The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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N O T I C E

In the Matter of James Marshall Biddle

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on September 13, 2018, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 13, 2018

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

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N O T I C E

In the Matter of James L. Bell

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The Committee on Character and Fitness has now scheduled a hearing in this regard on September 13, 2018, beginning at 4:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
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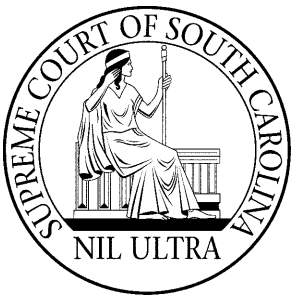

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
August 15, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Berkeley County. Effective September 4, 2018, all filings in all common pleas cases commenced or pending in Berkeley County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Calhoun	Cherokee
Chester	Clarendon	Colleton	Dorchester
Edgefield	Fairfield	Georgetown	Greenville
Greenwood	Hampton	Horry	Jasper
Kershaw	Lancaster	Laurens	Lee
Lexington	McCormick	Newberry	Oconee
Orangeburg	Pickens	Richland	Saluda
Spartanburg	Sumter	Union	Williamsburg
York	**Berkeley—Effective September 4, 2018**		

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
August 9, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Archie More Hardin, Appellant.

Appellate Case No. 2015-000516

Appeal From Orangeburg County
Maité Murphy, Circuit Court Judge

Opinion No. 5589
Heard February 15, 2018 – Filed August 15, 2018

AFFIRMED

Daniel Carson Boles, of Charleston; and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General John Benjamin Aplin, of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

MCDONALD, J.: Archie More Hardin appeals his convictions arising from the armed robbery of an Orangeburg T-Mobile store, arguing the circuit court erred in

(1) denying his motion for a continuance; (2) concluding the out-of-court identifications made by the victims were sufficiently reliable despite law enforcement's unduly suggestive procedure; and (3) admitting evidence collected in a second search of Hardin's apartment. We affirm.

Facts and Procedural History

On the morning of May 16, 2014, Hardin entered a T-Mobile store on St. Matthews Road in Orangeburg, where he spoke with employee Jarron Weaver about purchasing an iPad. Hardin left the store to make a phone call, reentered a few minutes later to discuss a credit check for the purchase, and left again. Shortly thereafter, two armed and disguised men entered the store and held Weaver and store manager, Thomas Sims, Jr., at gunpoint. The armed men directed Weaver and Sims to the back room, forced them to the floor, bound their hands and feet with duct tape, and threatened to shoot them if they looked up. One of the armed men found employee Kirstie Berry outside—he punched her in the face, pulled her into the store, pistol whipped her, and duct-taped her hands and feet. After stealing cell phones and other electronics, including Sims's personal iPad, the men exited the rear of the store; two witnesses saw them jump a fence and drive away in a gray, four-door Toyota sedan.

Using the "Find My iPad" application, the Orangeburg County Sheriff's Office (OCSO), the Richland County Sheriff's Office, and the City of Columbia Police Department (CCPD) collaborated to locate the stolen iPad. Investigator Elizabeth Schumpert of the OCSO relayed the location information to Corporal Leonard Cain, who tracked the iPad around Columbia. Cain first spotted the suspected getaway car at the Budget Inn on Sunset Boulevard, where he witnessed "an individual with a blue shirt on come outside of the hotel lobby door and get inside the vehicle." Cain watched the car "make a right turn on the side of the hotel building. . . . [a]nd then saw two individuals a few minutes later peeking their heads around the corner looking at [Cain]." Eventually, Cain met up with CCPD Investigator Darius Wade, and they followed the iPad track until it ended at an apartment complex on Bentley Court in Columbia.

When they arrived at the apartment complex, Cain, Wade, and other CCPD officers found Hardin walking to a vehicle matching the description of the Toyota sedan used as the getaway car in the T-Mobile robbery. Hardin admitted he rented the car but claimed to have loaned it to his friend "Black" earlier that day. Hardin

also stated that he and Black saw Cain at a gas station "at Edison and Beltline Boulevard" and thought Cain was Black's probation officer. The officers frisked Hardin, whom they found to be unarmed, and told him they were looking for a stolen iPad and a "black male, 5'10"[,] 190 to 200 pounds, [who] walks with a limp." Hardin gave written consent for the officers to search his person and his apartment.

Law enforcement first conducted a perimeter sweep of Hardin's apartment. When officers were unable to locate the iPad inside the apartment using the "play music" function, they searched outside and found the device in a plastic bag near a dumpster "about a hundred yards" from Hardin's building. Hardin claims the officers subsequently demanded that he re-sign the consent to search, which the officers had amended to include "any firearms, handguns." Hardin refused to re-sign. During a more comprehensive search of Hardin's apartment, the officers found a box of cell phones and two guns matching the description of those used in the robbery. Hardin told the officers the items belonged to Black and offered to help find him.[1]

While other police officers were searching for the stolen iPad, Cain texted a photograph of Hardin to Schumpert, who was still on scene at the Orangeburg T-Mobile; Schumpert showed the photo to the three employee victims. Despite their varying descriptions of the suspects' clothing, the victims positively identified Hardin as one of the armed robbers.

On September 3, 2014, the Orangeburg County Grand Jury indicted Hardin on three counts of kidnapping and one count each of armed robbery, assault and battery of a high and aggravated nature (ABHAN), and possession of a weapon during the commission of a violent crime.

On February 23, 2015, the circuit court heard Hardin's motions for a continuance, to suppress the evidence found in his apartment, and to exclude the victims' out-of-court identifications of the texted photograph. The court denied Hardin's pretrial motions and his subsequent motion for a directed verdict. Following the three-day trial, the jury found Hardin guilty of all charges. The circuit court denied Hardin's post-trial motions and imposed concurrent sentences of thirty years' imprisonment

[1] Law enforcement officers testified at trial that Black was still under investigation.

for armed robbery and each count of kidnapping, and twenty years' imprisonment for ABHAN. As to Hardin's charge for possession of a weapon during the commission of a violent crime, the court sentenced him to five years' imprisonment, to run consecutive to the other sentences.

Law and Analysis

I. Motion for a Continuance

Hardin sought a continuance before his trial, which was set to begin on February 23, 2015, asserting that until February 17, 2015, it was his understanding that the State had sent certain DNA evidence and latent fingerprints to the South Carolina Law Enforcement Division (SLED) for testing. Citing *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012)[2] and *Holmes v. South Carolina*, 547 U.S. 319 (2006),[3] Hardin argued he was entitled to the continuance because (1) the State utilized its unconstitutional control of the docket to schedule his trial before forensic evidence had been tested, and (2) the State's denial of access to the DNA evidence for testing effectively hindered his fundamental right to prepare and present a full and complete defense, including a potential defense of third-party guilt. In response,

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[2] *See id.* at 436, 735 S.E.2d at 469 (holding "section 1-7-330 is unconstitutional beyond a reasonable doubt"); S.C. Code Ann. § 1-7-330 (2005) ("The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor[,] and the solicitor shall determine the order in which cases on the docket are called for trial. *Provided*, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term.").

[3] *See id.* at 329–31 (finding South Carolina's application of "arbitrary" third-party guilt rule focusing on strength of prosecution's case with "little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence" did not rationally serve the end third-party guilt evidentiary rules were designed to further and "violate[d] a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'" (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

the State argued the DNA taken from the Toyota and the firearms seized from Hardin's apartment could not possibly exculpate him because his co-defendant had not yet been apprehended. The State further argued it was proper that it controlled the docket in Hardin's case because the case was less than a year old. The circuit court ultimately denied Hardin's continuance motion.

Hardin argues the circuit court erred in declining to continue the trial because the DNA evidence the State failed to submit for analysis to SLED—and which he sought to have his expert examine—was possibly exculpatory in nature. Relying on *State v. Tanner*, 299 S.C. 459, 385 S.E.2d 832 (1989), Hardin contends he made more than the required showing that he could have introduced additional relevant evidence had he been given more time. Because of the nature of the evidence at issue here, we find Hardin's reliance on *Tanner* misplaced.

In *Tanner*, the defendant was arrested and charged with three counts of felony driving under the influence. 299 S.C. at 460, 385 S.E.2d at 833. Following the accident, law enforcement collected DNA samples from Tanner's vehicle. *Id.* at 462, 385 S.E.2d at 834. Although Tanner may have become aware of the existence of these samples prior to trial, the State informed him they were lost or misplaced in response to at least six inquiries and a discovery motion. *Id.* Nevertheless, SLED brought the untested DNA samples to court, where the State informed Tanner of their availability ten minutes before the pretrial hearing. *Id.* Tanner moved for a continuance to either conduct an independent examination of the DNA samples or wait for SLED to complete an analysis. *Id.* The circuit court ruled the State could not use the samples in its case but denied Tanner's request for a continuance. *Id.* Our supreme court reversed, holding the circuit court erred in failing to consider the potential exculpatory value of the DNA samples because "the defendant has satisfied the *Squires* criteria of demonstrating other evidence that could have been produced[] and other points in his behalf that could have been raised." *Id.*

The untested evidence in this case differs from that in *Tanner*. Here, the DNA evidence was not critical to the issue of Hardin's guilt or innocence. The three employee victims never claimed one perpetrator acted alone; all testified that two armed and disguised men held them at gunpoint, bound their hands and feet with duct tape, and robbed the store. At least one of the suspects is still at large, and the State repeatedly emphasized it did not submit the DNA evidence for analysis because it is "SLED's policy" not to analyze such evidence if one suspect is in

custody while another remains at large.[4] Law enforcement recovered two firearms from inside Hardin's apartment and collected DNA from the Toyota sedan, which Hardin admittedly rented and allegedly loaned to Black. Thus, the DNA evidence—from a rental car likely occupied by many individuals over time—could not have exculpated Hardin. The results of properly testing such evidence could only be neutral or possibly even inculpatory.

The primary defense in *Tanner* was that the defendant was not the driver at the time of the accident. Thus, any evidence of the victim's hair or blood on the driver's side of the vehicle could have supported Tanner's contention that he was merely a passenger. Here, however, Hardin failed to show how the presence or absence of his DNA in the rented Toyota or on the guns could have actively supported his third-party guilt defense when his co-defendant was still at large.

Law enforcement also collected fingerprints from a Nexus box,[5] an iPhone, and the rental car; however, under direct comparison, these prints did not match Hardin's.[6] Like the DNA, the State did not submit for analysis any of the duct tape used to bind the victims' hands and feet. But because the victims testified the robbers were wearing gloves, we agree with the circuit court that any latent fingerprints or "touch DNA" on the tape could not have been helpful to Hardin's defense.[7]

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[4] It is unclear whether this was SLED's policy or simply a decision by the State in this case. In any event, witnesses for the State testified there was an ongoing investigation regarding the unapprehended accomplice and that some of the DNA evidence "may" be tested for any subsequent prosecution.

[5] Sims testified T-Mobile kept old paperwork in Nexus boxes.

[6] Investigator William Ketcherside conducted a direct comparison of the fingerprints collected in the investigation to Hardin's fingerprints; they did not match. None of the collected fingerprints were run through the Automated Fingerprint Index System (AFIS).

[7] "The term touch DNA refers to DNA that is left behind after a person touches or otherwise comes into direct contact with a physical item." Daniel M. Hart, *Constitutional Issues Raised by the Development of Microbial Cloud Analysis*, 33 Syracuse J. Sci. & Tech. L. 74, 93–94 (2017).

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." *State v. Wrapp*, 421 S.C. 531, 535, 808 S.E.2d 821, 823 (Ct. App. 2017). "Where there is no showing that any other evidence on behalf of the [defendant] could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996). Under our deferential standard of review, we cannot say the circuit court erred in denying Hardin's request for more time to examine the evidence or in finding Hardin was not prejudiced by the solicitor's handling of the evidence and setting the case for trial. *See Langford*, 400 S.C. at 436, 735 S.E.2d at 479 (explaining the "determination that section 1-7-330 violates separation of powers is not dispositive . . . . To warrant reversal, [a defendant] must demonstrate that he sustained prejudice as a result of the solicitor setting when his case was called for trial").

II. Suggestive Identification Procedure

Hardin argues the circuit court erred in concluding that despite the unduly suggestive identification procedure, the victims' out-of-court identifications were nevertheless so reliable that no substantial likelihood of misidentification existed. We agree the procedure was unduly suggestive, but find any error in admitting the photo identifications was harmless.

Testimony established that while other officers were searching for the stolen iPad, Corporal Cain photographed Hardin standing in front of a uniformed officer[8] and texted the photograph to another OCSO deputy, who showed it to the victims still on-scene at T-Mobile. Despite their varying descriptions of the suspects, the victims positively identified Hardin as one of the assailants when they viewed the texted photo. The circuit court concluded Hardin carried his burden of proving the identification procedure was impermissibly suggestive. However, after evaluating the reliability of the identifications under the totality of the circumstances, the circuit court found the out-of-court identifications admissible as there was no substantial likelihood of misidentification.

[8] The uniformed officer is clearly visible in the photograph.

At the pretrial hearing, the victims provided detailed descriptions of their assailants. Sims testified he was able to view Hardin for five to ten minutes before he left T-Mobile the first time; he then saw Hardin briefly return, leave again, and come in a third time with another man, both of whom were disguised and carrying guns. Sims described the guns as "revolvers"—one was "old looking" and "rusty" and the other was "newer"—and stated Hardin was wearing "sunglasses, a black hat, a black shirt, and khakis." Sims was immediately able to identify Hardin in the State's photograph as one of the men who robbed the store. In his statement to police, Sims noted the second robber was the shorter of the two, had a stocking over his face, and wore sunglasses; however, on cross-examination, Sims admitted the second robber was not wearing sunglasses.

