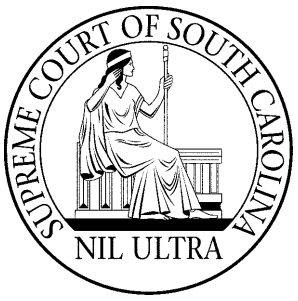

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
September 2, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

State of South Carolina, Appellant,

v.

Kathryn Martin Key, Respondent,

Appellate Case No. 2017-001013

ORDER

The petition for rehearing is granted, and we dispense with further briefing. After careful consideration of the petition, the majority opinion is unchanged. Justice Few has issued a concurring opinion. These opinions are attached.

s/ John W. Kittredge A.C.J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ Thomas E. Huff A.J.

Columbia, South Carolina
September 2, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Appellant,

v.

Kathryn Martin Key, Respondent.

Appellate Case No. 2017-001013

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 27971
Heard November 20, 2019 – Filed May 13, 2020
Re-Filed September 2, 2020

VACATED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia; and Solicitor William Walter Wilkins III, of Greenville, for Appellant.

James H. Price III and Elizabeth Powers Price, both of Price Law Firm P.A., of Greenville; and J. Falkner Wilkes, of Greenville, for Respondent.

JUSTICE JAMES: Kathryn Martin Key was convicted in the summary court of driving under the influence (DUI). Her conviction was based upon the testing of her blood, which was drawn without a warrant while she was unconscious. The circuit court reversed and remanded, finding the summary court should have suppressed evidence of Key's blood alcohol concentration because the State did not obtain a warrant. The State appealed to the court of appeals, and the appeal was transferred to this Court.

While the State's appeal was pending in this Court, the United States Supreme Court decided *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). In *Mitchell*, the Supreme Court held for the first time that, generally, law enforcement is permitted to draw the blood of an unconscious DUI suspect without a search warrant pursuant to the exigent circumstances exception to the warrant requirement. However, the Supreme Court acknowledged the possibility of an "unusual" case presenting an exception to this new general rule. The *Mitchell* Court determined the defendant should be given the opportunity to establish the applicability of the exception to the general rule and remanded the case to the trial court for that purpose.

We have carefully considered the *Mitchell* holding and conclude we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We hold the burden of establishing the existence of exigent circumstances remains upon the State. The exigent circumstances issue in this case was not ruled upon by the summary court; therefore, we remand this case to the summary court for further proceedings consistent with this opinion.

BACKGROUND

At approximately 8:45 a.m. on December 10, 2015, Key was driving a motor vehicle on Muddy Ford Road in Greenville County. She drove across the center-line, crashed her vehicle into the driver's side of an oncoming vehicle, and then drove off the road and struck a tree. When South Carolina State Trooper Aaron Campbell arrived on scene at 8:57 a.m., Key was on a stretcher and was being loaded into an ambulance. Trooper Campbell approached to ask Key for her name and phone number, but one of the paramedics stopped him and said, "Man, she needs to go [to the hospital]." The ambulance departed, so Trooper Campbell was unable to question Key at the scene.

Trooper Campbell stayed at the scene for over an hour to investigate the accident. He photographed the scene, interviewed the driver of the other vehicle,

and completed an accident report. Trooper Campbell recovered an almost-empty mini bottle of Jack Daniel's liquor from the glove compartment of Key's vehicle. "Wet residue" in the bottle led Trooper Campbell to believe the liquor had been "freshly consumed." Trooper Campbell completed his investigation and drove to Greenville Memorial Hospital to charge Key with DUI and open container.

Trooper Campbell located Key in the emergency room trauma bay. She was unconscious and was intubated due to the severity of her injuries. Trooper Campbell arrested the unconscious Key for DUI at 10:35 a.m. and read her implied consent rights[1] to her at 10:36 a.m. Without seeking a search warrant, Trooper Campbell asked a nurse to draw Key's blood. Her blood was drawn at 10:45 a.m. (approximately two hours after the accident), and testing revealed her blood alcohol concentration (BAC) was .213%. Key then spent five days in the intensive care unit.

