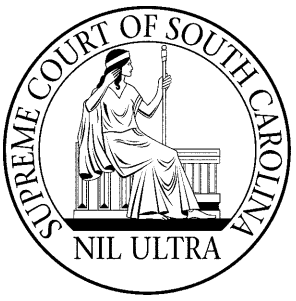

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44
November 5, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chico Bell, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2011-201106

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Opinion No. 5277
Heard September 8, 2014 – Filed November 5, 2014

AFFIRMED

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Megan E. Harrigan, all of Columbia, for Petitioner.

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

SHORT, J.: In this post-conviction relief (PCR) action, we affirm the PCR court's order granting Chico Bell's application for relief.

FACTS

Following a Richland County jury trial, Bell was convicted of armed robbery and sentenced to twenty years of imprisonment. Bell filed a direct appeal, which this court affirmed. *See State v. Bell*, Op. No. 2009-UP-027 (S.C. Ct. App. filed Jan. 13, 2009). Bell subsequently filed an application for PCR, which the PCR court granted. This court granted the State's petition for a writ of certiorari on the issue of whether the PCR court erred in finding trial counsel was ineffective for failing to communicate a ten-year plea offer to Bell.[1] We affirm.

At the PCR hearing, Bell testified he first learned of the State's plea offer "during the sentencing part of the process[,]" and the plea offer was "something about ten years." Bell stated no one with the public defender's office told him about the ten-year plea offer prior to the verdict. Bell testified he would have taken the plea offer if he had known about it. Additionally, Bell asserted if the State offered him the ten-year deal again, he would take it.

Also at the PCR hearing, Bell's trial counsel testified she was appointed to represent Bell after he filed a grievance against his prior counsel. Trial counsel stated Bell's case was transferred to her, and "it was handled in-house." She explained that while she worked for the public defender's office, the attorneys maintained their own files. When a file was transferred, the new attorney would receive the file and all of the previous attorney's notes. Trial counsel testified Bell's counsel included a note "from before [she] got the file," which was written by prior counsel. In describing the note, trial counsel explained,

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[1] This court also granted the State's petition on the issue of whether Bell suffered prejudice from counsel's failure to communicate the plea offer because Bell received a fair trial. Citing the United States Supreme Court's opinions in *Missouri v. Frye*, 132 S.Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), the State abandoned this issue in its brief.

> It's very distinct. That [prior counsel] talked to the assistant solicitor, . . . and they had a discussion about a couple of things, and in one of them [the solicitor] made an offer of ten years. There's nothing in writing from [the solicitor]. There's no document. There's just a note in here that . . . he made an offer of ten years.

Trial counsel testified nothing in the file indicated the offer was extended to Bell. Trial counsel stated that when she first met with Bell, she did not have the file with her. Trial counsel explained that during her last meeting with Bell, they discussed the evidence, and her notes indicated Bell did not want to plead guilty. The State conceded an offer was never extended to Bell, but the State contends an offer never existed.

In its written order, the PCR court found Bell proved trial counsel was ineffective by failing to communicate the plea offer to him before the jury's verdict. First, the PCR court found "a plea offer was made by the State and that [c]ounsel failed to communicate the plea offer to [Bell]." Second, the PCR court found Bell's testimony that he would have accepted the plea offer had he known about it was credible. Third, the PCR court found the difference between the sentence Bell received, twenty years, and the plea offer, ten years, was proof of prejudice. Further, the PCR court found Bell established prejudice by his own testimony "and by the circumstances of the case." Finally, the PCR court found "[t]here is a reasonable probability that, but for this error of [c]ounsel, the result to [Bell] would have been different."

As a remedy, the PCR court found, "as did the Davie[2] Court, . . . that the appropriate remedy is to grant PCR and send the case back to [the trial c]ourt for [Bell] to be re-sentenced as if he had accepted the ten (10) year offer." Accordingly, the PCR court vacated Bell's twenty-year sentence and remanded the matter for a resentencing hearing "on the plea offer of ten years."[3] The State filed a Rule 59(e), SCRCP, motion to alter or amend, which the PCR court denied. The State's petition for certiorari followed.

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[2] *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009).

[3] The State did not appeal the PCR court's order as to the mandated remedy.

ISSUE

Did the PCR court err in finding trial counsel was ineffective for failing to communicate the plea offer to Bell?

STANDARD OF REVIEW

Upon appellate review, this court gives great deference to the PCR court's findings of fact and conclusions of law. *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR [court's] findings where matters of credibility are involved." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." *Davie*, 381 S.C. at 608, 675 S.E.2d at 420. "This [c]ourt will uphold the findings of the PCR court when there is any evidence of probative value to support them, and [it] will reverse the decision of the PCR court when it is controlled by an error of law." *Id.*

LAW/ANALYSIS

The State argues the PCR court erred in finding trial counsel was ineffective for failing to communicate the plea offer because Bell presented no evidence an enforceable plea offer existed. The State maintains the trial court did not appropriately consider the solicitor's comments disavowing the plea offer during the sentencing portion of the trial. Bell argues the State conceded the plea offer was never extended to him, and its only argument is with the credibility of the evidence that the plea offer ever existed.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Our supreme court has also held "a defendant has the right to effective assistance of counsel during the plea bargaining process." *Davie*, 381 S.C. at 607, 675 S.E.2d at 419. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 132 S.Ct. at 1408; *see also Davie*, 381 S.C. at 609, 675 S.E.2d at 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance").

"In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief." *Davie*, 381 S.C. at 607, 675 S.E.2d at 419. "The [applicant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The PCR court in this case relied on *Davie* in finding Bell's counsel was ineffective. In *Davie*, counsel testified the State mailed him a written plea offer while he was in the process of changing his address. 381 S.C. at 606, 675 S.E.2d at 419. He testified he did not receive the offer until after the expiration of the offer, and if he had been aware of it, he would have communicated it to Davie. *Id.* Davie pled guilty to numerous charges without negotiation or recommendation from the State other than the dismissal of other charges that would have made him eligible for a sentence of life imprisonment without the possibility parole. *Id.* at 605, 675 S.E.2d at 418. He was sentenced to twenty-seven years in prison. *Id.* The supreme court found "plea counsel's failure to convey the State's initial plea offer to [Davie] constituted deficient performance." *Id.* at 610, 675 S.E.2d at 421. The court further found,

> Even if counsel is given the benefit of the doubt that he was not aware of the plea offer until after the expiration date, we find counsel was deficient in not objecting at the plea hearing. During the plea hearing, the solicitor informed the circuit court judge that "[t]he original plea offer in this matter has not been accepted by the due date of September 11th of this year, and so we told the defendant we were ready to go to trial." In view of the solicitor's statement, it was incumbent upon plea counsel to object or in some way indicate to the court that he had no knowledge of the original plea offer. Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence. Because counsel failed to make any attempt to protect Petitioner's interests regarding this significantly lower sentence, we conclude counsel's performance fell below the prevailing

> professional norms and, thus, constituted deficient performance.

Id. at 610-11, 675 S.E.2d at 421.

During sentencing, Bell's counsel stated, "I would like to point out that in this case he was offered to plead to the minimum of 10 years . . . ." The solicitor responded, "He was not offered to plead the minimum[,] and the offer has nothing to do with this. There are no . . . plea offers in this case." The solicitor also stated, "I just want to reiterate, I have never tendered a plea offer on this case." Bell's trial counsel responded, "I disagree." The trial judge stated, "We are not going to argue, it is my job to sentence."

We acknowledge the State's argument that the solicitor's comments during the sentencing hearing were entitled to consideration. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."). However, we are mindful of our standard of review, and we find evidence to support the PCR court's decision that trial counsel was ineffective for failing to extend the plea offer. *See Davie*, 381 S.C. at 608, 675 S.E.2d at 420 ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). In this case, trial counsel testified Bell's file contained a note indicating the solicitor made an offer of ten years imprisonment. Bell testified he did not know anything about a plea offer until his sentencing. First, the PCR court found "that a plea offer was made by the State and that [c]ounsel failed to communicate the plea offer to [Bell]." The court concluded trial counsel's performance was deficient. We find evidence of probative value in the record to support that finding.

Once an applicant proves counsel's performance was deficient, the applicant generally must show actual prejudice. *Id.* In determining prejudice for counsel's failure to convey a plea offer, the supreme court advocated "a case-by-case approach . . . of assessing whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer." *Id.* at 613, 675 S.E.2d at 422. Noting "presumed prejudice is reserved to very limited situations," the supreme court in *Davie* acknowledged Davie had to show actual prejudice. *Id.* However, the court stated, "it is not always necessary for a[n applicant] to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a[n

applicant's] self-serving statement may be sufficient to establish actual prejudice." *Id.* The supreme court concluded the difference in the sentence Davie received and the plea offer was proof of prejudice. *Id.* at 614, 675 S.E.2d at 423. In support of its conclusion, the *Davie* court noted,

> First, the solicitor and plea counsel both acknowledged that the State originally offered a fifteen-year sentence in exchange for [the applicant's] guilty plea. Secondly, plea counsel admitted that he failed to communicate this offer to [the applicant]. Thirdly, both plea counsel and [the applicant] testified that had this offer been communicated[, the applicant] would have accepted the plea agreement. Finally, had [the applicant] accepted the original offer, he would have received a significantly lower sentence than the twenty-seven-year sentence that was imposed.

Id. In this case, trial counsel testified the plea offer was for ten years imprisonment. Bell was sentenced to twenty years' imprisonment. The difference is evidence of his prejudice. *See id.* (concluding the difference in the sentence received and the plea offer was proof of prejudice). Furthermore, Bell testified he would have taken the State's plea offer had trial counsel told him about it, and the PCR court found Bell's testimony credible. Although self-serving, the statement is also evidence supporting the PCR court's finding of prejudice. *See id.* at 613, 675 S.E.2d at 422 ("[D]epending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice."). Deferring credibility matters to the PCR court, we find evidence to support the finding. *See Simuel*, 390 S.C. at 270, 701 S.E.2d at 739 ("This [c]ourt gives great deference to a PCR judge's findings where matters of credibility are involved.").

