The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have failed to file reports showing compliance with continuing legal education requirements, or who have failed to pay the filing fee or any penalty required for the report of compliance, for the reporting year ending in February 2019. Pursuant to Rule 419(d)(2), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificates to practice law in this State to the Clerk of this Court by June 7, 2019.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 13, 2019

LAWYERS NON-COMPLIANT
WITH THE MCLE REQUIREMENTS
FOR THE 2018-2019 REPORTING YEAR
AS OF APRIL 25, 2019

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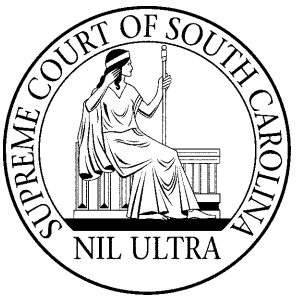

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
May 15, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daniel Hamrick, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-002164

ON WRIT OF CERTIORARI

Appeal from Charleston County
Deadra L. Jefferson, Trial Court Judge
Larry B. Hyman Jr., Post-Conviction Relief Judge

Opinion No. 27886
Heard January 10, 2019 – Filed May 15, 2019

REVERSED

Appellate Defenders Jennifer Ellis Roberts and David Alexander, of Columbia, for Petitioner.

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

JUSTICE FEW: This is a belated appeal of Daniel Hamrick's conviction for felony driving under the influence resulting in great bodily injury. Hamrick argues the trial court erred in (1) denying his motion to suppress test results from blood drawn without a search warrant, (2) admitting the blood test results into evidence despite a violation of the three-hour statutory time limit for drawing blood, (3) permitting a police officer to give opinion testimony on accident reconstruction, and (4) excluding from evidence a video recording of an experiment conducted by Hamrick's expert in accident reconstruction. We find the trial court erred in admitting the officer's opinion testimony. We reverse and remand to the court of general sessions for a new trial.

I. Facts and Procedural History

Around 3:20 a.m. on November 14, 2011, Daniel Hamrick struck Ahmed Garland—a road construction worker—while driving on U.S. Highway 17 in the town of Mount Pleasant. Garland suffered permanent brain injuries as a result. The State contends Hamrick struck Garland while Garland was stepping off of a paving machine located behind a row of cones delineating the construction zone from the designated lane of travel. Hamrick concedes he struck Garland, but contends it happened in the lane of travel.

Within five minutes of the incident, Officer Daniel Eckert arrived at the scene and administered first aid to Garland. Emergency medical service professionals arrived at the scene less than ten minutes later, and Officer Eckert began interviewing Hamrick and other witnesses. Several witnesses claimed to smell alcohol on Hamrick's breath, and Hamrick admitted he drank one beer earlier in the morning. Officer Eckert asked Hamrick to perform field sobriety tests, but Hamrick refused. At 3:40 a.m., Officer Eckert informed Hamrick he was not free to leave. He instructed Hamrick to remain by the front of Officer Eckert's car.

At 4:08 a.m., Officer Andrew Harris—the lead investigator—arrived. Officer Harris interrogated Hamrick and instructed him to perform sobriety tests. Hamrick performed the tests, which indicated to Officer Harris that Hamrick was intoxicated. At 4:40 a.m., Officer Harris formally placed Hamrick under arrest, handcuffed him, administered *Miranda* warnings to him, and directed officers to transport Hamrick to the Mount Pleasant police station for a breathalyzer test.

When Hamrick arrived at the police station, the breathalyzer machine malfunctioned. After the machine became operational, Hamrick refused to take a breathalyzer test. Officers then took Hamrick to East Cooper Hospital, where at 6:55 a.m., they told Hamrick he was required to provide a blood sample pursuant to the mandatory blood testing provision of subsection 56-5-2946(A) of the South Carolina Code (2018), and the implied consent provision of subsection 56-5-2950(A) of the South Carolina Code (2018). The officers did not seek a search warrant before drawing Hamrick's blood. Hamrick's blood alcohol concentration measured .113 percent.

Prior to his 2013 trial, Hamrick filed a written motion to suppress the results of his blood test. He argued the warrantless search the police conducted in drawing his blood violated his Fourth Amendment rights because no exigency existed, and there was no other applicable exception to the warrant requirement. He relied on *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), decided six months earlier, in which the Supreme Court of the United States held "the natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing." 569 U.S. at 145, 133 S. Ct. at 1556, 185 L. Ed. 2d at 702; *see also* 569 U.S. at 148, 133 S. Ct. at 1558, 185 L. Ed. 2d at 704 (restating that "a blood sample . . . drawn from a defendant suspected of driving while under the influence of alcohol" is a search under the Fourth Amendment (citing and quoting *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 919 (1966))). The trial court conducted a hearing and considered all of the applicable circumstances, as it was required to do under *Schmerber* and *McNeely*. At the conclusion of the hearing, the court found the exigent circumstances exception excused the warrant requirement on the unique facts presented, and denied the motion to suppress. The court did not address whether the implied consent provision of subsection 56-5-2950(A) excused the warrant requirement.

As an alternative ground for excluding the blood test results from trial, Hamrick argued his blood was not drawn within three hours of Hamrick's arrest as mandated by subsection 56-5-2950(A), which states blood samples "must be collected within three hours of the arrest." Hamrick maintained he was under arrest by 3:40 a.m., when he refused to perform field sobriety tests and Officer Eckert informed him he was not free to leave. The trial court rejected this argument and ruled Hamrick was

not under arrest until Officer Harris placed Hamrick in handcuffs and administered *Miranda* warnings at 4:40 a.m.

During trial, Officer Harris testified he documented the point of impact inside the construction zone, as opposed to inside the designated lane of travel. Woodrow Poplin, a mechanical and civil engineer, testified as an expert witness for Hamrick. Poplin testified Officer Harris's reported point of impact was incorrect because Hamrick's car could not have reached that point without knocking over the cones separating the lane of travel from the construction zone, or without hitting the paving machine. Poplin testified, in his opinion, the collision occurred inside the designated lane of travel. Hamrick offered into evidence a video of an experiment Poplin conducted to determine whether it was possible for Hamrick's car to hit Garland where Officer Harris testified the collision occurred without also hitting the cones or the paving machine. The trial court permitted Poplin to testify about the experiment, but excluded the video from evidence.

The jury found Hamrick guilty of felony driving under the influence resulting in great bodily injury.[1] The trial court sentenced Hamrick to fifteen years in prison. Hamrick's trial counsel failed to appeal, and Hamrick filed a post-conviction relief application alleging counsel was ineffective for not doing so. The post-conviction relief court agreed, and granted Hamrick a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). As *White* requires,[2] Hamrick filed a petition for a writ of certiorari asking this Court to consider the belated appeal. We transferred the petition to the court of appeals pursuant to Rule 243(l) of the South Carolina Appellate Court Rules. The court of appeals granted certiorari to consider Hamrick's appeal. The court of appeals then transferred the appeal to this Court

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[1] S.C. Code Ann. § 56-5-2945(A)(1) (2018).

[2] In *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986), we set forth specific procedures litigants should follow pursuing a belated direct appeal, which has now become known as a *White* appeal. 288 S.C. at 291, 342 S.E.2d at 60; *see also* Rule 243(i), SCACR (entitled, "Special Procedures Where a *White v. State* Review Is Sought").

pursuant to Rules 203(d)(l)(A)(ii) and 204(a) of the South Carolina Appellate Court Rules.[3]

II. Analysis

We begin with the trial court's error in permitting Officer Harris to give opinion testimony on the subject of accident reconstruction. This error requires a new trial. We will then address the admissibility of the video of Poplin's experiment and Hamrick's challenges to the admissibility of his blood test results, as those issues will necessarily arise on remand.

A. Officer Harris's Testimony

To prove Hamrick guilty of felony driving under the influence, in addition to proving he was "under the influence of alcohol," the State must prove he committed "any act forbidden by law or neglect[ed] any duty imposed by law in the driving of the motor vehicle, which . . . proximately cause[d] great bodily injury . . . to another person." § 56-5-2945(A). The State sought to meet this requirement by proving three acts: Hamrick was speeding, he failed to keep a proper lookout, and he struck Garland outside the designated lane of travel. The State put significant—if not primary—emphasis on proving Garland was located outside the designated lane of travel when Hamrick struck him.

The State called several eyewitnesses who were on the scene when it happened. However, none of them testified with specificity to where the impact occurred. The State also called Officer Harris. From the outset of his testimony, the State attempted to demonstrate Officer Harris's qualifications as an expert in accident reconstruction. Throughout his testimony, the State pursued opinion testimony as to whether Hamrick struck Garland in the designated lane of travel or within the construction zone. The State asked, "Through your investigation and documentation of the scene did you develop an approximate point of impact?" Before Officer Harris could complete his answer, Hamrick objected, and the trial court sustained the objection.

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[3] The court of appeals determined Hamrick's suppression argument raised issues regarding the constitutionality of the mandatory testing requirement in subsection 56-5-2946(A), and thus the appeal must be heard by this Court pursuant to Rule 203(d)(l)(A)(ii).

The State then asked Officer Harris whether he "ma[de] any measurements." Officer Harris's answer was not responsive, and conveyed his opinion on accident reconstruction. He testified, "I marked a possible point of impact based on what information I had been given." Hamrick objected, and the trial court again sustained the objection. The solicitor changed the subject and finished Officer Harris's direct examination on the question of whether Hamrick was intoxicated.

On cross-examination, Hamrick's counsel highlighted many of the deficiencies in Officer Harris's qualifications in accident reconstruction and in the information available to him regarding a specific point of impact. At several points, counsel got Officer Harris to concede he wasn't sure of a point of impact. For example, as to a specific point of impact, Officer Harris testified, "I'm not sure; you are right. I don't have a point of impact."

On re-direct examination, the State resumed asking Officer Harris about his training in accident reconstruction, including the reconstruction of "automobile pedestrian collisions." As a part of his answer to questions about his qualifications, Officer Harris began to explain his opinion on the trajectory of Garland's body after impact. Hamrick objected on the basis of his qualifications. Then, for the first time, the State requested the trial court find Officer Harris met the Rule 702, SCRE, qualification requirement as an expert in accident reconstruction. After Hamrick pointed out Officer Harris had never been found qualified as an expert before, the trial court held an off-the-record conference. The trial court did not rule on the record whether Officer Harris met the qualification requirement. The court stated only, "You may proceed." As we held in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), "When admitting [expert testimony[4]] under Rule 702, SCRE, *the trial judge must find* . . . the expert witness is qualified . . . ." 335 S.C. at 20, 515 S.E.2d at 518 (emphasis added).

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[4] In *Council*, we used the term "scientific evidence." *Id.* In subsequent decisions, however, we made it clear the trial court's gatekeeping responsibility to make findings as to the foundational elements of Rule 702—including whether the expert meets the qualification requirement—applies to all expert testimony. *See, e.g.*, *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) (discussing the "Rule 702, SCRE, qualifications" requirement in the context of non-scientific evidence).

The State continued attempting to elicit Officer Harris's opinion, asking, "Is there enough evidence . . . to determine the point of impact," and "could you reach a conclusion about point of impact." Even after Officer Harris answered "no" to those questions, the State continued, "Combined with witness testimony and witness statements taken from the scene, does that help you in making that sort of conclusion," referring to Officer Harris's conclusion regarding the point of impact. Hamrick continued to object, in an obvious effort to keep Officer Harris from giving opinion testimony that the impact occurred in the construction zone.