Key moved pre-trial to have the evidence of her BAC suppressed. She argued Trooper Campbell's failure to obtain a warrant violated the Fourth Amendment to the United States Constitution and Article I, section 10 of the South Carolina Constitution. Key contended there were no exigent circumstances to excuse the State's failure to obtain a warrant. She also contended South Carolina's implied consent statute is unconstitutional. Key did not argue Trooper Campbell lacked probable cause to suspect she had been driving under the influence.

In response, the State argued the implied consent statute is constitutional and was followed by Trooper Campbell. The State asserted the blood was legally drawn

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[1] *See* S.C. Code Ann. § 56-5-2950(A) (2018) (providing a person arrested for DUI is considered to have given consent to certain chemical tests for the purpose of determining the presence of drugs or alcohol); *id.* (providing a blood test may be conducted if a breath test cannot be administered and stating the blood sample must be collected within three hours of the arrest); § 56-5-2950(B)(1) (requiring the person suspected of DUI to be given a written copy and verbally informed that "the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court"); § 56-5-2950(H) ("A person who is unconscious or otherwise in a condition rendering the person incapable of refusal is considered to be informed and not to have withdrawn the consent provided by subsection (A) of this section.").

because Key statutorily consented to the blood draw by operating a motor vehicle and by not withdrawing her implied consent. The State noted, "Judge, this is not a case where we have to look for exigent circumstances. We are not looking for an exception to the warrant requirement." The summary court denied Key's motion to suppress.

The case proceeded to a bench trial before the summary court. Trooper Campbell testified about his investigation of the accident and confirmed he did not seek a warrant before directing a nurse to draw Key's blood at the hospital. The parties stipulated there was a magistrate on duty in Greenville County at the time Key was arrested and her blood drawn. On cross-examination, Trooper Campbell acknowledged the on-duty magistrate was only three miles from the hospital on the morning of the accident. Trooper Campbell confirmed Key was unconscious when he read Key's implied consent rights to her and when the nurse drew her blood. A SLED toxicologist testified Key's BAC was .213%.

The summary court found Key guilty of DUI, imposed a fine, and sentenced her to the five days she "served" while in intensive care. Key appealed her conviction to the circuit court. In addition to the consent argument it presented to the summary court, the State argued to the circuit court that the record was replete with evidence of exigent circumstances, including the wreck itself, Trooper Campbell staying behind at the scene to interview the accident victim and conduct his investigation, and Key's unconscious state. In a written order, the circuit court reversed Key's conviction and remanded the case for a new trial, ruling the blood alcohol evidence was obtained pursuant to an unlawful search and seizure in violation of both the Fourth Amendment to the United States Constitution and the South Carolina Constitution. The circuit court rejected the State's position that the implied consent statute permitted a warrantless blood draw but did not address the State's exigent circumstances argument. The State moved for reconsideration and again noted its argument of exigent circumstances. The circuit court denied the State's motion without addressing the exigent circumstances issue.

The State appealed to the court of appeals, and the appeal was transferred to this Court pursuant to Rules 203(d)(1)(A)(ii) and 204(a) of the South Carolina Appellate Court Rules.

DISCUSSION

The State argues the circuit court erred in reversing Key's conviction and remanding for a new trial. In its brief to this Court, the State argued the circuit court erred in finding a warrant was required to draw Key's blood because (1) exigent circumstances were present and (2) Key validly consented under the implied consent statute and did not revoke her consent. During oral argument, the State abandoned its implied consent argument and proceeded solely under its exigent circumstances argument. Therefore, we will address only the latter issue.

A. Preservation

Key argues the State's exigent circumstances argument is not preserved for appellate review because the argument was not raised to or ruled upon by the summary court. We disagree.

Before the summary court, the State argued a warrant was unnecessary because Key, by driving a motor vehicle, consented to having her blood drawn under the implied consent statute. The State argued there was no need to address the issue of exigent circumstances because the consent issue was dispositive. Since the State prevailed on the issue of consent, it was unnecessary for the State to present additional arguments to the summary court as to why a warrant was not required. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions."). Nothing in the trial record indicates the State conceded to the summary court that there were no exigent circumstances.

