warrantless entry into the room. Johnson claims the circuit court erred in ruling the plain view exception applied, as the deputies' initial intrusion affording them the plain view was not lawful. Additionally, he asserts the incriminating nature of the evidence was not immediately apparent, as the deputies only observed computer equipment during their initial entry into the room. Johnson contends the

deputies observed the other evidence listed in the warrant after repeatedly entering and re-entering the room. Therefore, Johnson considers all of the evidence from the hotel room to be fruit of the poisonous tree that should have been suppressed.

"When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). "'The appellate court will reverse only when there is clear error.'" *Id.* (citing *State v. Missouri*, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004)). "[T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).[3]

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[3] In *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011), this court considered the scope of an appellate court's review of the record in a Fourth Amendment case:

> *Tindall* articulated the standard of review subsequently repeated in *Wright*. However, *Tindall's* ensuing discussion included a footnote explaining that this standard of review requires a two-part analysis: (1) whether the record supports the trial court's factual findings and (2) whether those factual findings establish reasonable suspicion or probable cause. *See Tindall*, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5 ("While we acknowledge that we review under the deferential 'any evidence' standard, this Court still must review the record to determine if the trial judge's ultimate determination is supported by the evidence. In short, we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that the officer had reasonable suspicion of a serious crime to justify continued detention of Tindall." (citation omitted)).

Morris, 395 S.C. at 606 n.2, 720 S.E.2d at 471 n.2 (alteration in original).

Generally, a warrantless search is *per se* unreasonable and thus violates the Fourth Amendment's prohibition against unreasonable searches and seizures. *State v. Abdullah*, 357 S.C. 344, 350, 592 S.E.2d 344, 348 (Ct. App. 2004). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." *Id.* "[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). "The exigent circumstances doctrine provides an exception to the Fourth Amendments [sic] protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." *Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348. A warrantless search is justified under the exigent circumstances doctrine where there is a risk of danger to police. *Id.* (citing *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)). "In such circumstances, a protective sweep of the premises may be permitted." *Id.* (citing *Maryland v. Buie*, 494 U.S. 325, 337 (1990)). "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

In the present case, the deputies approached Quinn's hotel room to execute an arrest warrant. After the deputies knocked, Quinn delayed coming to the door for a few minutes; during that time the deputies heard movement and whispering from within the room. Quinn eventually cracked the door open, remaining largely concealed behind it, which caused the deputies to become concerned and uneasy about what Quinn might have been concealing behind the door. As the deputies entered the room to arrest Quinn, they observed computers throughout the room in various states of disassembly. Deputies Bolin and Stagner both suspected these computers might have been used in illegal activity. Additionally, the deputies saw Catoe and Johnson in the room's beds under the covers, possibly hiding. After the deputies ordered them to show their hands, Catoe complied but Johnson twice showed his hands and put them back under the covers, which caused the deputies to worry that Johnson had a weapon. Deputy Stagner detained Johnson and observed gang-related tattoos on him. The deputies immediately performed a protective sweep of the room out of concern for officer safety; according to Deputy Stagner these events in the hotel room all happened simultaneously. We find these circumstances rightfully compelled the protective sweep to ensure the deputies'

safety. *See State v. Brown*, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (finding that a protective sweep of a motel room was justified because it was reasonable to believe that concealed persons within the room might pose a danger); *Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348 (noting a protective sweep may be permitted under the exigent circumstances doctrine where there is a risk of danger to police); *id*. at 352, 592 S.E.2d at 348 (holding the totality of the circumstances gave officers reasonable grounds from an objective standard for a search of the premises with a goal of securing the scene against perpetrators); *id.* at 352, 592 S.E.2d at 349 (stating it was improvident to presuppose that subduing the defendant foreclosed the officers' objectively reasonable need to perform a protective sweep of the premises). While Johnson claims the deputies viewed the evidence by improperly entering and re-entering the room while waiting for the warrant, the deputies testified that the evidence giving rise to probable cause was all visible during the protective sweep. The deputies maintained they did not manipulate the evidence in any way. Additionally, the reasonableness of the deputies' conduct can be inferred from their decision to obtain a search warrant before fully searching the room. *See Abdullah*, 357 S.C. at 352, 592 S.E.2d at 348 (holding "the reasonableness of the officers' conduct may be further gleaned from the decision to secure a warrant to seize the contraband once the protective sweep was concluded and exigent circumstances unquestionably ceased to exist").

We disagree with Johnson's contention that this case resembles the facts of *Brown*, 289 S.C. 581, 347 S.E.2d 882, in which our supreme court found exigent circumstances did not excuse a warrantless search. In *Brown*, law enforcement never obtained an arrest or search warrant despite performing surveillance of a murder suspect's motel room for two and one-half hours. *Id.* at 586, 347 S.E.2d at 885. Law enforcement eventually called the suspect via phone and ordered him and any others to exit the room. *Id.* After the suspect and others exited the room and were arrested, law enforcement performed a protective sweep of the room. *Id.* Our supreme court noted that the protective sweep was justified because it was reasonable to believe that concealed persons within the room might pose a danger. *Id.* at 587, 347 S.E.2d at 886. However, the court held the State failed to meet its burden of proof to justify the warrantless search under the exigent circumstances exception because the State could not explain law enforcement's failure to obtain any type of warrant during the lengthy surveillance period. *Id.* at 587-88, 347 S.E.2d at 886. Such facts are distinguishable from the case at hand, as the deputies

had a valid arrest warrant and the entry and protective sweep of the hotel room were immediately incident to executing that arrest warrant.

"Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." *State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). To satisfy the "plain view" exception, two elements must be met: "(1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *Wright*, 391 S.C. at 443, 706 S.E.2d at 327.

We find the initial intrusion which afforded the authorities the plain view of the evidence was lawful. The validity of Quinn's arrest warrant has not been challenged, and "police are allowed to enter a hotel room to arrest an occupant when acting pursuant to a valid arrest warrant." *Goins v. State*, 397 S.C. 568, 574, 726 S.E.2d 1, 4 (2012). Johnson claims in his brief that Quinn was in custody when the deputies entered the hotel room, and thus the initial warrantless search of the room was illegal. He cites *United States v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006) for the proposition that "[e]xigent circumstances, however, do not meet Fourth Amendment standards if the government deliberately creates them." However, each of the deputies testified that they entered the hotel room to arrest Quinn after she backed further into the room; therefore, the deputies' initial intrusion into the room was justified by the execution of a valid arrest warrant. Furthermore, as the deputies' protective sweep shortly after entering the room was justified through the exigent circumstance of ensuring officer safety, the deputies' intrusion that afforded them the plain view of the evidence was lawful.

We also find the incriminating nature of the evidence was immediately apparent to the deputies. Upon initially entering the room, the deputies observed an inordinate number of computers, many in states of disassembly. Deputy Bolin testified the presence of multiple disassembled computers constituted probable cause that a crime had been committed because of the "amount of time that [the occupants] were in the hotel room, the amount of computers in the hotel room, and the work that was being done to them." He suspected the computers had been stolen and were being used to extract personal information from the hard drives. Deputy Stagner stated the large number of computers and equipment was suspicious given

that Quinn had checked into the hotel the previous day; he also noted that computers could be used in manufacturing narcotics. During the protective sweep, the deputies observed two uncapped syringes, a package of razor blades, and aluminum foil packaging consistent with drug packaging. While not stated in the search warrant, Deputy Stagner also observed a digital scale. The deputies considered this evidence indicative of illegal drug activity.