The State then asked Officer Harris whether it was "possible" for Hamrick to have swerved into the construction zone from the designated lane of travel and hit Garland without hitting any cones or the paving machine. Hamrick's counsel immediately stated, "Objection, Judge. . . . He's not been qualified to render such an opinion." Finally, the trial court ruled, stating, "He investigated the accident. He has training and experience. He does not have to be qualified as an expert to render a lay opinion based on his rational perception." After another off-the-record discussion, the court again stated only, "You may proceed." In the testimony that followed, Officer Harris never specifically identified a point of impact. He did, however, give his opinion that the impact did not occur in the designated lane of travel, but occurred behind the cones in the construction zone.

We find the trial court erred in two respects. First, the court incorrectly characterized Officer Harris's testimony as "lay" opinion. Under Rule 701 of the South Carolina Rules of Evidence, lay opinion is "limited to those opinions . . . rationally based on the perception of the witness." Officer Harris arrived on the scene forty-eight minutes after the incident occurred, and thus, he clearly did not perceive the location of the impact.[5] In addition, Rule 701 provides lay opinion is not admissible unless

[5] *See Jackson v. Price*, 288 S.C. 377, 379-80, 342 S.E.2d 628, 629-30 (Ct. App. 1986) (error to permit highway patrolman—who arrived after the accident—to testify as to point of impact (citing *State v. Kelly*, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985) ("A police officer may not give his opinions as to the cause of an accident. He may only testify regarding his direct observations unless he is qualified as an expert."))). While *Kelly* and *Jackson* were decided before our Rules of Evidence, the Note to Rule 701, SCRE, indicates the rule is consistent with prior law. Rule 701, SCRE Note.

"the witness is not testifying as an expert." *See also* Rule 701, SCRE (providing lay opinion is "limited to those opinions . . . which . . . do not require special knowledge, skill, experience or training"). Accident reconstruction requires expertise,[6] and from the outset, the State sought to establish Officer Harris's qualifications as an expert in accident reconstruction. Officer Harris's testimony was not "lay" opinion, and the trial court erred by characterizing it as such.

Second, the trial court failed to make the necessary findings that the State established the foundation required by Rule 702. *See Council*, 335 S.C. at 20, 515 S.E.2d at 518. The State attempted to do this, but Hamrick repeatedly objected. The specific issue Hamrick raised was whether Officer Harris met the requirement of "qualified as an expert by knowledge, skill, experience, training, or education." Rule 702, SCRE. When Hamrick objected to the testimony on this basis, the trial court conducted off-the-record discussions. Without putting any finding on the record, the trial court permitted the State to proceed asking Officer Harris questions to elicit his opinion as to the point of impact. The trial court's failure to make any finding on the record was error.

Our review of the record convinces us Officer Harris did not possess the necessary qualifications to give an opinion in accident reconstruction. His training in the field was limited to a few courses he took over a period of several years. He had no other training or education that would otherwise demonstrate he was qualified as an expert to give an opinion on accident reconstruction. Accident reconstruction is a highly technical and specialized field in which experts employ principles of engineering, physics, and other knowledge to formulate opinions as to the movements and interactions of vehicles and people, under circumstances lay people—even trained officers—simply cannot understand. A law enforcement officer who attended several classes on the subject does not possess the necessary qualifications to satisfy the "qualified as an expert" element of the Rule 702 foundation. *See State v. Ellis*, 345 S.C. 175, 177-78, 547 S.E.2d 490, 491 (2001) (officer qualified as an expert in

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[6] *See generally* 31A Am. Jur. 2d *Expert and Opinion Evidence* § 255 (2012) ("Accident reconstruction experts . . . rely on knowledge and the application of the principles of physics, engineering, or other sciences which are beyond the understanding of the average juror." (footnotes omitted)).

crime scene processing and fingerprint identification was qualified to testify to measurements taken at the scene, recovery of shell casings, and identification of blood stains, but was not qualified to testify regarding the location and position of the victim's body based on crime scene reconstruction); *Kelly*, 285 S.C. at 374, 329 S.E.2d at 443 ("A police officer may not give his opinions as to the cause of an accident.").

Because Officer Harris gave opinion testimony on the subject of accident reconstruction, and the State failed to lay the Rule 702 foundation for his testimony, we find the trial court erred in admitting the testimony.

B. Harmless Error

We quickly dispense with any suggestion the trial court's error was harmless. Officer Harris's opinion testimony was critical to the State's ability to prove an "act forbidden by law" or that Hamrick "neglect[ed] any duty imposed by law in the driving of the motor vehicle," and on that basis prove Hamrick "proximately cause[d] great bodily injury" to Garland. § 56-5-2945(A). While the State also presented evidence Hamrick was driving five miles per hour over the speed limit and failed to keep a proper lookout, the burden of proving proximate cause would have been much more difficult for the State to meet if the point of impact was in the lane of travel. Therefore, we find the error in admitting Officer Harris's opinion testimony regarding the point of impact could not have been harmless.

C. Video of Poplin's Experiment

To combat the State's theory the collision occurred inside the construction zone, Hamrick called Poplin to testify about Poplin's investigation of the incident and his opinion the point of impact was in Hamrick's designated travel lane. To test his opinion, Poplin conducted an experiment to determine whether it was possible for Hamrick to have struck Garland in the construction zone as reported by Officer Harris. Poplin videotaped his experiment, and Hamrick's counsel sought to introduce the video into evidence.

The trial court expressed concern over Hamrick offering the video into evidence as an attempt to re-create the incident. The trial court stated, "[T]here's no concrete evidence in the record as to what the point of contact would have been or was, and

. . . I cannot be assured of the accuracy of any re-enactment." The trial court stated, "You normally have video animations if you're re-creating accidents . . . . But the things that were problematic for me . . . [dealt] with the . . . human element in driving . . . and just the subjective nature of it." The court also expressed concern the video would mislead the jury. The court stated, "It is a re-creation. You want the jury to believe that this is how it happened that night, and that is what becomes problematic about it. Otherwise you wouldn't be seeking to put it in." The court allowed Poplin to testify about the details of his experiment, but excluded the video from evidence.

We find the trial court conducted an erroneous analysis of the admissibility of the video. The proper analysis begins with the question of whether the evidence is relevant. *See* Rule 402, SCRE ("All relevant evidence is admissible . . . ."). Rule 401 provides evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The video of Poplin's experiment was clearly relevant because the video tended to prove Hamrick could not have struck Garland in the construction zone as the State claimed he did. Rule 402 also provides relevant evidence may be excluded "as otherwise provided by . . . these rules" or another provision of law. However, we do not see that any of the trial court's concerns justify excluding the video from evidence under the rules or any other provision of law.

First, we disagree with the trial court's characterization of the video as a re-creation or demonstration of how the incident happened. Certainly, Hamrick offered Poplin's opinion testimony generally to demonstrate how the incident did happen. But the video was offered to prove how the incident did not happen. It was substantive evidence—not demonstrative—offered to prove Hamrick's car could not have struck Garland inside the construction zone—as Officer Harris testified it had—without also knocking over the cones or striking the paving machine. *See* 2 Michael H. Graham, *Handbook of Federal Evidence* § 401:10 (8th ed. 2018) ("The results of experiments are substantive evidence, ... Sometimes the purpose of the experiment is to determine how a particular event . . . did not occur." (footnote omitted)). As substantive, relevant evidence, the trial court did not have the discretion to exclude the video except in reliance upon a specific, applicable rule or other provision of law.

Further, if the trial court was concerned the video would mislead the jury, it was required to conduct an on-the-record Rule 403 analysis. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."); *State v. Spears*, 403 S.C. 247, 254, 742 S.E.2d 878, 881 (Ct. App. 2013) (holding "the trial court erred by failing to conduct an on-the-record Rule 403 balancing test"). The State made the "possibility" of Hamrick hitting Garland in the construction zone an issue through the testimony of Officer Harris. Poplin testified the experiment showed it was not possible for the impact to have occurred in the construction zone. The probative value of Poplin's video included showing the jury whether Poplin aggressively attempted to make the vehicle do what Officer Harris testified it did, and whether Poplin placed the cones and paver to accurately represent their location on the night of the incident. The trial court did not analyze this or any other probative value.

Because we reverse on the error of the admission of Officer Harris's opinion testimony, and because the probative value of Poplin's video may be different in the absence of that testimony, it is not necessary for us to rule whether the trial court abused its discretion in excluding the video. On remand, however, the trial court should consider the State's objections to the video under the proper legal framework.

D. Motion to Suppress Blood Test Results

The State offered the results of Hamrick's blood test as part of its effort to prove Hamrick was "under the influence of alcohol" as required by subsection 56-5-2945(A). Hamrick moved to exclude the results for a statutory violation, and to suppress the results for a constitutional violation. We address each argument in turn.

i. Three-Hour Statutory Requirement

We first discuss Hamrick's motion to exclude the test results based on the timing requirement in subsection 56-5-2950(A), which provides samples other than breath samples "must be collected within three hours of the arrest." We find the trial court did not err in refusing to exclude the test results on this ground. Even if Hamrick's arrest occurred outside of the three-hour statutory timeframe, the only exclusionary provision that could apply is set forth in subsection 56-5-2950(J) of the South Carolina Code (2018), which provides,

> The failure to follow policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure . . . .

§ 56-5-2950(J). It is not clear to us how the failure to draw Hamrick's blood within three hours of his arrest "materially affected the accuracy or reliability of the test results or the fairness of the testing procedure." There is no evidence the delay in drawing Hamrick's blood resulted in anything but a test result showing a lower blood alcohol concentration than would have been shown if the test were timely conducted. *See generally McNeely*, 569 U.S. at 145, 133 S. Ct. at 1556, 185 L. Ed. 2d at 702 (discussing "the natural metabolization of alcohol in the bloodstream"). There is no suggestion of any other problem with the testing procedures. Therefore, the trial court did not err in refusing to exclude the blood test results on this basis.

ii. Fourth Amendment Ground for Suppression

Hamrick argued the test results should be suppressed because his blood was drawn without a warrant, in violation of the Fourth Amendment. We find that even if there was a Fourth Amendment violation, the good-faith exception to the exclusionary rule applies, and therefore, the test results will not be suppressed.

The "compulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." *Schmerber*, 384 U.S. at 767, 86 S. Ct. at 1834, 16 L. Ed. 2d at 918. "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430, 439 (2014); *see also State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007) ("[A] warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement.").

There are two exceptions to the warrant requirement that could be applicable in this case—consent and exigent circumstances. *See generally State v. Counts*, 413 S.C.

153, 163, 776 S.E.2d 59, 65 (2015) (providing "consent" and "exigent circumstances" are recognized exceptions to the warrant requirement). The exigent circumstances exception "'applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.'" *McNeely*, 569 U.S. at 148-49, 133 S. Ct. at 1558, 185 L. Ed. 2d at 704 (quoting *Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 1856, 179 L. Ed. 2d 865, 874-75 (2011)). As to consent, pursuant to South Carolina's implied consent statute, subsection 56-5-2950(A), Hamrick is deemed by law to have consented to have his blood drawn by virtue of driving a motor vehicle in South Carolina, unless he withdraws his consent as contemplated in subsection 56-5-2950(H).