When Key appealed to the circuit court, the State argued as an additional sustaining ground that the record "is replete with exigent circumstances," and cited Key's unconscious state as one of those circumstances. *See I'On*, 338 S.C. at 419-20, 526 S.E.2d at 723 ("[A] respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . . The basis for respondent's additional sustaining grounds must appear in the record on appeal[.]"). Here, the basis for the additional sustaining ground appears in the record on appeal. Because the State raised the issue of exigent circumstances to the circuit court, raised the issue again in its motion for

reconsideration, and raised the issue on appeal to this Court, the exigent circumstances issue is preserved for review.

B. Exigent Circumstances

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

It is settled that the collection of a person's blood for BAC testing is a search and a seizure under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 767 (1966); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). "The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Evidence seized in violation of the Fourth Amendment must be excluded from trial." *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). "Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured." *Kentucky v. King*, 563 U.S. 452, 459 (2011). However, because the touchstone of the Fourth Amendment is reasonableness, the general presumption that a warrant is required may be overcome in certain situations. *Id.* Consent and exigent circumstances are two of the recognized exceptions to the general warrant requirement. *See State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012); *Missouri v. McNeely*, 569 U.S. 141, 148-49 (2013). Most important to the issue before us is the settled principle that "the burden is upon the State to justify a warrantless search." *State v. Peters*, 271 S.C. 498, 501, 248 S.E.2d 475, 477 (1978). At no time has this Court placed the burden on a defendant to establish that an exception to the warrant requirement does not exist.

"The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant." *Birchfield*, 136 S. Ct. at 2173. "It permits, for instance, the warrantless entry of private property when there is a need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence." *Id.*

"[B]ecause an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results." *McNeely*, 569 U.S. at 152.

The United States Supreme Court has addressed the constitutionality of warrantless blood draws in several DUI cases. *See Schmerber*, 384 U.S. at 770-71 (holding the warrantless blood draw of a DUI suspect was valid because the law enforcement officer, dealing with a car accident, could "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence'"); *McNeely*, 569 U.S. at 165 (holding the determination of whether a warrantless blood draw of a DUI suspect qualifies as an exigent circumstance involves a case-by-case analysis of the totality of the circumstances and that the natural dissipation of alcohol in the bloodstream alone does not establish a per se exigency); *Birchfield*, 136 S. Ct. at 2184 (holding a lawful search incident to arrest of a DUI suspect permits a warrantless breath test but not a warrantless blood draw).

In *Mitchell*, the United States Supreme Court held the exigent circumstances exception to the warrant requirement "almost always" justifies the warrantless drawing of blood from unconscious DUI suspects. 139 S. Ct. at 2531. Three justices joined Justice Alito's lead opinion. Justice Thomas provided the fifth vote, concurring in the judgment but explaining he would impose an even more expansive rule that the natural metabolization of alcohol in the bloodstream creates an exigent circumstance in every DUI case as soon as law enforcement has probable cause to believe the driver is impaired—"regardless of whether the driver is conscious." *Id.* at 2539 (Thomas, J., concurring).[2]

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[2] *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (Silberman, J., concurring) (providing the rule illustrated by *Marks* applies "only when one opinion is a logical subset of other, broader opinions"); *id.* ("In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.").

In *Mitchell*, the Sheboygan, Wisconsin Police Department received a report of a drunk driver, and the responding officer found the defendant wandering on foot around a nearby lake, stumbling and slurring his words. A preliminary breath test revealed his BAC was .24%—triple the Wisconsin legal limit. The defendant was arrested for DUI, and law enforcement drove him to the police station for a more reliable breath test. By the time the squad car reached the station, the defendant was too lethargic to submit to a breath test. The officer decided to take the defendant to a nearby hospital for a blood test, but the defendant lost consciousness by the time they arrived at the hospital. While the defendant was still unconscious, the officer read the defendant his statutory implied consent rights. After hearing no response from the defendant and without obtaining a warrant, the officer asked hospital staff to draw the defendant's blood. The blood was collected ninety minutes after the time of arrest, and testing revealed a BAC of .222%. The defendant moved to suppress the BAC evidence, arguing the warrantless blood draw violated his Fourth Amendment right against unreasonable searches.