Weaver testified he talked with Hardin, face-to-face, for ten to fifteen minutes when he first came into T-Mobile, and then again for another five to ten minutes when he returned. Hardin had on a baseball cap and sunglasses. Weaver acknowledged that in his statement to police, he also described Hardin as wearing a black shirt over a grey shirt, and khaki pants. When shown the photograph, Weaver was immediately able to recognize Hardin as one of the men who robbed the store and explained he was one hundred percent certain of the identification.

Berry testified she got a good look at Hardin because she was face-to-face with and less than a foot away from him when he pulled her into the store. She noted Hardin was wearing a lavender shirt with a black t-shirt over it, blue jeans, a hat, and sunglasses. Like Sims and Weaver, Berry was immediately able to identify Hardin as the robber who tied her up when presented with the photograph, and she was one hundred percent certain of the identification.

Based on the victims' testimony as well as the testimony of the police officers who took the photograph of Hardin, texted it to Orangeburg, and showed it to the victims, the circuit court evaluated the likelihood of misidentification. In determining the out-of-court identifications were reliable and denying Hardin's motion to exclude them, the court noted: (1) the victims had ample opportunity during daylight hours to view the robbers at the time of the crime, (2) the victims were able to pay close attention to what the person looked like, (3) the victims gave accurate descriptions of the perpetrator, (4) the victims testified their level of certainty was one hundred percent, and (5) only a short amount of time elapsed between the armed robbery and the victims' identifications.

"Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such[] or the commission of prejudicial legal error." *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "However, an eyewitness identification [that] is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." *Id.* "A criminal defendant may be deprived of due process of law by an identification procedure arranged by police [that] is unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "Single person show-ups are particularly disfavored in the law." *Moore*, 343 S.C. at 287, 540 S.E.2d at 448.

In *Neil v. Biggers*, 409 U.S. 188, 196–99 (1972), the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Initially, the trial court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. *State v. Dukes*, 404 S.C. 553, 557–58, 745 S.E.2d 137, 139 (Ct. App. 2013) (citing *Biggers*, 409 U.S. at 198–99). If the court determines the identification did not result from unnecessarily suggestive police procedures, the inquiry ends. *Id.* However, if the court finds law enforcement used "an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless 'so reliable that no substantial likelihood of misidentification existed.'" *Id.* (quoting *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). Under the totality of the circumstances, courts are to consider these factors in assessing the reliability of an otherwise unnecessarily suggestive identification procedure: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 114–16 (1977).

Here, the victims testified one assailant had a nylon stocking over his face, while the other wore sunglasses and a ball cap. Although the record indicates Weaver spent a reasonable amount of time prior to the robbery interacting with a customer he believed to be Hardin, Sims and Berry did not. Sims only briefly saw the man he believed to be Hardin talking with Weaver prior to the robbery; however, Berry testified she was taking a smoke break behind T-Mobile during this time. In fact, Berry never saw the men until one of them pulled her back inside the store. The

victims provided differing descriptions of the assailants' clothing. Considering all these facts, we have no doubt the single photograph of Hardin and a uniformed officer, shown to the victims on a cell phone screen by another uniformed officer in the hours after the robbery, was unduly suggestive.

Under the totality of the circumstances, we find the circuit court erred in assessing the reliability of an otherwise unnecessarily suggestive identification procedure. *See Manson*, 432 U.S. at 114–16 (explaining the factors courts must consider in assessing the reliability of an otherwise unnecessarily suggestive identification procedure). Our review of the record reveals (1) the victims did not have ample opportunity to view the disguised assailants at the time of the crime as the victims were face-down on the floor for most of the robbery; (2) based on their descriptions of the assailants, which focused on their clothing rather than their physical appearances, the victims did not and probably could not pay close attention to their appearances; and (3) the victims did not accurately describe the armed and disguised men to police—they merely noted the assailants were black males, one of whom was taller than the other, and what clothing they wore. *Cf. Moore*, 343 S.C. at 289, 540 S.E.2d at 449 ("Third, the degree of accuracy of [the eyewitness's] description is tenuous, at best. Her descriptions were based primarily on the suspects' clothing and race, and that one was taller than the other. She really did not get a look at either suspect's face[] but saw one from the profile.").

Regarding the third factor, the State conceded as much in its brief: "Although not perfectly aligned in every single detail, the [v]ictims all gave very consistent descriptions of [Hardin,] *which focused on his hat, his sunglasses, and his black shirt*." (emphasis added). While the victims testified they were one hundred percent certain that Hardin was one of the assailants, and the length of time between the robbery and the identifications was only a little over three hours, we do not believe these two factors alone suffice to support a finding that the out-of-court identifications were proper and admissible. *See Moore*, 343 S.C. at 288, 540 S.E.2d at 448 ("Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such[] or the commission of prejudicial legal error. However, an eyewitness identification [that] is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." (citations omitted)).

Still, we must determine whether any error in admitting the out-of-court identifications could have reasonably affected the outcome of the trial. *See State v.*

Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("Error is harmless where it could not reasonably have affected the result of the trial.); *id.* at 381, 580 S.E.2d at 795 ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); *id.* ("Thus, an insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989))); *see also State v. Kelley*, 319 S.C. 173, 460 S.E.2d 368 (1995) (explaining that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, an appellate court will not set aside a conviction for insubstantial errors not affecting the result).

Aside from the cell phone photograph, admitted as State's Exhibit 2, and the identification testimony implicating Hardin, the State also presented substantial evidence independently establishing Hardin's participation in the T-Mobile armed robbery: the witnesses' identification of the getaway Toyota, the employee victims' identification of the guns found in Hardin's apartment as the guns used in the armed robbery, and law enforcement's discovery of T-Mobile merchandise and the stolen iPad in or near Hardin's apartment less than three hours after the crime. *See State v. Simmons*, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) ("We note that, under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable."). As the challenged identification evidence was cumulative to other properly admitted evidence, *see infra* section III, we find the erroneous admission of the out-of-court identifications was harmless beyond a reasonable doubt.

III. Motion to Suppress Evidence

Hardin argues the circuit court erred in admitting any evidence collected in what he characterizes as the "second search" of his apartment because he effectively withdrew consent by refusing to re-sign the consent to search form. Hardin contends law enforcement was required to obtain a search warrant prior to the second search. We disagree.

Pretrial, Investigator Wade testified he assisted Corporal Cain in tracking the movement of the stolen iPad; the track ended at Hardin's apartment complex in Columbia. Wade offered testimony consistent with Cain's regarding locating the

car matching the description of the fleeing Toyota sedan and encountering Hardin as he exited the apartment. Hardin admitted to Wade that he rented the Toyota.

Wade told Hardin they were looking for a man who walked with a limp and a stolen iPad and that Hardin gave written consent for law enforcement to search his apartment. Wade testified that Hardin did not object to the second search, which followed the perimeter safety sweep, or otherwise withdraw his consent, even though Hardin knew he could stop the search at any time. On cross-examination, Wade admitted there were four officers present when they first approached Hardin and that they conducted a pat-down search for weapons before asking for his consent to search the apartment.

Hardin testified that as he came out of his apartment and was getting into the rented Toyota, eight officers approached him with their guns drawn, patted him down, and searched the Toyota immediately after he got out with his hands up. He claimed that when Investigator Wade asked to search his apartment, he responded, "[Y]'all don't have a warrant. No, you can't search my apartment." Hardin alleged Wade said they would detain him while they went back to Orangeburg to get a warrant, so in order to "alleviate the scene," he agreed to sign the consent to search form. He admitted he did not feel pressured to give the written consent but "felt it would be best just to get it over with."

Hardin was handcuffed outside the door of his apartment during the perimeter sweep, but the officers then locked the apartment door and took him down to a patrol car. Officer Cain retrieved the apartment key from another officer and went back to search a second time. Hardin testified that when Cain came back to the parking lot, Wade again approached Hardin with the written consent form. However, Hardin further contends he told Wade, "I'm not going to sign that form no [sic] more . . . [Y]'all searched my apartment one time [and] you didn't find anything. You went back in there without me being present. I don't know what you done [sic] or what you did [sic] do, but I'm not signing it."

On cross-examination, Hardin admitted he never told law enforcement to stop the search or that he did not want them searching his apartment. On redirect, however, Hardin claimed that when he said he never withdrew consent, he was only referring to the "first search." He reiterated that he never gave the police consent to search the apartment a second time and he did not re-sign the consent form after Wade added the additional language referencing firearms.

The circuit court held "the consent was valid and voluntary" and thus, "the search is valid and the items that were found in the apartment and in the car are admissible." The court found the officers' testimony was credible and Hardin's testimony was contradictory, which raised questions about his veracity. Ultimately, the circuit court concluded, "the added language in [the consent form] was explained to [Hardin] and the consent was never withdrawn and, therefore, the items that were found will be admissible."

"The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Whren v. United States*, 517 U.S. 806, 809 (1996) (quoting U.S. Const. amend. IV); *see also* S.C. Const. art. I, § 10 (protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures"). The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

The exclusionary rule is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. *State v. Brown*, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) (citing *Davis v. United States*, 564 U.S. 229, 231 (2011)). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *Brown*, 401 S.C. at 89, 736 S.E.2d at 266 (quoting *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011)). "These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment." *Id.*

In *State v. Mattison*, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003), this court discussed the issue of voluntary consent to search:

> Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. The State bears the burden of establishing the voluntariness of the consent. The "totality of the circumstances" test applies whether the consent was given in a non-custodial or custodial situation. In a custodial situation, the custodial setting is

> a factor to be considered in determining whether consent was voluntarily given. Custody alone, however, is not enough in itself to demonstrate a coerced consent to search.
>
> The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge. A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion.

(citations omitted). "Conduct falling short of 'an unequivocal act or statement of withdrawal' is not sufficiently indicative of an intent to withdraw consent." *Id.* at 587, 575 S.E.2d at 857. "Effective withdrawal of a consent to search requires unequivocal conduct, in the form of either an act, statement, or some combination of the two, that is inconsistent with consent previously given." *Id.*

Hardin contends he effectively withdrew his consent when he refused to re-sign the consent to search form, admitted as State's Exhibit 1, after Wade amended the form to include "any firearms, handguns." But our review of the record reveals Hardin had already given written consent for the search of his apartment and placed no limits on the scope of that consent. Although there is conflicting testimony as to whether Hardin attempted to withdraw consent prior to the "second search," Hardin admitted on cross-examination that he did not withdraw consent. We recognize that Hardin attempted to clarify on redirect that he meant he never withdrew consent as to the *initial* search. However, the circuit court assessed the credibility of the various witnesses and declined to accept as credible Hardin's assertion that he withdrew consent; unequivocally or otherwise. *See Mattison*, 352 S.C. at 584–85, 575 S.E.2d at 856 ("The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge.").

Hardin's refusal to re-sign the consent form falls short of the necessary unequivocal act or statement of withdrawal, particularly in light of Wade's testimony that Hardin did not object to the search or otherwise attempt to withdraw his consent. *See id.* at 585, 575 S.E.2d at 858 (holding the defendant's act of lowering his hands as the officer searched his groin area fell short of an unequivocal act or statement

of withdrawal). Under the totality of circumstances, the evidence presented at the suppression hearing supports the circuit court's finding that Hardin's consent was valid and the recovered evidence admissible.

Conclusion

Hardin's convictions are

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Levant Mealor, Appellant.

Appellate Case No. 2013-002752

Appeal From Pickens County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5590
Heard February 7, 2018 – Filed August 15, 2018

AFFIRMED

Ryan Christopher Andrews, of Cobb, Dill & Hammett, LLC, of Mount Pleasant; and Chief Appellate Defender Robert Michael Dudek, of Columbia, both for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

KONDUROS, J.: Michael Levant Mealor (Mealor) appeals his conviction of trafficking methamphetamine in the amount of twenty-eight grams or more but less than one hundred grams. He contends the trial court erred in permitting the introduction of logs from a national database of pseudoephedrine sales. He also

argues the trial court erred in allowing testimony on the theoretical yield of methamphetamine from the amount of pseudoephedrine allegedly purchased by or for him. Additionally, Mealor maintains the trial court erred in denying his motion for a directed verdict. We affirm.

FACTS

John Ross, a volunteer reserve deputy for the Pickens County Sheriff's Office (the Office), monitored the National Precursor Log Exchange (NPLEX)[1] for the Office. Ross noticed a trend of individuals with the same address purchasing pseudoephedrine on the same day or within a few days of each other.[2] He suspected those individuals were "smurfing," which is the practice in which methamphetamine manufacturers will recruit others to purchase pseudoephedrine for them in exchange for money or drugs due to limits on how much pseudoephedrine a person can purchase.[3] Ross began monitoring those individuals' purchases and signed up to receive notifications in NPLEX for any attempted purchases by them. The Office also began surveilling those individuals.

In November 2011, officers received notice Mealor had purchased pseudoephedrine at a pharmacy. Officers went to the pharmacy and observed a car associated with the case parked at another pharmacy across the street. The officers waited and observed Cynthia Greenfield[4] exit the store. The officers then received a notification Greenfield had purchased pseudoephedrine. The officers followed the car anticipating the occupants might go to a hardware store to get supplies for making methamphetamine. However, the car instead drove toward the residence, traveling over forty miles per hour in a twenty-five-miles-per-hour speed limit zone. The officers initiated a traffic stop for speeding. Amanda Hayes Hurley was driving and Daniel Ray Hurley, Mealor, and Greenfield were passengers along with infant children. Amanda had a suspended license, and the officers asked for

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[1] The NPLEX is an electronic database housing all pseudoephedrine purchases in twenty-nine states.