The exclusionary rule is a "judicially created remedy" for a Fourth Amendment violation. *Davis v. United States*, 564 U.S. 229, 238, 131 S. Ct. 2419, 2427, 180 L. Ed. 2d 285, 294 (2011). "[T]he *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement." 564 U.S. at 246, 131 S. Ct. at 2432, 180 L. Ed. 2d at 300. The rule does not apply "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." 564 U.S. at 238, 131 S. Ct. at 2427, 180 L. Ed. 2d at 295. "Where there is no misconduct, and thus no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction." *State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014).

When the officers made the decision to draw Hamrick's blood without a warrant, the law appeared to support the existence of exigent circumstances and the validity of statutory implied consent. There is nothing in this record that in any way suggests the officers did not "act with an objectively 'reasonable good-faith belief' that their conduct is lawful." Therefore, we decline to address whether the exigent circumstances or consent exceptions to the warrant requirement applied on the facts of this case, because even if we found no exception applied, we would find the good-faith exception to the exclusionary rule forecloses suppression.

III. Conclusion

We **REVERSE** Hamrick's conviction for felony driving under the influence resulting in great bodily injury and remand for a new trial.

REVERSED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Thomas E. Huff, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Denzel Marquise Heyward, Petitioner.

Appellate Case No. 2018-000981

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 27887
Heard March 27, 2019 – Filed May 15, 2019

REVERSED AND REMANDED

Chief Appellate Defender Robert Michael Dudek and Appellate Defender Donald Michael Mathison, both of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General Jonathan Scott Matthews, and Assistant Attorney General James Clayton Mitchell, III, all of Columbia, for Respondent.

JUSTICE HEARN: Petitioner Denzel Heyward was indicted for murder, attempted murder, armed robbery, and possessing a firearm during a crime of violence for an incident that resulted in the death of Kadeem Chambers. The jury could not reach a verdict as to murder, but found Heyward guilty of the remaining charges. The trial court sentenced him to an aggregate term of 65 years. Heyward appealed, asserting the court erred by admitting a photo lineup identification and by finding his counsel opened the door to the admission of testimony that he had previously committed domestic violence. The court of appeals affirmed. *State v. Heyward*, 422 S.C. 488, 812 S.E.2d 432 (Ct. App. 2018). We now reverse and remand for a new trial.

FACTS/PROCEDURAL BACKGROUND

During the trial, Quasantrina Rivers—the mother of Heyward's child and a cooperating codefendant—testified that she drove Heyward and Dashaun Simmons—another codefendant—to a residence in Ridgeville where Heyward retrieved a gun. She then drove the men to an acquaintance's house on Johns Island. Another car containing two men (Chambers and his brother, Jujuain Hemingway) drove up, and after speaking to one of the occupants, Heyward "bum rushed"[1] him and pushed him against the car. Simmons then approached the car from the woods carrying a rifle and forced the two men to lay on the ground. Heyward and Simmons demanded to know "where everything was at," but the men responded they had nothing. Thereafter, Heyward stomped his foot on the back of Hemingway's head, and Simmons fired a shot in his direction. Heyward and Simmons forced the men to open the trunk of their car and took a suitcase from it. Chambers then began to "tussle" with Simmons when two shots rang out, striking Chambers. Heyward and Simmons fled with Rivers, who drove them back to Ridgeville. The group spent much of the next two days there before Rivers ultimately turned herself in to police. Chambers passed away at the hospital. Hemingway testified similarly regarding the events of the night in question.

Prior to trial, Heyward sought to prohibit Rivers from testifying that he had allegedly physically abused her during their relationship. In moving to exclude the testimony, he argued he had no prior convictions for domestic violence and the

[1] "To attack or seize with an overpowering rush." "bum-rush." *Merriam-Webster.com*, 2019. (Last Visited April 2, 2019). *available at* https://www.merriam-webster.com/dictionary/bum-rush.

allegations had no bearing on any element of a crime charged, resulting only in undue prejudice.

The State explained it wanted to introduce the evidence to help the jury understand the complicated relationship between Heyward and Rivers, including the fact that despite agreeing to testify against Heyward, she continued to visit him frequently in jail. According to the State, the allegations demonstrated his ability to manipulate her. Further, it helped explain why Rivers allegedly drove Heyward and Simmons to retrieve a gun, drove them to and from a robbery, and then took two days to turn herself in to police. The State asserted allegations of domestic violence would not cause the jury to assume Heyward committed murder.

The trial court determined the State was attempting to introduce the evidence to demonstrate Heyward's bad character, which Rule 404(b), SCRE, is designed to prevent. The court stated it would not allow Rivers to testify about prior incidents of abuse on direct examination, but noted the testimony could be permitted to rehabilitate her.

At trial, the State called Rivers' mother, Sidearis Singleton, who testified about Rivers' behavior after the incident and her decision to turn herself in. On cross-examination, Heyward asked Singleton whether Rivers had attempted suicide before, whether she knew if Rivers had mental health issues, and whether Rivers had ever accused Singleton's husband of sexually assaulting her. Singleton answered she did not know to each question.

On redirect, the State asked Singleton who had abused Rivers. Heyward objected, and the court stated: "[w]ell, you raised the—you raised the issue. I guess she would—you introduced it, so—." The court then held an off-record bench conference at Heyward's request. The State proceeded with questioning, asking Singleton who had physically harmed Rivers in any way. She responded that Heyward had committed domestic violence against Rivers. Singleton testified Heyward had a history of physically abusing Rivers and she had seen Rivers after some of the abuse, noticing her hair had been pulled out and her lip was busted or swollen. Rivers later testified her relationship with Heyward included some violence, and she also recounted several instances of Heyward "fighting" her physically on the day of the incident.

The jury deliberated for approximately eight hours, sending multiple notes to the court, and were given an *Allen*[2] charge after reporting they could not reach an agreement. At 1:20 a.m., the jury returned verdicts convicting Heyward and Simmons of attempted murder, armed robbery, and the weapons charge. The jury could not reach a unanimous verdict on the murder charge. Heyward requested the court continue sentencing due to the late hour, but the State asserted it would be a great hardship for Chambers' family to have to come back another day. Chambers' family submitted pictures, a video recording, and a victim impact statement for sentencing purposes. The State asked for consecutive sentences. The court stated the evidence demonstrated lying in wait and "total disregard for other human beings." Consequently, the trial court found the maximum penalty was warranted and sentenced both Heyward and Simmons to 30 years for attempted murder, 30 years for armed robbery, and 5 years for the weapons charge, all to be served consecutively.

Heyward appealed, and the court of appeals affirmed. *Heyward*, 422 S.C. 488, 812 S.E.2d 432. The court held, in relevant part, that Heyward had failed to preserve the domestic violence testimony issue for review by not stating his objection for the record, but even if he had, counsel opened the door to the testimony. The court of appeals further determined that even if the circuit court erred, the testimony was cumulative to that of Rivers regarding physical abuse. We granted certiorari to review the decision.

ISSUE[3]

Did the circuit court err in finding defense counsel's questioning of Singleton opened the door to testimony about prior instances of domestic violence Heyward committed against Rivers?

STANDARD OF REVIEW

A trial court's determination that a party has opened the door to the introduction of otherwise inadmissible evidence is within the sound discretion of the trial judge and is reviewed for abuse. *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d

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[2] *Allen v. United States*, 164 U.S. 492 (1896).

[3] We also granted certiorari as to Heyward's other question: whether the circuit court erred by admitting Hemingway's identification of Heyward. We now dismiss the writ as improvidently granted as to this issue.

357, 360 (Ct. App. 2008). This occurs when a trial court's conclusions lack evidentiary support or are controlled by an error of law. *State v. Collins*, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014).

DISCUSSION

Heyward argues the trial court erred by permitting testimony he previously abused Rivers because counsel did not open the door to its admission. He contends the issue is preserved for review because the substance of his objection was clear from the context of both the pre-trial hearing and the objections made at trial. Heyward asserts the prejudice from admission was substantial because it bolstered Rivers' credibility—which was central to the State's case—and painted him in a negative light.

The State contends the issue is not preserved because Heyward's counsel failed to state his objection on the record after the bench conference. The State notes counsel also failed to object when Rivers testified her relationship with Heyward included violence. The State argues that regardless, the door was opened to Singleton's testimony regarding domestic violence because Heyward's counsel asked her about whether Rivers had been abused, as well as her mental health and state of mind. Finally, the State asserts any error was harmless due to the significant evidence of Heyward's guilt.

A specific objection to an evidentiary ruling is required unless the grounds are apparent from context. Rule 103(a)(1), SCRE. However when this Court can discern the basis of the objection from the record, the issue is preserved for review. *See State v. Byers*, 392 S.C. 438, 444-47, 710 S.E.2d 55, 58-59 (2011).

A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction. *State v. Young*, 364 S.C. 476, 486-87, 613 S.E.2d 386, 391-92 (Ct. App. 2005). However, we are wary of a "thinly-veiled attempt to show propensity" by way of the open-door doctrine. *State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008). Testimony in response must be "proportional and confined to the topics to which counsel had opened the door." *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018).

Initially, while counsel failed to state the grounds for his objection to Singleton's testimony on the record—which he had done following other bench conferences during the trial—we believe the context of the pre-trial hearing and what

was said on the record makes the grounds for the objection apparent. It is clear the possibility of counsel opening the door to testimony regarding domestic violence against Rivers was on everyone's mind. The circuit court extensively discussed the issue before trial; the State was looking for an opportunity to introduce the allegations; Heyward's counsel took care not to ask Singleton about physical abuse or Rivers' relationship with Heyward; and counsel immediately objected when the State sought to elicit the testimony from Singleton. The trial court no doubt understood the basis for the objection, but responded counsel had raised the issue, indicating the court believed the door had been opened. While counsel did not specify the basis for the objection and the ruling for the record after the bench conference, the context of the entire trial demonstrates the issue was raised and ruled upon, preserving it for appellate review. *See Byers*, 392 S.C. at 444-47, 710 S.E.2d at 58-59.

As to the merits, we do not believe counsel opened the door to allegations Heyward physically abused Rivers. Counsel asked Singleton whether Rivers had attempted suicide, struggled with mental health issues, and accused Singleton's husband of sexual assault. None of these issues arise out of the same fact or transaction as past incidents of physical abuse Heyward may have committed against Rivers. *Young*, 364 S.C. at 486-87, 613 S.E.2d at 391-92. Moreover, the testimony the State elicited in response was not proportional or confined to the doors counsel had opened through his questioning of Singleton; *i.e.*, her suicide attempts, mental health, or sexual abuse. *Bowman*, 422 S.C. at 42, 809 S.E.2d at 244. Singleton proceeded to testify Heyward repeatedly physically abused Rivers, resulting in specific physical injuries. We believe the State thereby used the open-door doctrine to introduce propensity evidence, just as the circuit court recognized during the pre-trial hearing. *Young*, 378 S.C. at 106, 661 S.E.2d at 390. Consequently, we find no evidentiary support for the court's decision, which amounted to an abuse of discretion. *Collins*, 409 S.C. at 530, 763 S.E.2d at 25.