CONCLUSION

Based on the foregoing analysis, the PCR court's order is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Daniel D'Angelo Jackson, Appellant.

Appellate Case No. 2011-199366

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5278
Heard June 10, 2014 – Filed November 5, 2014

REVERSED

Dayne C. Phillips, of Lexington, and Appellate Defender Carmen Vaughn Ganjehsani, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Ernest Adolphus Finney, III, of Sumter, for Respondent.

FEW, C.J.: Daniel D'Angelo Jackson appeals his convictions for murder and armed robbery. He argues he was denied his Sixth Amendment right of confrontation when the trial court admitted the redacted statements of his nontestifying codefendant Reginald Canty. We reverse.

I. Facts and Procedural History

On the night of January 12, 2008, William Flexon was shot twice and killed while delivering pizzas to lot seven in O.C. Mobile Home Park in the Cherryvale area of Sumter. Law enforcement officers found Canty walking nearby shortly after the shooting. Canty agreed to speak with the officers, and between January 13 and 25, he gave six statements.

In his statements, Canty described his and Jackson's role in the events leading up to Flexon's death.[1] Canty stated he was at home in O.C. Mobile Home Park when Jackson asked him if he wanted to make some money by robbing a pizza delivery man. Canty wrote, "I said yes cause I didn't want the other guys to laugh and pick at me."[2] At Jackson's request, Canty's cousin Desmond took Jackson and Canty to Cherryvale Grocery. Canty saw Jackson use the pay phone outside the grocery store, and heard him call Sambino's Pizza Restaurant and order three large pizzas, requesting delivery to lot seven in O.C. Mobile Home Park. Canty stated he and Jackson then went inside the store, where Jackson purchased "a Debbie snack cake (donut sticks)." Canty and Jackson returned to the mobile home park and waited for the pizza delivery man to arrive. Canty reported he stayed at his house where he could see lot seven while Jackson hid behind some trailers. Canty watched the pizza delivery man arrive at lot seven, and saw him exit his vehicle. Canty stated the delivery man "went to the abandoned residence (Lt. 7) and saw the door open and then turn[ed] around [and] went back to his vehicle real fast." Canty then saw Jackson and at least one other person rob the delivery man. Canty reported Jackson shot the delivery man and ran away.

The State charged Jackson and Canty with murder and armed robbery and called them to trial together. Jackson filed a pretrial motion to sever the trials, arguing that if the State introduced Canty's statements at trial and Canty did not testify, the admission of the statements would violate Jackson's constitutional right to confront and cross-examine Canty. *See Bruton v. United States*, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622, 20 L. Ed. 2d 476, 479 (1968) (holding the Confrontation Clause of

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[1] We have included an appendix that contains Canty's fifth statement as read to the jury. However, several details in this paragraph are from Canty's other statements.

[2] Canty was sixteen years old at the time of the crimes, and Jackson was nineteen.

the Sixth Amendment bars the admission of a nontestifying codefendant's confession that incriminates another defendant). The trial court denied the motion.

Jackson renewed his severance motion on the first day of trial. As an alternative to severance, Jackson requested the court "thoroughly redact[]" the statements, but argued, "I don't think that's going to protect us." The court denied Jackson's renewed severance motion and stated, "[W]e'll see where we are on redaction if any statements are proposed by the State."

The State presented testimony and evidence establishing that Jackson and Canty acted together to lure a pizza delivery man to a vacant trailer at O.C. Mobile Home Park and rob him there. The owner of Sambino's Pizza Restaurant testified that on the night of January 12, a man called and ordered three large pizzas. The unnamed man told her he was calling from a pay phone, and he requested the pizzas be delivered to lot number seven in O.C. Mobile Home Park. A custodian of telephone records subsequently testified the call to Sambino's was made from the pay phone at Cherryvale Grocery.

Eugene Mackovitch testified he was working at Cherryvale Grocery the night of January 12. He recalled two African-American men—one darker-skinned and the other fairer-skinned—entered the store together, and he sold one of them a Little Debbie snack cake. During his testimony, the State played surveillance video showing Mackovitch and the two men inside the grocery store.[3] Mackovitch explained the video showed him selling the Little Debbie snack cake to one of the men.

The State presented two witnesses who identified by name the two men shown in the video. Anitta Shannon, another employee of the grocery store, testified she personally knew Jackson and identified him as the individual buying the Little Debbie snack cake. Sergeant Robert Burnish of the Sumter County Sheriff's Office—the chief investigating officer on the case—identified both Jackson and Canty as the men in the video.

Later, the State sought to introduce Canty's statements. Jackson requested the trial court review the third, fourth, fifth, and sixth statements, and the court held a

[3] Cherryvale Grocery had no surveillance cameras outside, where the pay phone was located.

hearing outside the jury's presence. The State proposed to redact the four statements by replacing Jackson's name with "another person," and the court found this redaction satisfied the requirements of *Bruton*. Jackson objected on the basis that admitting the statements violated his right to confront and cross-examine Canty. He argued that even with the State's proposed redaction, the statements were "still going to lead to inferences . . . that it might be my client that he's referring to." The court overruled Jackson's objection.

Investigator Dominick West of the Sumter County Sheriff's Office then read the redacted versions of the four statements to the jury. He did not say Jackson's name, but instead said "another person" or "the other person" wherever Jackson's name appeared in the statements. Canty's redacted statements described how "another person" (1) asked Canty if he wanted to participate in robbing a pizza man; (2) told Canty to get Desmond to take them to Cherryvale Grocery ; (3) used the pay phone to call Sambino's and order three large pizzas, requesting delivery to lot seven in O.C. Mobile Home Park; (4) bought a "Debbie snack cake donut sticks"; (5) returned to the mobile home park with Canty; (6) went behind the trailer on lot seven and waited for the pizza man to arrive; and (7) robbed and shot the pizza man, while Canty watched from his house.

Sergeant Burnish testified about his investigation of the crimes and read the original, unredacted versions of Canty's first and second statements to the jury.[4] In the first statement, Canty reported, "The gun looked like a rifle and the person that was holding the gun had a hoodie, but I couldn't see his face." He next read the second statement, in which Canty named "the bad guy . . . James or J-Boy" as the person who shot the pizza man with a rifle and ran. Sergeant Burnish also read the same redacted version of the sixth statement that Investigator West read.

After Sergeant Burnish testified that Canty made his third statement on January 15, Sergeant Burnish explained:

> Q: You were not there when Mr. Canty gave a statement on the 15th?
>
> A: I was in the building; I was not present for that statement.

[4] Canty's first and second statements did not name Jackson.

Q: Now, what happened and what did you do next in your investigation?

A: Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson.

At the close of the State's case, Jackson moved for a mistrial on the basis that admitting Canty's statements violated his right to confront and cross-examine Canty. The trial court denied Jackson's motion. Neither Canty nor Jackson testified. After Canty and Jackson presented their defenses, Jackson renewed his mistrial motion, which the court again denied.

The State presented no direct evidence of the events that occurred after Canty and Jackson left the grocery store, except Canty's statements. In particular, no eyewitnesses to the shooting testified. However, circumstantial evidence linked Jackson to the crimes. Both Investigator West and Sergeant Burnish testified they interviewed Jackson after his arrest, and Jackson "said how could I be charged with armed robbery if I didn't steal anything from the pizza man." Jackson also admitted he fled his aunt's house when he saw law enforcement officers coming. The State presented an officer who testified he recovered a Little Debbie donut sticks wrapper from "the side of the road near the entrance to . . . the mobile home park," 137 feet from Flexon's body. Canty called Latoya Rush, who testified she was Canty's neighbor when the crimes occurred. She recalled asking Canty that evening "to keep an eye on [her] house because [she] didn't want to lock [the] door" while she went to McDonald's. Rush stated that "a little while" before she left to go to McDonald's, Jackson was at her house and asked her if she had "any socks or gloves." Rush testified she went to McDonald's and was gone for "no more than ten minutes," and when she came back, she saw officers had arrived in her neighborhood because a "man was dead."

The State also presented Jackson's aunt, Andrea Russell, who testified Jackson "spent a few days" at her apartment in January 2008, although she could not recall exactly when. She later found underneath her couch a rifle that she remembered Jackson brought with him when he arrived. At trial, she identified it as the rifle the State introduced in evidence. The State's firearms expert, referring to the rifle Russell found in her apartment and a bullet fragment removed from Flexon's body,

testified "this gun fired that bullet into William Flexon." The firearms expert also testified a shell casing Russell found in her apartment was fired by the same rifle.

The jury found Jackson and Canty guilty of murder and armed robbery. The trial court sentenced Jackson to life in prison for murder and thirty years in prison for armed robbery.[5]

II. Admission of Canty's Statements Violated the Confrontation Clause

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront and cross-examine the witnesses against him, and the Fourteenth Amendment applies this right to the States. U.S. Const. amends. VI and XIV; *State v. Henson*, 407 S.C. 154, 161, 754 S.E.2d 508, 512 (2014). In a joint trial, the admission of a nontestifying codefendant's confession that incriminates another defendant violates the other defendant's right of confrontation. *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479; *Henson*, 407 S.C. at 161-62, 754 S.E.2d at 512. Such a confession may be admitted in evidence, with an appropriate limiting instruction, only if it is redacted so that it does not incriminate the other defendant on its face, either explicitly or by obvious and immediate implication. *Gray v. Maryland*, 523 U.S. 185, 192, 118 S. Ct. 1151, 1155, 140 L. Ed. 2d 294, 301 (1998); *Henson*, 407 S.C. at 161-64, 754 S.E.2d at 512-13; *see also Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 1709, 95 L. Ed. 2d 176, 188 (1987) (holding a nontestifying codefendant's confession can be admitted only if it "is redacted to eliminate not only the defendant's name, but any reference to his or her existence").