[2] Some of the individuals using that address were Mealor, Carol Denise Hayes (Hayes), and Brandon Hayes.

[3] Those limits in South Carolina are 3.6 grams per day, 9 grams per month, and 108 grams a year.

[4] Although some testimony indicates Greenfield and Mealor were "boyfriend and girlfriend," other testimony indicates they married shortly before their trial.

her permission to search the vehicle, which she gave. The officers found two boxes of cold medicine containing pseudoephedrine—the same boxes for which the officers had received the earlier alerts.

In June 2012, officers arrested many of the individuals they believed were involved. On December 10, 2013, the grand jury indicted Mealor on one count of trafficking over one hundred grams of methamphetamine. Trial began on December 16, 2013, for Mealor, Greenfield,[5] and Hayes, who is Mealor's sister as well as Amanda's mother. Many witnesses testified about activities relating to methamphetamine occurring at a house owned by Louise Mealor—Mealor and Hayes's mother—and indicated Mealor, Greenfield, and Hayes all lived in the house. Other witnesses testified Jason Mealor —Hayes's son—and his then girlfriend, Melissa Wardlaw, also lived in the house.

Multiple witnesses[6] testified about buying medicines with pseudoephedrine to give to Mealor or Greenfield. Rebecca Crisp testified she gave pseudoephedrine she purchased to Hayes, who put it in the bedroom Mealor and Greenfield used. A few of those witnesses indicated they bought some of the pseudoephedrine to treat allergy or sinus problems for themselves, their children, or other family members. Several witnesses testified they would receive methamphetamine from Mealor or Greenfield after they gave them pseudoephedrine they bought. A few witnesses stated they received other drugs or money in return. One witness testified about going to various pharmacies with Mealor and Greenfield to buy pseudoephedrine. Many witnesses also testified about using methamphetamine with them or seeing it used at their home. Several witnesses testified about different supplies that are used in making methamphetamine, such as plastic bottles, batteries, ether, and big bottles of Coleman fuel. One witness indicated she asked Greenfield why she had so many plastic bottles and was told it was because Greenfield and Mealor could feel them expand unlike with glass. Some witnesses also testified the place had a toxic or strong smell. One witness indicated Greenfield told her "the less [you] know, the better off [she] was" when she asked about the smell. Some witnesses testified Greenfield and Mealor told them they were going to make methamphetamine so it would be a cleaner product than what they were buying as

[5] Greenfield also appealed to this court.

[6] Each witness had a trafficking methamphetamine charge pending against him or her. They all testified they had not been promised anything in exchange for their testimony.

well as cheaper. Angela Armstrong testified she knew Mealor and Greenfield would be making methamphetamine out of the pseudoephedrine she gave them because they told her they were. Wardlaw testified Greenfield and Mealor told her they could make methamphetamine. Thomas Rooney testified he saw Mealor and Greenfield making methamphetamine in their bedroom in the house several times. Rooney stated the process of making methamphetamine has a strong smell and causes the place where it is being manufactured to become "really smoky." He indicated he had seen Mealor and Greenfield shaking plastic drink bottles to make the methamphetamine. Billy Miller testified that when he gave Mealor and Greenfield the pseudoephedrine they told him they were going to make methamphetamine out of it.

The State presented testimony from an employee of the company that maintains the NPLEX database, who indicated he was the records custodian for the logs. Over objections, the State introduced the NPLEX record for each of the defendants on trial and the witnesses and others charged with the same offenses. The NPLEX record for Mealor shows he purchased 69.36 grams and was blocked from purchasing it seven times for a total of thirty-seven attempts during 2011. The NPLEX record for Greenfield shows she purchased 68.64 grams and was blocked from purchasing it an additional five times for a total of thirty-four attempts in the same time period.

Captain Chad Brooks with the Office also testified. He provided he had been involved in the seizure of close to two hundred methamphetamine labs. He indicated he had manufactured methamphetamine once in a lab setting. He stated he was trained how to calculate the yield that could be produced from a particular amount of pseudoephedrine.[7] Captain Brooks testified 92% was about the highest

[7] All three defendants objected when the State first asked Captain Brooks about his training on calculating the yield of methamphetamine from pseudoephedrine. The State questioned Captain Brooks specifically on his qualifications. The trial court overruled the objection, finding it was not necessary for the witness to have certain degrees and that it went to credibility as opposed to admissibility. Mealor then voir dired Captain Brooks. The trial court qualified him as an expert and stated that it did not know what Captain Brooks's testimony would entail because the court had not yet heard it. Once Captain Brooks started testifying about possible yield, Greenfield renewed the objection, stating "[i]t's, basically, chemistry testimony." Mealor joined the renewal, which the trial court overruled.

yield one could obtain and 40 to 50% is the lowest yield amount one could obtain "assuming it doesn't flash fire and assuming you['re] successful." He indicated 40% was the "worst case scenario." The yield percentage depends on a lot of factors such as how long one waited for the extraction to occur and spillage. He testified the things normally observed at a home lab are sulfuric acid (drain cleaner), coffee filters, funnels, bottles, Xylene, ether, starter fluid cans, cut batteries, medication blister packs, and burn piles. He testified the labs are "very portable and easy to dispose of." He also testified producing methamphetamine creates a distinct smell. Captain Brooks testified on cross-examination he did not find any methamphetamine manufacturing equipment at the scene or on any of the defendants.

At the close of the State's case, Greenfield moved for a directed verdict and Mealor joined in that motion. They contended only one witness testified he saw Greenfield and Mealor make methamphetamine. They asserted because trafficking requires at least ten grams of methamphetamine and the State presented no evidence of any particular amount of methamphetamine, the State's case was speculative. Mealor also argued that assuming a 40% yield from the pseudoephedrine witnesses indicated they gave him and Greenfield, the result would be sixty-three grams of methamphetamine, which was less than the charge for which they were on trial—trafficking one hundred grams. The trial court denied the motion for a directed verdict on trafficking under one hundred grams but took under advisement trafficking over one hundred grams.

Mealor and Greenfield both testified in their own defense. They both stated all of the pseudoephedrine they bought was to treat their allergy and sinus problems. They both indicated they had a problem with others stealing some of the pseudoephedrine they bought. Mealor testified he had been using Sudafed since he was thirteen years old due to his doctor's recommendation at the time. He also provided he did not have a way to get to the store, so he would buy pseudoephedrine whenever someone drove him to the store. He agreed that according to the NPLEX records, he bought 69.36 grams of pseudoephedrine in 2011, which was under the limit of 108 grams that one person could legally buy in one year. Greenfield admitted to attempting to buy pseudoephedrine thirty-four times in 2011, including the times she was blocked for being over the monthly limit.

Mealor explained on cross-examination he and Greenfield often purchased pseudoephedrine at the same store around the same time because they "stayed together all the time. [They] never left each other's side." He contended the fact he bought pseudoephedrine at the same pharmacy or a nearby pharmacy within a short period of time (i.e. thirty minutes) of many of the witnesses was a coincidence. Greenfield asserted the same. Greenfield also testified she bought pseudoephedrine from several different pharmacies because she had prescriptions for medications at various pharmacies. Both Greenfield and Mealor asserted that during the time period at issue, they did not live at the address where the State alleged the methamphetamine was being made. They both indicated Jason and Wardlaw lived there. Instead, Greenfield and Mealor along with Greenfield's daughter, Julie Williams, contended they lived at Williams's home to help care for her while she was pregnant. However, Greenfield admitted that at times they would stay at the house in question for periods of several nights.

At the close of the defendants' case, Mealor and Greenfield renewed their motions for a directed verdict on the charge of trafficking over one hundred grams of methamphetamine. The State asserted the amount of the pseudoephedrine purchases the witnesses testified they gave Mealor combined with his own purchases amounted to a total of 161 grams of pseudoephedrine. The State provided the amount of the witness's pseudoephedrine purchases they testified they gave Greenfield combined with her own purchases amounted to a total of 182 grams of pseudoephedrine. The State indicted Mealor's amount did not include Greenfield's purchases and vice versa. Greenfield and Mealor disputed these figures. Greenfield alleged the witnesses testified they gave Mealor or Greenfield 80 grams of their purchases whereas Mealor asserted it was 132 grams, not including the amounts they purchased themselves.

The trial court denied the motion, finding when taking the light most favorable to the State as the nonmoving party, the yield used to calculate the possible amount produced would be the highest yield possible and because the defendants agreed with the amount of pseudoephedrine the witnesses testified they gave the defendants, the possible produced methamphetamine would be above one hundred grams. The court also found that because the statute makes it illegal to conspire to manufacture methamphetamine, the numbers could be used in the aggregate and not necessarily allotted to the defendant to whom the witness testified they gave the pseudoephedrine. The trial court determined the jury could find credible the testimony the yield could be 92%. The State requested to amend the indictment to

trafficking between twenty-eight and one hundred grams, given the evidence presented, which the trial court granted.

During closing arguments, the State posited the witnesses testified they gave 164.64 grams pseudoephedrine to Mealor during 2011. The State asserted when combined with the amount his NPLEX record indicates Mealor purchased himself, this amounted to 243 grams. For Greenfield, the State contended the witnesses gave her 179.76 grams, which it alleged amounted to 248 grams when combined with the amount her NPLEX record showed she purchased. The State argued that when Captain Brooks's lowest yield of 40% was applied to those amounts, the amount of methamphetamine produced was 65 grams for Mealor only accounting for the 164 grams given to him and about 100 grams methamphetamine when the amount of pseudoephedrine he purchased himself was added.

The jury convicted Mealor and Greenfield of trafficking twenty-eight grams or more but less than one hundred grams of methamphetamine. The trial court sentenced them each to nine years' imprisonment.[8] This appeal followed.[9]

LAW/ANALYSIS

I. NPLEX Logs

Mealor argues the trial court erred in permitting the introduction of the NPLEX logs into evidence because (1) they did not meet the business records exception to

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[8] The jury found Hayes guilty of criminal conspiracy. The trial court sentenced her to three years' imprisonment.

[9] After Mealor filed his appeal and obtained the transcript, he moved to have the record reconstructed due to alleged errors and omissions. This court granted the motion on June 1, 2015, and remanded the cases to the trial court to reconstruct the record. The trial court and trial attorneys convened and attempted to supplement the missing portions of the record. After the trial court determined they had satisfactorily reconstructed the record, Mealor's appellate counsel asked for an order stating the record could not be reconstructed. The trial court denied that request, finding the record had been successfully reconstructed. Mealor appealed that denial to this court on March 9, 2016. On July 22, 2016, Mealor requested to drop his appeal regarding the reconstruction of the record. This court granted that motion on August 17, 2016, and this appeal proceeded.

hearsay; (2) a proper foundation was not laid; and (3) the admission violated Rule 403, SCRE. We find this issue unpreserved.

When an appellant does not object or join in a codefendant's objection at trial, an issue cannot be raised by the appellant on appeal even though the appellant's codefendant objected. *See State v. Nichols*, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997). Further, when a defendant objects on one basis at trial but argues a different basis for the objection on appeal, the issue is not preserved for review. *State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); *see also State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (finding a defendant may not argue one ground below and another on appeal).

When the State first introduced the NPLEX logs during the records custodian's testimony, Mealor stated "we all three have separate arguments to make." He argued as to the logs' "trustworthiness and reliability" because they "have no date range of purchase" and the date range requested was not shown "on the face of the documents." The trial court overruled the objection. One of Mealor's codefendants argued a proper foundation was not laid for the introduction of the logs, and the trial court overruled that objection. Mealor did not state he was joining that argument. Following the trial court's ruling, the State resumed questioning and again sought to introduce the NPLEX logs into evidence. Mealor objected again, arguing the logs contained other people's purchase history in addition to Mealor's. An off-the-record bench conference was held after which the trial court ruled the logs were admissible as a business record and noted Mealor could point out on cross-examination the records included people other than him. Accordingly, the only two objections to the NPLEX logs Mealor expressed at trial on the record were (1) unreliability due to lack of a date range and (2) a problem with people's records other than his own being included. These are not the same reasons he raises on appeal in support of his argument that the trial court erred in admitting the records into evidence. Therefore, this issue is not preserved for our review on appeal.

II. Expert Testimony

Mealor asserts the trial court erred in allowing Captain Brooks's testimony regarding the theoretical yield of methamphetamine from the amount of pseudoephedrine available. He contends Captain Brooks did not have the expertise to testify as to the yield amount because he had no training in chemistry. Mealor

further maintains the trial court erred in finding the testimony reliable. We disagree.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters largely within the trial court's discretion." *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). The trial court does not abuse its discretion in qualifying experts and allowing their testimony as long as the witnesses have "acquired by study or practical experience such knowledge of the subject matter of [their] testimony as would enable [them] to give guidance and assistance to the jury in resolving a factual issue [that] is beyond the scope of the jury's good judgment and common knowledge." *State v. Anderson*, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014) (quoting *State v. Goode*, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991)).

Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education[] may testify thereto in the form of an opinion or otherwise." "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). "'Th[e] language [in Rule 702] makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. It makes clear that any such knowledge might become the subject of expert testimony.'" *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)). "'Hence, as a matter of language, the Rule applies its reliability standard to all "scientific," "technical," or "other specialized" matters within its scope.' Reliability is a central feature of Rule 702 admissibility . . . . " *Id.* (quoting *Kumho Tire Co.*, 526 U.S. at 147).

However, "the reliability of a witness's testimony is not a pre[]requisite to determining whether or not the witness is an expert." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012). "The expertise, [the] reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert

status will be determined *prior* to determining the reliability of the testimony." *Id.* at 388, 728 S.E.2d at 474-75. "[A]ll expert testimony, not just scientific expert testimony, must be vetted for its reliability prior to its admission at trial." *Id.* at 388, 728 S.E.2d at 474.