The testimony presented at the suppression hearing indicated that the incriminating nature of the evidence in the hotel room was immediately apparent to the deputies. Furthermore, Deputy Gladden testified that prior to her arrival at the hotel, she received information that Quinn might be under the influence of methamphetamine. Based on the totality of the circumstances, we find the magistrate had a substantial basis for concluding probable cause existed to justify the issuance of a search warrant. *See State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (stating a magistrate may issue a search warrant only upon a finding of probable cause); *State v. Weston*, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A reviewing court should give great deference to a magistrate's determination of probable cause."); *State v. Davis*, 354 S.C. 348, 356, 580 S.E.2d 778, 782 (Ct. App. 2003) (noting that a magistrate making a probable cause determination should '"make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place'" (alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 214 (1983))); *State v. Dupree*, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003) ("An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. This review, like the determination by the magistrate, is governed by the 'totality of the circumstances' test." (internal citations omitted)). The search warrant obtained for the hotel room was properly founded on probable cause resulting from items in plain view of deputies lawfully conducting a protective sweep. Therefore, we hold the circuit court acted within its discretion in admitting the evidence obtained in the search of the hotel room.

II. Circuit Court's Rulings Concerning the Weight of Methamphetamine

Section 44-53-375(C) of the South Carolina Code (Supp. 2013)[4] states:

> (C) A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base" . . . .

The statute goes on to prescribe sentencing based on the amount of methamphetamine involved. *See* S.C. Code Ann. § 44-53-375(C)(2) (Supp. 2013) (setting the punishment for "trafficking in methamphetamine or cocaine base" in an amount of twenty-eight grams or more, but less than one hundred grams).

Section 44-53-110 of the South Carolina Code (Supp. 2013)[5] defines methamphetamine: "'Methamphetamine' includes any salt, isomer, or salt of an isomer, *or any mixture or compound containing amphetamine or methamphetamine*. Methamphetamine is commonly referred to as 'crank', 'ice', or 'crystal meth'" (emphasis added). Additionally, subsection 44-53-210(d)(2) (Supp.

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[4] The code provision in effect at the time Johnson committed the offense in 2011 has not since been amended; thus, we cite to the current version of section 44-53-375.

[5] Section 44-53-110 has recently been amended by 2014 S.C. Laws Acts 221. The relevant language quoted here is not affected by the amendment, but it is now found at subsection 44-53-110(28).

2013)[6] states Schedule II narcotics include: "Unless specifically excepted or unless listed in another schedule, *any material, compound, mixture, or preparation which contains any quantity of the following substances* having a stimulant effect on the central nervous system: . . . *Methamphetamine, its salts, and salts of isomers*" (emphasis added). In regards to the weight of controlled substances, section 44-53-392 of the South Carolina Code (Supp. 2013)[7] states, "Notwithstanding any other provision of this article, the weight of any controlled substance referenced in this article is the weight of that substance in pure form *or any compound or mixture thereof*" (emphasis added).

The language of section 44-53-392, which defines the weight of methamphetamine as "the weight of that substance in pure form or any compound or mixture thereof," is plain and unambiguous, and clearly and definitely includes a mixture containing liquid and methamphetamine. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). "As such, a court must abide by the plain meaning of the words of a statute." *Id*. "'This Court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation.'" *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010) (quoting *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 273-74, 692 S.E.2d 516, 519 (2010)). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" *Id*. (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). We are convinced the plain

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[6] The code provision in effect at the time Johnson committed the offense in 2011 has not since been amended; thus, we cite to the current version of section 44-53-210.

[7] The code provision in effect at the time Johnson committed the offense in 2011 has not since been amended; thus, we cite to the current version of section 44-53-392.

and ordinary meaning of the statute defines the weight of methamphetamine to include the weight of the mixture of liquid and methamphetamine at issue in this case.

We do not agree with Johnson's contention that the legislature requires the methamphetamine to be usable methamphetamine, nor do we agree that the statute disregards the weight of byproducts in the manufacturing process. Subsection 44-53-376(A) of the South Carolina Code (Supp. 2013)[8] states, "It is unlawful for a person to knowingly cause to be disposed any waste from the production of methamphetamine or knowingly assist, solicit, or conspire with another to dispose of methamphetamine waste." Johnson cites subsection 44-53-376(A) in arguing that South Carolina drug statutes recognize that methamphetamine contains unusable by-products, and "any mixture" of methamphetamine was not intended to include the waste from the production of the drug. We disagree with this argument, as the plain and unambiguous language of sections 44-53-110, 44-53-210, 44-53-375, and 44-53-392 clearly and definitely includes a mixture containing liquid and methamphetamine. Additionally, section 44-53-392 of the South Carolina Code (Supp. 2013) states, "*Notwithstanding any other provision of this article*, the weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound or mixture thereof" (emphasis added).

Johnson argues the circuit court improperly relied on *State v. Kerr*, 299 S.C. 108, 382 S.E.2d 895 (1989), in ruling on this issue. In *Kerr*, our supreme court held section 44-53-370, by its clear and unambiguous terms, applied to the weight of a mixture containing cocaine and not merely the weight of the cocaine in its pure form. *Id.* at 109, 382 S.E.2d at 896. The court then quoted from *Sheriff of Humboldt Cnty. v. Lang*, 763 P.2d 56, 58-59 (Nev. 1988), to express the rationale behind the statute, explaining that diluted cocaine increases the amount of consumption and potential harm. *Kerr*, 299 S.C. at 109-10, 382 S.E.2d at 896-97. Johnson points out that this rationale does not exist with respect to unfinished mixtures of methamphetamine. However, the circuit court never attributed the reasoning expressed in *Kerr* and *Lang* to the methamphetamine statute; in fact, the

[8] The code provision in effect at the time Johnson committed the offense in 2011 has not since been amended; thus, we cite to the current version of section 44-53-376.

court noted that this reasoning would not apply to an unfinished mixture of methamphetamine. Instead, the circuit court found that the statutory language regarding methamphetamine was similar to the unambiguous statutory language in *Kerr*, and the court presumed the legislature had considered the "extremely dangerous" process of manufacturing methamphetamine. The statutory language deemed clear and unambiguous in *Kerr* read, "The weight of any controlled substance in this subsection includes the substance in pure form or any compound or mixture of the substance." *Id.* at 109, 382 S.E.2d at 896 (emphasis omitted) (quoting S.C. Code Ann. § 44-53-370(e) (1985)). This language is nearly identical to the language of section 44-53-392, which we find similarly clear and unambiguous.

Johnson notes that some federal and state courts use the "market-oriented" approach when determining the weight of methamphetamine. *See* 21 U.S.C. § 841(b)(1)(A)(viii) (setting the punishment for a violation involving "50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers"); *Chapman v. United States*, 500 U.S. 453, 461 (1991) ("Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence."). We find this argument unpersuasive. Unlike the states from which Johnson cited case law[9], we find no authority, either in statute or in common law, in which this state has adopted or modeled itself after federal drug sentencing laws or the Federal Sentencing Guidelines, which distinguish between methamphetamine and a mixture of methamphetamine.

Johnson also contends the circuit court violated his Sixth Amendment right to a jury trial when the court precluded him from arguing to the jury that the entire weight of the mixture could not be counted against him. He alleges this error deprived him of a trial by jury on an essential element of the offense. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (noting a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt" (alteration in original)

[9] Johnson cited *State v. Magness*, 165 S.W.3d 300, 303-04 (Tenn. Crim. App. 2004), and *State v. Slovik*, 71 P.3d 159, 161-63 (Or. Ct. App. 2003).

(quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995))). We find the circuit court did not err in precluding Johnson from making this argument to the jury, as this argument is an erroneous statement of law. *See State v. Portee*, 278 S.C. 260, 261, 294 S.E.2d 421, 422 (1982) (finding it improper when a prosecutor made an erroneous statement of law to the jury).[10]

CONCLUSION

For all of the foregoing reasons, the decision of the circuit court is

AFFIRMED.

HUFF and PIEPER, JJ., concur.

[10] As we do not find the circuit court erred in concluding the weight of the mixture was to be considered, we need not address the State's harmless error argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues when its determination of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Henry Haygood, Appellant.

Appellate Case No. 2012-211961

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5247
Heard June 4, 2014 – Filed June 30, 2014

REVERSED AND REMANDED

Breen Richard Stevens, of Orangeburg, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General John Croom Colvin Hunter, both of Columbia, for Respondent.

HUFF, J.: Henry Haygood was convicted of criminal domestic violence (CDV) in magistrate's court. Upon appeal to the circuit court, his conviction was affirmed. We reverse and remand for a new trial.

FACTUAL/PROCEDURAL HISTORY

Haygood appeared before Magistrate Samuel A. Daily for a bench trial on the charge of CDV. The State presented Lieutenant Lacra Jenkins as its only witness,

while Haygood presented no evidence at his trial. According to the magistrate's return,[1] Lt. Jenkins "testified as to what took place during his initial investigation, after he responded to an alleged CDV call" on March 31, 2008. The return indicates the lieutenant testified as follows:

> Upon arrival he stated that the victim[,] Towanna Haygood[,] was very upset. During his investigation he stated that the alleged victim, Towanna Haygood[,] stated to him that her husband beg[a]n fighting her in the bedroom and he stated to her that he was going to kill her. Lt. Jenkins then testified that Mrs. Haygood stated that Mr. Haygood went to the bedroom closet and retrieved a brown in color shotgun and that her 14 [year-old] son struggle[d] with him to take the shotgun away from him. Mrs. Haygood then told him that Mr. Haygood reached in his pants pocket where he keeps a small handgun at times. She then grabbed his pants pocket causing some small bullets to fall to the floor. She stated to him that Mr. Haygood then went outside the resident but came back and punch[ed] a hole in the bedroom closet. Lt. Jenkins stated that when he arrived on the scene he observed Mr. Haygood being highly intoxicated. When he tried talking to him[,] he beg[a]n using profanity, stating that this was his house and that he would do anything he wishes. Lt. Jenkins further testified that Henry and Towanna Haygood were married at the time of the incident and ha[d] a child in common.

As to objections and rulings during the trial, the return indicates trial counsel objected to the State's "introduction of verbal statements made by the alleged victim to the investigating officer" that were "pertaining to allegations of what [Haygood] did on the date [in] question." It additionally notes the State took the position that the officer's duty, after being dispatched to an alleged CDV, "was to do an investigation of the incident and be prepared to testify as to the facts (during his investigation) at trial," and that the testimony in question qualified as an excited

[1] The return indicates these proceedings were recorded electronically. However, Haygood's trial counsel informed the circuit court that when she requested a copy of the recording, she was told the recording was no longer available.

utterance. The magistrate overruled Haygood's objection, "agree[ing] with the State that in some criminal domestic violence [cases] the investigating officer of the alleged incident should be allowed to testify as to the finding of facts during his investigation." The magistrate found Haygood guilty of CDV and sentenced him to thirty days in jail or a fine of $2,130.00, suspended upon completion of a batterer's intervention program.

Haygood appealed his conviction to the circuit court on the ground that the introduction of the alleged verbal statements violated his Sixth Amendment right to confront witnesses against him pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), arguing the alleged victim was not unavailable for trial and the defense had no opportunity to cross examine the victim such that it was error to admit the testimonial statements. In argument before the circuit court, trial counsel noted she had objected on the basis of *Crawford* to the State's attempt to introduce oral statements given by the victim though the officer. Counsel further recounted for the circuit court that the State had argued the information in the oral statement by the victim was an excited utterance and she again had objected to admission of the evidence before the magistrate based on *Crawford*, noting hearsay was not the issue. Trial counsel reiterated to the circuit court that the magistrate ruled the testimony of the officer was admissible as an excited utterance, but that was not her objection. Rather, her argument was based on *Crawford*, as the officer was eliciting testimony on statements made by the alleged victim and the alleged victim was not present for her to have an opportunity to cross-examine. Counsel asserted that, pursuant to *Crawford*, the State had the burden of proving a victim was unavailable and that the defendant had a previous opportunity to cross-examine the witness.

The solicitor agreed that this case turned on whether or not the statements were "testimony." However, he maintained the State disagreed that *Crawford* provided that excited utterances no longer qualified as exceptions to the rule against hearsay. He argued the magistrate decided the issue "based on whether or not the testimony the officer was giving was that of the testimony of variety," and the magistrate used the correct application of law in deeming it to be an excited utterance exception to hearsay and "not testimony." The solicitor further distinguished the matter at hand from *Crawford* on the basis that *Crawford* involved a recorded statement made during a police interrogation, whereas the statement in the case at hand was made to an officer arriving at the scene and was nontestimonial and qualified as an excited utterance. The solicitor argued, in this case, the magistrate

heard testimony that the officer arrived shortly after the incident,[2] weapons were involved, and the victim's child was involved, showing the victim was in an excited state. Thus, the solicitor maintained, "because the statement was taken immediately after the start of the event while [the declarant] was still under stress from the start of the event," the testimony met every element of an excited utterance.

The circuit court took the matter under advisement and thereafter issued an order denying Haygood's appeal. In its decision, the circuit court noted Haygood's appeal was based on the magistrate's admission of a statement by the victim which was testified to by the responding officer. The court then stated, "[Haygood] claims that this statement should be excluded based on the fact that it is hearsay." After evaluating the statement under Rule 803(2), SCRE, the circuit court found the statement qualified as an excited utterance and found it admissible as an exception to the rule against hearsay. The circuit court additionally found the matter at hand distinguishable from *Crawford* on the basis that case dealt with a recorded statement taken in a custodial interrogation. Further, it determined the United States Supreme Court (USSC) deemed the statement in *Crawford* inadmissible, not because it fell within the excited utterance hearsay exception, but because it bore a particularized guarantee of trustworthiness. The circuit court then concluded the statements testified to by Lt. Jenkins were admissible under the excited utterance exception and, because the statements fell within a long established exception to the rule against hearsay, their admission did not violate the Confrontation Clause. This appeal follows.

ISSUE

Whether Haygood's Sixth Amendment right to confrontation was violated by the admission of testimonial hearsay under the excited utterance exception without an opportunity of cross-examination by the defense.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v.*

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[2] Our review reveals no evidence in the record concerning how soon after the incident occurred the officer arrived.

Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429-30, 632 S.E.2d at 848.

LAW/ANALYSIS

Haygood contends the circuit court violated his right to confrontation when it found testimonial hearsay admissible under the excited utterance exception to the rule against hearsay. Haygood first asserts the circuit court erred in finding the testimonial statements made by the alleged victim to the police did not violate the Confrontation Clause because the statements fell within the excited utterance exception to hearsay. He argues, under *Crawford*, the statements were testimonial in nature, and while the statements were arguably given in excited utterance, because they were testimonial in nature they required a Sixth Amendment confrontation by the defense. Haygood also argues the circuit court erred in distinguishing this case from *Crawford* on the bases that the statement in *Crawford* (1) was taken in a custodial interrogation and (2) was not an excited utterance. Lastly, in response to the State's assertion that the issue is not preserved for appellate review, Haygood contends trial counsel presented the arguments to both the magistrate and the circuit court, and both improperly conflated counsel's Sixth Amendment argument with the excited utterance hearsay exception. Based upon the improper admission of the testimonial statements, Haygood requests this court reverse his conviction and remand the matter for a new trial. We find the issue is properly preserved for our review, and agree with Haygood that admission of the statements in question violated his constitutional right to confrontation, requiring reversal of his conviction.