Jackson argues the admission of Canty's statements violated his right of confrontation. He contends that even as redacted, the statements allowed the jury to infer that Canty was referring to Jackson. The law requires a court to carefully analyze "the exact words used for redaction . . . in context to determine whether the reference to the defendant was adequately obscured" to avoid a *Bruton* violation. *State v. Holder*, 382 S.C. 278, 285 n.3, 676 S.E.2d 690, 694 n.3 (2009); *see id.* (explaining "the use of 'the other guy' ha[s] been upheld as a proper substitution in

[5] The trial court sentenced Canty to thirty years in prison for his convictions. This court affirmed Canty's convictions in an unpublished opinion. *State v. Canty*, 2014-UP-208 (S.C. Ct. App. filed June 4, 2014).

previous cases," but "there could be some instances where this identical phrase would not be [a] sufficient" redaction (citing *State v. Vincent*, 120 P.3d 120, 123-24 (Wash. Ct. App. 2005))). As the First Circuit stated,

> The application of *Bruton*, *Richardson*, and *Gray* to redacted statements that employ phraseology such as "other individuals" or "another person" requires careful attention to . . . the text of the statement itself and to the context in which it is proffered. The mere fact that the other defendants were on trial for the same crimes to which the declarant confessed is insufficient, in and of itself, to render the use of neutral pronouns an impermissible means of redaction. A particular case may involve numerous events and actors, such that no direct inference plausibly can be made that a neutral phrase like "another person" refers to a specific codefendant. A different case may involve so few defendants that the statement leaves little doubt in the listener's mind about the identity of "another person." In short, each case must be subjected to individualized scrutiny.

United States v. Vega Molina, 407 F.3d 511, 520-21 (1st Cir. 2005) (internal citations omitted); *see also Richardson*, 481 U.S. at 214, 107 S. Ct. at 1711, 95 L. Ed. 2d at 190 (Stevens, J., dissenting) ("*Bruton* has always required trial judges to answer the question whether a particular confession is or is not 'powerfully incriminating' on a case-by-case basis."); *Foxworth v. St. Amand*, 570 F.3d 414, 433 (1st Cir. 2009) (stating "an inquiring court must judge the efficacy of redaction on a case-by-case basis, paying careful attention to both a statement's text and the context in which it is offered").

Evaluating the content of Canty's redacted statements in context, we find the admission of the statements violated Jackson's right to confront and cross-examine Canty.

1. The Little Debbie Snack Cake

Canty's redacted statements contain one specific detail about the person he referred to as "another person" and "the other person," and because of that detail "the

reference to [Jackson] was [not] adequately obscured," *Holder*, 382 S.C. at 285 n.3, 676 S.E.2d at 694 n.3, and "the statement [left] little doubt in the listener's mind about the identity of 'another person.'" *Vega Molina*, 407 F.3d at 520. In his fifth statement, Canty stated that while he was inside Cherryvale Grocery, "Another person brought[6] a Debbie snack cake donut sticks." In his third and fourth statements, Canty likewise told officers "the other person brought a snack cake" and "the other person brought a Debbie snack cake." This detail specifically identified Jackson to the jury as "another person" and "the other person." The State had already shown the store's surveillance video in which jurors could see a man purchase what appeared to be a snack. Mackovitch—the clerk working in the store that night—testified he sold one of the men "a Little Debbie snack cake." Shannon, who was not working that night but who knew Jackson, watched the video and identified Jackson as the person Mackovitch testified purchased the Little Debbie snack cake. This testimony regarding the purchase of the snack cake was a vivid description of a unique act that only one person completed. Thus, when the State presented Canty's fifth statement to the jury in which he stated "another person" bought a Little Debbie snack cake, the conclusion that Canty was referring to Jackson was inescapable on the face of the statement, despite the removal of Jackson's name. When the jury then heard "another person" was one of the men who attacked the pizza man at the mobile home park, the statement obviously and immediately incriminated Jackson.

Moreover, the witnesses testified the video shows one of the men in the store to be a darker-skinned African-American and the other man to be a fairer-skinned African-American. Mackovitch testified "it was the fairer-skin African-American male that purchased the snack cake." While the jury was listening to Canty's statements that "another person brought a Debbie snack cake donut sticks" and "the other person brought a Debbie snack cake," it could see at the defense counsel table Canty and Jackson, the same two people the witnesses had distinguished by the difference in their complexions. In this context, Canty's statements informed the jury that the fairer-skinned man in the video was the same person who (1)

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[6] Canty wrote the word "brought" in his statements. As the other evidence we discuss in this opinion clearly indicates, however, he meant "bought," as in purchased. In reaching this conclusion, we rely on Investigator West's testimony during a pretrial hearing concerning the voluntariness of Canty's statements: "[Canty] stated that [Jackson] bought Debbie cake, Debbie snack cake and left the store." Investigator West gave similar testimony before the jury.

asked Canty if he wanted to participate in robbing a pizza man; (2) told Canty to get Desmond to take them to Cherryvale Grocery; (3) used the pay phone at the store to call Sambino's and order three large pizzas, requesting delivery to lot seven in O.C. Mobile Home Park; (4) bought a "Debbie snack cake donut sticks"; (5) returned to the mobile home park with Canty; (6) went behind the trailer on lot seven and waited for the pizza man to arrive; and (7) robbed and shot the pizza man, while Canty watched from his house.

The State argues, however, the statements do not incriminate Jackson on their face. It contends a juror hearing only the statements would not be able to identify Jackson as the person Canty describes, and instead would have to link other evidence—such as the surveillance video and Shannon's testimony—to the statements, and from that linkage draw an inference that "another person" was Jackson. The State maintains this necessity removes Jackson's case from the scope of *Bruton* and subsequent cases. The State's argument is based on passages from the decisions of the Supreme Court of the United States and our supreme court, such as "the rule announced in *Bruton* is a 'narrow' one that applies only when the statement implicates the defendant 'on its face.'" *Holder*, 382 S.C. at 284, 676 S.E.2d at 693 (quoting *Richardson*, 481 U.S. at 207-08, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185-86); *see also id.* (stating "[i]n *Richardson*, the Supreme Court remarked that the rule announced in *Bruton* . . . does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony"); *Richardson*, 481 U.S. at 208-09, 107 S. Ct. at 1707-08, 95 L. Ed. 2d at 186-87 (distinguishing "evidence requiring linkage" from "evidence incriminating on its face" and declining to extend *Bruton* to confessions that incriminate only by inference from other evidence). We find the admission of Canty's statements violated *Bruton* even under the reasoning of *Richardson* and *Holder*.

We agree that because the State redacted Canty's statements to remove Jackson's name, a juror hearing the statements would have to consider evidence outside the four corners of the statements, and draw an inference from the statements in combination with the other evidence that Canty was referring to Jackson. As our supreme court explained in *Henson*, however, "*Richardson* did not turn on whether the confession admitted required an inference in order to incriminate the defendant, but on *the kind of inference required*." 407 S.C. at 164, 754 S.E.2d at 513 (emphasis added). In *Gray*, the Supreme Court defined the kind of inference required for a *Bruton* violation, holding the admission of a codefendant's statement

violates *Bruton* when the "statements . . . , despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately." 523 U.S. at 196, 118 S. Ct. at 1157, 140 L. Ed. 2d at 303.

Other courts have applied this standard to determine whether a statement incriminates a codefendant on its face despite the necessity of the jury drawing an inference. *See, e.g.*, *United States v. Green*, 648 F.3d 569, 575 (7th Cir. 2011) (citing this passage from *Gray* as the standard courts apply "when the defendant's identity can be established through other evidence" and finding no *Bruton* violation); *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 134 (2d Cir. 2008) (noting "whether . . . redaction sufficiently protects a criminal defendant's rights 'depend[s] in significant part upon the kind of . . . inference' that the jury may draw," and citing the passage from *Gray* as the standard for determining whether statements "have the effect of 'facially incriminat[ing] the . . . co-defendant,' thereby rendering them unsuitable for admission under *Bruton*" (alteration in original) (quoting *Gray*, 523 U.S. at 196, 118 S. Ct. at 1157, 140 L. Ed. 2d at 303)). Our own supreme court quoted the passage from *Gray* in *Henson* before concluding, "In other words, the [*Gray*] Court brought within *Bruton*'s prohibition those confessions which facially incriminate through inference." 407 S.C. at 164, 754 S.E.2d at 513.

The evidence in this case meets the *Gray* standard for a *Bruton* violation because the statement "obviously refer[red] directly to someone," and the Little Debbie cake reference would cause the jury to immediately infer it was Jackson. *Gray*, 523 U.S. at 196, 118 S. Ct. at 1157, 140 L. Ed. 2d at 303. As we previously explained, the State had already conclusively proven—before the jury heard the statements—that Jackson was the person who purchased the Little Debbie snack cake. With this knowledge, the jury could not help but immediately infer from the face of the statements that Jackson was "another person."

The State also argues, however, "The reference to the purchase of a Little Debbie snack cake . . . would not be read to refer obviously to Jackson *even if the statements were the first piece of evidence at the trial*." (emphasis added). The State bases this argument on the remainder of the sentence from *Gray* that we quoted in the previous paragraph. In its entirety, the sentence reads:

> The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.

Id. Based on this sentence, the State argues, "Any significance to the purchase of a Little Debbie cake had to be developed through the trial evidence."

In *Henson*, our supreme court found a *Bruton* violation because "the jury could infer from the face of Reid's confession *without relying on any other evidence*, that the confession referred to and incriminated Henson." 407 S.C. at 166, 754 S.E.2d at 514 (emphasis added). The *Henson* court explained that in *Holder*, similarly, "it was apparent the statement was referring to the appellant *even without considering any other evidence*." 407 S.C. at 165, 754 S.E.2d at 514 (emphasis added). However, we do not read *Gray*, *Henson*, or *Holder* as the State asks us to do here—to forbid us from relying on other evidence to conclude a jury would infer Canty's statements incriminated Jackson on their face. In *Gray* itself, the Supreme Court relied in part on other evidence—the testimony of a police detective—introduced after the codefendant's confession. 523 U.S. at 188-89, 193, 118 S. Ct. at 1153, 1155, 140 L. Ed. 2d at 298, 301. In *State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010), our supreme court relied on an investigator's testimony that the defendant's arrest was based in part on the codefendant's statement in finding a *Bruton* violation. 390 S.C. at 605, 703 S.E.2d at 219.