"The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." *White*, 382 S.C. at 273, 676 S.E.2d at 688. "Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter." *Id.* "Courts are often presented with challenges on both fronts[—]qualifications and reliability. The party offering the expert must establish that [the] witness has the necessary qualifications in terms of 'knowledge, skill, experience, training[,] or education.'" *Id.* (quoting Rule 702, SCRE). "With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications." *Id.* "It is in this latter context that the trial court properly concludes that 'defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility.'" *Id.* at 273-74, 676 S.E.2d at 688 (quoting *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990)). "Turning to the reliability factor, a trial court may ultimately take the same approach, but only after making a threshold determination for purposes of admissibility." *Id.* at 274, 676 S.E.2d at 688.

"The admissibility of *scientific* evidence depends upon 'the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.'" *State v. Whaley*, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991) (emphasis added by court) (quoting *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)). "Scientific evidence is admissible under Rule 702, SCRE," when "(1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable . . . ; and (4) the probative value of the evidence outweighs its prejudicial effect." *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001). The trial court must use the following factors to determine the reliability of scientific testimony: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Graves v. CAS Med. Sys.,*

Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (quoting *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999)). "However, these factors 'serve no useful analytical purpose' for nonscientific evidence. In those cases, we have declined to offer any specific factors for the circuit court to consider due to 'the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence.'" *Id.* at 74-75, 735 S.E.2d at 655-56 (quoting *White*, 382 S.C. at 274, 676 S.E.2d at 688).

"Nevertheless, the court must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable." *Id.* at 75, 735 S.E.2d at 656. "The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony." *White*, 382 S.C. at 274, 676 S.E.2d at 688 (footnote omitted). Our supreme court "ha[s] declined to set a general test for nonscientific testimony due to the multitude of challenges [that] may arise. Thus, this evidence must be evaluated on an ad hoc basis." *Graves*, 401 S.C. at 75, 735 S.E.2d at 656 (looking at other jurisdictions' decisions when assessing the reliability of testimony based on a particular method that had not previously been assessed in South Carolina). In cases involving nonscientific expert testimony, the supreme court has not required a greater foundation or applied the *Jones* test. *Whaley*, 305 S.C. at 142, 406 S.E.2d at 372.

Although South Carolina has not discussed the expertise required to testify about the yield of methamphetamine from pseudoephedrine, others jurisdictions have. The Appellate Court of Illinois has held: "Differences in methamphetamine yield simply do not involve novel science; they involve personal applications of well[-]known and commonly accepted scientific procedures." *People v. Wilke*, 854 N.E.2d 275, 282 (Ill. App. Ct. 2006). That court also explained: "It is undisputed in the scientific community that chemical processes exist whereby pseudoephedrine can be converted into methamphetamine. Not even defendant contests this fact. Given such acceptance of the underlying method, a *Frye*[10]

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[10] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), provided the standard in federal cases for admitting scientific evidence until the Federal Rules of Evidence superseded it. *See State v. Dinkins*, 319 S.C. 415, 418 n.3, 462 S.E.2d 59, 60 n.3 (1995) ("[T]he United States Supreme Court recently held the adoption of the Federal Rules of Evidence superseded the *Frye* test."); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) ("That the *Frye* test was displaced by

hearing is not required in the instant case." *Id.* at 281. The court found the defendant was "mistak[ing] a credibility issue for an admissibility issue." *Id.* at 282. In another case, that court determined trial counsel did not err in failing to challenge under the *Frye* test the admissibility of the method of calculating methamphetamine weight from pseudoephedrine noting, "Defendant's own expert testified that the procedures to produce methamphetamine 'are very similar to other chemical procedures. There is nothing unique about them. This is simple chemistry.'" *People v. Dorsey*, 839 N.E.2d 1104, 1109 (Ill. App. Ct. 2005). In *Wilke*, the Appellate Court of Illinois also noted "[t]he 'science' . . . involves the chemistry behind converting pseudoephedrine to methamphetamine. . . . Any arguments about defendant's particular ability to apply the chemistry . . . raise an

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the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify." (footnote omitted)).

"Rule 702 of the Federal Rules of Evidence is identical to Rule 702 of the South Carolina Rules of Evidence . . . ." *In re Robert R.*, 340 S.C. 242, 246, 531 S.E.2d 301, 303 (Ct. App. 2000). "Although our supreme court in *Council* declined to adopt the [federal] *Daubert* standard, instead selecting an approach based on both the South Carolina Rules of Evidence and prior South Carolina case law, at least one observer has noted that the two standards are 'very similar.'" *Id.* at 247 n.3, 531 S.E.2d at 303 n.3 (quoting G. Ross Anderson, Jr., *Evidence Eggshells—A New Walk for Experts*, The Bulletin, Fall 1999, at 7, 9). "While many of *Jones*'s progeny borrow principles from *Daubert*'s predecessor, . . . our courts never adopted the *Frye* standard completely in favor of *Jones*'s more liberal approach." *State v. Morgan*, 326 S.C. 503, 509 n.2, 485 S.E.2d 112, 115 n.2 (Ct. App. 1997) (citing *State v. Ford*, 301 S.C. 485, 488, 392 S.E.2d 781, 783 (1990) ("South Carolina, however, has never specifically adopted the *Frye* test and has employed a *less restrictive* standard in regard to the admissibility of scientific evidence." (emphasis added))), *overruled by White*, 382 S.C. at 273, 676 S.E.2d at 688 ("We overrule *Morgan* to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence.").

issue of evidentiary weight." 854 N.E.2d at 281. The court concluded, "Arguments about different yields stemming from different laboratory conditions are simply misplaced in this context. Defendant is certainly entitled to raise such matters, but the appropriate time for doing so is during cross-examination of the State's expert (or direct examination of a defense expert) . . . ." *Id.* at 282. A concurrence by a judge on the Appellate Court of Illinois has also examined the conversion formula: "[I]t is abundantly clear that a formula exists for the conversion of precursor material into a quantity of methamphetamine. That formula is commonly accepted by the scientific community and, in essence, is operable by the application of mathematics." *Dorsey*, 839 N.E.2d at 1110 (Appleton, J., concurring).

In a case from the Court of Appeals of Indiana involving a methamphetamine conviction, a judge concurred "to address the issues with determining generally the amount of methamphetamine that is involved in the manufacturing in a particular case." *Harmon v. State*, 971 N.E.2d 674, 683 (Ind. Ct. App. 2012) (Vaidik, J., concurring). The judge noted one method "to determine the actual weight of the methamphetamine produced" is to "us[e] a conversion ratio based on the amount of . . . pseudoephedrine that is present." *Id.* The judge found that method to be a "more appropriate method," explaining: "This method uses a scientifically determined formula to calculate how much methamphetamine would be produced based on the amount of . . . pseudoephedrine that is used in manufacturing. Using a conversion ratio allows for a reliable measure of the weight of the drug that will be produced . . . ." *Id.* at 684. The judge observed: "Other jurisdictions around the country have adopted this method, and expert witnesses are employed to apply the conversion ratio due to its case-by-case variability." *Id.*

> It is essential that an expert witness be present at trial to testify to the conversion ratio and how it applies in each case. . . . [A] conversion ratio between . . . pseudoephedrine to methamphetamine can be used, but it can change "depending on the cooking process, on whether pill binders are stripped from the . . . pseudoephedrine, and on the person who is 'cooking' the methamphetamine." With so many ingredients involved in the manufacturing of methamphetamine and so many different factors that can alter how those ingredients affect the yield, determining yield is not a task that

> should be undertaken by a lay person. When the difference of such a small amount can have such a profound effect on a potential sentence, the trial court needs to be sure that the yield is accurate.

Harmon, 971 N.E.2d at 685 (quoting *Halferty v. State*, 930 N.E.2d 1149, 1153 (Ind. Ct. App. 2010)).

The Indiana Supreme Court has "reject[ed] a one-size-fits-all method of showing final yield because manufacturing techniques and ingredients vary from lab to lab, and the form in which law enforcement officers discover an intermediate product may not allow for uniform scientific analysis." *Buelna v. State*, 20 N.E.3d 137, 147 (Ind. 2014). That court found an acceptable method to show the weight of the final yield was to use a conversion ratio based on the amount of pseudoephedrine used by the manufacturer as "long as the State can also establish that a defendant used a sufficient amount of precursors to successfully convert . . . pseudoephedrine into methamphetamine[] and had the capability and skill to do so." *Id.*

A concurrence in one of the cases from the Appellate Court of Illinois noted, "The only variables in the formula are the skill of the 'cookers,' the equipment used by them, and the location of the production." *Dorsey*, 839 N.E.2d at 1110 (Appleton, J., concurring). That judge explained, "It is these variables that produce the plethora of different conversion ratios of raw material to product—ranging from .92 to .40—seen by this court as well as other state and federal courts throughout the country." *Id.*

In the present case, Captain Brooks testified he had attended a "clandestine meth lab training school." He stated he was "certified through the [Drug Enforcement Agency (DEA)] as what they call a site safety officer at labs sites and also clandestine lab certified." Captain Brooks provided he had been involved in thousands of methamphetamine investigations, as well as "[h]igh level trafficking conspiracies surrounded by methamphetamine." He noted he had "been involved in the seizure of probably close to 200 methamphetamine labs." He also indicated he had manufactured methamphetamine in a controlled setting. Captain Brooks described "[i]n the clandestine lab training, [he] went to the [South Carolina Law Enforcement Division (SLED)] lab and manufactured methamphetamines from start to finish the lab, in the controlled setting." He indicated he had been trained about the various methods with which one can make the methamphetamine. He

also provided he was trained how to determine the yield of methamphetamine from the amount of precursor elements. He explained, "It's, basically, a mathematical equation. By taking the grams of [p]seudoephedrine that are introduced into the lab . . . ."

The trial court did not abuse its discretion in qualifying Captain Brooks as an expert and allowing him to testify as to the possible yield of methamphetamine from the pseudoephedrine available. Captain Brooks had more knowledge about manufacturing methamphetamine and calculating methamphetamine yield than the jury would have as common knowledge, and his testimony assisted the jury in understanding how methamphetamine labs operate—this is all that Rule 702 requires. Mealor argued that from "research on the [i]nternet," the experts disagreed on the actual conversion measurements but did not provide any sources. He argued the "yield is [a]ffected by the way [it is] cooked, by who cooks it, by what's done with it." He contended "it would be completely inappropriate to expect a police officer who is trained in investigative techniques regarding this with no more than a high school education in chemistry as an expert." However, Captain Brooks explained those factors are what caused a range of yields instead of a specific percentage that would be the yield in any situation. Captain Brooks did not develop the calculation; he simply utilized it as he was trained. As numerous courts have held, this is a widely accepted calculation. Accordingly, the trial court did not abuse its discretion in qualifying Captain Brooks as an expert due to his training and experience and allowing him to testify as to the theoretical yield.

III. Directed Verdict

Mealor maintains the trial court erred in denying his motion for a directed verdict because the State did not present direct or substantial circumstantial evidence of his guilt. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *State v. Venters*, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). Additionally, an appellate court must find a case was properly submitted to the jury "if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused."

Weston, 367 S.C. at 292-93, 625 S.E.2d at 648. The trial court should submit a case "to the jury when the evidence is circumstantial 'if there is any substantial evidence [that] reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "[T]he trial court should grant a [defendant's] directed verdict motion when the evidence presented merely raises a suspicion of guilt." *Id.* at 142, 708 S.E.2d at 778. "Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct. App. 2013).

"[T]he lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). During the *jury*'s review, "every circumstance relied upon by the [S]tate [must] be proven beyond a reasonable doubt[] and . . . all of the circumstances so proven [must] be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." *Id.* (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955)). During the consideration of a directed verdict motion, the *trial court* must view the evidence in the light most favorable to the State and submit the case to the jury if any substantial evidence "reasonably tends to prove the guilt of the accused" or if any substantial evidence exists "from which his guilt may be fairly and logically deduced." *Id.* at 236-37, 781 S.E.2d at 354 (emphasis added) (quoting *Littlejohn*, 228 S.C. at 329, 89 S.E.2d at 926). "Therefore, although the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness." *Id*. at 237, 781 S.E.2d at 354. "Accordingly, in ruling on a directed verdict motion whe[n] the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *Id.*

Section 44-53-375(C) of the South Carolina Code (2018) provides:

> A person who knowingly sells, manufactures, delivers, [or] purchases, . . . or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, [or] purchase, . . . 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 . . . is guilty of a felony which is known as "trafficking in methamphetamine" . . . .

The appropriate sentence upon conviction varies according to the range of grams of the substance. In this case, the State ultimately asserted Mealor manufactured or attempted to manufacture "twenty-eight grams or more, but less than one hundred grams." § 44-53-375(C)(2).[11]

Our supreme court has recently discussed whether testimony regarding the theoretical maximum yield of methamphetamine from pseudoephedrine provides sufficient evidence of quantity to survive a motion for a directed verdict. *See State v. Cain*, 419 S.C. 24, 795 S.E.2d 846 (2017). In that case, the supreme court reversed the trial court's denial of the defendant's motion for a directed verdict. *Id.* at 37, 795 S.E.2d at 853. Law enforcement had not found methamphetamine but had found evidence of ingredients used to manufacture methamphetamine, including empty packages that once contained 19.2 grams of pseudoephedrine. *Id.* at 27, 795 S.E.2d at 848. The defendant was tried for trafficking ten grams or more of methamphetamine. *Id.* On appeal, the defendant argued the expert's "testimony is insufficient because it proves only the theoretical quantity of drugs a person could have produced at maximum efficiency; it does not prove the quantity [the defendant] could realistically have intended to manufacture." *Id.* at 28-29, 795 S.E.2d at 848. The defendant further maintained "[w]ithout evidence showing [he] could actually have produced ten grams or more of methamphetamine with the equipment and ingredients he had at his disposal, . . . the trial court erred in denying his motion for directed verdict." *Id.* at 29, 795 S.E.2d at 848-49.