I. Preservation

"It is axiomatic that an issue cannot be raised for the first time on appeal." *State v. Cope*, 405 S.C. 317, 338-39, 748 S.E.2d 194, 205 (2013) (quoting *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012)). "For an issue to be properly preserved it has to be raised to and ruled on by the trial court." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). An argument advanced on appeal but not raised and ruled on below is not preserved. *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate

review." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "[T]his is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function." *Id.* at 329-30, 730 S.E.2d at 285. Though our appellate courts should follow longstanding precedent and resolve an issue on preservation grounds when it "clearly is unpreserved," it is "good practice for us to reach the merits of an issue when error preservation is doubtful." *Id.* at 330, 730 S.E.2d at 285.

Although the magistrate's return does not specifically mention *Crawford* or the Confrontation Clause, the return does indicate trial counsel objected to the State's "introduction of verbal statements made by the victim to the investigating officer" that "pertain[ed] to allegations of what [Haygood] did on the date [in] question." Additionally, the return indicates the magistrate overruled Haygood's objection, "agree[ing] with the State that in some criminal domestic violence [cases] the investigating officer of the alleged incident should be allowed to testify as to the finding of facts during his investigation." Thus, a review of the return shows the issue of whether Haygood's Sixth Amendment right to confrontation was violated by the admission of testimonial hearsay under the excited utterance exception without an opportunity of cross-examination by the defense is not "clearly . . . unpreserved." *Id.* Further, the colloquy between trial counsel, counsel for the State, and the circuit court judge during Haygood's appeal to the circuit court indicates this issue was in fact argued before the magistrate. Trial counsel explicitly stated to the circuit court that she informed the magistrate her objection was based on *Crawford*. The fact that trial counsel noted to the circuit court that the magistrate ruled the testimony was admissible as an excited utterance, in spite of the fact that hearsay was not her objection, is an indication that the magistrate believed the excited utterance exception to the hearsay rule was dispositive of trial counsel's *Crawford* argument. We do not agree, as the State propounds, that the argument before the circuit court shows Haygood conceded the magistrate never ruled on the *Crawford* objection. Rather, it simply indicates the magistrate overruled the *Crawford* objection, finding the excited utterance exception to be controlling. Additionally, the solicitor stated to the circuit court, "I agree that this case turns on what [trial counsel] spoke of, and that's specifically whether or not this [statement is] testimony. That's what *Crawford* speaks to." The solicitor also recounted for the circuit court that the magistrate "decided this issue of evidence based on whether or not the testimony the officer was giving was that of the testimony of variety," and the magistrate correctly determined the testimony was

admissible as a hearsay exception, "an excited utterance, [and it was] not testimony." Further, the solicitor specifically argued the statement in question was "not a testimonial statement," but was instead an excited utterance, and again proclaimed "[t]his is not a testimonial statement." The solicitor then attempted to distinguish *Crawford*. Based on the record before us, we find the issue is preserved for our review.[3]

II. Confrontation Clause Law

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

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[3] As previously noted, the trial proceedings were electronically recorded, but when trial counsel sought to obtain the recording in preparation for appeal, she was informed the recording was no longer available. Thus, we do not have the benefit of knowing what occurred at the trial level to determine exactly what arguments were made to the magistrate in regard to admission of this evidence and how the magistrate specifically ruled at that time. The State does not argue *Crawford*, and the Confrontation Clause was never raised to the magistrate, but only that such was never specifically ruled on by the magistrate. However, argument before the circuit court demonstrates the issue was raised to the magistrate, and the return indicates "[t]he court overruled [Haygood's] objections." We do not believe the defendant should be penalized by the loss of the recording and the vagueness of the magistrate's return on this point, especially in light of the fact that the appeal before the circuit court clearly indicates the matter was raised to the magistrate, and the State did not, on appeal to the circuit court, object based on error preservation. Additionally, though the State refers to section 18-7-80 of the South Carolina Code as granting the circuit court the authority to direct the magistrate to amend deficiencies in the return, and thus supporting its argument the matter is not preserved, this section simply allows the appellate court to direct a "further or amended return," should "the return be defective." S.C. Code Ann. § 18-7-80 (2014). There is nothing to indicate the circuit court or either of the parties believed the return was defective or that either party considered the issue not ruled upon by the magistrate or in any way unpreserved for review. Finally, the matter is clearly preserved as far having been raised to the circuit court acting as an intermediate appellate court. *Cf. State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("An argument that is not raised to an intermediate appellate court is not preserved for review by this Court.").

witnesses against him." U.S. Const. amend. VI. "The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). An analysis of three seminal USSC cases leads us to the conclusion that the admission of the statements at hand violated Haygood's Sixth Amendment confrontation rights.

A. *Crawford v. Washington*

In *Crawford*, Michael Crawford was convicted of assaulting a man who allegedly tried to rape Crawford's wife. *Id.* at 38, 41. At trial, the State played for the jury the wife's tape-recorded statement to the police describing the stabbing, even though Crawford had no opportunity for cross-examination. *Id.* The State invoked the hearsay exception for statements against penal interest in its quest to admit the wife's statement. *Id.* at 40. Previously, the law set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), abrogated by *Crawford*, provided that the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability'" — a test that could be met by showing the evidence either (1) fell within a firmly rooted hearsay exception, or (2) bore particularized guarantees of trustworthiness. *Id.* at 40. The trial court admitted the statement of Crawford's wife on the basis it bore particularized guarantees of trustworthiness. *Id.* The USSC reversed Crawford's conviction, finding the State admitted the wife's testimonial statement against Crawford despite the fact that he had no opportunity to cross-examine her, thereby violating Crawford's Sixth Amendment rights. *Id.* at 68.

In revisiting *Roberts*, the USSC noted the Confrontation Clause "applies to 'witnesses' against the accused — in other words, those who 'bear testimony.'" *Id.* at 51. It then observed:

> "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of

> confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Id. at 51 (citation omitted). The USSC found "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation," and though the Confrontation Clause's ultimate goal is to ensure reliability of evidence, it commands that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. It determined "[t]he *Roberts* test allow[ed] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability," and it "replace[d] the constitutionally prescribed method of assessing reliability with a wholly foreign one." *Id.* at 62. The USSC concluded "[t]he unpardonable vice of the *Roberts* test . . [was] not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 63.

Upon reconsideration of *Roberts*, the USSC held the Confrontation Clause bars admission of testimonial hearsay statements of a witness absent from trial unless: (1) the declarant is unavailable to testify at trial, and (2) the accused had a prior opportunity to cross-examine the declarant. 541 U.S. at 53-54, 58, 68. Thus, even if a statement is admissible hearsay, the Confrontation Clause may operate to render the otherwise admissible hearsay evidence inadmissible if it is testimonial in nature. *See id.* at 68 (holding testimonial evidence implicates the Sixth Amendment, which demands unavailability and a prior opportunity for cross-examination, but the admission of nontestimonial hearsay evidence remains the province of each state's development of hearsay law). Included within the "core class of 'testimonial' statements" by the court in *Crawford* are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Id.* at 51-52. "Statements taken by police officers in the course of interrogations" are considered testimonial. *Id.* at 52; *See also id.* at 53 ("[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."). The USSC characterized its use of the term "interrogation" as being used in its colloquial sense, "rather than in any technical legal, sense." *Id.* at 53 n.4. Though it declined, in *Crawford*, to "spell out a comprehensive definition of 'testimonial,'" it noted, at a minimum, it applied "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." *Id.* at 68. (emphasis added).