Other courts have relied on evidence outside the four corners of the codefendant's statement to find a *Bruton* violation. In *United States v. Hoover*, 246 F.3d 1054 (7th Cir. 2001), the Seventh Circuit found the phrases "incarcerated leader" and "unincarcerated leader" in a codefendant's redacted statement were "obvious stand-ins" for Hoover and Shell, two gang members. 246 F.3d at 1059. In doing so, the court relied on other evidence introduced at trial showing Hoover ran the gang from within prison, while Shell "was Hoover's ambassador on the outside." *Id.* Based on this evidence, the court concluded, "Only a person unfit to be a juror could have failed to appreciate that the 'incarcerated leader' and 'unincarcerated leader' were Hoover and Shell." *Id.* The court explained its reliance on other evidence, stating, "Very little evidence is incriminating when viewed in isolation;

even most confessions depend for their punch on other evidence. To adopt a four-corners rule would be to undo *Bruton* in practical effect." *Id.*

We discuss *Hoover* not because it is directly on point,[7] but because it illustrates that a court may consider evidence other than the codefendant's statement in determining whether a *Bruton* violation occurred. *See also United States v. Schwartz*, 541 F.3d 1331, 1351-52 (11th Cir. 2008) (finding a *Bruton* violation "[e]ven though [the codefendant]'s statement 'was not incriminating on its face, and became so only when linked' with other evidence" because the statement named the defendant's "corporations after the jury had heard lengthy testimony regarding the extent of [the defendant]'s ownership and control of them" (quoting *Richardson*, 481 U.S. at 208, 107 S. Ct. at 1707, 95 L. Ed. 2d at 186)); *United States v. Mayfield*, 189 F.3d 895, 902 (9th Cir. 1999) (finding a *Bruton* violation because "the impermissible inference that [the codefendant] named Mayfield as the drug ringleader was unavoidable, if not on its face, then certainly in the context of the previously admitted evidence at trial"); *State v. Weaver*, 97 A.3d 663, 679 (N.J. 2014) (stating a codefendant's statement admitted in violation of *Bruton* "cannot be considered in a vacuum" but must be "[c]onsidered in the context of the complete trial record").

Thus, we do not agree with the State's argument that this court may not consider other evidence in determining whether Canty's statements incriminated Jackson. Rather, the question before us is whether "the exact words used for redaction," in context with other evidence, "adequately obscured" "the reference to the defendant," *Holder*, 382 S.C. at 285 n.3, 676 S.E.2d at 694 n.3, such that the jury would not "obviously" and "immediately" infer that Canty was referring to Jackson. *Gray*, 523 U.S. at 196, 118 S. Ct. at 1157, 140 L. Ed. 2d at 303. We find they did not.

2. The Redaction of the Statements

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[7] *Hoover* is different from Jackson's case in at least two respects. First, the redaction in *Hoover* functioned as a pseudonym—indeed, much like a nickname—while the identifying detail of Canty's statements is a description of a unique action Jackson took. Second, the inference identifying the defendant in the codefendant's statement was stronger in *Hoover* than it is here—so strong "[o]nly a person unfit to be a juror" could have missed it. *Id.*

The manner in which Canty's statements were redacted and the number of instances where Jackson's name was removed exacerbate the *Bruton* problem. Canty describes how "another person I know by another name came up to me and asked whether I wanted to be a part of robbing a pizza man." He also states he knew "[a]nother person was one of the males, and I didn't -- and I don't know who the other two were." These clumsy substitutions invite the jury to speculate about the identity of the unnamed person Canty implicates in his statements. The Supreme Court discussed this effect in *Gray*, explaining "the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference." 523 U.S. at 193, 118 S. Ct. at 1155-56, 140 L. Ed. 2d at 301; *see also United States v. Jass*, 569 F.3d 47, 60 (2d Cir. 2009) (stating "the Supreme Court's Confrontation Clause concern has been with juries learning that a declarant defendant specifically identified a co-defendant as an accomplice in the charged crime," which becomes too great a risk to the codefendant's right of confrontation "[o]nce a jury learns of a defendant's specific identification—whether through introduction of an unredacted confession, *or through a clumsy redaction that effectively reveals the fact*" (emphasis added) (internal citation omitted)).

The phrase "[a]nother person was one of the males," followed by "I don't know who the other two were," makes it clear Canty *did* know who "another person" was, and indicates that person's identity was intentionally removed from his statement. *See Gray*, 523 U.S. at 192, 118 S. Ct. at 1155, 140 L. Ed. 2d at 301 ("Redactions that simply replace a name with an obvious blank space or . . . other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result."); 523 U.S. at 194, 118 S. Ct. at 1156, 140 L. Ed. 2d at 302 ("*Bruton*'s protected statements and statements redacted to leave a blank or some other similarly obvious alteration function the same way grammatically."); *United States v. Taylor*, 745 F.3d 15, 29-30 (2d Cir. 2014) (finding a redacted statement violated *Bruton* and *Gray* in part because "the wording of the statement suffers from stilted circumlocutions" that make it "obvious that names have been pruned from the text"); *United States v. Akinkoye*, 185 F.3d 192, 197 (4th Cir. 1999) (stating "if a redacted confession of a non-testifying codefendant . . . shows signs of alteration such that it is clear that a particular defendant is implicated, the Sixth Amendment has been violated").

We also find the frequent repetition of "another person" and "the other person" causes those phrases to lose their effectiveness in obscuring Canty's references to Jackson, and makes it more likely a jury would realize the original statements incriminated Jackson. Altogether, these phrases appear more than thirty times throughout Canty's six statements. The substituted phrases are not intertwined into the narrative structure, and they disrupt the syntax of the sentences. This excessive repetition creates an unnatural prose that draws the listener's attention to the redaction. Thus, a juror hearing the phrases would likely believe Canty's statements originally contained an actual name. *See United States v. Williams*, 429 F.3d 767, 773-74 (8th Cir. 2005) (finding "the redaction of [the confessing codefendant]'s statement made it obvious that a name had been redacted" because: (1) there were "more than forty instances where [the nonconfessing codefendant]'s name was replaced with the word 'someone,'" (2) "[t]he replacements were not seamlessly woven into the narrative," and (3) "the neutral pronoun 'someone' may have lost its anonymity by sheer repetition"; and thus concluding "[i]t may well have been clear to the jury that the statement had obviously been redacted and that the 'someone' of the statement was [the nonconfessing codefendant]"); *United States v. Sandstrom*, 594 F.3d 634, 649 (8th Cir. 2010) (applying *Williams* in a similar scenario).

3. The State's Reliance on the Statements

The State relied heavily on Canty's statements in arguing Canty committed the crimes. In so doing, the State asked the jury to accept the statements as reliable. The State also asked the jury to accept its argument that Jackson committed the crimes with Canty. The only way the statements could be reliable, therefore, was if "the other person" referred to in the statements was Jackson. In other words, by asking the jury to convict Canty based in part on the reliability of his statements, and by asking the jury to convict Jackson too, the State was necessarily asking the jury to believe Canty was referring to—incriminating—Jackson. *See Gray*, 523 U.S. at 193, 118 S. Ct. at 1155, 140 L. Ed. 2d at 301 ("A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that [the nonconfessing codefendant], not someone else, helped [the confessing codefendant] commit the crime."); *Henson*, 407 S.C. at 166, 754 S.E.2d at 514 ("The jury also could presume the solicitor would not both assert that

Henson was the fourth conspirator and offer the confession into evidence if the solicitor believed the confession referred to anyone other than Henson.").

This is particularly true given that the State prosecuted Canty for murder under the accomplice liability doctrine of the hand of one is the hand of all. Under the hand of one doctrine, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014).[8] To prove Canty guilty of murder under this doctrine, the State had to prove he "joined with another" to rob the pizza delivery man. The State presented circumstantial evidence—such as the surveillance video—that Canty and Jackson planned to do this. However, the strongest evidence the State presented to prove Canty "joined with another" in a "common design and purpose" was the evidence in Canty's statements. Moreover, to prove Canty guilty of murder under this doctrine, the State had to prove a participant in the agreed plan shot Flexon in executing their "common design and purpose." The only person this could have been was Jackson. Thus, for the State to successfully prove Canty guilty of murder under the doctrine of the hand of one is the hand of all, the person whose name was redacted from Canty's statements and replaced with the phrase "another person" had to be Jackson.

4. Unpreserved Issues

There are two additional issues, either of which possibly warrants reversal under *Bruton*, but neither of which is preserved for our review.

The first unpreserved issue involves Sergeant Burnish's testimony about his investigation of the crimes and Jackson's arrest. Sergeant Burnish described how he and Investigator West picked up Canty on January 15 and took him to the law enforcement center for questioning. There, Canty gave a statement to Investigator West. Sergeant Burnish explained he was not present when Canty gave this statement, but "was in the building." The solicitor then asked, "what happened and what did you do next in your investigation?" Sergeant Burnish answered, "Based

[8] Donta Reid, the defendant in the cited case, was the nontestifying codefendant whose statements to police were found to violate Davontay Henson's right of confrontation when admitted at their joint trial. *Henson*, 407 S.C. at 157, 754 S.E.2d at 509.

on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson."

Jackson argues Sergeant's Burnish's testimony created a *Bruton* violation because it effectively told the jury that Canty named Jackson in his original, unredacted statements. *See Gray*, 523 U.S. at 188-89, 193, 118 S. Ct. at 1153, 1155, 140 L. Ed. 2d at 298, 301 (finding a detective's testimony that he was able to arrest the defendant after his codefendant gave a confession "blatantly link[ed] the defendant to the deleted name" in the redacted confession introduced at trial); *Johnson*, 390 S.C. at 605-07, 703 S.E.2d at 219-20 (holding an investigator's testimony that he arrested the defendant based in part on a conversation in which a codefendant gave a confession "effectively told the jury" the unredacted confession named the defendant, and thereby created a *Bruton* violation).