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[11] The trial court denied the motion for a directed verdict on trafficking under one hundred grams but initially took under advisement trafficking over one hundred grams. Later, after the defendants renewed their motions, the State requested to amend the indictment to between twenty-eight and one hundred grams, given the evidence presented, which the trial court granted.

In *Cain*, the expert "described the equipment and ingredients found at the scene, and how [the defendant] would have used them in the 'one pot'[12] method of manufacturing methamphetamine. . . . [The expert] testified [the defendant]'s method did not take place under laboratory conditions, and admitted that calling his operation a 'meth lab' was a 'misuse of the word lab.'" *Id.* at 29, 795 S.E.2d at 849. The State questioned the expert on the quantity of methamphetamine the method utilized by the defendant could produce, specifically how much methamphetamine the amount of pseudoephedrine would produce with various yields starting at a 100% yield, which was under ideal laboratory conditions, and decreasing to a 65% yield, which would produce 11.48 grams. *Id.* at 29-30, 795 S.E.2d at 849. The supreme court found "[t]his testimony was the only evidence the State offered as to the quantity involved in [the defendant]'s alleged trafficking in methamphetamine." *Id.* at 30, 795 S.E.2d at 849.

The supreme court determined:

> [The expert]'s testimony proves it was theoretically possible to manufacture 17.67 grams of methamphetamine from 19.2 grams of pseudoephedrine if the process was conducted at one hundred percent efficiency. However, [the expert] specifically acknowledged the quantity of 17.67 grams was calculated on the assumptions of "ideal laboratory conditions" with "pure products" used by a "trained chemist." [The expert] admitted [the defendant] did not have ideal laboratory conditions, and the State offered no evidence [the defendant] even knew how to manufacture methamphetamine. There is no other evidence in the record to support the validity of [the expert]'s assumptions. [The expert]'s testimony also proves the quantity of methamphetamine [the defendant] could have manufactured at various lower levels of efficiency. However, [the expert]'s testimony provides no basis for

[12] Captain Brooks testified shake and bake and one pot are the same method. He also indicated the other two most common methods are red phosphorous or "red fee" and the birch or "Nazi" method.

> calculating the level of efficiency [the defendant] could actually have reached under the circumstances that existed in the house. In fact, [the defendant]'s counsel specifically asked [the expert] on cross[-]examination, "There's no way to tell, from what you had there, how much [the defendants] were actually getting from their work?" [The expert] replied, "No, sir."

Id. at 31, 795 S.E.2d at 850.

In deciding *Cain*, the supreme court examined an Eighth Circuit Court of Appeals case, *United States v. Eide*, 297 F.3d 701 (8th Cir. 2002). *Cain*, 419 S.C. at 31-33, 795 S.E.2d at 850-51. The *Cain* court noted, "In *Eide*, after rejecting the government's evidence of theoretical maximum yield, the Eighth Circuit focused on the expert's explanation of 'the particular methamphetamine manufacturing processes' the defendant used, and her testimony 'that his lithium ammonia reduction process was capable of producing a 40 to 50 percent yield.'" *Cain*, 419 S.C. at 32, 795 S.E.2d at 850-51 (quoting *Eide*, 297 F.3d at 705). The *Eide* court stated, "This yield would have resulted in producing 10.1 to 12.6 grams of actual methamphetamine." *Cain*, 419 S.C. at 32, 795 S.E.2d at 851 (quoting *Eide*, 297 F.3d at 704). The *Eide* court affirmed the conviction finding, "The particularized nature of [the expert]'s testimony, combined with additional evidence suggesting that [the defendant] was experienced in the manufacture of methamphetamine, were sufficient for a jury to find beyond a reasonable doubt that [the defendant] was a good cook capable of producing a 40 to 50 percent yield." *Cain*, 419 S.C. at 32-33, 795 S.E.2d at 851 (quoting *Eide*, 297 F.3d at 705). However, the *Cain* court distinguished *Eide* determining, "Unlike the expert testimony in *Eide*, [the expert]'s testimony provided the jury no basis on which to determine how much methamphetamine [the defendant] could actually have produced." *Cain*, 419 S.C. at 33, 795 S.E.2d at 851. The court found, "If [the defendant] were a 'good cook' like [the defendant in *Eide*], 'capable of producing a . . . 50 percent yield,' he would have manufactured 8.83 grams of methamphetamine, and thus, he could not be guilty of trafficking." *Cain*, 419 S.C. at 33, 795 S.E.2d at 851.

In *Eide*, the Eighth Circuit explained, "Estimating the amount a clandestine lab is capable of manufacturing may be determined from the quantity of the precursor chemicals seized together with expert testimony about their conversion to methamphetamine." 297 F.3d at 705. "Quantity yield figures should not be

calculated without regard for the particular capabilities of a defendant and the drug manufacturing site." *Id.*

The Eighth Circuit further noted:

> The jury also heard testimony from police, [Division of Narcotics Enforcement (DNE)] officers, and [the defendant]'s family members indicating that he was heavily involved in the manufacture of methamphetamine. Police and DNE officers testified to the large amount of evidence gathered at [the defendant]'s residence that was consistent with the production of methamphetamine manufacturing, including cans of engine starting fluid, muriatic acid, liquid propane tanks, lithium camera batteries, crushed pseudoephedrine, rags smelling of anhydrous ammonia, scales, plastic baggies, and the sludge-like substance containing trace amounts of methamphetamine. The jury heard [the defendant]'s half[-]sister testify about suspicious objects she had seen in his lab, including a couple of bags of white powder, coffee filters[,] and the apple juice jar, and [the defendant]'s former wife testified that she had smelled chemicals coming from the basement and had seen coffee filters and a blender with white powder.

Id. at 705-06.

Ultimately, the *Eide* court determined the prosecution presented sufficient evidence the defendant had attempted to manufacture five or more grams of methamphetamine, noting, "The combined effect of [the expert]'s particularized testimony and the strong and detailed circumstantial evidence linking [the defendant] to the manufacture of methamphetamine were enough for the jury to conclude that [the expert]'s calculations were an accurate estimate of [the defendant]'s manufacturing capabilities." *Id.* at 706.

"Congress responded to growing concerns about a 'methamphetamine epidemic in America,' *United States v. Layne*, 324 F.3d 464, 468 (6th Cir. 2003) (quoting H.R.

Rep. 106–878, at 22 (Sept. 21, 2000)), by" replacing "the individualized determination of how much of a controlled substance certain chemicals would yield" for sentencing in federal methamphetamine cases, with conversion ratios for "'the quantity of controlled substance that could reasonably have been manufactured . . . determined by using a table of manufacturing conversion ratios for . . . pseudoephedrine, *which table shall be established by the Sentencing Commission based on scientific, law enforcement, and other data the Sentencing Commission considers appropriate*.' Pub. L. No. 106–310, § 3651(b), 114 Stat. 1238-39 (2000)." *United States v. Martin*, 438 F.3d 621, 624-25 (6th Cir. 2006) (emphasis added by court). "These tables adopt a 50% conversion ratio for pseudoephedrine, such that [two] grams of the chemical is equivalent to [one] gram of methamphetamine." *Id.* at 625. "In adopting the 50% conversion ratio for pseudoephedrine, the Commission relied on a report promulgated by the DEA's Office of Diversion Control that was published on the website of the Office of National Drug Control Policy (ONDCP)." *Id.* "That report 'indicate[d] that the actual yield of methamphetamine from . . . pseudoephedrine is typically in the range of 50 to 75 percent.'" *Id.* (alteration by court) (quoting Proposed Amendments to the Sentencing Guidelines, 66 Fed. Reg. 7962, 7965 (Jan. 26, 2001)) (citing U.S. Sentencing Guidelines, App. C, Amendment 611 ("This yield is based on information provided by the [DEA] that the typical yield of these substances for clandestine laboratories is 50 to 75 percent.")); *see also United States v. Stacy*, 769 F.3d 969, 977 (7th Cir. 2014) (holding that although the defendant argued "the 50% ratio [w]as meant to 'approximate the amount of pure methamphetamine that a high-grade laboratory could produce[,]' . . . the Commission based its ratio on a report from the [DEA] about the typical yield rate *in clandestine laboratories*").

In a Seventh Circuit case, "[t]he experts . . . testified that although an 80-85% yield *might* be possible with a clandestine laboratory, yields in the range of 40%-60% were *more probable*. This data is confirmed by the Iowa study, which [the defendant] introduced at sentencing." *United States v. Eschman*, 227 F.3d 886, 890 (7th Cir. 2000). In another case from the Appellate Court of Illinois, a police officer qualified as an expert in the manufacturing of methamphetamine "stated some jurisdictions use an 80% to 90% yield rate, but his office arrived at a 60% yield because 'it was the most lenient[,] giving the most margin for error and the most leniency towards the suspect.'" *People v. Reatherford*, 802 N.E.2d 340, 346-47 (Ill. App. Ct. 2003) (alteration by court).

In *Martin*, the defendant argued "expert testimony in reported federal court opinions and by DEA personnel before Congress conflicts with the Commission's choice of 50% as the appropriate conversion ratio for pseudoephedrine." 438 F.3d at 636. The *Martin* court noted "the sources that [the defendant] cites reveal that, although yield rates are at times as low as 15%, they can also be as high as 85%." *Id.* The court determined "[t]hese sources—among them the so-called 'Iowa Study' and expert testimony by a DEA chemist in *Eschman*, 227 F.3d at 889—therefore reflect a 'difference of opinion in the scientific community' as to yield rates." *Martin*, 438 F.3d at 636. The court held, "A yield rate of 50%, moreover, is not just a reasonable middle ground between two extremes, but is also borne out by cases predating the Act—cases in which this court endorsed the 50% rate as a valid approximation." *Id.*

In a Court of Appeals of Indiana case, the court found the State had not presented sufficient evidence the defendant had manufactured three grams of methamphetamine. *Halferty*, 930 N.E.2d at 1153. In that case, an officer "testified that '*in general*,' the conversion ratio between . . . pseudoephedrine to methamphetamine was '*usually* right around 70, 80 percent.'" *Id.* "When questioned about the term 'usually,' [the officer] testified that the ratio can change depending on the cooking process, on whether pill binders are stripped from the . . . pseudoephedrine, and on the person who is 'cooking' the methamphetamine." *Id.* The officer also acknowledged "depending on the cook, the ratio of . . . pseudoephedrine to methamphetamine can 'fall below 50 percent.'" *Id.* The court noted "[c]ooking the [amount] of . . . pseudoephedrine at a yield of fifty percent would create . . . an amount . . . less than three grams. [The officer] also testified that the conversion ratio was 'in general,' 'usually,' or 'about' seventy to eighty percent." *Id.* at 1154. The court determined, "The use of these terms does not constitute proof beyond a reasonable doubt. Without the proof of three grams, a conviction for Class A felony dealing in methamphetamine cannot stand." *Id.*

Another Court of Appeals of Indiana case similarly found "the use of the term 'could' b[y] a testifying police officer is, in and of itself, not proof beyond a reasonable doubt that [the defendant] manufactured three or more grams of meth." *Fancil v. State*, 966 N.E.2d 700, 707 (Ind. Ct. App. 2012). The court noted "the State argue[d] that this case is distinguishable from *Halferty* because [it] presented evidence that [the defendant] ha[d] the skill and experience to produce an efficient conversion yield." *Id.* Additionally, "[t]he State contend[ed] that [the defendant] only had to achieve a conversion ratio of twenty percent, not the fifty percent

considered in *Halferty*, 930 N.E.2d at 1154, in order to produce three grams of meth from fifteen grams of pseudophedrine." *Id.* The court disagreed with the State's arguments, finding "[a]lthough the State did present evidence that [the defendant] had been manufacturing meth for a number of months and possessed a degree of skill, [the officer's] testimony did not address a specific conversion ratio for [the defendant] in light of his capability and the materials present at his residence." *Id.* (citation omitted). "Moreover, although [the defendant] only needed to be able to convert at a rate of twenty percent to produce the three grams, the State cannot rely on the low conversion ratio from *Halferty* that was not in evidence in this case." *Id.*

In the present case, unlike *Cain* in which the State presented no testimony by anyone that the defendants had actually produced methamphetamine, the State presented multiple witnesses who testified Greenfield and Mealor provided them with methamphetamine they had produced. Rooney testified he observed activities related to the manufacturing of methamphetamine at the residence. He indicated he recognized the smell of making methamphetamine. He provided he saw Greenfield and Mealor shaking plastic drink bottles. He testified he saw Greenfield and Mealor making methamphetamine there "[q]uite a few" times. He also observed big containers of Coleman fuel, which they used in the manufacturing. He also saw cut open batteries. He testified he saw Greenfield and Mealor making methamphetamine in their bedroom. Miller testified he did not see them make methamphetamine but they told them they would be making it when he gave them the pseudoephedrine. Several witnesses testified they gave Mealor pseudoephedrine in exchange for methamphetamine. Amanda testified Mealor and Greenfield would give her money to purchase pseudoephedrine for them, and she would keep the change.

Captain Brooks testified 40 to 50% is the lowest yield percentage of methamphetamine one could possibly get from pseudoephedrine. He indicated that was the worst case scenario. He testified sulfuric acid (drain cleaner), coffee filters, funnels, bottles, Xylene, ether, starter fluid, cut batteries, medication blister packs, and burn piles are all things normally observed at a lab. Several witnesses placed these things at the house in question.