B. *Davis v. Washington* and *Hammon v. Indiana*

Following the 2004 *Crawford* opinion, in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), the USSC took steps to "determine more precisely" which statements made pursuant to police interrogation are testimonial in nature. *Id.* at 822. Specifically, the court was tasked with determining whether statements made to law enforcement during a 911 call as well as statements made at a crime scene were "testimonial" and therefore subject to the Confrontation Clause. *Id.* at 817. There, the court dealt with two different domestic disturbance cases: one involving a victim's identification of her abuser in response to initial questions from a 911 emergency operator (*Davis*), and the other involving oral statements made by a victim to police, as well as an affidavit written and signed by the victim, provided at the scene, wherein the victim gave an account of what had occurred between her and her husband (*Hammon*). *Id.* at 817-18, 819-20. In *Davis*, the relevant statements were made in a 911 call wherein the operator ascertained the victim was involved in a domestic situation with Davis, the victim relaying at the time of the call that Davis was jumping on her and using his fists. *Id.* at 817. The police arrived within four minutes of the call and observed the victim in a shaken state with fresh injuries, frantically attempting to gather her belongings and her children so she could leave the residence. *Id.* at 818. In *Hammon*, after police responded to a reported domestic disturbance, they found the victim alone on her front porch, appearing "somewhat frightened," but stating to officers "nothing was the matter." *Id.* at 819. The victim's husband, who was in the kitchen, told the police he and his wife had been in an argument but "everything was fine now," and the argument between them had never become physical. *Id.* While one officer remained with the husband, another attempted to speak with the victim in the living room, again asking her what had occurred. *Id.* The husband made several attempts to participate in the victim's conversation with police, and the officer testified the husband became angry when he insisted the husband stay separated from the victim so the officer could investigate what had happened. *Id.* 819-20. After hearing the victim's account, the officer had her fill out and sign an affidavit, wherein the victim indicated her husband broke their furnace, shoved the victim onto the ground into broken glass, hit her in the chest, threw her down, broke lamps and a phone, tore up her van so she could not leave the house, and attacked the victim's daughter. *Id.* at 820.

In approaching its analysis of the two situations, the USSC stated as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements — or even all conceivable statements in response to police interrogation — as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. Additionally, the court noted, "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires [the courts] to evaluate." *Id.* at 822 n.1.

Applying this law to the facts of the two domestic violence cases, the USSC concluded the statements in *Davis* identifying the assailant in the course of the 911 call were nontestimonial, while the statements produced by the interrogation in *Hammon* were "inherently testimonial." *Id.* at 829, 830.

Specifically, as to the 911 call in *Davis*, the USSC noted as follows:

> When we said in *Crawford*, supra, at 53, 124 S.Ct. 1354, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in

> the terms of the 1828 American dictionary quoted in Crawford, " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " 541 U.S., at 51, 124 S.Ct. 1354. . . . A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

Id. at 826-27. The Supreme Court then discussed the differences between the call from the 911 victim in *Davis* and the interrogation of the wife in *Crawford*, noting as follows: (1) in *Davis*, the victim was speaking about events as they were actually occurring, rather than describing past events, while the wife's interrogation in *Crawford* took place hours after the events she described had occurred; (2) unlike the wife in *Crawford*, "any reasonable listener would recognize" that the victim making the 911 call in *Davis* was facing an ongoing emergency; (3) the nature of what was asked and answered in *Davis* was such that the elicited statements were necessary to be able to resolve the present emergency rather than simply to learn, as in *Crawford*, what had occurred in the past; and (4) there were distinct levels of formality between the two cases, with the wife in *Crawford* responding calmly at the station house to a series of questions with the officer-interrogator taping and making notes, while the victim in *Davis* provided frantic answers over the phone in an environment that was not tranquil or even safe. *Id.* at 827. Against this backdrop, the USSC concluded the circumstances of interrogation in *Davis* "objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency" and the caller in the 911 call was not acting as a witness, she was not testifying, and what she said was not "a weaker substitute for live testimony" at trial. *Id.* at 828. Accordingly, her statements identifying Davis as her assailant were not testimonial. *Id.* at 829.[4]

Applying the law to the facts in *Hammon*, however, led the USSC to conclude the statements in that case were testimonial in nature. *Id.* at 830. It found "it [was] entirely clear from the circumstances that the interrogation [in *Hammon*] was part

[4] It should be noted the USSC also cautioned that a conversation which begins as an interrogation to determine the need for emergency assistance may at some point evolve into testimonial statements once the emergency assistance purpose has been achieved. *Id.* at 828.

of an investigation into possibly criminal past conduct — as, indeed, the testifying officer expressly acknowledged." *Id.* at 829. The USSC noted no emergency was in progress at the time the statements were made, when the officers first arrived the victim told them things were fine, and when the officer questioned the victim a second time eliciting the challenged statements, "he was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" *Id.* at 829-30. Viewed objectively, the primary purpose of the interrogation in *Hammon* was to investigate a possible crime. *Id.* at 830. Additionally, the USSC noted, though the interrogation in *Crawford* was more formal, being tape-recorded at the station house following *Miranda*[5] warnings, the wife's interrogation in *Hammon* was nonetheless "formal enough" as it was conducted in a separate room, "away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigation.'" *Id.* Comparing the circumstances in *Hammon* to those in *Crawford*, the USSC noted as follows: (1) both declarants were actively separated from the defendant; (2) both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed; and (3) both took place some time after the events described were over. *Id.* Accordingly, the USSC held "[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Id.* Notably, the court declined to hold "*no* questions at the scene will yield nontestimonial answers," as officers called to investigate need to know whom they are dealing with so they might assess the situation, the threat to their safety, and any possible danger to a potential victim. *Id.* at 832. Thus, such exigencies may result in initial inquiries which produce nontestimonial statements. *Id.* However, in cases such as *Hammon*, where the "statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." *Id.*

C. *Michigan v. Bryant*

In 2011, the USSC issued another opinion addressing whether statements made to police after officers responded to an incident constituted testimonial evidence. In *Michigan v. Bryant*, ___, U.S.___, ___, 131 S.Ct. 1143 (2011), the USSC further

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[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

examined the primary-purpose test, expounding on the "ongoing emergency" discussed in *Davis*. *Id.* at 1156.