However, Jackson never made any argument to the trial court as to the effect Sergeant Burnish's testimony had on the *Bruton* problem. In fact, the only times Jackson addressed the merits of the alleged *Bruton* violation were in his pretrial motion to sever and when he renewed the motion on the first day of trial. At those points, the trial court could not have known Sergeant Burnish would connect Canty's statement to Jackson's arrest. When Jackson renewed his motion at the close of the State's case and the close of all evidence, he offered no new arguments in support of the alleged *Bruton* violation, and did not mention how Sergeant Burnish's testimony affected the issue. Therefore, we find unpreserved Jackson's argument that Sergeant Burnish effectively told the jury Canty's unredacted statements named Jackson.

The second unpreserved issue relates to the trial court's failure to instruct the jury not to consider Canty's statements in determining Jackson's guilt. A trial court's instruction to the jury that it may not consider a nontestifying defendant's confession against a codefendant is central to the right of the State to conduct a joint trial. *See Richardson*, 481 U.S. at 206-07, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185-86 (stating the Court's decision in *Bruton* created "a narrow exception" to "the almost invariable assumption of the law that jurors follow their instructions"); *Henson*, 407 S.C. at 162, 754 S.E.2d at 512 ("Historically, instructing the jury to consider a confession as only evidence against the confessing codefendant was considered sufficient under the Confrontation Clause, but in *Bruton* the United States Supreme Court dispensed with that fiction.").

The Eighth Circuit explained the necessity of a limiting instruction to protect the confrontation rights of defendants such as Jackson:

> The Confrontation Clause dictates that "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." There is a general assumption in the law, however, that juries follow their instructions. As such, the general rule is that "a witness whose testimony is introduced at a joint trial is not considered to be a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant."

United States v. Gayekpar, 678 F.3d 629, 636 (8th Cir. 2012) (internal citation omitted) (quoting *Richardson*, 481 U.S. at 206, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185). In *Gayekpar*, the Eighth Circuit found that although the redaction was sufficient, a *Bruton* violation occurred because the district court failed to give a limiting instruction. 678 F.3d at 637.

The Eighth Circuit was able to consider the trial court's failure to give a limiting instruction under the plain error rule. 678 F.3d at 637-38. We are constrained to find the issue unpreserved. *See State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (stating "the plain error rule does not apply in South Carolina state courts"); *State v. Evans*, 316 S.C. 303, 307 n.1, 450 S.E.2d 47, 50 n.1 (1994) (finding that when a defendant claiming a *Bruton* violation "did not request [a limiting instruction] nor make the argument [on appeal] that the failure to give a limiting instruction was error . . . , [the argument] has been waived").

III. Distinguishing Jackson's Case from Other Cases

The State cites numerous cases in which courts found no *Bruton* violation where the defendant's name or nickname was redacted from the nontestifying codefendant's statement and replaced with a neutral phrase like the ones used in this case—"another person" and "the other person." We find the cases cited by the State are distinguishable on their facts because the statements in those cases did not incriminate the codefendant on their face.

In *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007), the government jointly tried five codefendants who participated in a mail fraud conspiracy. 508 F.3d at 405. Two of these codefendants, Vasilakos and Lent, appealed their convictions, arguing the district court erred by admitting into evidence deposition statements of their codefendants from civil proceedings. 508 F.3d at 406. Before introducing the statements, "the government replaced each reference to Vasilakos and Lent with a neutral word, such as 'the person' or 'another person.'" 508 F.3d at 408. The two appellants argued the admission of the statements violated their right of confrontation. 508 F.3d at 406. The Sixth Circuit disagreed. 508 F.3d at 408. The court explained the statements did not "ineluctably implicate Vasilakos or Lent" because "the government was prosecuting multiple defendants" and "alleged a multifaceted conspiracy in which several individuals engaged in activities" described in the depositions. *Id.*

In *Priester v. Vaughn*, 382 F.3d 394 (3d Cir. 2004), the appellant sought habeas corpus relief for an alleged *Bruton* violation in his 1991 trial for murder. 382 F.3d at 395-96, 397.[9] The Third Circuit found no *Bruton* violation because the statements contained "no . . . 'nicknames,' descriptions or phrases that directly implicate[d]" the appellant, and the phrases used for redaction were "bereft of any innuendo that ties them unavoidably to" him. 382 F.3d at 400-01.

The outcomes of *Vasilakos* and *Priester* are different from the result we reach today not because the Sixth Circuit and Third Circuit applied a different rule of law, but because the facts of those cases are distinguishable from the facts before us. This difference becomes clear by comparing *Vasilakos* and *Priester* to two

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[9] *Priester* is distinguishable from this case initially because it is an appeal from the denial of habeas corpus relief. As the Third Circuit explained, the cases upon which the appellant relied—*Gray* and *United States v. Richards*, 241 F.3d 335 (3d Cir. 2001)—"were announced after [the] merits appeal was heard in the Pennsylvania Superior Court and it did not act unreasonably in failing to predict the Supreme Court's decision in *Gray*." 382 F.3d at 400. Under the deferential standard of review the Third Circuit was required to apply, the appellant was not entitled to relief unless the state court's "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 382 F.3d at 397 (emphasis removed) (quoting 28 U.S.C. § 2254(d)).

other cases decided by those courts, both of which our supreme court found "persuasive" in *Henson*: *Richards* and *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001). *See Henson*, 407 S.C. at 165-66, 754 S.E.2d at 514. The State argues the outcomes of *Vasilakos* and *Priester* are different because the Sixth Circuit "limited" *Stanford* in *Vasilakos* and the Third Circuit "rejected" *Richards* in *Priester*. We disagree. Rather, we believe the courts reached different outcomes because each court's evaluation of the specific facts of that case required it. The different results of these cases are reconciled by a careful evaluation of their distinguishable facts.

A similar evaluation of specific facts also reconciles our decision today with our decision in *State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), *cert. granted in part*, (Feb. 21, 2014). In that case, the State tried McDonald together with his two codefendants—Whitehead and Cannon—for murder and burglary. 400 S.C. at 274, 734 S.E.2d at 168. Cannon gave a statement admitting his, Whitehead's, and McDonald's involvement in the crimes. 400 S.C. at 274, 734 S.E.2d at 167. After the State redacted Cannon's references to Whitehead and McDonald by replacing their names with the phrase "another person," the trial court allowed the statement into evidence. 400 S.C. at 276-77, 734 S.E.2d at 169. We carefully evaluated the statement, the redaction, and the context in which the State presented the statement at trial—as *Holder* required—and concluded the redacted statement incriminated only Cannon, not McDonald. 400 S.C. at 278-79, 734 S.E.2d at 170.

McDonald, like other cases cited by the State,[10] is based on its unique facts. We can reconcile *McDonald* with this case despite the use of the same neutral phrase

[10] In each case cited by the State to support its position that neutral phrases such as those used in this case do not offend the Sixth Amendment, the court ruled on the facts of that case the co-defendant's statements did not incriminate the defendant. Each case, therefore, is distinguishable on its facts from the case before us. *See, e.g., United States v. Lighty*, 616 F.3d 321, 377 (4th Cir. 2010) (finding the redacted statement was like that in *Akinkoye*, *infra*, and unlike that in *Gray* because "it would have been unclear to the jury that the statements had been altered at all"); *Jass*, 569 F.3d at 58, 61-64 (holding a redacted confession did not violate the defendant's right to confrontation "[b]ecause the redacted statements neither manifested obvious indications of alteration, nor otherwise signaled to the jury that the statements had originally contained actual names," and finding the "confession

for redaction—"another person." First, the trial court in *McDonald* gave the jury a limiting instruction. 400 S.C. at 278, 734 S.E.2d at 170. Second, Cannon's statement in *McDonald* did not contain a vivid description of a unique act by his codefendant, as Canty's statement did with his description of Jackson purchasing a Little Debbie cake. Had the State removed Canty's reference to the purchase of the Little Debbie cake, which was virtually unnecessary to convict Canty, this case may very well have turned out like *McDonald*. In addition, although Cannon's redacted statement used the phrase "another person" twenty-one times, 400 S.C. at 277-78, 734 S.E.2d at 169-70, no single use of the phrase created an awkward sentence construction as did the redaction of Canty's statement. Thus, the fact of redaction was far less obvious in *McDonald* than here.

Under the facts of this case, primarily the description of "another person" purchasing the Little Debbie cake, Canty's redacted statements incriminated

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was not obviously altered to omit the specific identity of" the nonconfessing codefendant (internal quotation marks and citations omitted)); *United States v. Logan*, 210 F.3d 820, 821-23 (8th Cir. 2000) (examining the redaction "another individual," concluding "there was no indication whatever that there had been a redaction," and pointing out "the allegedly offending phrase occurred only once"); *United States v. Verduzco-Martinez*, 186 F.3d 1208, 1214-15 (10th Cir. 1999) ("[c]onsidering [the nontestifying codefendant]'s redacted statements as a whole" and finding "the use of the neutral pronoun/phrase 'another person' did not identify [the nonconfessing codefendant] or direct the jury's attention to him, nor did it obviously indicate to the jury that the statements had been altered"); *Akinkoye*, 185 F.3d at 198 (finding no *Bruton* violation because "the jury neither saw nor heard anything in the confessions that directly pointed to the other defendant"); *United States v. Edwards*, 159 F.3d 1117, 1125-26 (8th Cir. 1998) (finding "the district court's decision to admit nontestifying defendant admissions, redacted as to codefendants by the use of pronouns and other neutral words" was not a *Bruton* violation because it was consistent with *Gray* and other cases allowing redacted confessions into evidence "so long as the redacted confession or admission does not facially incriminate or lead the jury directly to a nontestifying declarant's codefendant"); *State v. Garrett*, 350 S.C. 613, 620-21, 567 S.E.2d 523, 526-27 (Ct. App. 2002) (determining no Confrontation Clause violation occurred because the redacted statement removed specific mention of the nonconfessing codefendant and "was limited in scope to events occurring the night of the crime in question," and thus based on the specific facts of that case).