The State asserts any error was harmless in light of the evidence adduced at trial as a whole. We cannot agree, as the evidence of Heyward's guilt was not overwhelming. Further, while Rivers subsequently testified her relationship with Heyward included some violence and she recounted specific events from the day of the incident, Singleton's testimony had the effect of corroborating Rivers' testimony as a whole. Rivers was indeed the State's most important witness, and as a result, we cannot conclude Singleton's testimony was harmless because it later became cumulative. The evidence was introduced solely to demonstrate Heyward's poor

character, and given the close case presented, we are unable to find the error was not prejudicial.

CONCLUSION

Accordingly, we **REVERSE** and **REMAND** the case for a new trial.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Edward P. McKenzie, Respondent.

Appellate Case No. 2019-000368

Opinion No. 27888
Submitted April 25, 2019 – Filed May 15, 2019

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Edward P. McKenzie, of St. Thomas, Virgin Islands, *pro se*.

PER CURIAM: By order of the Supreme Court of New Jersey dated December 6, 2018, Respondent was suspended from the practice of law in that state for one year. *In re McKenzie*, 198 A.3d 933 (N.J. 2018). At the time of his New Jersey suspension, Respondent was licensed in South Carolina, but administratively suspended for failing to pay his license fees.[1]

According to the New Jersey order, Respondent entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), in the Superior Court of the Virgin Islands to one count of compounding a crime in violation of Virgin Islands law. The New Jersey Supreme Court found Respondent's conduct violated New Jersey Rules of

[1] On April 11, 2003, this Court administratively suspended Respondent based on his failure to pay his 2003 license fees as required by Rule 410, SCACR. S.C. Sup. Ct. Order dated Apr. 11, 2003 (Shearouse Adv. Sh. No. 13). Respondent did not seek reinstatement following his administrative suspension.

Professional Conduct 8.4(b) (commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer), and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). New Jersey's Rule 8.4(b) is identical to South Carolina's Rule 8.4(b), RPC, Rule 407, SCACR, and its Rule 8.4(c) is identical to South Carolina's Rule 8.4(d), RPC, Rule 407, SCACR.

Respondent failed to notify the Commission on Lawyer Conduct (the Commission) in writing of his suspension in New Jersey as required by Rule 29(a), RLDE, Rule 413, SCACR. This Court, the Commission, and the Office of Disciplinary Counsel were made aware of Respondent's New Jersey suspension by a letter from the Clerk of the Supreme Court of New Jersey. Thereafter, pursuant to Rule 29(b), RLDE, Rule 413, SCACR, Respondent was notified via a certified letter from this Court's Clerk that he had thirty days to inform the Court of any claim that the imposition of identical discipline in South Carolina was not warranted and the reason for any such claim. The Court did not receive a response from Respondent to the Clerk's letter, which was sent to the address provided by Respondent in the Attorney Information System. The letter was returned to the Clerk unopened with the word "Refused" written on the outside of the envelope under Respondent's address.

Because we find a sufficient attempt was made to serve Respondent with Rule 29(b), RLDE, Rule 413, SCACR, notice, and none of the factors in Rule 29(d), Rule 413, SCACR, preventing the imposition of identical discipline are present in this matter, we hereby reciprocally suspend Respondent from the practice of law in South Carolina for one year from the date of this opinion. Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

SUPREME COURT OF NEW JERSEY
D-170 September Term 2017
081557

In the Matter of

Edward P. McKenzie,

An Attorney At Law

(Attorney No. 019811982)

FILED
DEC 06 2018
CLERK

ORDER

The Disciplinary Review Board having filed with the Court its decision in DRB 18-032, concluding that as a matter of final discipline pursuant to Rule 1:20-13(c), **Edward P. McKenzie** of **St. Thomas, Virgin Islands,** who was admitted to the bar of this State in 1983, should be suspended from the practice of law based on respondent's plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) in the Superior Court of the Virgin Islands to one count of compounding a crime, in violation of 14 Virgin Islands Code, §521(a)(3), conduct that in New Jersey constitutes violating RPC 8.4(b)(commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer) and RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation);

And the Court having determined from its review of the matter that a one-year prospective term of suspension is the appropriate quantum of discipline for respondent's unethical conduct;

And good cause appearing;

It is ORDERED that **Edward P. McKenzie** is suspended from the practice of law for a period of one year, effective January 4, 2019; and until

the further Order of the Court; and it is further

ORDERED that respondent comply with Rule 1:20-20 dealing with suspended attorneys; and it is further

ORDERED that pursuant to Rule 1:20-20(c), respondent's failure to comply with the Affidavit of Compliance requirement of Rule 1:20-20(b)(15) may (1) preclude the Disciplinary Review Board from considering respondent's petition for reinstatement for a period of up to six months from the date respondent files proof of compliance; (2) be found to constitute a violation of RPC 8.1(b) and RPC 8.4(d); and (3) provide a basis for an action for contempt pursuant to Rule 1:10-2; and it is further

ORDERED that the entire record of this matter be made a permanent part of respondent's file as an attorney at law of this State; and it is further

ORDERED that respondent reimburse the Disciplinary Oversight Committee for appropriate administrative costs and actual expenses incurred in the prosecution of this matter, as provided in Rule 1:20-17.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 3rd day of December, 2018.

Heather J. Baker

CLERK OF THE SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ronald Wade Moak, Respondent.

Appellate Case No. 2019-000202

Opinion No. 27889
Submitted April 17, 2019 – Filed May 15, 2019

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Sabrina C. Todd, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

George W. Speedy and Zack Owen Atkinson, both of Speedy, Tanner, Atkinson & Cook, LLC, of Camden, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of not more than one year. We accept the Agreement and suspend respondent from the practice of law in this state for one year from the date of this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent agreed to represent D.D. on seven drug charges and one count of financial identity theft for a flat fee. D.D. was arrested on a bench warrant several months before respondent's representation began and remained in jail throughout

the representation, as respondent's efforts to have the bench warrant lifted were unsuccessful. Respondent shared important developments in the case with D.D., but did not write D.D. and did not recall receiving the numerous letters D.D. reports having sent respondent. Frustrated by D.D.'s failure to make payments as promised, respondent eventually stopped visiting D.D. in jail.

When respondent ceased contact, D.D. wrote to the clerk of court and a circuit judge regarding the lack of progress in his case. Over a two-month period, the judge responded to four of D.D.'s letters. Each time, the judge emailed respondent and the solicitor, including D.D.'s letter and the judge's response. D.D.'s first two letters concerned evidence in his case. In the third letter, D.D. complained about respondent and requested the public defender's office be reappointed. The judge responded by asking respondent and the solicitor to have D.D. brought to court so his request could be heard. D.D. was not brought to court and wrote to the judge again two weeks later, advising he had not had any contact with respondent despite writing respondent several letters.

Respondent made no attempt to contact D.D. after learning D.D. was contacting the judge and, instead, moved to be relieved after receiving the judge's fourth response to D.D. By the time of the hearing on respondent's motion to be relieved, it had been at least six months since respondent communicated with D.D. The court relieved respondent and reappointed the public defender.

Matter II

K.F. sought respondent's assistance with enforcing a child support order. Respondent agreed to pursue a contempt action for a $600 fee. He received a down payment and K.F.'s child support order. Respondent showed K.F. a copy of the contempt complaint before he filed it, but did not provide her with a filed copy. Respondent notified K.F. of the hearing date and asked one of his friends to serve K.F.'s ex-husband. However, respondent's friend failed to serve the ex-husband. Respondent could not reach the friend prior to the scheduled hearing and never learned why service did not occur. Respondent told K.F. he would have the hearing rescheduled and the documents served; however, he did not request a new hearing date.

Respondent failed to respond to K.F.'s texts and/or communicate with her family

members.[1] In one text, K.F. asked respondent to return her documents and withdraw from the case so she could hire new counsel. Respondent admits he never fully read the text. K.F. also sent respondent a certified letter with the same requests; however, respondent never collected the letter from the post office.

One month after the contempt hearing was scheduled to occur, K.F. filed a complaint with ODC. Approximately six weeks after learning of the investigation and after receiving multiple status inquiries from ODC, respondent returned K.F.'s file and had her execute a consent order relieving him. The clerk of court does not have a copy of the consent order and respondent did not retain a copy; however, K.F. was able to hire new counsel who pursued a contempt action on her behalf.

K.F. filed both a disciplinary complaint and a fee dispute. Believing the fee dispute was part of the disciplinary investigation, respondent did not cooperate with the fee dispute investigator. The Resolution of Fee Disputes Board (the Board) decided K.F. was entitled to a refund of the $200 she paid respondent. Respondent did not appeal the Board's decision and did not refund the money. Respondent claims he offered K.F. a refund, but she declined it.

Matter III

Respondent represented E.M. at a bond revocation hearing in August 2017. Respondent and E.M. had differing recollections about the scope of the representation and there was no written fee agreement between the parties. Respondent maintains he agreed to represent E.M. at the bond revocation hearing for $500, and in the event he was hired to represent E.M. on the underlying criminal charges, the $500 would be applied to the $1,500 fee he quoted E.M. for the entire case. E.M. contends the scope of the representation was never limited to the revocation bond hearing.

Respondent represented E.M. at the bond revocation hearing without receiving any payment. Weeks after the hearing, E.M.'s sister paid respondent $100.

Thereafter, confusion arose about whether respondent or the public defender's

[1] Because K.F. was profoundly hard of hearing, respondent communicated with her by text and through telephone conversations with her mother and stepfather.

office was representing E.M. on his charges and a hearing was held to clarify the matter. At the hearing, respondent asked the court to consider him E.M.'s attorney, explaining he appeared at the bond revocation hearing based on a promise of being hired on E.M.'s pending charges, and he had not "been paid at all on this case." E.M. told the court the public defender was his attorney. The court relieved respondent and clarified the public defender represented E.M. on all pending charges.

In the weeks that followed, E.M. paid respondent an additional $300. In December 2017, based on the additional payments and E.M.'s promise to continue to make monthly payments, respondent filed a notice of appearance on each of E.M.'s pending charges. However, respondent did not file any discovery requests because he believed he could get the discovery from the public defender.

In January 2018, another hearing was held to clarify counsel in response to a letter E.M. sent to the court. At this hearing, the public defender was relieved and respondent was recognized as E.M.'s counsel. E.M. requested discovery during the hearing and the public defender offered to forward the discovery from the State to respondent. Respondent advised the court that, when he received it, he would share the discovery with E.M. Respondent received the discovery at the hearing and maintains he reviewed some of it briefly with E.M. at the courthouse. Thereafter, because E.M. was not making payments, respondent chose not to visit E.M. to review the discovery in more detail and did not provide E.M. with a copy of the discovery.

E.M. filed a motion to relieve respondent. At a March 2019 hearing, respondent stated he was willing to be relieved because E.M. was not paying him. Respondent admitted he had the discovery at his home and did not refute E.M.'s claim that he had not provided E.M. with a copy. The court relieved respondent and reappointed the public defender.