The *Mitchell* plurality explained the dilemma it believed officers would face when presented with an unconscious DUI suspect—"It would force [law enforcement officers] to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits." *Id.* at 2538. The plurality emphasized that such a scenario is the very reason the exigency exception exists and concluded exigent circumstances almost always exist when (1) blood alcohol evidence is dissipating and (2) "some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." *Id.* at 2537. The plurality concluded both conditions are satisfied when a DUI suspect is unconscious and concluded "when a driver is unconscious, the general rule is that a warrant is not needed." *Id*. at 2531. It summarized:

> In such cases, [where the DUI suspect is unconscious and unable to provide a breath test,] the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In

> addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

Id.

While the Supreme Court concluded the new general rule will "almost always" apply, the Court acknowledged there may be an "unusual case" in which "a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* at 2539 (emphasis added). Because the defendant did not have the opportunity to make such a showing, the Court remanded the case to the Wisconsin state court to allow the defendant to attempt to make the showing. *Id.*

The *Mitchell* plurality closed with the following:

> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Id.

The people have the right under the Fourth Amendment "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause[.]" We cannot sponsor the notion of requiring a defendant to prove that this right—a right she

already possesses—exists in any given case. We must therefore part company with the *Mitchell* Court, as we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We have consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement. *See, e.g.*, *State v. Bruce*, 412 S.C. 504, 510, 772 S.E.2d 753, 756 (2015); *State v. Robinson*, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014); *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013); *State v. Weaver*, 374 S.C. 313, 319-20, 649 S.E.2d 479, 482 (2007); *State v. Brown*, 289 S.C. 581, 587, 347 S.E.2d 882, 885 (1986); *State v. Huggins*, 275 S.C. 229, 232, 269 S.E.2d 334, 335 (1980). Likewise, the United States Supreme Court and all state and lower federal courts have consistently held the State bears the burden of establishing exigent circumstances. *See, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (stating "the burden is on the government to demonstrate exigent circumstances");[3] *McDonald v. United States*, 335 U.S. 451, 456 (1948) ("We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."); *United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013) ("The government bears the burden of proof in justifying a warrantless search or seizure.").[4]

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[3] *See also Welsh*, 466 U.S. at 749-50 (emphasis added) (internal citation omitted) ("Prior decisions of this Court . . . have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,' and that *the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches* or arrests. Indeed, the Court has recognized only a few such emergency conditions[.]" (citing *Schmerber*, 384 U.S. at 770-71)).

[4] In light of our holding, we need not address Key's argument that Article I, section 10 of the South Carolina Constitution requires exclusion of evidence of her BAC. Article I, section 10 largely mirrors the Fourth Amendment but adds the express prohibition against unreasonable invasions of privacy: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated . . . ." S.C. Const. art. I, § 10 (emphasis added). "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy

CONCLUSION

In any given case, the unconsciousness of a DUI suspect might indeed be a significant factor—or even the determining factor—in the analysis of the exigent circumstances issue. However, in any given case, unconsciousness might not be a significant factor. In this case, the question of the existence of exigent circumstances was not litigated in the trial court. We therefore vacate the circuit court's reversal of Key's conviction, and we remand this case to the summary court for a determination of whether the exigent circumstances exception to the warrant requirement applies. The State shall have the burden of establishing the applicability of the exception, and the summary court shall base its ruling upon its view of the totality of the circumstances. Those circumstances may well include the very circumstances emphasized by the *Mitchell* Court.

If the summary court determines the exception applies, Key's conviction shall stand. If the summary court determines the exception does not apply, Key will receive a new trial with the BAC result suppressed. We express no opinion at this stage as to whether the exigent circumstances exception does or does not apply in this case.

VACATED AND REMANDED.