In *Bryant*, police officers responding to a radio dispatch found a man lying in a gas station parking lot, suffering from a gunshot wound to his abdomen. *Id.* at 1150. The victim subsequently died of his wounds; however, before he was removed from the scene, officers were able to speak with him for five to ten minutes, asking him, "'what had happened, who had shot him, and where the shooting had occurred.'" *Id.* During that discussion, the victim was able to tell officers that Bryant had shot him and was able to relate when and where the shooting occurred. *Id.* At Bryant's trial, officers were allowed to repeat in court what the victim had told them about the incident. *Id.* Bryant argued the victim's statements to police were testimonial under *Crawford* and *Davis* and were therefore inadmissible, while the prosecution argued the statements were admissible as excited utterances under the Michigan Rules of Evidence. *Id.* at 1151. It was undisputed the victim was unavailable at trial and Bryant had not been afforded a prior opportunity to cross-examine him. *Id.* The Supreme Court of Michigan concluded that the circumstances clearly indicated that the "primary purpose" of the officers' questioning was to establish the facts of an event that had already occurred, and was not to enable police assistance to meet an ongoing emergency. *Id.* It therefore held the admission of the victim's statements to police was reversible error. *Id.*

The USSC disagreed, holding that the circumstances of the interaction between the victim and the police objectively indicated that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency and, accordingly, the victim's identification and description of the shooter and the location of the shooting were not testimonial statements, such that their admission at trial did not violate Bryant's Confrontation Clause rights. *Id.* at 1150. In further analyzing which police interrogations produce testimony, thereby implicating a Confrontation Clause bar, the court first noted that not all those questioned by police are witnesses and not all interrogations by them are subject to the Confrontation Clause. *Id.* at 1153. It also noted "the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." *Id.* at 1155. Additionally, the court observed there may be circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony, and "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.*

"Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*

The USSC clarified an objective evaluation is the proper means to determine the matter stating, "To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' . . . which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 1156 (citation omitted). The court emphasized that the relevant inquiry is not the subjective or actual purpose of the individuals, but "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* Among the most important circumstances to consider in determining the primary purpose of the interrogation is whether there exists an ongoing emergency at the time of the encounter between the declarant and the police.[6] *Id.* at 1157. "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 1158.

The USSC also recognized that domestic violence cases have a narrower zone of potential victims than those situations involving threats to public safety, and because *Davis* and *Hammon* were domestic violence cases, the court "focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat to them." *Id.* However, it concluded "[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Id.* Noting "the duration and scope of an emergency may depend in part on the type of weapon employed," the court distinguished *Davis* and

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[6] Such is relevant because an emergency focuses the participants on something other than an attempt to prove past events which may be potentially relevant to later criminal prosecution. *Id.* "[B]ecause the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Id.* The court likened this logic to that justifying the excited utterance exception in hearsay law, noting excited utterances "are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood," and an ongoing emergency has a similar effect of focusing attention on response to the emergency. *Id.*

Hammon on the basis that those cases involved the use of fists by the assailant, while the emergency in *Bryant* involved the use of a gun. *Id.* However, it further noted, had Hammon been reported to be "armed with a gun," separation of him from the victim by a single household wall might not have been sufficient to end the emergency. *Id.* at 1159.

Additionally, the USSC again recognized that there are limitations as to whether an emergency is ongoing, noting a conversation which may begin as interrogation to determine the need for emergency assistance may evolve into testimonial statements, which portions should be excluded from evidence. *Id.*

> This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public.

Id.

The USSC also made clear that whether or not an ongoing emergency exists is not dispositive of the testimonial inquiry, but is simply a factor to be considered, albeit an important one. *Id.* at 1160. Another factor to consider is the informality of the encounter between a victim and police. *Id.* Observing that the questioning in *Bryant* "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion," the court determined those facts made *Bryant* distinguishable from the formal station-house interrogation in *Crawford*. *Id.*

Next the court observed, beyond the circumstances in which the encounter occurs, "the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." *Id.* The court emphasized that a combined inquiry that accounts for the actions and statements of both the declarant and the interrogator is required, with the primary purpose of the interrogation often being most accurately determined by looking at the contents of the questions and the answers. *Id.* at 1160-61.

The court ultimately summarized as follows:

> As we suggested in *Davis*, when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Id. at 1162 (footnote omitted).

Applying this analysis to the facts in *Bryant*, the USSC concluded "the circumstances of the encounter as well as the statements and actions of [the declarant] and the police objectively indicate[d] that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency,'" such that the victim's identification and description of his assailant and the location of the shooting were not testimonial hearsay and were not barred by the Confrontation Clause. *Id.* at 1166-67. In so finding, the court noted as follows:

As to the circumstances in which the encounter occurred, the court found the potential scope of the dispute, and therefore the emergency, in *Bryant* stretched more broadly than that in the domestic disturbance cases of *Davis* and *Hammon*, encompassing a potential threat to the police and the public. *Id.* at 1163-64. Additionally, *Bryant* involved the use of a gun, and while physical separation was sufficient to end the threat in Hammon, it did not necessarily end the threat in *Bryant*. *Id.* at 1164. Importantly, the court reiterated that "the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the 'primary purpose of the interrogation [was] to

enable police assistance to meet [the] ongoing emergency.'" *Id.* at 1165 (quoting *Davis*, 547 U.S. at 822).

Reviewing the statements and actions of the declarant the court noted, from the description of the victim's condition and report of his statements, it could not say that the primary purpose of a person in such a situation would be to establish or prove past events potentially relevant to later criminal prosecution. *Id.* As to the officers' statements and actions, the court observed the questions they asked — what happened, who had shot him, and where the shooting had occurred — were of the type necessary to allow the officers to access the situation, the threat to their safety, and the possible danger to the victim as well as the public. *Id.* at 1166. "In other words, they solicited the information necessary to enable them 'to meet an ongoing emergency.'" *Id.*

Finally, in considering the informality of the situation and the interrogation, the USSC found the situation in *Bryant* to be more similar to the "harried 911 call in *Davis* than the structured, station-house interview in *Crawford*," with "[t]he informality suggest[ing] that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lack[ing] any formality that would have alerted [the declarant] to or focused him on the possible future prosecutorial use of his statements." *Id.*

Based upon this analysis, the USSC held the circumstances of the encounter and statements and actions of the declarant and interrogators in *Bryant* objectively indicated the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. *Id.* at 1166-67. Accordingly, the declarant's statements were nontestimonial and therefore were not barred by the Confrontation Clause. *Id.* at 1167.

III. Application of Law to the Facts

As a threshold matter we agree with Haygood that the circuit court erred in finding the testimonial statements made by the victim to the police did not violate the Confrontation Clause because the statements fell within the excited utterance exception to hearsay. Though the circuit court stated in its order that Haygood "claim[ed] that this statement should be excluded based on the fact that it is hearsay," the record is clear that trial counsel twice argued to the circuit court that hearsay was not the issue the defense was raising, but it was arguing inadmissibility based on *Crawford*. Further, *Crawford* plainly provides that a statement which may qualify as admissible hearsay may otherwise be rendered

inadmissible by the Confrontation Clause if it is testimonial in nature. *See Crawford*, 541 U.S. at 68. ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law. . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."); *id.* at 56 n.7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse — a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."). Additionally, *Hammon* illustrates although a statement may be considered admissible as an excited utterance exception to the rule against hearsay, that exception will not save it from inadmissibility if otherwise barred by the Confrontation Clause. *See Hammon*, 547 U.S. at 820, 821 ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."). Indeed, while the State appears to have taken the position before the circuit court that the statements in this matter did not offend the Confrontation Clause because they qualified as excited utterances, it does not continue to take this stance on appeal.[7] Rather, it recognizes the paramount question is whether the statements made by the victim were testimonial, and maintains only testimonial statements require compliance with the Confrontation Clause while nontestimonial statements are generally admissible, subject to traditional limitations on hearsay evidence. Though a statement's qualification as an excited utterance is relevant in making the primary purpose determination, it is but a consideration. *See Bryant*, 131 S.Ct. at 1155 ("In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."). Thus, if the statements in question are in fact testimonial, they were erroneously found to be admissible by the circuit court based simply on a finding they qualified as an excited utterance exception to the rule against hearsay.