Matter IV

E.M. filed an application with the Board seeking the return of the $400 he and his family paid toward respondent's fees. The fee disputes coordinator emailed respondent a copy of the fee dispute. An investigator contacted respondent via email and voicemail; however, respondent failed to respond. The investigator filed

a report recommending E.M.'s claim be approved in full. The circuit co-chair concurred and mailed both respondent and E.M. a letter stating the $400 repayment should be made within thirty days of the receipt of the letter. Respondent did not file an appeal and did not comply with the Board's decision. The circuit co-chair emailed respondent three times seeking his compliance with the decision before he reported respondent's noncompliance to ODC.

Respondent admits he did not respond to any communications regarding the fee dispute, did not appeal the Board's decision, and did not pay the award within the timeframe provided by the co-chair. However, respondent maintains his failure to comply with the fee dispute process and the Board's final decision was not willful; rather, respondent claims he failed to carefully read the letters and emails he received regarding the fee dispute and incorrectly believed they were all part of the disciplinary investigation.

Matter V

R.K. hired respondent in November 2017 to file a custody transfer action involving the Department of Social Services. R.K.'s child had been placed with a relative but, because her circumstances had improved, she expected no objection to the child being returned to her custody. R.K. paid respondent $500, which constituted unearned fees when it was received. Respondent did not have a written advance fee agreement that would permit him to treat the money as earned upon receipt, and he failed to deposit the funds into a trust account.

Respondent did not file an action in family court and did not adequately communicate with R.K. R.K. became so frustrated by her inability to reach respondent that she began having friends and relatives contact him. Respondent advised one caller that he misplaced the documents R.K. had provided to him and needed a certain replacement document in order to file the action. R.K. obtained a new copy of the document in question, but was unable to reach respondent to provide it to him.

Matter VI

C.F. hired respondent after his bond was revoked. Respondent and C.F. agreed upon a $2,000 fee, with a $500 down payment and monthly payments of $100.

Respondent did not deposit the $500 into a trust account even though it was unearned upon receipt, and the parties did not have a written advance fee agreement entitling him to treat the money as earned upon receipt.

C.F.'s most immediate goal was to have his bond reinstated. Respondent moved to have C.F.'s bond reinstated, moved for discovery, and requested a preliminary hearing. A preliminary hearing was scheduled, but respondent requested a continuance without informing C.F. the reason for the continuance. C.F.'s wife asked respondent why he sought the continuance, but respondent did not respond.

At a hearing on respondent's motion to reinstate bond, the judge declined the motion but ordered the solicitor to bring at least one of the charges to trial within ninety days. Because of the judge's ruling, the solicitor ensured C.F.'s charges went to a grand jury, C.F. was indicted approximately two weeks later, and C.F. proceeded to trial on his oldest charge within the order's timeframe. Respondent tried the case and C.F. was found not guilty. Despite that victory, C.F. wanted to be released on bond and wrote the clerk of court and the solicitor's office requesting respondent be removed from his cases and the public defender's office be reappointed.

Respondent's Failure to Cooperate

Respondent submitted timely responses to ODC's notices of investigation in Matters I and II. ODC scheduled an on-the-record interview for those matters and sent respondent a notice to appear and subpoena via certified mail. Three weeks later, ODC emailed respondent because he had yet to collect the certified letter. Respondent collected the mail from his post office box, but did not appear for the interview or contact ODC to explain and reschedule. ODC's efforts to reach respondent by phone and email on the day of the scheduled interview were unsuccessful. Respondent later explained he was preparing for trial and trying to arrange to take his elderly stepfather to Charleston for cancer treatment and simply forgot.

The interview was rescheduled for March 2, 2018. Respondent appeared, but failed to bring all the requested records. After the interview, ODC requested additional documentation by email. Respondent did not respond or provide the requested documentation. Respondent also failed to return a follow-up voicemail

from ODC. Respondent was personally served with a subpoena and notice to appear at a May 4, 2018 interview and brought the requested documentation for Matters I and II to that interview.

Respondent failed to respond to the notice of investigation for Matter III. A reminder letter sent to respondent via certified mail was returned unclaimed. Respondent provided testimony regarding Matter III during his May 4, 2018 interview, but did not bring a written response despite being reminded the written response was overdue in the correspondence attached to the notice to appear. Respondent testified he intended to provide a written response, but did not offer one until September 6, 2018.

Respondent did not respond to the notices of investigation or reminder letters in Matters IV and V. On August 13, 2018, he was personally served with a subpoena and notice to appear for an interview regarding Matters III, IV, and V. The cover letter advised that his appearance was not a substitute for his overdue written responses. Respondent appeared as scheduled and provided testimony, but did not bring the written responses. During the interview, respondent admitted he had not checked his post office box since mid- to late-July despite knowing he had several pending disciplinary investigations, and he had not provided a written response in Matter III. Even after receiving the notice that informed him of the existence of Matters IV and V, respondent chose not to check his mail prior to the interview on September 4, 2018. Respondent provided written responses in Matter III, IV, and V on September 6, 2018.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: 1.3 (diligence); 1.4 (communication); 1.15(a) (safekeeping client property); 1.15(c) (requiring unearned fees be deposited into a trust account) 1.16(d) (refunding unearned fees upon termination of representation); 8.1(b) (failing to respond to a lawful demand for information from a disciplinary authority); and 8.4(e) (engaging in conduct prejudicial to the administration of justice). Respondent further admits his conduct violated Rule 11 of the Resolution of Fee Disputes Board, Rule 416, SCACR (cooperation with an investigation by assigned member).

Respondent also admits his conduct constitutes grounds for discipline pursuant to Rule 7(a)(1) (violating the Rules of Professional Conduct) and (3) (willfully failing to appear personally, comply with a subpoena, or respond to a lawful demand from a disciplinary authority), RLDE, Rule 413, SCACR.

Conclusion

We find respondent's misconduct warrants a definite suspension from the practice of law in this state for one year from the date of this opinion. Accordingly, we accept the Agreement and suspend respondent for a period of one year. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigations and prosecutions of these matters by ODC and the Commission, and shall pay $500 in restitution to R.K.

Additionally, prior to seeking reinstatement, respondent must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR (reinstatement following a definite suspension for nine months or more), including completion of Legal Ethics and Practice Program Ethics School within the preceding year.

Finally, within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR (duties following suspension).

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

In the Matter of Brian DeQuincey Newman, Petitioner.

Appellate Case Nos. 2019-000336 and 2019-000449

ORDER

On April 20, 2017, petitioner was administratively suspended for failing to file a report showing his fulfillment of continuing legal education (CLE) requirements with the Commission on Continuing Legal Education and Specialization. *In re Admin. Suspension for Failure to Comply with the Continuing Legal Educ. Requirements*, 2017-04-20-01 (S.C. Sup. Ct. Order dated April 20, 2017). Petitioner has filed a petition for reinstatement pursuant to Rule 419(e), SCACR, demonstrating (1) he has paid all license fees and penalties due to the South Carolina Bar; (2) he is current on all CLE requirements, including any fees and penalties; and (3) the Office of Disciplinary Counsel is not currently conducting any disciplinary investigations involving petitioner.

On November 14, 2018, petitioner was suspended from the practice of law in this state for a period of six months, retroactive to the date of his interim suspension.[1] *In re Newman*, 425 S.C. 420, 821 S.E.2d 689 (2018). Petitioner has filed an affidavit demonstrating he has complied with the requirements of Rule 32, RLDE, Rule 413, SCACR.

Petitioner's requests for reinstatement are granted, and petitioner is hereby reinstated to the practice of law in this state.

s/ Donald W. Beatty C.J.

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[1] Petitioner was placed on interim suspension on January 8, 2016. *In re Newman*, 415 S.C. 239, 781 S.E.2d 355 (2016).

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 13, 2019

The Supreme Court of South Carolina

In the Matter of J. David Flowers, Petitioner

Appellate Case No. 2019-000503

ORDER

The records in the office of the Clerk of the Supreme Court show Petitioner was admitted and enrolled as a member of the South Carolina Bar on November 16, 1990. He voluntarily transferred to inactive status in September 2011. On April 24, 2013, the Court suspended Petitioner from the practice of law in this state for ninety-days for failing to file his state and federal income tax returns for tax years 2007, 2008, 2009, and 2010. *In re Flowers*, 402 S.C. 385, 741 S.E.2d 759 (2013).

Petitioner did not seek reinstatement; however, he now asks the Court to accept his request to resign from the South Carolina Bar pursuant to Rule 409, SCACR. Petitioner states he understands that should he ever again seek to be admitted or licensed in this state, he will have to fully comply with all conditions of admission or licensing, including taking the South Carolina Bar Examination, if applicable.[1]

We accept Petitioner's resignation. Within fifteen (15) days of the date of this order, Petitioner shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of Court.

s/ Donald W. Beatty C.J.

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[1] Additionally, we remind Petitioner that should he seek to be admitted or licensed in South Carolina again, he must demonstrate he paid his delinquent taxes in full. *See Flowers*, 402 S.C. at 387, 741 S.E.2d at 760 ("Respondent may not request reinstatement until he has paid his delinquent taxes in full and has filed proof with the Commission on Lawyer Conduct of [the] same.").

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 13, 2019

The Supreme Court of South Carolina

In the Matter of Larry Duane Pickens, Petitioner

Appellate Case No. 2019-000341

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 3, 1997, Petitioner was admitted and enrolled as a member of the South Carolina Bar. Currently, Petitioner is administratively suspended from the practice of law under Rule 419, SCACR, for failing to comply with his continuing legal education requirements.

Petitioner has now submitted his resignation from the South Carolina Bar pursuant to Rule 409, SCACR, and states he understands that he will have to fully comply with all conditions of admission or licensing if he should ever again seek to be admitted or licensed, including taking the South Carolina Bar Examination.

We accept Petitioner's resignation. Within fifteen (15) days of the date of this order, Petitioner shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

May 13, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jermaine Demarcus Grier, Appellant.

Appellate Case No. 2016-001045

Appeal From Lancaster County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5649
Submitted September 19, 2018 – Filed May 15, 2019

AFFIRMED

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

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., and Jennifer Ellis Roberts, all of Columbia; and Solicitor Randy E. Newman, Jr., of Lancaster, all for Respondent.

MCDONALD, J.: Jermaine D. Grier appeals his conviction for possession of contraband by a county or municipal prisoner, arguing the circuit court erred in denying his motion for a directed verdict and refusing to charge the jury with

section 24-3-965 of the South Carolina Code (Supp. 2018), which governs the possession of certain contraband by inmates incarcerated within the South Carolina Department of Corrections. We affirm.

Facts and Procedural History

On November 16, 2015, Officer LaQuentin Smith was preparing to transport Grier from the Lancaster County Detention Center (LCDC) to the Lancaster County Courthouse. As part of the transport process, officers instruct a detainee to place his hands through an opening in his cell door (this opening is generally used to deliver food) for inspection. Officers then handcuff the detainee and ask him to turn around with his back to the door so the officers can wrap a chain around the inmate's waist and secure it.[1] Officer Smith testified that when he and two other officers instructed Grier to place his hands through the door slot for inspection, Grier pulled back his left hand and placed it inside his jumpsuit. When Officer Smith again told Grier to place his left hand through the opening, Grier complied. Officer Smith found nothing in Grier's left hand.