Jackson by obvious and immediate implication. Under the facts of *McDonald*, however, Cannon's redacted statement did not incriminate his codefendant.

IV. Admission of Canty's Statements Was Not Harmless

The State argues that even if the trial court erroneously admitted the statements in violation of the Confrontation Clause, their admission did not constitute reversible error. We disagree.

Confrontation Clause violations are subject to a harmless error analysis. *Holder*, 382 S.C. at 285, 676 S.E.2d at 694. "In the context of Confrontation Clause violations through the admission of a codefendant's confession, the harmless error standard has been formulated as: 'In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.'" *Henson*, 407 S.C. at 167, 754 S.E.2d at 515 (quoting *Schneble v. Florida*, 405 U.S. 427, 430, 92 S. Ct. 1056, 1059, 31 L. Ed. 2d 340, 344 (1972)).

We find the admission of the statements prejudiced Jackson and contributed to his guilty verdict, and the remaining evidence against Jackson was not overwhelming. First, the statements were the only direct evidence Jackson planned the robbery, called Sambino's, and shot Flexon. No other witness or evidence identified Jackson as the person who asked Canty to rob a pizza man, and the statements were the only eyewitness account of the shooting. Second, the State emphasized the statements throughout trial, especially during its closing argument. Finally, the trial court did not give the jury a limiting instruction that it may consider the statements only against Canty. As the Eighth Circuit noted in *Gayekpar*, "[w]ith no cautionary instruction, the jury was free to consider [Canty]'s statements when it decided the sufficiency of the [State]'s case against [Jackson]." 678 F.3d at 637.

We acknowledge the remaining evidence tending to establish Jackson's guilt is strong. However, the evidence is purely circumstantial, and we do not believe this "properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Henson*, 407 S.C. at 167, 754 S.E.2d at 515 (internal quotation marks and citation omitted). *See also* 407 S.C. at 158, 167, 754 S.E.2d at 510, 515 (finding a

Bruton violation and concluding the error was not harmless, even where two coconspirators testified Henson was the shooter and gave other testimony corroborating the State's evidence against him); *State v. Singleton*, 303 S.C. 313, 314-15, 400 S.E.2d 487, 487-88 (1991) (finding a *Bruton* violation and concluding the error was not harmless, even where "[t]he victim testified that appellant walked up to his car, pointed a pistol in the car and demanded he turn over his money"); *Edmond v. State*, 341 S.C. 340, 349, 534 S.E.2d 682, 687 (2000) (concluding "evidence of petitioner's guilt was not overwhelming as the State's entire case was built on circumstantial evidence").

We conclude the admission of Canty's statements was not harmless error.

V. Conclusion

We find the admission of Canty's redacted statements violated Jackson's right of confrontation under the Sixth Amendment and was not harmless error. We **REVERSE** and **REMAND** for a new trial.[11]

SHORT, J., concurs.

GEATHERS, J., concurring in a separate opinion: I concur in the majority's conclusions that the admission of Canty's redacted statements was a *Bruton* violation and the violation was not harmless beyond a reasonable doubt. However, I do not agree that a juror hearing the statements would have to consider evidence outside the four corners of the statements in order to infer that Canty was referring to Jackson. Further, I do not agree that had the State removed Canty's reference to the purchase of the Little Debbie cake, this case may have turned out like *State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), *cert. granted in part* (Feb. 21, 2014). The blunt and repetitive substitutions of "another person" or "the other person" for Jackson's name, especially "Another person was one of the males, . . . and I don't know who the other two were," were obvious redactions that

[11] Jackson also appeals the trial court's refusal to quash the jury panel pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Because we find a reversible Confrontation Clause violation occurred, we need not address this issue. *See Henson*, 407 S.C. at 168 n.4, 754 S.E.2d at 515 n.4 (declining to address a remaining issue because the court's determination of the Confrontation Clause issue was dispositive).

"performed the same accusatory function as using the defendant's name." *State v. Henson*, 407 S.C. 154, 163, 754 S.E.2d 508, 513 (2014) (discussing the State's substitution of obvious blanks for the defendant's name in *Gray v. Maryland*, 523 U.S. 185, 193-94 (1998)). These substitutions, by themselves, impermissibly refer to Jackson's existence because they "obviously refer directly to someone," *Gray*, 523 U.S. at 196, and Jackson was Canty's sole co-defendant.

APPENDIX: Text of Canty's Fifth Statement

This appendix contains the text of Canty's fifth statement as Investigator West read it to the jury. We have omitted objections and other interruptions so that what appears below is simply the text of the statement:

> I was standing by the mailbox of the O.C. Mobile Home Park when another person I know by another name came up to me and asked whether I wanted to be a part of robbing a pizza man, and I said yes because I didn't want the other guys to laugh and pick at me. Another person told me to ask my cousin to take us to the store. I was going to get the -- I was going to get batteries. My cousin name is Desmond Canty. He told me he was going to call Sambino's and order some pizzas. We went to Cherryvale Grocery. Another person used the pay phone right next to the trash can, green, and called Sambino's. Another person ordered three large pizzas. Pepperoni and cheese is all heard he asked for. We went -- we then went into the store. I looked for the batteries, but they didn't have any. Another person brought a Debbie snack cake donut sticks. We went back to the house and we went into the back where the trash cans were, and I sat on a blue Caprice next to Toya's house. Toya stays next door to us. Toya left. I then went and sat on my porch until the pizza man came. I saw a silver in color Chrysler van pulled up, and it pulled up to the back where another person was -- the other person was. The pizza man stayed in his vehicle for approximately three minutes, and he then -- and then -- he then got out and went to the abandoned residence, lot number 7, and

saw the door open and turn around and went back to his vehicle real fast. The pizza man was met by three males with hoodies. Another person was one of the males, and I didn't -- and I don't know who the other two were. The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop, and then the gun fired. After I saw the man got shot, I ran in the house and told my moms I heard a gunshot.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephen George Brock, Appellant,

v.

Town of Mount Pleasant, Respondent.

Appellate Case No. 2012-208787

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

Opinion No. 5279
Heard September 8, 2014 – Filed November 5, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Robert Clyde Childs, III, of Childs Law Firm, and J. Falkner Wilkes, both of Greenville, for Appellant.

Jessica Sara Jubick and James J. Hinchey, Jr., both of Hinchey Murray & Pagliarini, LLC, of Charleston, for Respondent.

CURETON, A.J.: Stephen Brock sued the Town of Mount Pleasant (the Town) under South Carolina's Freedom of Information Act (FOIA) and Public Records Retention Act (RRA), requesting declaratory judgments and injunctive relief relating to how the Town conducted its meetings and kept its records. The trial court granted the requested relief as to some issues and awarded Brock $42,000.00

in attorney's fees and costs. Brock appeals, arguing the trial court erred in failing to: (1) find the Town violated FOIA when it took action on matters without giving the public proper notice; (2) find the Town violated FOIA when its announcements of executive sessions violated FOIA's specific purpose provision; (3) find the Town violated RRA by deleting e-mails; and (4) award the full amount of requested attorney's fees and costs. We affirm in part, reverse in part, and remand.

I. FACTS

In 2007, Mark Mason, an attorney in the Town, owned the "O.K. Tire Store property" (O.K. Tire Store), a large piece of property that included access to Shem Creek. The Town was very interested in obtaining the property and in the summer and fall of 2007, negotiations between the Town's town council (Town Council) and Mason increased. According to Mac Burdette,[1] the Town's administrator, the property was publicly discussed in Town Council's committee and council meetings, the topic "was written about many times in the *Post & Courier*, as well as [discussed on] television media," and a proposed six million dollar purchase price was quoted "many times" during the summer and fall of 2007. After Mason rejected Town Council's first offer, the parties commenced litigation.[2] That litigation, Town Council's eventual purchase of the property for six million dollars, and Brock's position on Town Council's planning commission[3] during that time led to the series of meetings at issue in this case.[4]

Town Council's entire "meeting notice" for its November 13, 2007 meeting (November 13 meeting) stated:

> I. EXECUTIVE SESSION
>
> A. Legal and Contractual Matters pertaining to properties near Shem Creek

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[1] "Mac" Burdette is also referred to as "Robert" Burdette.

[2] "O.K. Tire property litigation" and "Shem Creek property" are used interchangeably throughout the record to refer to the same piece of property and legal action.

[3] Prior to filing his complaint, Brock was the general manager of a local news station in the Town and the chairman of Town Council's planning commission. In 2007, Town Council asked Brock to resign as chairman of the commission.

[4] All three contested meetings were special meetings.

B. Personnel Matters—Appointments to Boards & Commissions
    1. Workforce Housing Advisory Committee
    2. Pride Committee
    3. Accommodations Tax Advisory Committee

Once the mayor called the meeting to order, Burdette "indicated staff would like to ask Council to go into executive session to discuss legal and contractual matters pertaining to properties near Shem Creek and to also discuss personnel matters pertaining to appointments to Boards and Commissions." Thereafter, Town Council passed "a motion to amend the agenda to add . . . legal advice pertaining to an opinion from the Attorney General concerning the Planning Commission" and adjourned into executive session. Upon reconvening, the mayor indicated no actions or votes were taken during the executive session, and Town Council approved the following actions: "to direct the Town Attorney to move forward with the discussions as discussed in executive session pertaining to a piece of property on Shem Creek"; and "to authorize the Mayor and members of Council to obtain their individual attorneys for all lawsuits now and in the future with all fee statements to be reviewed by the Town Attorney." The Town's attorney clarified item two "relate[d] to all lawsuits related to Town business."