As well, we agree with Haygood that the circuit court erred in distinguishing this case from *Crawford* on the bases that the statement in *Crawford* (1) was taken in a custodial interrogation and (2) was not an excited utterance. First, the fact that the

[7] The State conceded at oral argument that, even if the statements qualified as excited utterances, they would be inadmissible if found to be testimonial in nature.

statements here were not taken at a police station during custodial interrogation, although a proper factor to consider, is not dispositive. *See Davis*, 547 U.S. at 827 (considering the difference in the level of formality between the interview in the station house in *Crawford* and the frantic 911 call in *Davis* as one of the factors in determining whether the statements from the 911 call were testimonial); *Hammon*, 547 U.S. at 830 (recognizing the *Crawford* interrogation was more formal, but determining the interrogation of Hammon's wife was "formal enough" in considering that factor and determining the wife's statements were testimonial); *Bryant*, 131 S.Ct. at 1166-67 (considering the informality of the situation and the interrogation as one of the factors in objectively evaluating the statements and actions of the parties to determine the primary purpose of the interrogation in deciding whether the Confrontation Clause bars admission of a statement). *Davis*, *Hammon*, and *Bryant* demonstrate *Crawford* may apply to prohibit statements regardless of whether statements are made to police in a custodial interrogation or outside of such confines. Second, absolutely nothing in *Crawford* limits its application to statements previously admitted based upon them bearing a particularized guarantee of trustworthiness. Indeed, the language in *Crawford* indicates that consideration of whether the Confrontation Clause is implicated does not evaporate simply because testimony happens to "fall within some broad, modern hearsay exception." *Crawford*, 541 U.S. at 56. Further, the *Hammon* case establishes the decision in *Crawford* expressly applies to the sort of statements made here, i.e., those found admissible based upon the excited utterance exception. Thus, the USSC did not seek to limit the provision of the Confrontation Clause by challenging only statements that bore a particularized guarantee of trustworthiness. Accordingly, we agree with Haygood that the circuit court erred in distinguishing this case from *Crawford* on the bases that the statement in *Crawford* was taken in a custodial interrogation and it did not involve an excited utterance. While such circumstances may be appropriate to consider in making an objective determination of the primary purpose of an interrogation in order to determine whether a statement is testimonial or nontestimonial, they are not dispositive of the issue.

Turning to the ultimate issue before us — whether the victim's statements are testimonial or nontestimonial — we note analysis of the case at hand is hampered by the fact that, not only do we not have available the specific questions and answers between the victim and Lt. Jenkins, we have only a summary of testimony from Lt. Jenkins as to what the victim said to him and little other information of the circumstances under which the statements were made. As noted by the State, the limited record before us makes it difficult to ascertain the circumstances

surrounding the encounter between the victim and the officer. However, upon considering the restricted scenario before us,[8] we find it sufficiently demonstrates the statements made by the victim were testimonial, and because there is no evidence the victim was unavailable and no evidence Haygood ever had the opportunity to cross-examine the victim, the admission of the statements violated Haygood's Sixth Amendment confrontation rights.

Summarizing the law, statements are "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," while they are considered nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis* and *Hammon*, 547 U.S. at 822. Further, *Bryant* edifies that "[t]o determine whether the 'primary purpose' of an interrogation is to enable police assistance to meet an ongoing emergency, which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." 131 S.Ct. at 1156 (citation omitted). The relevant inquiry is not the subjective or actual purpose of the individuals, but "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* Among the most important circumstances to consider in determining the primary purpose of the interrogation is whether there exists an ongoing emergency at the time of the encounter between the declarant and the police, and whether or not such an emergency exists and is ongoing "is a highly context-dependent inquiry." *Id.* at 1157, 1158. There are limitations as to whether an emergency is ongoing, as a conversation which may begin as interrogation to determine the need for emergency assistance may evolve into testimonial statements. *Id.* at 1159. Further, whether or not an ongoing emergency exists, although an important factor, is simply one factor to be considered in determining the primary purpose of an interrogation and is not dispositive of the testimonial inquiry. *Id.* at 1160. "[T]he

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[8] *See Bryant*, 131 S.Ct. at 1162-63 (noting the court was hampered in applying analysis to the facts of that case because (1) it did not have the luxury of reviewing a transcript of the conversation between police and the victim and (2) the pre-*Crawford* and *Davis* trial provided a record that had not been developed to ascertain the primary purpose of the interrogation, but nonetheless making the determination of its nontestimonial nature based upon the record before it).

existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, **the ultimate inquiry is whether the 'primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency**.'" *Id.* at 1165 (emphasis added) (quoting *Davis*, 547 U.S. at 822).

Objectively evaluating the circumstances in which the encounter occurred between the victim and Lt. Jenkins and the statements and actions of the victim and Lt. Jenkins, we find the primary purpose of the interrogation was not to enable Lt. Jenkins's assistance in order to meet an ongoing emergency but, rather, was to prove past events potentially relevant to later criminal prosecution.

Unlike *Davis*, the case at hand does not involve a 911 call, which is traditionally designed, not to prove or establish some fact from the past, "but to describe current circumstances requiring police assistance." *Davis*, 547 U.S. 827. We cannot say, as the USSC did in *Davis*, that any reasonable listener would recognize from the statements made by the victim at hand that she was facing an ongoing emergency or that the her statements were a plea for help "against a bona fide physical threat." *Id.* Though the restricted record before us does not give us the benefit of knowing specifically what questions were asked by Lt. Jenkins and what the victim answered, the testimony of Lt. Jenkins does not demonstrate, as it did in *Davis*, that the elicited answers of the victim were necessary to resolve a present emergency. Rather, the nature of the statements tend to indicate the information was elicited in order for Lt. Jenkins "simply to learn (as in Crawford) what had happened in the past." *Id.* Additionally, while we agree with the State that, based upon the imperfect record, it is difficult to ascertain the level of formality involved between Lt. Jenkins and the victim, there is nothing to suggest the victim here was frantic in speaking with Lt. Jenkins or that the environment was unsafe at the time the victim made her statements, as was the case in *Davis*. *Id.*

Though, as the State observes, Lt. Jenkins testified the victim was visibly upset when he arrived at the scene, there is simply no indication she remained in that state when she made the statements in question or that her statements were a cry for help. Notably, the victim in *Hammon* was characterized as "somewhat frightened" upon the arrival of the police, yet the USSC ultimately found her statements to be testimonial. *Hammon*, 547 U.S. at 819. The State also places much emphasis on the fact that Lt. Jenkins testified Haygood was highly intoxicated when he arrived on the scene, was hostile toward the officer, and told the officer "this was his house and that he would do anything he wishes." It is not clear at what point these maters occurred in relation to the victim's interview by the

officer and under what circumstances, thus it is difficult to say whether these matters lend support to the State's assertion that they indicated the domestic disturbance was ongoing. At any rate, we note the facts in *Hammon* likewise demonstrated some hostile and belligerent behavior by the husband when he attempted to participate in the victim's conversation with the police and became angry after he was rebuffed and separated from the victim. *Id.* at 819-20.