After officers finished securing Grier, Officer Smith notified Sergeant Matthew Kennington that he suspected Grier had concealed something in his jumpsuit and needed to be searched. With Sergeant Nicholas Tuley as his witness, Sergeant Kennington searched Grier's jumpsuit and confiscated a twisted metal piece of a pen that appeared to have been sharpened down to the tip.

In February 2016, the Lancaster County Grand Jury indicted Grier for possession of contraband by a county or municipal prisoner under section 24-7-155 of the South Carolina Code (Supp. 2018). Grier's indictment states:

> POSSESSION OF CONTRABAND BY COUNTY OR MUNICIPAL PRISONER
>
> That Jermaine Demarcus Grier a prisoner of a county or municipal jail, prison, work camp or overnight lockup facility, did in Lancaster County, South Carolina, on or

[1] This is most commonly referred to as a "belly chain."

> about November 16, 2015, unlawfully possess a quantity of matter declared by the superintendent of the facility to be contraband, to wit: a sharpened metal piece derived from a writing pen, an illegal weapon, in violation of § 24-7-155, *Code of Laws of South Carolina (1976), as amended*.

Section 24-7-155 provides:

> It is unlawful for a person to furnish or attempt to furnish a prisoner in any county, municipal, or multijurisdictional jail, prison camp, work camp, or overnight lockup facility with a matter declared to be contraband. It is unlawful for an inmate of a facility to possess a matter declared to be contraband. Matters considered contraband within the meaning of this section are those which are designated as contraband and published by the Department of Corrections as Regulation 33-1 of the Department of Corrections and this regulation must be displayed in a conspicuous place available and visible to visitors and inmates at the facility. The facility manager of a local detention facility, with the approval of the sheriff or chief administrative officer as appropriate, may designate additional items as contraband. Notice of the additional items must be displayed with Regulation 33-1.

Regulation 33-1 of the South Carolina Department of Corrections (2011) sets forth the following list of contraband:

> a. Any item which was not issued to the prisoner officially or which cannot be purchased by him or her in the prison canteen.
>
> b. Weapons, any and all firearms, knives of any and all descriptions, clubs, billies or any other article that may be used for offense or defense.

> . . . .
>
> e. Keys and locks.
>
> f. Tools of any description not approved for issue to prisoners by the Director.
>
> . . . .
>
> Notice is hereby served on all prisoners and their visitors and any other person that the provisions of § 24-3-950, S.C. Code 1976 will be enforced; and all such persons are urged to observe the law and refrain from violating this section in particular.[2]

Grier's jury trial began on May 11, 2016. Pretrial, Grier moved to quash the indictment,[3] arguing the evidence he received through discovery suggested the confiscated item found in his jumpsuit was a tool for unlocking handcuffs, not an illegal weapon as set forth in the indictment. Additionally, Grier argued section 24-3-965 of the South Carolina Code (Supp. 2018)[4] provided the appropriate

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[2] *See* S.C. Code Ann. § 24-3-950 (2018) ("It shall also be unlawful for any prisoner under the jurisdiction of the Department of Corrections to possess any matter declared to be contraband. . . . Any person violating the provisions of this section shall be deemed guilty of a felony and, upon conviction, shall be punished by a fine of not less than one thousand dollars nor more than ten thousand dollars or imprisonment for not less than one year nor more than ten years, or both.").

[3] Although Grier did not use the language "motion to quash," the circuit court characterized Grier's motion as such.

[4] *See* S.C. Code Ann. 24-3-965 ("Notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, 24-3-950, and 24-7-155, the offenses of furnishing contraband, other than weapons or illegal drugs, to an inmate under the jurisdiction of the Department of Corrections or to an inmate in a county jail, . . . and the possession of contraband, other than weapons or illegal drugs, by an inmate under

charge for possession of contraband other than weapons or illegal drugs and that it vested the magistrate's court with exclusive jurisdiction.

The State responded that Grier was charged under § 24-7-155, for possession of a weapon, not under § 24-3-965. The circuit court denied Grier's motion to quash his indictment.

As its first witness, the State called Captain Larry Deason, who testified that during the booking process, all detainees receive a copy of LCDC's rules and regulations, are asked if they have any questions, and are required to sign a form on an electronic tablet confirming their receipt of the rules. Captain Deason explained that he and facility director Deborah Home formulated the rules based on statutes, Department of Corrections regulations, and their previous experience relating to the safety and security of officers and inmates. Caption Deason testified that the rules and regulations are compiled in a short handbook, which includes a description of items inmates are allowed to have in their cells and a section defining contraband. Without objection, LCDC's rules and regulations were admitted into evidence. Additionally, R. 33-1, which lists contraband articles, was admitted into evidence without objection.

Sergeant Richard Plyler testified he gave Grier a copy of the rules, which Grier stated he understood before signing the form confirming his receipt. Over Grier's objection, the trial court admitted Grier's signature page into evidence.

As its next witness, the State called Officer Smith. Officer Smith explained the confiscated item "resembled . . . the metal piece of the pen that you use to hang on to your pocket or something." When Officer Smith was asked if the confiscated item had any edges, he stated it "[s]eemed like it was sharpened just a little bit." On cross-examination, Officer Smith admitted he told the officer who took the

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the jurisdiction of the Department of Corrections or by an inmate in a county jail, municipal jail, regional detention facility, prison camp, work camp, or overnight lockup facility must be tried exclusively in magistrates court. Matters considered contraband within the meaning of this section are those which are designated as contraband by the Director of the Department of Corrections or by the local facility manager.").

report that it was possible Grier could have used the confiscated item to open his handcuffs. The following colloquy ensued on cross-examination:

> Q: Did you describe the object as something he appeared to have been using or attempting to use to unlock his cuffs?
>
> A: We explained to [Grier] that it's possible it could have been used to open his cuffs.
>
> Q: Did you ever make any accusation or suggestions that he was using it as a weapon, or was there ever any attempt to use it as a weapon, or did you tell anybody that you perceived it as a weapon?
>
> A: Well, it could be used as both, as a weapon or as a key the way it was made.
>
> Q: Okay. Do you recall telling anyone that you considered it a weapon?
>
> A: I don't recall.

Sergeant Kennington, the State's final witness, testified that under LCDC's rules and regulations, the confiscated item was an item of contraband and that it could have been used "both as a weapon or something to get a cuff off."

After the State rested its case, Grier renewed his motion to quash the indictment, arguing "the testimony was that it was possible that it could be used as a weapon but there's no evidence that it was, in fact, used as a weapon or presented as a weapon." Grier maintained he should have been charged with violating § 24-3-965—rather than § 24-7-155—and tried in magistrate's court instead of general sessions. The circuit court again denied Grier's motion to quash.

Grier next moved for a directed verdict, contending there was "no evidence that has been presented that there was any display of the contraband list at all." The State argued the conspicuous display was accomplished by providing each inmate

with a copy of the rules and regulations. The circuit court found that the evidence demonstrating each inmate is provided with a copy of the rules and regulations during booking was sufficient to survive the directed verdict motion.

The following morning, Grier supplemented his directed verdict motion, conceding LCDC's rules and regulations were made available to Grier but asserting that the statute's use of the word "visible" required the rules and regulations to be more than simply "available." The State countered that the rules were both displayed and visible because each detainee received his own printed copy. After noting the "visible to visitors" language of § 24-7-155 was not at issue, the State argued the most conspicuous way to display the rules and regulations to a detainee was to provide him with his own physical copy. The circuit court acknowledged the "visitors" provision was not at issue and agreed with the State's argument that there was no better way to give notice than by providing detainees with a document defining contraband. Thus, the court again denied Grier's directed verdict motion. The circuit court then clarified that it would permit Grier to argue this issue—that the contraband in question was not a weapon—to the jury.

During the charge conference, Grier asked the circuit court to charge the language of § 24-3-965 (addressing the possession of non-weapons by state prisoners and the magistrate's court's jurisdiction) as a lesser included offense of § 24-7-155. Specifically, he argued the jury would make a factual determination as to whether the confiscated item found on Grier was a weapon, and if the jury found it was not, the offense would necessarily fall under § 24-3-965. The State argued § 24-3-965 was not a lesser included offense, and the officers' testimony established the confiscated item was a weapon with a sharp end, encompassed within the applicable regulations. Grier responded that if the jury believed the confiscated item was a lock pick, then it was not a weapon, and § 24-3-965 should govern. The circuit court denied Grier's motion, finding § 24-3-965 is not a lesser included offense of § 24-7-155.

In his closing argument, Grier argued that even though LCDC's rules and regulations were made available, they were not visible as required by § 24-7-155. He reasoned that the statute required the rules to be visible rather than merely available because illiterate inmates who could not read their own copy would have the benefit of discussing the rules with other inmates, which would "bring[] a

consciousness of the rules to the inmate that just hand[ing] them a piece of paper and sending them back to their cell does not give to them."

The circuit court charged the jury on the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, direct and circumstantial evidence, criminal intent, actual and constructive possession, credibility of witnesses, and the language of § 24-7-155. At no time during the charge did the court instruct the jury to decide whether the confiscated item was or was not a weapon. Neither Grier nor the State objected to the charge as given. Following its deliberation, the jury unanimously found Grier guilty, and the circuit court sentenced him to eight years' imprisonment, with credit for time served.

Law and Analysis

I. Directed Verdict

Grier argues the circuit court erred in refusing to direct a verdict of acquittal when the State failed to prove Regulation 33-1 was displayed in a conspicuous place available and visible to visitors and inmates in the facility, as required by statute. We disagree.

"We review the denial of a directed verdict motion in a criminal case under the any evidence standard of review." *State v. Cain*, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *Id.* (quoting *State v. Harris*, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015)).

Here, Grier was indicted for possession of contraband by a county or municipal prisoner, and the contraband at issue was categorized as a weapon. Sergeant Plyler testified he provided Grier with a copy of LCDC's rules and regulations and Grier signed a form acknowledging his receipt of this document. Likewise, Grier conceded that the rules were made available to him. Although LCDC's rules and regulations define "contraband" as "any item not permitted in the jail or any item used in a way for which it was not originally intended as well as too much of an item an inmate is allowed," they neither include the specific list of items detailed in R. 33-1, nor do they list any additional items. While the record demonstrates R.

33-1 is displayed at LCDC for visitors, the record is devoid of evidence that R. 33-1 is "displayed" for inmates as section 24-7-155 requires. Further, although Captain Deason's testimony provided evidence suggesting the substance of R. 33-1 was encompassed within the handbook provided to inmates at intake, the record contains no evidence that Grier was actually provided with a copy of R. 33-1. Accordingly, we find LCDC's failure to conspicuously display (or specifically provide) R. 33-1 to detainees at the facility violates the requirements of § 24-7-155.

Nevertheless, under our "any evidence" standard of review, we find this case was properly submitted to the jury because the record contains direct evidence that Grier unlawfully possessed contraband—specifically, a twisted metal piece of a pen sharpened down to the tip, and that he knew it was contraband. *See Cain*, 419 S.C. at 33, 795 S.E.2d at 851 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." (quoting *Harris*, 413 S.C. at 457, 776 S.E.2d at 366)). The State presented testimony that the confiscated item could be used as both a weapon and a lock pick. Further, the confiscated item is not included in the list of allowable items set forth in section five of LCDC's rules and regulations. Finally, the definition of contraband contained in section thirteen of LCDC's rules and regulations includes "any item not permitted in the jail" or "any item used in a way for which it was not originally intended," both of which are applicable here. As evidence existed to support the State's position that the sharpened pen tip was contraband—and that Grier had notice it was contraband—the circuit court properly allowed the case to go to the jury.