The trial court did not err in denying the motion for a directed verdict. Viewing the facts in the light most favorable to the State, the State presented evidence from which the jury could find Mealor manufactured or attempted to manufacture over

twenty-eight grams of methamphetamine. Many witnesses testified Mealor and Greenfield gave them methamphetamine in return for pseudoephedrine. Accordingly, the records contain evidence they were able to actually produce methamphetamine. Further, witnesses also testified one of the reasons Mealor and Greenfield started manufacturing methamphetamine was because they believed they could produce it at a lesser cost than buying it. Captain Brooks testified the worst case scenario yield was 40%. Applying a 40% yield to the amount of pseudoephedrine Mealor and Greenfield were given, according to the testimony the State presented, the amount of grams of methamphetamine would be over twenty-eight grams. Several witnesses testified Mealor or Greenfield would give them methamphetamine in the amount of $20 or $40 at a time.[13] While Captain Brooks's testimony indicates a person attempting to make methamphetamine could end up with no methamphetamine due to flash fire, that person would still have been attempting to produce some amount of methamphetamine. Here, many witnesses testified that Mealor and Greenfield gave them methamphetamine after they had made it, demonstrating they were successful. Although we do not have specific testimony that Greenfield or Mealor was a "good cook," we do have testimony they successfully produced methamphetamine. Accordingly, the trial court did not err in denying the directed verdict motion.

CONCLUSION

The trial court's admission of the NPLEX logs is unpreserved for review on appeal. Further, the trial court did not err in admitting Captain Brooks's testimony on the theoretical yield and denying Mealor's motion for a directed verdict. Accordingly, the trial court is

AFFIRMED.

LOCKEMY, C.J., and WILLIAMS, J., concur.

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[13] "In the case of methamphetamine, an individual user can purchase the drug in quantities as small as one gram." *State v. Bramme*, 64 P.3d 60, 64 (Wash. Ct. App. 2003). A detective "testified that the smallest unit of methamphetamine sold is one gram. Most users buy 1.8 grams—a 'teener'—or two teeners for personal use." *State v. Zunker*, 48 P.3d 344, 347 (Wash. Ct. App. 2002).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Juan Smith, Appellant.

Appellate Case No. 2015-001905

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5591
Heard June 7, 2018 – Filed August 15, 2018

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Senior Attorney General William M. Blitch, Jr., and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

GEATHERS, J.: Appellant Michael Juan Smith seeks reversal of his conviction for attempted murder. Appellant argues (1) he was entitled to a directed verdict because the State failed to prove he had the specific intent to kill the victim; (2) he was entitled to a mistrial based on improper statements made by the solicitor during her closing argument because the statements violated his due process right to a verdict based only on the evidence of his guilt; and (3) the circuit court erred by

instructing the jurors they could infer malice based on the "felony murder rule" because the underlying felonies were not inherently dangerous and involved merely possession of a firearm.[1] We affirm.

FACTS/PROCEDURAL HISTORY

The facts in the light most favorable to the State are as follows. On Sunday, October 13, 2013, at approximately 2 a.m., Appellant and his four companions, Ryan Ellison, Shante Bethel, Asia Bethel, and Taqayya White, were in Columbia's Five Points, which was crowded and noisy, when they encountered a group of three men, Byron Tucker, Donnell Woodard, and Daquan Samuel. The three men flirted with Appellant's female companions, causing tension between these men and Appellant. A silent video shows the men exchanging words with Appellant, but the written record references only one specific word uttered—Donnell Woodard used the word, "slob," which "is a disrespect toward the Bloods,"[2] a notorious gang. Members of Appellant's family as well as several of his friends were members of the Bloods, and Appellant admitted to being an unofficial member of the Bloods.[3] One of Appellant's female companions, Shante Bethel, testified that none of the three men said anything threatening but rather they were merely disrespectful. Likewise, Taqayya White testified that the three men were not intimidating.

Immediately after the confrontation, Appellant, who admitted he had been drinking and "smoking weed" that night, took a gun out of the inside pocket of his jacket, moved it to the outside right pocket, and kept his hand in that pocket. He testified that he and his companions then began walking toward their car and the three men followed them. Appellant also testified, "somebody said they had a gun" and he heard a gunshot, so he cocked his gun to put a round in the chamber and "fired one shot back," intending to target at least one of the three men. Instead, Appellant's bullet struck Martha Childress (Victim) in her chest at the seventh rib

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[1] We address the issues in a different order from that in Appellant's brief.

[2] Byron Tucker told the police that Woodard was in a gang that rivaled the Bloods. However, Captain Vincent Goggins, the supervisor of the Midlands Gang Task Force, testified he did not find Woodard, Tucker, or Daquan Samuel in the Task Force's "gang database," but he did find Appellant in the database as a "self-admitted" Blood gang member.

[3] Appellant testified he detected that the three men knew he was a gang member: "They said slob, so I already knew what the problem was, so they already figured out I was a gang member." Upon prompting by his counsel, he stated he was not a gang member because he was "never initially beaten in."

and passed through her diaphragm and liver and into her spinal canal, transecting her spinal cord and paralyzing her from the waist down.

White's statement to police contradicted Appellant's testimony that he heard a shot before he fired his gun—she told police that Appellant was the only one who fired a shot that night. His other three companions also testified at trial, admitting they did not see anyone pull out a gun or fire a shot at Appellant.[4] A disinterested eyewitness observed a muzzle flash coming from Appellant but did not see anyone else with a gun.

Tucker gave a version of events that was different from Appellant's version. Tucker, who described Five Points as "Blood territory," testified that after Samuel tried to entice Appellant's female companions with money, Appellant "turned to walk back in [their] direction and then that's when the first shot rang out." Tucker, who did not have a gun that night, ducked, then a second shot "came out."

Officer Theodore McLaughlin with the City of Columbia Police Department testified that he "was standing on the corner of Devine and Harden Street observing the students as they were crossing the street" when he heard one or two gunshots "coming from the fountain area." He then "saw [Appellant] running in the sidewalk dodging . . . people on the sidewalk." Officer McLaughlin continued, "[H]e had his right hand in his right coat pocket, and it looked like he was holding something from bouncing. It was a heavy object." Officer McLaughlin caught Appellant in front of Pop's Pizza, grabbing him "at the jacket front and his right pocket," and felt a pistol in that pocket. As Officer McLaughlin reached inside the pocket to retrieve the pistol, Appellant's hand was still on it. Officer McLaughlin pulled Appellant's hand out of the pocket and took the pistol, observing that it was a Glock 27 that was "still warm to the touch." As Officer McLaughlin began to unload the pistol, he noticed there was a round chambered in it.

On November 13, 2013, Appellant was indicted for attempted murder, possession of a weapon during the commission of a violent crime, unlawful carrying of a pistol, possession of a firearm by a person convicted of a violent felony, and possession of a stolen pistol. On December 18, 2013, he was indicted for unlawful

[4] Asia Bethel testified she saw one of the three men pulling up his shirt and exposing a gun, but she turned away and did not see him pull the gun out. Shante Bethel testified she saw one of the men put his hand in his pants. She also turned away and then heard gunshots. White testified she saw no one, other than Appellant, with a gun that night.

possession of a weapon by a person convicted of a crime of violence. The circuit court conducted Appellant's trial on August 10–14, 2015, and August 17, 2015.

At trial, Appellant argued he was acting in self-defense, explaining that he associated with gang members and when he encountered members of a rival gang on the morning in question, he acted to protect himself. The circuit court directed a verdict for Appellant on the stolen pistol charge, and the jury convicted Appellant of the remaining charges. He was sentenced to one year of imprisonment for unlawful carrying of a pistol; thirty years for attempted murder; five years for possession of a weapon during the commission of a violent crime, to run consecutively; five years for possession of a weapon by a person convicted of a violent felony, also to run consecutively; and five years for possession of a weapon by a person convicted of a crime of violence. This appeal followed.[5]

ISSUES ON APPEAL

1. Was Appellant entitled to a directed verdict on the attempted murder charge?

2. Was Appellant entitled to a mistrial based on improper statements made by the solicitor during her closing argument?

3. Did the circuit court err by instructing the jurors they could infer malice based on the "felony murder rule" when the underlying felonies involved possession of a firearm?

4. Did the circuit court's felony murder rule instruction violate *State v. Norris*?[6]

5. Did the circuit court's felony murder rule instruction violate *State v. Belcher*?[7]

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[5] Although Appellant's Notice of Appeal references all of his convictions and sentences, his appellate brief seeks reversal of only his attempted murder conviction.

[6] 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) (setting forth an example of a proper jury instruction on the felony murder rule), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) and *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

[7] 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) ("[T]he 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse[,] or justify the killing (or the alleged assault and battery with intent to kill).").

STANDARD OF REVIEW

Directed Verdict

"[W]hen ruling on a motion for a directed verdict, the [circuit court] is concerned with the existence of evidence, not its weight." *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) (quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)). Likewise, on appeal, "this [c]ourt must affirm the [circuit] court's decision to submit the case to the jury" when "the [S]tate has presented 'any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused.'" *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) (quoting *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)). In making this determination, "this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Pearson*, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016) (quoting *Butler*, 407 S.C. at 381, 755 S.E.2d at 460).

Mistrial

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Jury Instructions

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

LAW/ANALYSIS

I. Directed Verdict

Appellant asserts he was entitled to a directed verdict on the attempted murder charge because the State was required to show his specific intent to kill Victim and

the State could not rely on the transferred intent doctrine to make this showing. We disagree.

We begin by comparing the elements of murder with those of attempted murder. "The elements of the common-law offense of murder are codified at [section 16-3-10 of the South Carolina Code (2015)]: '"Murder" is the killing of any person with malice aforethought, either express or implied.'" *State v. Watson*, 349 S.C. 372, 376, 563 S.E.2d 336, 337 (2002) (quoting section 16-3-10). We find the following definition of "malice aforethought" instructive:

> "Malice aforethought" is defined as "the requisite mental state for common-law murder" and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule). "General intent" is defined as "the state of mind required for the commission of certain common law crimes not requiring specific intent" and it "usually takes the form of recklessness . . . or negligence."

State v. Kinard, 373 S.C. 500, 503–04, 646 S.E.2d 168, 169 (Ct. App. 2007) (citations omitted) (quoting Black's Law Dictionary 813, 969 (7th ed. 1999)).[8]

Our legislature has defined *attempted* murder in the following manner: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015) (emphasis added). Our supreme court recently interpreted this language to mean that the State must show a defendant's *specific intent* to kill in order to prove attempted murder. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).[9] The supreme court also stated, "One cannot be guilty of

[8] The *Kinard* court noted that our supreme court's opinion in *State v. Harris*, 340 S.C. 59, 64, 530 S.E.2d 626, 628 (2000) found that the definition of 'malice aforethought' in Black's Law Dictionary "does not vary in a meaningful way from a proper jury instruction." 373 S.C. at 504 n.3, 646 S.E.2d at 169 n.3.

[9] The court affirmed, as modified, this court's opinion, filed on April 22, 2015, holding the State must show that a defendant charged with attempted murder had the specific intent to commit murder. 412 S.C. 403, 407–11, 772 S.E.2d 189, 191–93

attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." *Id.* at 57, 810 S.E.2d at 23 (quoting *Keys v. State*, 766 P.2d 270, 273 (Nev. 1988)).

Before we address the transferred intent doctrine, we examine Appellant's specific intent to kill one of the three men with whom he exchanged words on the morning of the shooting. Appellant's argument that he was acting in self-defense is undoubtedly an admission that he intended to use deadly force—he asserts he believed that he had to use deadly force to avoid losing his life or being seriously injured. *See State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("A person is justified in using *deadly force* in self-defense when: (1) The defendant was without fault in bringing on the difficulty; (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable[,] prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance." (emphasis added) (quoting *Wiggins*, 330 S.C. at 545, 500 S.E.2d at 493); *State v. Starnes*, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010) (holding there was no evidence to support a voluntary manslaughter jury instruction because there was no evidence that the defendant "was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence" and observing that the record showed only "that Appellant *deliberately and intentionally* shot [the victims] and that he either shot the men with malice aforethought *or in self-defense*" (emphases added)). Therefore, any evidence showing that Appellant's intentional use of deadly force was unjustified, combined with the doctrine of transferred intent, requires this court to affirm the denial of Appellant's directed verdict motion.

Here, there was ample evidence showing that Appellant's intentional use of deadly force was unjustified. Shante Bethel testified that none of the three men whom Appellant claimed were threatening actually said anything threatening; rather,

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(Ct. App. 2015). The supreme court also expanded the analysis to explain that our legislature "created the offense of attempted murder by purposefully adding the language 'with intent to kill' to 'malice aforethought, either express or implied' to require a higher level of *mens rea* for attempted murder than that of murder." 422 S.C. at 61, 810 S.E.2d at 25. In the present case, the circuit court instructed the jury that attempted murder "requires the specific intent to kill."

they were merely disrespectful. Nonetheless, immediately after the verbal exchange with Tucker, Woodard, and Samuel, Appellant moved his gun from the inside pocket of his jacket to the outside right pocket and kept his hand in that pocket, indicating his preparation for his later use of the gun to target at least one of the three men. Further, Taqayya White told police that Appellant was the only one who fired a shot that night. Three of Appellant's companions admitted they did not see anyone pull out a weapon or fire a shot at Appellant. A disinterested eyewitness observed a muzzle flash coming from Appellant but did not see anyone else with a gun.