Further, we do not believe *Bryant* requires a finding that the statements in the case at hand were nontestimonial. First, unlike *Bryant*, this matter involved a domestic dispute, which the USSC in *Bryant* recognized is typically more limited in the scope of the emergency in terms of the threat to individuals other than the initial victim. *Bryant*, 131 S.Ct. 1158, 1163. The State, however, points to the fact that a gun was involved in this situation, asserting the scope of the emergency was heightened because the police found a gun in Haygood's possession. While *Bryant* recognized the involvement of a gun may create a continuing threat even in a domestic situation, as separation of the parties in a domestic matter by a single household wall might not be sufficient to end the emergency, *id.* at 1158-59, 1164, there is nothing in the record before us to indicate Haygood was actually armed with a gun at the time the police arrived, much less that he was in possession of such while the victim was giving her statement. Indeed, the record shows only that, while Haygood retrieved a shotgun during the dispute with the victim, the teenage son struggled with him to take the shotgun away, and though the victim knew Haygood kept a small handgun in his pocket "at times," when he reached in his pocket the victim grabbed the pocket causing small bullets, not a gun, to fall to the floor. At that point, Haygood went outside and then returned to punch a hole in the closet. Thus, there is no evidence, as the State suggests, that Haygood was armed with a gun at the time the police arrived at the residence such that any emergency had not yet ended. Indeed, under the evidence of record, while Haygood may have attempted to arm himself with a shotgun, the teenage son struggled with him to take the shotgun away during the incident. Simply put, there is nothing in the narrative to indicate there was any perceived danger from Haygood at the time the victim's statements were made to Lt. Jenkins. From the report of the victim's statements in this case, we cannot say that a person in her situation would have had a primary purpose of anything other than "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *Id.* at 1165.

Additionally, though certainly not as formal as the station-house interview in *Crawford*, neither did the matter at hand involve a "harried 911 call" as in *Davis*,

or the "fluid," and "somewhat confused," situation with the "[un]structured interrogation" that occurred in *Bryant*. *Id.* at 1166. Rather, based upon the circumstances in this case, it appears, like the situation in *Hammon*, the interrogation was "formal enough." *Hammon*, 547 U.S. 830. Though it is not clear whether or not the victim here was actively separated from Haygood as she spoke to Lt. Jenkins about the matter, there is nothing to indicate she or anyone else was in any danger. Rather, it appears from the context of the situation that the victim "deliberately recounted" for the officer "how potentially criminal past events began and progressed." *Id.*

Finally, the State correctly notes that the USSC in *Bryant* likened the underlying rationale for considering the existence *vel non* of an ongoing emergency as one of the most important factors in determining the primary purpose of an interrogation as being similar to that justifying the excited utterance exception to the rule against hearsay. *Bryant*, 131 S.Ct. at 1157. From this, the State extrapolates that the magistrate's determination that the victim's statements were admissible under the excited utterance exception "illustrates the freshness of the domestic disturbance." First, as previously noted, the fact that a statement may qualify as an excited utterance will not necessarily save it from exclusion under the Confrontation Clause. Further, there is absolutely no indication in the record that the police arrived and took the victim's statement very shortly after the domestic incident occurred. Thus, while the victim may have still been "under the stress of excitement caused by the event or condition,"[9] this does not necessarily indicate that the incident occurred immediately prior to the officer's arrival or that an emergency was ongoing at that point. Finally, even assuming *arguendo* that its qualification as an excited utterance is an indication of how "fresh" the statement is, the relationship in time between the domestic incident and the statement is certainly but one of the considerations in determining the context in which the victim made her statements to the police.

We find the case at hand is more similar to that of *Hammon*, wherein the interrogation occurred after police responded to the scene following a domestic disturbance. Most tellingly, we note the magistrate's return reflects that Lt. Jenkins

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[9] *See* Rule 803(2), SCRE (providing an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

"testified as to what took place during his initial *investigation* after he responded to an alleged CDV call," and that "*during his investigation*" the victim made the statements relating "what [Haygood] did on the date [in] question." Additionally, the return acknowledges it was the State's position that it was the officer's duty, upon being dispatched to the alleged CDV incident, "to *do an investigation* of the incident and be prepared to *testify as to the facts (during his investigation)* at trial," and that the magistrate agreed with the State that in some CDV cases, the "investigating officer . . . should be allowed to testify as to the *finding of facts during his investigation*." Thus the return indicates the statements from the victim were elicited as a result of Lt. Jenkins' investigation of the matter. Contrarily, there is nothing in the return to specifically indicate any of the statements were made in order to enable Lt. Jenkins to respond to or resolve a present emergency or threatening situation. The State cites to notations in the return's summary of testimony indicating Haygood was belligerent and intoxicated, and the victim was highly upset; however, these matters do not necessarily evince an ongoing emergency and the summary does not relate any such emergency. Further, though the State also maintains the return shows Haygood had been armed with one, and possibly two, guns, it does not indicate Haygood was still in possession of a weapon at the time the police arrived or that Lt. Jenkins had to disarm him. Moreover, the summary of Lt. Jenkins' testimony as to the victim's statements is a recitation of how Haygood's potentially past criminal behavior began and progressed, thus acting as a substitute for live testimony of the victim. Though the State asserts the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency, its characterization of it as such simply does not make it so. *See id.* at 832 n.6 ("While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are."). We find the primary purpose of the interrogation — resulting in the victim's statements — was to investigate a possible crime. *See id.* at 829 ("It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct — as, indeed, the testifying officer expressly acknowledged.").

Accordingly, after review of the record before us, we conclude an objective evaluation of the circumstances in which the encounter occurred as well as the statements and actions of the parties indicates the primary purpose of the

interrogation was not to enable police assistance to meet an ongoing emergency. Rather, the primary purpose of the interrogation was to investigate a possible crime, and the victim's statements to Lt. Jenkins are "an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination." *Id.* at 830. We therefore hold the victim's statements in this matter were testimonial, and because there is nothing to indicate the declarant was not unavailable to testify at trial and the accused did not have a prior opportunity to cross-examine the declarant, admission of the statements violated Haygood's Sixth Amendment right to confrontation.

CONCLUSION

Based on the foregoing, we reverse Haygood's conviction and remand for a new trial consistent with this court's opinion. We recognize the difficulties the State often encounters in prosecuting CDV cases. As noted by the USSC in *Davis* and *Hammon*, domestic abuse crimes are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial," and when this occurs, the offender reaps a windfall from the Confrontation Clause. 547 U.S. at 832-33. Nonetheless, our courts "may not . . . vitiate constitutional guarantees" because they may "have the effect of allowing the guilty to go free." *Id.* at 833. Therefore, we are constrained to reverse Haygood's conviction based on the erroneous admission of the inherently testimonial statements of his wife to the officer.

REVERSED AND REMANDED.

PIEPER, J., concurs in result only.

THOMAS, J.: I concur in the result reached in the majority opinion to reverse Haygood's conviction and remand for a new trial. I would reverse and remand exclusively on the grounds that the court erred in distinguishing this case from *Crawford v. Washington*, 541 U.S. 36 (2004), and subsequently failing to make a determination as to whether the victim's statements were testimonial or nontestimonial. While I am aware that an appellate court may engage in a *Crawford* analysis[10], I do not believe this court can perform such an analysis here

[10] *See State v. Ladner*, 373 S.C. 103, 114-15, 644 S.E.2d 684, 689-90 (2007) (finding a statement nontestimonial under *Crawford*).

given the summary of the testimony[11] and the lack of findings by the magistrate and the circuit court as to this issue. *See State v. Ladson*, 373 S.C. 320, 327-28, 644 S.E.2d 271, 275 (Ct. App. 2007) (reversing and remanding for a new trial where the record "lack[ed] the completeness and reliability necessary for this court to engage in meaningful appellate review").

[11] The proceedings in magistrate's court were electronically recorded pursuant to section 22-3-790 of the South Carolina Code (Supp. 2013). However, Haygood's trial counsel informed the circuit court that upon requesting a copy of the recording, she was told the recording was no longer available. Therefore, the only testimony from the trial in magistrate's court that we have before us is the magistrate's summary of the proceedings.