II. Jury Charge

Grier argues the circuit court erred in refusing to instruct the jury on section 24-3-965, and in allowing the jury to determine whether the confiscated item in question was a weapon in order to allow enhanced sentencing. We disagree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (alteration in original) (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). "The law to be charged must be determined from the evidence

presented at trial." *Id.* (quoting *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *Id.* (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "Moreover, '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" *Id.* (alteration in original) (quoting *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603).

Prior to trial, Grier moved to quash his indictment, arguing the confiscated item secreted in his jumpsuit was neither a weapon nor an illegal drug. Thus, Grier argued, the appropriate charge would be for the possession of non-weapons contraband under section 24-3-965, which states in pertinent part:

> [T]he possession of contraband, other than weapons or illegal drugs, by an inmate under the jurisdiction of the Department of Corrections or to an inmate in a county jail . . . must be tried exclusively in magistrates court. Matters considered contraband within the meaning of this section are those which are designated as contraband by the Director of the Department of Corrections or by the local facility manager.

During the charge conference, Grier requested that the circuit court charge the jury with § 24-3-965 as a lesser included offense of § 24-7-155. Grier further asked the court to allow the jury to determine whether the confiscated item was a weapon. If the jury determined the confiscated item was contraband but not a weapon, the magistrate's court would have exclusive jurisdiction. The circuit court declined to charge § 24-3-965 as a lesser included offense of § 24-7-155.

On appeal, Grier concedes § 24-3-965 is not a lesser included offense of § 24-7-155. Nevertheless, he argues the circuit court erred in not submitting a special verdict form instructing the jury to determine whether the contraband was, in fact, a weapon. However, Grier neither requested a special verdict form, nor raised an objection following the court's charge; thus, this argument is not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It

is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

Grier also attempts to now raise an argument under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Dervin v. State*, 386 S.C. 164, 687 S.E.2d 712 (2009), that he did not raise to the circuit court. Grier argues the statutory maximum the court may impose must be based solely on the facts reflected in the jury verdict or admitted by the defendant. He claims the circuit court improperly sentenced him because it used the statutory range from § 24-7-155, under which he was indicted, rather than that of § 24-3-965. We find this argument is not preserved for appellate review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."); *Staubes*, 339 S.C. at 412, 529 S.E.2d at 546 ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

Grier was indicted for possession of contraband by a county or municipal prisoner under § 24-7-155. There is direct evidence that Grier unlawfully possessed a twisted metal piece of a pen that appeared to have been sharpened to a pointed tip. The State presented testimony that the confiscated item could be used as either a weapon or as a lock pick. The confiscated item was not included in LCDC's list of allowable items, and LCDC's definition of contraband includes "any item not permitted in the jail" or "any item used in a way for which it was not originally intended." Both of these categories apply here, and Grier had notice that the confiscated item was prohibited as contraband.

Conclusion

Based on the foregoing, Grier's conviction is

AFFIRMED.[5]

KONDUROS and HILL, JJ., concur.

[5] We decided this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Felix Kotowski, Appellant.

Appellate Case No. 2016-000842

Appeal From Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 5650
Heard October 9, 2018 – Filed May 15, 2019

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, all for Respondent.

KONDUROS, J.: Felix Kotowski appeals his convictions for manufacturing methamphetamine and possession of less than one gram of methamphetamine, arguing the trial court erred in (1) denying his motion to suppress evidence seized during a "knock and talk," (2) denying his motion to suppress evidence seized during a protective sweep of a residence where Kotowski was an overnight guest,

and (3) admitting National Precursor Log Exchange (NPLEx) records into evidence. We affirm.

FACTS/PROCEDURAL HISTORY

On June 13, 2014, Sergeant Frank Thompson from the Dorchester County Sheriff's Office received an anonymous tip about the possibility of a drug house at 111 Marsh Point Road. Sergeant Thompson immediately checked NPLEx, which is a system that provides data used by pharmacies and law enforcement to track sales of pseudoephedrine. Sergeant Thompson's search revealed several pseudoephedrine purchases by Michelle Vining, the homeowner, as well as some by Brian Edwards. Sergeant Thompson set up an alert to be notified for any subsequent pseudoephedrine purchases by these individuals.

Sergeant Thompson also began to conduct "spotty surveillance" of the residence, mainly consisting of drive-by viewings. From this surveillance, Sergeant Thompson confirmed Vining's vehicle was parked at the residence. On one occasion, Sergeant Thompson observed a vehicle belonging to William Cherry parked at the residence. Sergeant Thompson was familiar with Cherry because Cherry's father had been convicted of methamphetamine related offenses.

On October 29, 2014, Sergeant Thompson received three NPLEx notifications indicating Vining had attempted to purchase pseudoephedrine three separate times. Two of Vining's attempts were blocked because she would have exceeded the statutory threshold. Vining successfully purchased a smaller amount at a different store on her third attempt. Because of these three transactions, Sergeant Thompson decided to conduct a knock and talk at Vining's residence the following day.

Sergeant Thompson, along with Detectives Daniel Lundberg and Brandon Allen—all of the Dorchester County Metro Narcotics Unit—arrived at Vining's residence the following day wearing clothing indicating they were law enforcement. After knocking on the door, Sergeant Thompson saw someone looking through the blinds on the right side of the house. He requested the person come to the door to no response. After knocking a second time, Detective Lundberg observed an individual at a second story window on the right side. After a third knock, Sergeant Thompson spotted an individual at a second story window, this time on the left side. After the third knock, Kotowski opened the door, stepped outside, and closed the door behind him.

When Kotowski stepped outside, Sergeant Thompson was "immediately overwhelmed with the odor of ammonia" coming from Kotowski. When asked if he lived at the residence, Kotowski stated he did not and provided he was there with his girlfriend Lisa. Kotowski called for Lisa to come to the door and when she did not, went inside the house to retrieve her. Kotowski attempted to close the front door behind him when he re-entered the residence, but Sergeant Thompson held the door open with his foot.

When Lisa came to the door, Sergeant Thompson asked her if she knew the location of Michelle Vining, to which Lisa answered she did not. As the conversation progressed, Lisa admitted to being Michelle Vining. Sergeant Thompson explained the officers received a tip concerning methamphetamine manufacturing occurring at the residence. Sergeant Thompson asked her if she would consent to a search of the residence, and Vining declined. Sergeant Thompson then asked if anyone else lived at the residence. According to Sergeant Thompson, Vining "was pretty deceptive about her answer and kind of hem hawing."

Believing something to be amiss, Sergeant Thompson ordered Detective Allen and Detective Lundberg to conduct a protective sweep of the residence while he contacted another officer to obtain a search warrant for the residence. During the protective sweep, Detective Lundberg and Detective Allen encountered a "heavy haze or a gaseous atmosphere" emanating from an upstairs bathroom and upon opening the door, were confronted by an overwhelming smell of ammonia. Based on evidence in plain sight during the protective sweep, a search warrant was issued, and Kotowski and Vining were arrested.

A grand jury indicted Kotowski on March 16, 2015, for manufacturing methamphetamine and possession of less than one gram of methamphetamine. Prior to trial, Kotowski moved to suppress the evidence seized in the house. The trial court denied Kotowski's motion. At the conclusion of trial, the jury found Kotowski guilty of both counts. The trial court sentenced Kotowski to concurrent terms of seven years' imprisonment for manufacturing and three years' imprisonment for possession of less than one gram of methamphetamine. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "On appeal from a motion to suppress on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse only if there is clear error." *State v. Counts*, 413 S.C. 153, 160, 776 S.E.2d 59, 63 (2015) (quoting *Robinson v. State*, 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014)).

LAW/ANALYSIS

I. Knock and Talk

Kotowski argues the trial court erred in denying his motion to suppress evidence found following the knock and talk and subsequent protective sweep of the house. He maintains the law enforcement officers did not have reasonable suspicion to conduct a knock and talk and therefore violated his right to privacy under Article I, Section 10 of the South Carolina Constitution. We disagree.

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "Generally, the Fourth Amendment requires the police to have a warrant in order to conduct a search." *Counts*, 413 S.C. at 163, 776 S.E.2d at 65 (quoting *Robinson v. State*, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014)). "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." *Id.* at 164, 776 S.E.2d at 65 (quoting *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001)). "The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" *Id.* (quoting *Forrester*, 343 S.C. at 643, 541 S.E.2d at 840). "Evidence seized in violation of the warrant requirement must be excluded from trial." *Id.* at 163, 776 S.E.2d at 65 (quoting *Robinson*, 407 S.C. at 185, 754 S.E.2d at 870). "However, a warrantless search may nonetheless be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement." *Id.* (quoting *Robinson*, 407 S.C. at 185, 754 S.E.2d at 870).

The *Counts* court looked to other jurisdictions to determine what sort of procedure should be necessary to protect citizen's right to privacy. Specifically, the court analyzed "whether law enforcement needs to: (1) have probable cause or reasonable suspicion to approach the private residence; or (2) inform the citizen of his or her right to refuse consent to search." *Id.* at 171, 776 S.E.2d at 69. The court concluded, "rather than enunciating an unyielding rule or eliminating the 'knock and talk' technique in its entirety, we hold that law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." *Id.* at 172, 776 S.E.2d at 70.

Reasonable suspicion consists of "'a particularized and objective basis' that would lead one to suspect another of criminal activity." *State v. Lesley*, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." *State v. Willard*, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). "An additional factor to consider when determining whether reasonable suspicion exists is the officer's experience and intuition." *State v. Taylor*, 388 S.C. 101, 116, 694 S.E.2d 60, 68 (Ct. App. 2010), *rev'd on other grounds*, 401 S.C. 104, 736 S.E.2d 663 (2013). "Nevertheless, 'a wealth of experience will [not] overcome a complete absence of articulable facts.'" *Id.* (quoting *United States v. McCoy*, 513 F.3d 405, 415 (4th Cir. 2008)). "Furthermore, an officer's impression that an individual is engaged in criminal activity, without confirmation, does not amount to reasonable suspicion." *Id.*

The trial court did not err in denying Kotowski's motion to suppress the evidence seized by law enforcement officers after conducting the knock and talk. Law enforcement relied on three pieces of information in arguing they had reasonable suspicion: (1) the anonymous tip Sergeant Thompson received on June 13, 2014; (2) the spotty surveillance Sergeant Thompson conducted of the house, which is where he recognized the vehicle belonging to the son of a convicted methamphetamine cook; and (3) the NPLEx records, showing what Sergeant Thompson referred to as "a substantial amount of purchases."

Here, we find the NPLEx records reflecting three attempted pseudoephedrine purchases in a single day, in conjunction with Sergeant Thompson's testimony he had received extensive training in methamphetamine labs and has been "clandestine meth lab certified" since 2004, adequate to raise reasonable suspicion. Sergeant Thompson has investigated over one hundred methamphetamine labs

during his career. He testified he noticed Vining tended to go to different pharmacies to make pseudoephedrine purchases, which he provided is consistent with illicit drug manufacturers attempting to conceal their movement from law enforcement. Due to Sergeant Thompson's experience in cases involving methamphetamine manufacturing, along with the articulable facts listed above, the trial court did not err in finding law enforcement officers had reasonable suspicion to conduct a knock and talk. Accordingly, the trial court did not err in admitting the evidence discovered pursuant to the knock and talk.