All of this evidence shows that any belief on Appellant's part that he was "in imminent danger of losing his life or sustaining serious bodily injury" was unreasonable. *See Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 ("If the defense is based upon the defendant's actual belief of imminent danger, a reasonable[,] prudent man of ordinary firmness and courage would have entertained the same belief . . . [.]" (quoting *Wiggins*, 330 S.C. at 545, 500 S.E.2d at 493)). Moreover, after Appellant fired his gun, he fled until he was caught by Officer McLaughlin. This shows that Appellant was free to flee the scene rather than fire the shot that injured Victim. *See State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 239 (Ct. App. 2014) (listing as an element of self-defense, "the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance").

Finally, in a series of telephone calls with Shante Bethel,[10] Appellant reflected on the incident and discussed how to present his case at trial. In one call, he stated that the police had charged him with the wrong offense, i.e., assault and battery of a high and aggravated nature, when he should have been charged with attempted murder. He also told Bethel to testify that he did not fire a shot, which belies his trial testimony that he fired a shot because he was afraid for his life. *See Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 (listing as one of the elements of self-defense the defendant's actual belief that "he was in imminent danger of losing his life or sustaining serious bodily injury"). Appellant also bragged about how he was going to "hit" the jury with "that innocent look," "get to them," and "have them confused." He then stated, "I got this. I just need y'all to play y'all part." The statements in these phone calls reflect Appellant's memory of his state of mind when he targeted Tucker, Woodard, and Samuel but instead shot Victim. *See United States v. Reamer*, 589 F.2d 769, 770 (4th Cir. 1978) ("The law is well established that, in a criminal case, evidence of a defendant's attempt to influence a witness to testify regardless of

[10] Appellant made these calls while he was incarcerated awaiting trial, and the calls were recorded.

the truth is admissible against him on the issue of criminal intent."); *Johnson v. State*, 263 S.W.3d 405, 426 (Tex. App. 2008) ("[A]n attempt to tamper with a witness is evidence of 'consciousness of guilt.'" (quoting *Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App.1999))). Therefore, the statements contradict Appellant's argument that he was justified in using deadly force to protect himself.

The foregoing evidence shows Appellant's unjustified, specific intent to kill at least one of the three men he encountered. Further, the State showed specific intent *as to Victim* through the doctrine of transferred intent. In *State v. Fennell*, our supreme court described the transferred intent doctrine in the following manner:

> Some have observed, as the prosecutor did at appellant's trial, that "malice follows the bullet." Such explanations, as well as the term "transferred intent" itself, are somewhat misleading. The defendant's mental state, or *mens rea*, whatever it may be at the time he allegedly commits a criminal act, is contained within the defendant's brain when he commits the act. That mental state never leaves the defendant's brain; it is not "transferred" from the defendant's brain to another person or place. A more apt description might be that the mental state is like a spotlight emanating from its source—the defendant's mind—to its target—the intended victim.
>
> Nor is that mental state in limited supply. The mental state "spotlight" is not extinguished at the moment a bullet strikes and kills the intended victim, such that there is no mental state left upon which to convict [as to] an unintended victim who also is injured or killed.

340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000).

Appellant cites *State v. Hinton*, 630 A.2d 593, 600–02 (Conn. 1993) in support of the proposition that the transferred intent doctrine does not apply to attempt crimes. However, as the State correctly points out, the *Hinton* court's analysis was based on its interpretation of Connecticut's statutory scheme for the offenses of attempted murder and assault in the first degree. 630 A.2d at 599–602. The first two subdivisions of Connecticut's assault statute expressly provided for transferred intent whereas there was no such provision in Connecticut's attempted murder statute. The *Hinton* court relied on the "rule of lenity" commonly used to interpret

ambiguous criminal statutes in favor of the defendant: "Under the circumstances of this case, the rule of lenity leads us to conclude that the transferred intent doctrine should not be applied to the crime of attempted murder." 630 A.2d at 602.

The State also points to the following language from our supreme court's opinion in *Fennell*:

> A person who, acting with malice, *unleashes a deadly force* in an attempt to kill or injure an intended victim *should anticipate that the law will require him to answer fully for his deeds* when that force kills or injures an unintended victim. Accordingly, we hold that the doctrine of transferred intent may be used to convict a defendant of [assault and battery with intent to kill] when the defendant kills the intended victim and also injures an unintended victim.

340 S.C. at 276, 531 S.E.2d at 517 (emphases added). The court further stated, "Our holding is consistent with the approach taken by other jurisdictions. 'When a defendant contemplates or designs the death of another, the purpose of deterrence is better served by *holding that defendant responsible for the knowing or purposeful murder of the unintended as well as the intended victim*.'" *Id.* (emphasis added) (quoting *State v. Worlock*, 569 A.2d 1314, 1325 (N.J. 1990)). The court also cited *Hinton* and *Ochoa v. State*, 981 P.2d 1201, 1205 (Nev. 1999) as supporting authorities, noting the application by the Supreme Court of Nevada of the transferred intent doctrine to "all crimes where an unintended victim is harmed as a result of [the] defendant's *specific* intent to harm an intended victim regardless of whether the intended victim is injured." 340 S.C. at 276, 531 S.E.2d at 518 (emphasis added). The *Ochoa* court concluded the transferred intent doctrine could be used to prove the defendant committed attempted murder. 981 P.2d at 1205.

Based on the foregoing, the State properly relied on the transferred intent doctrine to show specific intent as to Victim. We affirm the denial of Appellant's directed verdict motion.

II. Mistrial

Appellant also asserts he was entitled to a mistrial based on statements made by the assistant solicitor during her closing argument because the statements violated his due process right to a verdict based on the evidence of his guilt rather than fear.

Near the end of her closing argument, the assistant solicitor made the following comments:

> Base your evidence on the credible testimony. I will hang this case on the testimony of Michael Painter, who has no dog in this fight, who is able to describe exactly what happened and what's corroborated by the video. I will hang it on Byron Tucker, who came down here without a subpoena and said what happened. He and his friends didn't have a gun that night. They were shot at. He smiled because he didn't believe it. He was in shock.
>
> And then as Ms. Zmroczek pointed out, [Tucker] walked over to [Victim] and [Victim] gave him a hug because he did something that he did not have to do, which was come down here and testify so that the man who put her in that wheelchair can be held responsible for what he did. Base your decision, base your verdict on that.
>
> And if you don't think that we've done it, if you don't think that Michael Painter was right about the man in the tan outfit firing the gun, then find him not guilty. *We will give him back all of his stuff and put him back out on the street.*

(emphasis added). The assistant solicitor simultaneously tossed Appellant's gun on top of the clothing he wore on the night of the shooting.

The circuit court sustained Appellant's objection and immediately instructed the jury to "[d]isregard the last statement." After the circuit court completed charging the jury on the law, Appellant made a mistrial motion on the ground that the assistant solicitor's remark about putting Appellant back out on the street was calculated to inflame the passions and prejudices of the jury and violated due process. The circuit court denied the motion, specifically concluding that the circumstances did not rise to the level of "manifest necessity" given his curative instruction and his additional jury instructions.

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the [circuit] court and its ruling will not be disturbed on appeal absent

an abuse of discretion amounting to an error of law." *Harris*, 340 S.C. at 63, 530 S.E.2d at 627–28. "A mistrial should only be granted when absolutely necessary." *Id.* at 63, 530 S.E.2d at 628; *see also State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) ("The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way."); *State v. Patterson*, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) ("A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons."). "In order to receive a mistrial, the defendant must show error and resulting prejudice." *Harris*, 340 S.C. at 63, 530 S.E.2d at 628.

We acknowledge that

> solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom. In keeping their closing arguments within the record, solicitors additionally must tailor their remarks "so as not to appeal to the personal biases of the jury" or "arouse the jurors' passions or prejudices."

Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (citation omitted) (quoting *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). Nonetheless, an "[i]mproper closing argument does not automatically require reversal of a conviction." *State v. Carlson*, 363 S.C. 586, 607, 611 S.E.2d 283, 293 (Ct. App. 2005). "The appropriateness of a solicitor's closing argument and the decision whether to grant a defendant's motion for a mistrial are matters within the trial judge's discretion that ordinarily will not be disturbed on appeal." *Id.* at 607, 611 S.E.2d at 293–94.

Moreover, "[o]nce the trial judge has allowed the argument to stand . . . the defendant must bear the burden of demonstrating that the argument in effect denied him a fair determination of his guilt or innocence." *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). "On appeal, this [c]ourt will review the alleged impropriety of argument in the context of the entire record." *Id.* "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997).

Here, Appellant maintains the assistant solicitor's remark "asked the jury to focus on the irrelevant factor of [A]ppellant's future dangerousness, not his guilt or

innocence."[11] Specifically, Appellant asserts the assistant solicitor "capitalized not only on the jury's general fear of gangs, but on their specific fears for their own safety[,] which they expressed twice in writing to the [circuit court]."[12] Appellant is referring to two notes sent by the jury to the circuit court. Roughly mid-way through the State's case, the jury sent the following note to the circuit court:

> We are all concerned about our safety. It is our understanding that someone in a red shirt took a picture of all of us in the courtroom yesterday. We are not discussing the case, just concerned about our safety. We would like to discuss this with the judge when he has some time. Thanks,
>
> Jurors

After meeting with the jury, the circuit court advised counsel for the State and Appellant of the following:

> Okay. I questioned the jury about the note that they sent concerning someone taking a picture. My question to them was how have you learned about this more than anything, and they -- a couple of them said they thought

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[11] In support of this assertion, Appellant cites the following dictum from Justice Blackmun's plurality opinion in *Simmons v. South Carolina*:

> Arguments relating to a defendant's future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt.

512 U.S. 154, 163 (1994).

[12] Appellant also argues the remark in question was inaccurate and misleading because "the State knew that [A]ppellant had already been convicted and sentenced in federal court and under no circumstances would be 'back on the streets.'"

> they saw somebody take a picture of them and then they heard me say no more cell phones in the courtroom.
>
> I told them that I said no more cell phones in the courtroom because I was aware that somebody had taken a picture of me and that's when I ended the cell phones in the courtroom except for law enforcement, media[,] and lawyers.
>
> I said is anybody concerned about their safety, and they said no. So they're fine.

After the circuit court provided jury instructions and the jury exited the courtroom, they sent a second note, along with a request for a written copy of the jury instructions, to the circuit court: "There have been concerns expressed by the group about safety [after the] conclusion of this trial." The circuit court responded in writing at the bottom of the second note: "We will ensure your safety at the conclusion of the trial. Thank you – REH Written [with] the consent of the attorneys REH[.]"

Similar to previous inappropriate conduct in this particular judicial circuit,[13] the assistant solicitor in the present case undoubtedly pushed the boundaries that officers of the court must respect. She improperly alluded to Appellant's future

[13] *See State v. Anderson*, 413 S.C. 212, 219–20, 776 S.E.2d 76, 79–80 (2015) (holding the circuit court erred in qualifying a witness as an expert in child abuse assessment and in forensic interviewing and the prejudice was "overwhelming" because "the solicitor and [the witness] repeatedly pushed the boundaries of the parties' common understanding of the permissible limits of [the witness's] trial testimony" with improper vouching and the volume of the solicitor's voice at bench hearings was inappropriate); *State v. Young*, 420 S.C. 608, 623, 803 S.E.2d 888, 896 (Ct. App. 2017) (holding the circuit court erred in admitting a co-defendant's letter to his mother without conducting the examination required by Rule 804(b)(3), SCRE, for admitting a purported statement against penal interest because the "portions of the letter that did not plainly inculpate [the co-defendant] were rank hearsay inadmissible against" the defendant); *id.* at 629, 803 S.E.2d at 899 ("We remain concerned—not to mention perplexed—by the State's use of evidence the [United States] Supreme Court forbade a generation ago in *Williamson* [*v. United States*, 512 U.S. 594 (1994)], and in a manner condemned a generation before that in *Bruton* [*v. United States*, 391 U.S. 123 (1968)].").

dangerousness, which is irrelevant to his guilt of the charged offenses, in an attempt to appeal to the jurors' sense of fear. *See State v. White*, 246 S.C. 502, 504, 507, 144 S.E.2d 481–83 (1965) (holding that the State's argument, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do?" injected matters outside the record into the case and "calculated to take from the trial the necessary element of impartiality"); *Martin v. Estelle*, 546 F.2d 177, 179 (5th Cir. 1977) (observing that the continual references to "highly inflammatory evidence," combined with the prosecution's argument "that [the] appellant would be 'back on the streets' if found incompetent to stand trial" supported the appellant's "position that he was denied a full, fair, and meaningful competency trial"); *Wingate v. Wainwright*, 464 F.2d 209, 215 (5th Cir. 1972) (holding that the prejudicial nature of evidence of a habeas petitioner's prior alleged robberies for which he was tried and acquitted was "quickened by" the prosecution's improper argument, "I am asking you not to allow this man to go back on the street and to redo those things that he has done"). In fact, the State conceded during oral arguments before this court that the assistant solicitor's comments were inappropriate.

We also agree with Appellant that the words, "put him back out on the street" were misleading given his federal conviction and sentence. Nevertheless, the improper remark was cured by the circuit court's instruction to disregard it in combination with his repeated admonitions before and after the State's closing argument that the jurors were required by their oath to disregard any statement when instructed to do so and that the arguments of the attorneys did not constitute evidence. *See State v. Greene*, 330 S.C. 551, 561, 499 S.E.2d 817, 822 (Ct. App. 1997) ("An error is deemed to be cured if a curative instruction is given."). Notably, none of the opinions cited by Appellant in support of his argument for a mistrial involved a curative instruction from the presiding judge. In fact, two of these opinions specifically state that no curative instruction was given to the jury. *See United States v. Johnson*, 968 F.2d 768, 772 (8th Cir. 1992); *Bigner v. State*, 822 So. 2d 342, 352 (Miss. Ct. App. 2002).