KITTREDGE, Acting Chief Justice, HEARN, FEW, JJ., and Acting Justice Thomas E. Huff, concur. FEW, J., concurring in a separate opinion.

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protection than the Fourth Amendment." *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

JUSTICE FEW: I concur with the majority opinion. I write to address the State's argument this Court does not understand the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby."). The argument is based on the State's erroneous contention we refuse to be bound by the following statements from the plurality opinion in *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 204 L. Ed. 2d 1040 (2019).

> [I]n a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test . . . , we hold, the exigent-circumstances rule almost always permits a blood test without a warrant.

139 S. Ct. at 2531, 204 L. Ed. 2d at 1043.

> Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

139 S. Ct. at 2531, 204 L. Ed. 2d at 1044.

> We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

139 S. Ct. at 2539, 204 L. Ed. 2d at 1052.

The majority states we "part company with the *Mitchell* Court," but that statement does not mean—as the State suggests—we disagree with *Mitchell* and refuse to follow it. Rather, we have complied with the Supremacy Clause—as we must—by interpreting and applying the Fourth Amendment in

light of all Supreme Court precedent, including *Mitchell*. Respectfully, however, the *Mitchell* plurality made this task difficult. The plurality's statements are confusing and misleading, and difficult to apply in light of other Supreme Court decisions.

To be more specific, the statements by the plurality create several significant problems. First, the Supreme Court and all state and lower federal courts have consistently held the State bears the burden of establishing exigent circumstances. *See, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S. Ct. 2091, 2098, 80 L. Ed. 2d 732, 743 (1984) (stating "the burden is on the government to demonstrate exigent circumstances"); 466 U.S. at 749-50, 104 S. Ct. at 2097-98, 80 L. Ed. 2d at 743 ("Prior decisions of this Court . . . have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,' and that *the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches* or arrests. Indeed, the Court has recognized only a few such emergency conditions . . . ." (emphasis added) (citing *Schmerber v. California*, 384 U.S. 757, 770-71, 86 S. Ct. 1826, 1835-36, 16 L. Ed. 2d 908, 919-20 (1966)); *United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013) ("The government bears the burden of proof in justifying a warrantless search or seizure."); *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013) ("The prosecution bears the burden of establishing . . . the existence of circumstances constituting an exception" to the warrant requirement); *see also* 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.2(b) (5th ed. 2012) (stating "most states follow the rule . . . : if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution") (footnote omitted).

Under these cases, a defendant is not required to make any showing that exigent circumstances do not exist. Therefore, the *Mitchell* plurality—by stating a defendant should be given a "chance to attempt to make that showing"—either (1) implicitly overruled more than seventy years of its own

precedent[5] without acknowledging it was doing so,[6] or (2) inattentively used loose language to describe what it meant to say was *the State's* "chance to attempt to make that showing." It has to be the latter.

Second, the Court's use of the phrase "general rule" surely was not intended to actually create a "rule."[7] Rather, the Court simply anticipated that the "general result" of a suppression hearing will be the trial court's finding that the government proved the warrantless search reasonable because of exigency when a suspected DUI driver is unconscious. The "rule" applicable here is that a warrantless search ordinarily will be found unreasonable under the Fourth Amendment. The "exception" to the rule is that exigent circumstances may

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[5] *See United States v. Jeffers*, 342 U.S. 48, 51, 72 S. Ct. 93, 95, 96 L. Ed. 59, 64 (1951) (stating that to establish an exception to the warrant requirement, "the burden is on those seeking the exemption to show the need for it"); *McDonald v. United States*, 335 U.S. 451, 456, 69 S. Ct. 191, 193, 93 L. Ed. 153, 158 (1948) ("We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."); *see also Missouri v. McNeely*, 569 U.S. 141, 152-53, 133 S. Ct. 1552, 1561, 185 L. Ed. 2d 696, 707 (2013) (quoting the sentence from *McDonald*).