II. Protective Sweep

Kotowski contends the trial court erred in admitting evidence of an active methamphetamine lab because law enforcement officers violated his Fourth Amendment rights when they conducted a protective sweep of a residence where he was an overnight guest without exigent circumstances and without a warrant. We disagree.

"The exigent circumstances doctrine provides an exception to the Fourth Amendment[']s protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exists." *Counts*, 413 S.C. at 163, 776 S.E.2d at 65 (quoting *State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004)). "For instance, a warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling." *Id.* (quoting *Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348). "In such circumstances, a protective sweep of the premises may be permitted." *Id.* (quoting *Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348). "The linchpin of the protective sweep analysis is not 'the threat posed by the arrestee, [but] the safety threat posed by the house, or more properly by unseen third parties in the house.'" *United States v. Jones*, 667 F.3d 477, 484 (4th Cir. 2012) (quoting *Maryland v. Buie*, 494 U.S. 325, 336 (1990)). "'[T]he Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.'" *State v. Wright*, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011) (quoting *Whren v. United States*, 517 U.S. 806, 814 (1996)).

The trial court did not err in finding exigent circumstances justified a protective sweep. In its order, the trial court found:

> [T]here were exigent circumstances that warranted it. The overwhelming smell of ammonia certainly is a potentially dangerous type of situation that would risk not only officer safety but safety of the neighbors if there was to be an explosion and further there was activity which was described at different windows and the officers did not know for officer safety if there were other individuals located in the residence.

The record contains evidence supporting the trial court's finding, specifically the testimony of Sergeant Thompson, who provided "[d]epending on what method you're cooking [with] . . . you're dealing with lithium metal and lithium metal reacts to the water." With one particular manufacturing method, "you're actually manufacturing water ammonia so you have an explosive hazard. Let alone it's in a bottle under pressure with a lot of fuel, white gas, so you have an explosive hazard."

Considering the totality of the circumstances, we find exigent circumstances developed as soon as Kotowski opened the front door and Sergeant Thompson was "immediately overwhelmed with the odor of ammonia." Given Sergeant Thompson's extensive training concerning methamphetamine labs, officers had objectively reasonable grounds to conduct a limited search of the premises not only for the protection of the responding officers, but for the safety of any neighbors in close proximity to a possibly active methamphetamine lab. Accordingly, the trial court did not err in finding exigent circumstances justified a protective sweep of the residence.

III. NPLEx Records

Kotowski asserts the trial court erred in admitting testimony concerning the NPLEx records because they constituted hearsay and the State failed to establish a sufficient foundation to satisfy the business records exception. He also maintains the records violated his Sixth Amendment right to confrontation because the State failed to present testimony from a records custodian. Finally, he contends the admission of the NPLEx records violated Rule 403, SCRE, because they are unfairly prejudicial and invited the jury to convict him on an improper basis. We disagree and address these arguments in turn.

A. Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. Further, "[a] 'declarant' is a person who makes a statement." Rule 801(b), SCRE. However, Rule 803(6), SCRE, provides an exception to the rule against hearsay for business records.

This court recently decided a case looking at these same NPLEx records. We found "NPLEx logs are not created for litigation purposes and are admissible under the business records exception to the rule against hearsay." *State v. Mealor*, ___ S.C. ___, ___, 825 S.E.2d 53, 62 (Ct. App. 2019). "The NPLEx records were created to comply with state statutes, not to investigate a specific case or individual." *Id.* "[T]he main purpose of the NPLEx records is to enable the [National Association of Drug Diversion Investigators (NADDI)] to track and regulate the sale of non-prescription . . . pseudoephedrine. Accordingly, the main purpose of the NPLEx records is not to establish or prove some fact at trial." *Id.* (quoting *Montgomery v. State*, 22 N.E.3d 768, 775 (Ind. Ct. App. 2014)). These logs are prepared in the ordinary course of business in accordance with state law, not in anticipation of litigation or to address a specific individual. Accordingly, we find the trial court correctly found the NPLEx records fall under the business record exception to hearsay.

B. Foundation

"This court has held that before the trial court may admit a business record into evidence, a qualified witness must 'lay the foundation to meet the requirements of Rule 803(6) and section 19-5-510.'" *Id.* at 67 (quoting *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 73, 773 S.E.2d 607, 615 (Ct. App. 2015)). "*Black's Law Dictionary* defines 'laying a foundation' as '[i]ntroducing evidence of certain facts needed to render later evidence relevant, material, or competent.'" *Id.* (quoting *Laying a Foundation*, *Black's Law Dictionary* (10th ed. 2014)).

The North Carolina Court of Appeals dealt with a foundation argument regarding NPLEx logs in *State v. Hicks*, 777 S.E.2d 341 (N.C. Ct. App. 2015), similar to the one made here. The court found nothing required NPLEx records be authenticated by the person who made them, and instead, a law enforcement officer could authenticate the records. *Id.* at 349. The court explained:

> [The] officer thoroughly demonstrated his understanding of the NPLEx database, the method by which the data was gathered, transmitted, and stored, and the underlying basis for the report admitted into evidence. [The officer's] testimony provided a sufficient foundation for the admission of the computer report from the NPLEx database as a business record.

Id.

In the present case, Kotowski contends the State was required to present testimony from someone associated with Appriss—the company responsible for maintaining the database—regarding the methods used to collect, maintain, and review the data in the NPLEx database to ensure its accuracy. However, because Sergeant Thompson was able to testify about his knowledge of and familiarity with the NPLEx database, he falls under the "other qualified witness" portion of Rule 803(6), SCRE.

Sergeant Thompson testified he and other law enforcement officers regularly consult the NPLEx database for pseudoephedrine purchases when investigating individuals suspected of manufacturing methamphetamine. Sergeant Thompson further stated because of his familiarity with the system, Appriss has asked him to teach seminars on how to use it. Sergeant Thompson thoroughly demonstrated his understanding of the NPLEx database, the method by which the data was gathered, transmitted, and stored, and the underlying basis for the report, and therefore provided a sufficient foundation for the admission of the computer report from the NPLEx database as a business record. Thus, we find the trial court did not abuse its discretion in finding Sergeant Thompson a qualified witness.

C. Confrontation Clause

Evidence admissible under a hearsay exception must not violate the accused's rights under the Confrontation Clause. "The Sixth Amendment's Confrontation Clause guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *State v. Ladner*, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (quoting U.S. Const. amend. VI). "In

Crawford v. Washington[1], the United States Supreme Court . . . held that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant." *Id.*

While South Carolina has not addressed whether logs such as these violate the confrontation clause, many other jurisdictions have. The Seventh Circuit Court of Appeals has looked at some of those cases. That court noted:

> [I]n *Towns*, the Fifth Circuit concluded that NPLEX records did not present a Confrontation Clause issue because
>
> > [t]he pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value.
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> *United States v. Towns*, 718 F.3d 404, 411 (5th Cir. 2013); *see also United States v. Collins*, 799 F.3d 554, 585-86 (6th Cir. 2015) (observing that "the MethCheck reports at issue in this case were not made to prove the guilt or innocence of any particular individual, nor were they created for solely evidentiary purposes" and therefore holding that the district court had "not commit[ted] plain error in violation of the Confrontation Clause by allowing their admission at trial").

United States v. Lynn, 851 F.3d 786, 792-93 (7th Cir. 2017) (all alterations except for first by court).

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[1] 541 U.S. 36 (2004).

The Seventh Circuit further explained:

> NPLEX logs are regularly maintained and updated each time an individual purchases an over-the-counter cold medicine that includes pseudoephedrine. And, as the Fifth Circuit noted, state regulatory bodies may have legitimate interests in maintaining these records that far exceed their evidentiary value in a given case. For example, requiring identification for each pseudoephedrine purchase may deter misuse or pseudoephedrine-related drug offenses. The NPLE[x] logs therefore are nontestimonial, and the Confrontation Clause poses no barrier to their introduction.

Id. at 793 (footnote omitted).

The Sixth Circuit Court of Appeals has also considered the admission of similar logs. *Collins*, 799 F.3d at 586. In *Collins*, that court determined:

> [T]he MethCheck reports at issue in this case were not made to prove the guilt or innocence of any particular individual, nor were they created for solely evidentiary purposes. Although law enforcement officers may use MethCheck records to track pseudoephedrine purchases, the MethCheck system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions. *See Towns*, 718 F.3d at 411 ("Because the [pseudoephedrine] purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause."). Furthermore, it is improbable that a pharmacy employee running a standard identification check of a customer would have anticipated that the records of that transaction would later be used against these particular defendants at trial. Because the MethCheck records at issue in this case are not clearly testimonial in nature, the district court did not commit plain error in violation of

> the Confrontation Clause by allowing their admission at trial.

Id. (second alteration by court).

Kotowski argues the admission of the NPLEx records violated his right to confrontation. However, as stated above, NPLEx records were created to comply with state regulatory measures, not to investigate a specific case or individual. Sergeant Thompson testified as to the state's reasons for requiring creation of the records. He testified:

> [T]o reduce methamphetamine labs[,] [C]ongress enacted laws to where certain things were restricted, pseudoephedrine being that. It was required that you record any purchase of pseudoephedrine on a log, and at the time it was a paper log. So if you were to go and buy pseudoephedrine from any pharmacy or any gas station . . . you're required to sign a log with your name, your date of birth, what was purchased, the brand name, and the amount of the purchase, however [many] grams of pseudoephedrine or Sudafed.

Because the NPLEx records are kept to comply with state regulatory measures, we find they are nontestimonial. Thus, we agree with the conclusion in *Towns* that the Confrontation Clause poses no barrier to their introduction.

D. Unfair Prejudice

Pursuant to Rule 402, SCRE, all relevant evidence is generally admissible. A trial court has a great amount of discretion in deciding whether or not evidence is admitted, and such a determination will not be overturned unless it abuses that discretion. *State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence." Rule 403, SCRE. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *State v. McLeod*, 362 S.C. 73, 81-82, 606 S.E.2d 215, 220 (Ct. App. 2004) (citations omitted).

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Dennis*, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429 (brackets omitted) (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989)).

In this case, the NPLEx records were highly probative to show an objective basis for the reasonable suspicion standard to conduct the initial knock and talk. Sergeant Thompson testified the multiple purchase attempts by Michelle Vining in a short time frame alerted him that some illegal activity might be occurring. Therefore, we find the danger of unfair prejudice does not substantially outweigh the probative value of the records. Thus, the trial court did not abuse its discretion by allowing them into evidence.

CONCLUSION

Based on the foregoing, the trial court did not err in denying Kotowski's motion to suppress any evidence obtained as a result of the knock and talk. Further, the trial court did not err in finding exigent circumstances justified a protective sweep. Finally, the trial court did not err in admitting the NPLEx records into evidence. Thus, the trial court is

AFFIRMED.

MCDONALD and HILL, JJ., concur.