Further, the circuit court responded to the jurors' written expression of fear by advising them the court would ensure their safety at the trial's conclusion. Moreover, to the extent that the improper remark may not have been cured, we agree with the circuit court's statement that despite its traditional prohibition against evidence relating to gang activity, Appellant introduced "the gang issue" into the case so that it "was always in front of the jury without any objection from [Appellant] at all." We acknowledge Appellant's argument, "[a]ggressive behavior by the rival gang members . . . was necessary for [A]ppellant to explain his actions and to establish

his self-defense case." However, in all fairness, we cannot ignore the contribution that this trial strategy likely made to the sense of fear the jurors expressed in their notes to the circuit court. Therefore, the assistant solicitor's improper remarks did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Huggins*, 325 S.C. at 107, 481 S.E.2d at 116. The circuit court properly exercised its discretion in denying Appellant's mistrial motion.

III. Jury Instruction on Felony Murder Rule

Appellant argues the circuit court erred by instructing the jurors they could infer malice based on the "felony murder rule" because the underlying felonies were not inherently dangerous and involved merely possession of a firearm.

A. Nature of the Underlying Felony

In *Norris*, our supreme court set forth the following as an example of a proper jury instruction on the felony murder rule:

> The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

285 S.C. at 92, 328 S.E.2d at 343.[14]

[14] We acknowledge that the specific intent requirement for attempted murder may preclude the application of the felony murder rule in attempted murder cases given that the rule allows for the implication of malice. *See King*, 422 S.C. at 57, 810 S.E.2d at 23 ("One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." (quoting *Keys*, 766 P.2d at 273)). Yet, the *King* court recognized that the concept of implied malice still lingers in the language of section 16-3-29, which modifies the term "malice aforethought" with the phrase "express or implied." § 16-3-29; *see King*, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5 ("[W]e would respectfully suggest to the General Assembly to re-evaluate the language following 'malice aforethought' as the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a

Appellant argues that illegally possessing a firearm is a "status" crime that does not provide a sufficient basis to charge the felony murder rule. Appellant cites *Gore v. Leeke*, 261 S.C. 308, 316, 199 S.E.2d 755, 758 (1973) for the proposition that the felony murder rule should not be charged to the jury unless the underlying felony is inherently dangerous. Appellant also cites *Gore* for the proposition that the felony murder rule should not apply to crimes classified as *malum prohibitum*, which means "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral,"[15] as opposed to offenses considered "*malum in se*," which means "[a] crime or an act that is inherently immoral, such as murder, arson, or rape."[16] Appellant characterizes his illegal gun possession at the time he shot Victim as *malum prohibitum*.

First, contrary to Appellant's assertion, the *Gore* court did not adopt the following language: "[T]here is no room for the logical application of [the felony murder rule] where the felony committed was not an inherently dangerous one." Rather, the court presented this language as part of Mr. Gore's argument in that case. 261 S.C. at 316, 199 S.E.2d at 758. In fact, the court observed, in dictum,

> The weight of authority, in other jurisdictions where the question has arisen, appears to be to the effect that both the nature of the felony itself and the circumstances of its commission are to be considered in determining whether a felony is foreseeably dangerous so as to properly invoke the application of the felony-murder rule.

Id. at 317, 199 S.E.2d at 758. Nonetheless, the court declined to adopt a rule for application beyond the facts of the case before it and merely held that Gore's conviction under the felony murder rule "was fully justified" under the circumstances of the case. *Id.* at 318, 199 S.E.2d at 759.

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specific-intent crime."); *id.* (declining to address whether this court "erred in summarily affirming the trial judge's decision to instruct the jury that malice may be inferred from the use of deadly weapon" after acknowledging that the issue was related to the specific intent issue). In any event, we need not resolve this precise question as it was neither presented to the circuit court nor argued in Appellant's brief.

[15] *Malum prohibitum*, Black's Law Dictionary (9th ed. 2009).

[16] *Malum in se*, Black's Law Dictionary (9th ed. 2009).

Here, the circuit court gave the following explanation for its decision to instruct the jury on the felony murder rule:

> I believe that the carrying of a firearm in these conditions with [Appellant's] criminal history put everybody in an extreme risk of danger that was present in the area that night. There was no doubt based upon the evidence submitted and based upon the defense attorney's opening statement and his conviction in federal court that he was, at least, committing a federal crime and potentially committing, at least, two [s]tate felonies while carrying the firearm. So the difference in this situation is it's not like we have somebody in the community lawfully carrying a firearm [who] chooses to, you know, use it or to defend themselves. This is an individual who based upon his prior criminal history would not be allowed to carry a firearm period in state court or in federal court. And so I -- you know, I think the unlawful carrying of a pistol by a convicted felon in our community *in a situation such as a crowd in Five Points and in a situation where, according to his own testimony, he knew was violent*, he had been beaten up and assaulted[,] rises to a different level, and I will charge the version of felony murder.

(emphasis added).

In other words, the circuit court concluded the circumstances of the present case made Appellant's prohibited possession of a weapon foreseeably dangerous. This conclusion is supported by the record and by the *Gore* court's approach to the same question, i.e., the circumstances of this specific case justified the circuit court's instruction on the felony murder rule.

Further, even if *Gore* may be interpreted to limit the felony murder rule to *malum in se* offenses, we disagree with Appellant's characterization of his illegal gun possession at the time he shot Victim as *malum prohibitum*. This was not a case of an otherwise law-abiding citizen carrying a concealed weapon without the required permit. Appellant was prohibited from possessing a weapon because he had previously been convicted of a "violent felony" and a "crime of violence." Through the very prohibition of gun possession by such persons, the legislature has recognized the inherent danger involved. *See* S.C. Code Ann. § 16-23-30(A)(1)

(2015) ("It is unlawful for a person to knowingly sell, offer to sell, deliver, lease, rent, barter, exchange, or transport for sale into this State any handgun to . . . a person who has been convicted of a crime of violence in any court of the United States, the several states, commonwealths, territories, possessions, or the District of Columbia . . . ."); S.C. Code Ann. § 16-23-500(A) (2015) ("It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State.").

Moreover, any error in giving a jury instruction on this rule was harmless beyond a reasonable doubt, which we will address in more detail in Part III(D) below.

B. Violation of *Norris*

Appellant also argues the circuit court's felony murder rule instruction was inadequate because it did not employ the exact language used in the example given by our supreme court in *Norris*. We disagree.

Contrary to Appellant's argument, the *Norris* court did not indicate it was requiring circuit courts to use the model charge set forth in its opinion. In fact, the court found no error in the circuit court's instructions in that case. *Norris*, 285 S.C. at 91–92, 328 S.E.2d at 342.

In the present case, the circuit court gave the following instruction on the felony murder rule:

> Now, the law also allows you to *infer* malice if you conclude that the attempted murder was a proximate direct result of the commission of a felony. And for that regard, two of the gun charges, possession of a weapon by a person being convicted of a crime of violence and possession of a weapon by a person being convicted of a violent felony would be felonies under our law. You can imply that malice existed if a person in the commission of a felony at the time of the attempted fatal blow, if one attempts to kill another during the commission of a felony, the *inference* of malice may arise.

(emphases added). The circuit court also gave the following instructions on the role of inferences in the evidence presented:

> [T]he law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present. It is not necessary to establish intent by direct and positive evidence, but *intent may be established by inference in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case*.

(emphasis added). As to malice, the circuit court instructed the jury,

> Malice aforethought may be expressed or implied. These terms expressed and inferred -- excuse me, inferred, not implied. These terms expressed and inferred do not mean different kinds of malice, but merely the manner in which the malice may be shown to exist. That is either by direct evidence *or by inference from the facts and the circumstances [that] are proved*. Expressed malice is shown when a person speaks words [that] express hatred or ill will for another or when the person prepared beforehand to do the act [that] was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice. *Malice may also be inferred from conduct showing a total disregard for human life. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be considered by you, the jury, along with the other evidence in the case*. And you may give it the weight and credibility -- may give it the weight you decide it should receive.

(emphases added).

Therefore, the circuit court's jury instructions as a whole adequately informed the jury that Appellant's commission of a felony during the alleged attempted killing

did not *require* the jury to find malice but merely *allowed* them to infer malice. Further, even if the *Norris* court had made its model instruction mandatory, the circuit court's instructions in the present case, as a whole, covered all of the information set forth in the *Norris* example. *See State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011))); *id.* ("The substance of the law is what must be instructed to the jury, not any particular verbiage." (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994))).

Based on the foregoing, the circuit court's felony murder rule instruction did not violate *Norris.*

C. Violation of *Belcher*

Appellant asserts there was evidence he acted in self-defense, and thus, the circuit court's application of the felony murder rule to his weapon possession offenses violated *Belcher*, which prohibits a jury instruction allowing the inference of malice from the use of a deadly weapon when there is evidence "that would reduce, mitigate, excuse[,] or justify the killing (or the alleged assault and battery with intent to kill)." 385 S.C. at 610, 685 S.E.2d at 809. Appellant argues that if malice may not be inferred from the use of a deadly weapon, then surely it may not be inferred from mere possession of a deadly weapon.

The State argues Appellant did not preserve his *Belcher* argument for review because he did not raise it at trial. We agree.[17] *See State v. Freiburger*, 366 S.C.

[17] At oral argument, Appellant attempted to rebut the State's preservation argument by contending that a party does not have to cite the name of a case supporting the party's asserted ground for an objection in order to preserve the ground for appellate review. This court is well aware of the specificity required to preserve an argument for review. *See State v. Geer*, 391 S.C. 179, 191, 705 S.E.2d 441, 448 (Ct. App. 2010) ("A party need not use the exact name of a legal doctrine in order to preserve it, *but it must be clear that the argument has been presented on that ground*." (emphasis added) (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003))). At trial, Appellant's asserted grounds for objecting to the jury instruction on the felony murder rule never included an argument that his purported evidence of self-defense precluded the circuit court from giving the instruction.

125, 135, 620 S.E.2d 737, 742 (2005) ("[I]f asserted errors are not presented to the [circuit c]ourt, the question cannot be raised for the first time on appeal.").[18]

D. Harmless Error

The State argues any error in giving the felony murder rule instruction was harmless beyond a reasonable doubt because there was other evidence of Appellant's malice. *See State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (holding the circuit court's error in refusing to instruct the jury on a lesser-included offense was "harmless beyond a reasonable doubt"); *id.* ("When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998))). We agree.

"'In making a harmless error analysis, [the appellate court's] inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.' Thus, whether or not the error was harmless is a fact-intensive inquiry." *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435 (citation omitted) (quoting *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218). The appellate court "must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict." *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218.

In the present case, the most damning evidence of Appellant's express malice was *uncontested* and compelling. As previously stated, immediately after the exchange with Tucker, Woodard, and Samuel, Appellant moved his gun from the inside pocket of his jacket to the outside right pocket and kept his hand in that pocket. This shows Appellant's preparation for his later use of the gun to target at least one of the three men. Additionally, no one could testify to seeing any of the three men pull out a weapon or fire a shot at Appellant.

This evidence shows that any belief on Appellant's part that he was "in imminent danger of losing his life or sustaining serious bodily injury" was unreasonable. *See Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 ("If the defense is

[18] Likewise, Appellant's argument that the felony murder rule instruction "negated the jury's duty to determine whether the State disproved self-defense beyond a reasonable doubt" was not presented to the circuit court. Therefore, it is not preserved for review.

based upon the defendant's actual belief of imminent danger, a reasonable[,] prudent man of ordinary firmness and courage would have entertained the same belief . . . [.]" (quoting *Wiggins*, 330 S.C. at 545, 500 S.E.2d at 493)). Moreover, Appellant was free to flee the scene rather than fire the shot that injured Victim. *See Douglas*, 411 S.C. at 318, 768 S.E.2d at 239 (listing as an element of self-defense, "the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance").

Finally, in telephone calls to Shante Bethel, Appellant stated that the police had charged him with the wrong offense, i.e., assault and battery of a high and aggravated nature, when he should have been charged with attempted murder. He also told Bethel to testify that he did not fire a shot, which belies his trial testimony that he fired a shot because he was afraid for his life. *See Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 (listing as one of the elements of self-defense the defendant's actual belief that "he was in imminent danger of losing his life or sustaining serious bodily injury"). Additionally, he bragged about how he was going to "hit" the jury with "that innocent look," "get to them," and "have them confused." He then stated, "I got this. I just need y'all to play y'all part." These statements constitute compelling evidence of Appellant's consciousness of guilt. *See Reamer*, 589 F.2d at 770 ("The law is well established that, in a criminal case, evidence of a defendant's attempt to influence a witness to testify regardless of the truth is admissible against him on the issue of criminal intent."); *Johnson*, 263 S.W.3d at 426 ("[A]n attempt to tamper with a witness is evidence of 'consciousness of guilt.'" (quoting *Wilson*, 7 S.W.3d at 141)).

These undisputed facts belie Appellant's claim that he was acting in self-defense and, instead, show express malice and his specific intent to kill at least one of the three men he encountered. Moreover, the State showed specific intent *as to Victim* through the doctrine of transferred intent. Given the candid and compelling nature of the foregoing evidence, we conclude that beyond any reasonable doubt, the felony murder rule instruction made no contribution to the verdict and any error in giving it was harmless. *See Young*, 420 S.C. at 628, 803 S.E.2d at 899 ("The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986))).

CONCLUSION

Accordingly, we affirm Appellant's attempted murder conviction.

HUFF and MCDONALD, JJ., concur.