[6] *See People v. Eubanks*, 2019 IL 123525 (Ill. 2019) ("Previously, however, the Supreme Court had been clear that the burden of demonstrating exigent circumstances is on the State. *Mitchell* appears to be saying that, in cases where the 'general rule' applies, the burden shifts to defendant to establish the lack of exigent circumstances.") (citations omitted); *Fourth Amendment-Search and Seizure-Warrantless Blood Draws-Mitchell v. Wisconsin*, 133 Harv. L. Rev. 302, 308 n.75 (2019) (stating the plurality opinion in *Mitchell* "puts the burden on the defendant to establish" the exigency exception does not apply).

[7] *Compare Mitchell*, 139 S. Ct. at 2535 n.3, 204 L. Ed. 2d at 1048 n.3 ("In each of [several listed] cases, the requirement that we base our decision on the 'totality of the circumstances' has not prevented us from spelling out a general rule for the police to follow." (quoting *McNeely*, 569 U.S. at 168, 133 S. Ct. at 1570, 185 L. Ed. 2d at 716 (Roberts, C.J., concurring))). *See infra* note 4.

render a warrantless search reasonable. The "burden" of proving exigency is on the government. The "result" must be determined on a case-by-case basis by trial courts, not by appellate courts. But, as a "general rule," when an officer "reasonably conclude[s]" there is not time to secure a warrant before ordering blood to be drawn, the trial court will find the exigent circumstances exception applies.[8]

My twenty years of experience deciding and reviewing Fourth Amendment motions to suppress belies the *Mitchell* plurality's casual assumption that the government's burden is so easily satisfied by a mere showing of unconsciousness. My point is demonstrated by the stark difference between the facts of this case and those of *Mitchell*. In *Mitchell*,[9] a City of Sheboygan

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[8] The *Mitchell* plurality mentions in its "general rule" discussion the Chief Justice of the United States' concurring opinion in *McNeely*. 139 S. Ct. at 2535 n.3, 204 L. Ed. 2d at 1048 n.3 (quoting *McNeely*, 569 U.S. at 166, 133 S. Ct. at 1569, 185 L. Ed. 2d at 716 (Roberts, C.J., concurring)). The concurring opinion, as I read it, is not about the burden of proof. In fact, the opinion cites several "general rules" arising out of Supreme Court cases that said nothing about changing the burden of proof. *See McNeely*, 569 U.S. at 168, 133 S. Ct. at 1570, 185 L. Ed. 2d at 716-17 (Roberts, C.J., concurring) (discussing "an emergency aid exception," "a fire exception," and "a hot pursuit exception"). Rather, the *McNeely* concurring opinion states "the Court should be able to offer guidance on how police should handle cases like the one before us," and advocates for deference to the officer's judgment, stating, "If an officer could reasonably conclude that there is not [time to secure a warrant before blood can be drawn], the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant." 569 U.S. at 166-67, 133 S. Ct. at 1569, 185 L. Ed. 2d at 716 (Roberts, C.J., concurring); *see also* 569 U.S. at 175, 133 S. Ct. at 1574, 185 L. Ed. 2d at 721 (Roberts, C.J., concurring) (similar to the first quote); 569 U.S. at 173, 133 S. Ct. at 1573, 185 L. Ed. 2d. at 720 (Roberts, C.J., concurring) (similar to the second quote).

[9] This description of the facts of *Mitchell* is taken from the opinions of the Supreme Court of Wisconsin, 914 N.W.2d 151, 154-55 (Wis. 2018), *cert. granted*, 139 S. Ct. 915, 202 L. Ed. 2d 642 (2019), *and vacated and remanded*, 139 S. Ct. 2525, 204 L. Ed. 2d 1040 (2019), and the Court of Appeals of Wisconsin, 2017 WL 9803322 (Wis. Ct. App. 2017).

police officer spoke to a witness about an intoxicated man the witness had seen stumbling and almost falling before getting into a van and driving away. The officer located Mitchell thirty to forty-five minutes later walking near the municipal beach on Lake Michigan. He was wet, shirtless, and covered in sand, "similar to if you had gone swimming in the lake." His speech was slurred and he had "great difficulty in maintaining balance." The officer talked to Mitchell long enough for Mitchell to change his story at least once. The officer then searched for the van[10] and administered a preliminary breath test, all before arresting him for DUI. He made the arrest one hour and nine minutes after the witness made the initial report.