Town Council's "meeting notice" for its November 16, 2007 meeting (November 16 meeting) only included one item, stating:

I. EXECUTIVE SESSION
    A. Legal Advice pertaining to OK Tire property litigation
II. Adjourn

Once the mayor called the meeting to order, Burdette "asked that Council amend the agenda to include personnel matters pertaining to the Clerk of Council." Town Council passed "a motion to amend the agenda as stated by" Burdette and "a motion to amend the agenda to add personnel matters relating to the Boards and Commissions." Thereafter, the mayor "indicated a motion was needed to adjourn into executive session regarding legal advice pertaining to the OK Tire property litigation and to discuss other personnel matters as mentioned," and the Town's attorney "clarified that this was an executive session regarding all three matters mentioned." Town Council then adjourned into executive session and upon

reconvening, the mayor indicated no actions or votes were taken during the executive session. Subsequently, Town Council approved the following actions: "to adjust the position requirements and compensation for the Clerk of Council as discussed in executive session"; "to reject the offer that was tendered in reference to the Shem Creek property and OK Tire Store property litigation"; and "to authorize the attorney to prepare a letter as discussed in executive session in reference to the personnel actions regarding boards and commissions."[5]

The "agenda" for the December 5, 2007 meeting (December 5 meeting) stated in pertinent part:

> IV. APPROVAL OF AGENDA
>
> . . .
>
> VII. CORRESPONDENCE AND PUBLIC STATEMENTS[6]
>
> . . .
>
> XII. NEW BUSINESS—Council
>
> . . .
>
> H. **EXECUTIVE SESSION**
>
> **(1) Legal Advice** pertaining to Mathis Ferry Road Project (DEPAUL) relative to PBS&J
>
> **(2) Legal Advice** pertaining to an EEOC complaint relative to a firefighter applicant (Personnel matter)
>
> **[(3)] Personnel Matters** pertaining to (1) Personnel action regarding the Planning Commission; and (2) Appointment to Boards & Commissions

Shortly after the meeting began, Town Council passed motions "to amend the agenda by adding under Item H Executive Session, an item to receive legal advice pertaining to the OK Tire Store Litigation" and "to amend the agenda by deferring item H.3 under Executive Session, until the January Town Council meeting."

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[5] The letter was a letter asking Brock to resign as chairman of the planning commission.

[6] The meeting minutes reflect Brock signed-in to speak during the public comments portion of the meeting. However, when called to speak, Brock indicated he would "defer his comments."

During the meeting, after Town Council discussed items I through XII (G), Burdette asked Town Council to adjourn into executive session to discuss personnel matters pertaining to appointments to boards and commissions and legal advice regarding a road project, an EEOC complaint, and "the settlement of legal issues and purchase of property know[n] as the OK Tire Store and other properties." The Town's attorney "clarified that this would be legal advice on OK Tire property litigation." Town Council adjourned into executive session and upon reconvening, the mayor indicated no actions or votes were taken during the executive session. Thereafter, Town Council approved, among other actions, the following: "to approve the settlement agreement discussed in executive session pertaining to the OK Tire Store property condemnation lawsuits and authorize Mayor Hallman to execute the agreement" and "authorize the Town Administrator to transfer an additional $3 million into the water access property acquisition project for a total project budget amount of $6 million."

In 2009, Brock filed an amended complaint against the Town arguing, among other things, the Town violated FOIA by: (1) failing to give notice of a proposed action at its December 5 meeting; (2) failing to announce the specific purpose for executive sessions held at its November 13 and November 16 meetings; and (3) participating in illegal communication via e-mail. Additionally, Brock argued the Town violated RRA by routinely destroying and deleting those e-mails. Thereafter, the parties proceeded to trial.

Mason testified he was never informed that any part of the O.K. Tire Store settlement agreement executed on December 6, 2007, was subject to further consideration or ratification by council. Mason maintained he would have given Town Council an additional twenty-four hours to make a decision had Town Council requested an extension. Yet, he admitted he delivered the settlement document to Town Council on December 5, 2007, and required Town Council to sign and return the document by 5:00 p.m. December 6, 2007, or he would have moved forward with the pending property litigation.

At their depositions in 2009, two councilmembers testified all e-mail communication exchanged between councilmembers regarding town business occurred on private e-mail accounts and they regularly deleted those e-mails. The councilmembers confirmed Town Council did not have a retention policy for e-mails sent to the councilmembers' personal e-mail accounts. In March 2010, the Town signed a resolution adopting "A Policy for Elected Officials' Use of Town Computers and E-mail Accounts" (Computer Policy). The Computer Policy

required councilmembers to use computers issued by the Town when communicating with Town employees, officials, constituents or "other persons concerning matters related to Town business" and "[a]ll electronic communications *originating* on an official's Town-provided computer *and* all electronic communication received from sources other than a Town computer, along with all responses made by the official thereto, shall be retained on the computer, unless otherwise directed by the Clerk of Council."

The trial court issued a final order stating: "Regarding Mr. Brock's contentions Town Council violated S.C. Code Ann. § 30-40-80(a) (Notice of meetings of public bodies) on 5 December 2007, when Town Council added an item to the previously posted Town Council meeting agenda, the [trial c]ourt concludes the Town's actions did not violate FOIA." Therefore, the trial court dismissed "Count I of [Brock's] Amended Complaint which claimed the Town violated FOIA by amending Town Council meeting agendas." Further, the trial court found Brock failed to produce sufficient evidence showing the Town violated FOIA by failing to announce the specific purpose of executive sessions at the November 13, November 16, and December 5 meetings. The trial court declined to find the Town violated RRA by Town Council's past actions of deleting e-mails discussing town business, finding the law in that that area is constantly developing, and the Town has since assigned councilmembers laptops and e-mail accounts, and adopted the Computer Policy.

However, the trial court found Brock presented sufficient evidence demonstrating the Town violated FOIA by acts not subject to this appeal and awarded Brock injunctive relief on those issues. The trial court also enjoined Town Council from "deleting, destroying, or otherwise eliminating any Town electronic communications concerning public business except to the extent such destruction is accomplished in accordance with a lawfully established records retention policy." The trial court awarded Brock $42,000.00 in attorney's fees and costs.

Brock filed a Rule 59(e) motion to amend or alter the judgment, arguing the order did not address the issue of whether a matter added to an executive session agenda may be acted upon by a public body after reconvening into open session.[7] Brock maintained the public body could not take action on such matters without prior notice to the public. The trial court amended its order to include a finding that

[7] By amending its agendas for executive session, Town Council effectively amended the required agendas for special meetings.

FOIA does not prohibit a public body from acting on items added to an agenda for executive session upon reconvening to open session. This appeal followed.

II. ISSUES ON APPEAL

1. Did the trial court err in failing to find the Town violated FOIA when it took action on matters without giving the public proper notice?
2. Did the trial court err in failing to find the Town violated FOIA when its announcements of executive sessions violated FOIA's specific purpose provision?
3. Did the trial court err in failing to find the Town violated the RRA by destroying e-mails?
4. Did the trial court err in failing to award attorney's fees and costs?

III. STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "Actions for injunctive relief are equitable in nature." *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). "In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Id.* at 140-41, 691 S.E.2d at 470 (quotation marks and citation omitted).

IV. PUBLIC NOTICE

Relying in part on *Lambries I*,[8] Brock argues the trial court erred in failing to find the Town violated the notice provisions of FOIA when Town Council took action on matters not properly noticed to the public and press. Specifically, Brock maintains: (1) "unnoticed actions [of] December 5, November 13, and November

[8] *Lambries v. Saluda Cnty. Council*, 398 S.C. 501, 505, 728 S.E.2d 488, 490 (Ct. App. 2012) (*Lambries I*). In *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 760 S.E.2d 785 (2014) (*Lambries II*), our supreme court reversed *Lambries I.*

16, 2007[,] violated the agenda notice provision of section 30-4-80 of FOIA"; (2) "liability of a public body for violations of FOIA is not excused by subsequent actions to resolve actions undertaken during those meetings"; (3) "the December 5th action failed to qualify as a recognized exception to FOIA's notice requirement pursuant to section 30-4-80"; (4) he demonstrated Town Council's pattern of "similar acts of actions without notice"; and (5) he was entitled to a finding that the Town repeatedly violated FOIA's notice provisions. Brock maintains the trial court erred in ruling Town Council's actions at the December 5 meeting were ratified by its actions at a December 17, 2007 meeting based on *Multimedia.*[9] Brock asserts *Multimedia* is no longer applicable because the ratification provisions relied on in *Multimedia* were removed from FOIA. Therefore, according to Brock, the trial court's reliance on *Multimedia* and *Herald*[10] supporting ratification "to erase the FOIA violation" was in error.

FOIA was enacted based on the General Assembly's finding "that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." S.C. Code Ann. § 30-4-15 (2007). Accordingly, FOIA's essential purpose is to protect the public from secret government activity. *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). Because FOIA is remedial in nature, it should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166.

Section 30-4-80(a) of the South Carolina Code (2007) distinguishes between the notice requirements for regular, special, and emergency meetings of public bodies. The statute provides the notice for regular meetings "must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings." *Id*. For special meetings, the statute provides: "public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting." *Id*. Finally,

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[9]*Multimedia, Inc. v. Greenville Airport Comm'n*, 287 S.C. 521, 339 S.E.2d 884 (Ct. App. 1986).

[10] *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986).

the statute states, "This requirement does not apply to emergency meetings of public bodies." *Id*. Further, the term "agenda" is not defined in FOIA. *See* S.C. Code Ann. § 30-4-20 (2007); *Lambries II*, 409 S.C. at 12, 760 S.E.2d at 790 (stating "agenda (which is undefined in FOIA)" (quotation marks and citation omitted)).

In *Lambries I*, 398 S.C. at 505-06, 728 S.E.2d at 490-91, this court decided a published agenda for a regularly scheduled meeting could not be amended during the meeting without violating FOIA. Recently, however, our supreme court in *Lambries II*, 409 S.C. at 18, 760 S.E.2d at 794, reversed *Lambries I* and held: "In the absence of such a legislative directive here, we decline to judicially impose a restriction on the amendment of an agenda for a regularly scheduled meeting, especially when it is clear that no agenda is required at all." Further, the *Lambries II* court stated, "We find this is also the better public policy in light of the fact that a violation of FOIA can carry a criminal penalty, and we note this Court has previously declined to impose restrictions that are not expressly provided by the General Assembly in FOIA." *Id.*

Although FOIA declares the public's right to attend all meetings of public bodies, it also provides for executive sessions, closed to the public for any of six specific purposes. S.C. Code Ann. §30-4-70(a) (2007). A public body may hold a closed meeting for one or more of the following reasons:

> (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body . . . .
> (2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.
> . . .
> (5) Discussion of matters relating to the proposed location, expansion, or the provision of services

> encouraging location or expansion of industries or other businesses in the area served by the public body.

Id.

FOIA "originally allowed formal action to be taken in executive session if the action was later ratified in public." *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 129, 459 S.E.2d 876, 878 (Ct. App. 1995), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996). "However, the 1987 amendments to [FOIA] deleted the language allowing ratification of votes taken in executive session and specifically prohibited voting while in executive session." *Id.* "By affirmatively deleting the ratification language, the legislature made its intent clear. Ratification no longer validates a vote cast during an executive session." *Id.* at 129, 459 S.E.2d at 879.

As an initial matter, we find Brock's arguments regarding the trial court's rulings on: the applicability of *Multimedia*, *Herald*, and ratification provisions; exemptions to FOIA's provisions; and the alleged repeated FOIA violations are not preserved. While Brock's Rule 59(e) motion and reply to the Town's return outlined these issues, Brock chose not to make these arguments during the motion hearing. Instead, Brock limited his argument to one issue—paragraph C of the motion—stating his sole issue was the order did not include "a specific ruling on . . . whether voting on matters added to an agenda without notice to the public constitutes a violation of the notice provision of section[] 30-4-8[0]." Importantly, the trial court's supplemental order did not rule on the other issues. Accordingly, because those arguments on appeal were not presented to nor ruled upon by the trial court, we do not need to address them. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Therefore, the only argument left for this court to consider is whether the trial court erred in finding FOIA does not prohibit a public body from acting on items added to a special meeting agenda upon reconvening to open session.

To the extent Brock's notice issue is preserved, section 30-4-80 does not support his position. That section requires public bodies to post agendas for special meetings twenty-four hours before the meetings; however, it does not specifically require the agenda to include what action the public bodies plan to take. *See* § 30-4-80 ("All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is

practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting."). In fact, Brock points to no provision in the statutory language of FOIA which states the public body must include the exact action it plans to take on a meeting agenda. *See Lambries II*, 409 S.C. at 12, 760 S.E.2d at 790 (stating "agenda (which is undefined in FOIA)" (quotation marks and citation omitted)). Brock conceded Town Council regularly posted an agenda at least twenty-four hours before each regular and special meeting. As the trial court noted, Town Council could not have known what action it would take—to include on an agenda—prior to discussing the relative legal issues and personnel matters during executive session. From the posted and amended agendas, the public and press had notice Town Council desired to confer with its attorney in closed session regarding certain matters and may take some action upon reconvening to open session. Brock is not appealing the trial court's finding that Town Council did not violate FOIA by amending its agendas,[11] and once those agendas were amended, it seems Town Council could certainly act on the agenda items upon reconvening to public session.

Furthermore, as the Town correctly points out, FOIA does not mandate an agenda for executive sessions. *See Herald*, 291 S.C. at 11, 351 S.E.2d at 883 ("The Act does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session."); *id*. ("Practically speaking, it is easily foreseeable that public bodies might not know what will be taken up in executive session until they are meeting in an open session."). To require Town Council to notify the public of the exact actions it plans to take after an executive session seems inapposite to provisions allowing for closed sessions. *See Cooper v. Bales*, 268 S.C. 270, 274-75, 233 S.E.2d 306, 308 (1977) (holding

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[11] Indeed, at the motion for reconsideration hearing, Brock stated:

> Let me be clear that I agree absolutely you can add an item [to the agenda] in the executive session. If you want to talk about something there is no harm to the public, in fact it helps the public. It is absolutely in their interest to seek legal advice to discuss contracts or things approved for executive session. This is the meeting after the executive session that I'm referring to. . . . Again, it is about the open meeting following the executive session is the issue.

sections of FOIA must be harmoniously construed to preclude disclosure of minutes of executive sessions). Town Council gave the public notice of pending issues, allowed the public to present its comments on the topics, and never took action during executive session. Accordingly, we hold the trial court did not err as to this issue.

V. SPECIFIC PURPOSE PROVISION

Citing *Quality Towing*,[12] Brock argues the trial court erred in finding Town Council's announcements of executive sessions did not violate FOIA's specific purpose provision. We agree the Town failed to announce the specific purpose for its executive session at the November 13 meeting.

Section 30-4-70(b) of the South Carolina Code (2007) provides:

> Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the *specific purpose* of the executive session. As used in this subsection, 'specific purpose' means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section.

(emphasis added).

In *Quality Towing*, 345 S.C. at 164, 547 S.E.2d at 866, the city council's meeting minutes stated:

> C. Towing—Contractual Recommendation
>
> Mayor Grissom advised this matter would be discussed in Executive Session
>
> Upon motion by Councilman Cain, seconded by Councilman Woods, Council voted unanimously to go into executive session.

[12] *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001).

The *Quality Towing* court held the meeting minutes reflected the city council failed to announce the specific purpose of the executive session. 345 S.C. at 164, 547 S.E.2d at 866.

We find this case is distinguishable from *Quality Towing* with regards to the November 16 and December 5 meetings. Here, unlike *Quality Towing*, Burdette, along with the Town's attorney's clarifications, sufficiently announced the purpose of these two executive sessions when they disclosed exactly what was going to be discussed. *See* § 30-4-70 (b) (defining "specific purpose"). Brock maintains Town Council should have been more specific in its announcements. For example, Brock avers Town Council should have stated "settlement offer for O.K. Tire Store" instead of "legal advice pertaining to O.K. Tire Store" or "adjustment of the position requirements and compensation for the clerk of council" instead of "personnel matters related to the clerk of council." We find FOIA does not require such specificity. Accordingly, the trial court did not err in finding the Town did not violate FOIA by failing to state the specific purpose for adjourning into executive sessions at the November 16 and December 5 meetings.

However, we find the trial court erred in finding the Town did not violate FOIA by failing to announce the specific purpose of its executive session at its November 13 meeting. Town Council never announced it would discuss whether or not it may retain its own individual attorneys "for all lawsuits now and in the future" relating "to all lawsuits related to Town business" at the public's expense. Moreover, the actions taken were not consistent with the announced purpose. Announcing it would discuss "legal matters" or obtain "legal advice" on a particular issue was an insufficient announcement when Town Council obtained individual attorneys for "all lawsuits now and in the future" as a result of the executive session discussion. Therefore, we reverse the trial court's decision regarding the announcement of Town Council's specific purpose for the executive session at the November 13 meeting.

VI. PUBLIC RECORDS ACT

Brock argues that while the trial court correctly granted injunctive relief to prevent future occurrences of the destruction of e-mails, it erred in failing to find Town Council's past destruction of e-mails constituted a violation of the RRA. We disagree.

RRA refers to FOIA for its definition of "public record." S.C. Code Ann. § 30-1-10(A) (2007). FOIA defines public record as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20(c) (2007). RRA provides, "A person who unlawfully removes a public record from the office where it usually is kept or alters, defaces, mutilates, secretes, or destroys it is guilty of a misdemeanor." S.C. Code Ann. § 30-1-30 (2007).

The trial court did not issue a judgment with regard to Town Council's past actions of deleting e-mails, properly finding the law in this area is ever developing and the Town has since adopted the Computer Policy. We find the trial court did not abuse its discretion in declining to issue a declaratory judgment as to this issue.[13] *See S. Ry. Co. v. Order of Ry. Conductors of Am.*, 210 S.C. 121, 134, 41 S.E.2d 774, 779 (1947) ("It is generally held that the jurisdiction to render a declaratory judgment is discretionary, and should be exercised with great care, and with due regard to all the circumstances of the case.").

VII. ATTORNEY'S FEES AND COSTS

Brock argues the trial court erred in failing to award the attorney's fees and costs necessary in bringing this action.

Section § 30-4-100 (b) of FOIA provides: "If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof." "The award, however, must be reasonable and supported by adequate findings." *Burton*

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[13] *See generally Schill v. Wisconsin Rapids Sch. Dist.*, 786 N.W.2d 177, 208 (Wis. 2010) ("During the last several decades, technological advancements have revolutionized document storage and electronic communication. Prior to these advancements, [a public official's] personal communications . . . would not have been subject to disclosure under the public records law. . . . This fact presents new challenges to record custodians who are required to determine whether particular documents are records subject to disclosure." (Bradley, J., concurring)); Cherie Ballard & Gregory E. Perry, *A Chip by Any Other Name Would Still Be A Potato: The Failure of Law and Its Definitions to Keep Pace with Computer Technology*, 24 Tex. Tech L. Rev. 797, 799 (1993).

v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 357-58, 594 S.E.2d 888, 898 (Ct. App. 2004). "No good faith exception exists for an award of attorney's fees under FOIA." *New York Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 313, 649 S.E.2d 28, 31 (2007). "Further, on appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Among the several factors to be weighed by the trial court in setting a reasonable attorney's fee in a FOIA action is the beneficial result accomplished. In view of our holding the Town also violated FOIA by failing to state the specific purpose for its executive session at the November 13 meeting, we remand the issue of attorney's fees for further consideration consistent with this opinion. *See Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, ___, 762 S.E.2d 687, 689 (2014) ("As the prevailing party under these circumstances, the trial court erred in not awarding Sloan his reasonable attorney's fees and costs. Sloan is entitled to recover his reasonable attorney's fees and costs in this action." (footnote omitted)).

VIII. CONCLUSION

We affirm the trial court's finding that the Town did not violate section 30-4-80 of FOIA by acting on items added to special meetings agendas upon reconvening to open session. Additionally, we affirm the trial court's finding that the Town did not violate FOIA's specific purpose provision by failing to announce the specific purpose of its executive sessions at the November 16 and December 5 meetings, and its decision not to declare the Town violated RRA by deleting e-mails. However, we reverse the trial court's finding that the Town did not violate the specific purpose provision by failing to announce the specific purpose of its executive session at its November 13 meeting, and remand the attorney's fees issue for further consideration consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and SHORT, JJ., concur.