The officer then transported Mitchell to the police station. The duration of the drive is not discernable from the opinions. Mitchell's condition deteriorated during the drive, and by the time the officer reached the station, Mitchell could not get out of the car by himself. The officer then decided he must take Mitchell to the hospital. "During the approximately eight-minute drive to the hospital, Mitchell 'appeared to be completely incapacitated, [and] would not wake up with any type of stimulation.' At the hospital, Mitchell needed to be transported in a wheelchair where he sat 'slumped over' and unable to maintain an upright seating position." 914 N.W.2d at 155. The officer ordered the defendant's blood to be drawn at 5:59 p.m., approximately ninety minutes after the arrest and two hours and forty-two minutes after the witness made the initial report.

In *Mitchell*, therefore, the suspect's unconsciousness appears to have been a significant impediment to the officer's ability to get a warrant in a timely manner. At the scene, the suspect was conscious and somewhat responsive. The officer engaged in meaningful dialogue with him to determine what happened and whether there was probable cause for an arrest. The suspect did not lose consciousness until over an hour after the incident arose, when the officer had the suspect in custody by himself in the police car. The officer was in a bind at that point because the suspect's medical situation required the

[10] Nearby officers assisted in the search and ultimately found the van approximately two blocks away.

officer to immediately transport him to the hospital, and appears to have prevented him from pursuing a warrant or otherwise continuing his investigation. It would appear reasonable for the officer to conclude under those circumstances there was not time to secure a warrant.

The facts of this case are different from *Mitchell* in several significant respects. Key's collision occurred around 8:45 a.m. When Trooper Campbell arrived at the scene at 8:57, paramedics and fire fighters were already there. Trooper Campbell did not have to attend to any medical needs because paramedics were already loading Key into the ambulance and the driver of the other vehicle was not injured. The ambulance left the scene to deliver Key to the hospital minutes later. There is no indication in the record there were any traffic issues to handle. Muddy Ford Road is not a major road, but a short, two-lane road connecting several residential neighborhoods to the main traffic arteries in the area. During all this time, a magistrate judge was on duty at the Greenville Law Enforcement Center, less than ten miles from the accident scene and only three miles from the hospital.

In this case, therefore, it is not at all obvious that Key's unconsciousness played any role in hindering the officer's ability to obtain a warrant.[11] Within minutes after the incident, Key was in an ambulance headed to the hospital. There is no evidence Trooper Campbell faced any "urgent tasks." *See Mitchell*, 139 S. Ct. at 2538, 204 L. Ed. 2d at 1051 (hypothesizing "the accident might give officers a slew of urgent tasks"). When asked at trial what the officer did after the ambulance left, the officer testified he simply "complete[d] the accident report" and "went to the hospital." Whether these and other circumstances justify drawing Key's blood without a warrant will be explored in great detail on remand, but it hardly seems unreasonable for the South Carolina Highway

[11] The *Mitchell* plurality suggests it is important that it was the suspect's unconsciousness that prevented the officer from administering a breath test. 139 S. Ct. at 2534, 204 L. Ed. 2d at 1047. That may have been true in *Mitchell*, but not here. The reason Trooper Campbell could not give Key a breath test is because paramedics determined her medical condition—unconscious or not—required she be immediately transported to the hospital. The breath test would have been administered at the Law Enforcement Center.

Patrol to allocate its significant law enforcement resources in such a way as to accommodate Key's Fourth Amendment rights. As the Supreme Court noted in *McNeely*,

> Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

569 U.S. at 153-54, 133 S. Ct. at 1561, 185 L. Ed. 2d at 708; *see also* 569 U.S. at 172, 133 S. Ct. at 1572, 185 L. Ed. 2d at 719 (Roberts, C.J., concurring) ("There might, therefore, be time to obtain a warrant in many cases.").

When the Supreme Court speaks, we must listen. We make every effort to ensure that our rulings conform not only to the Supreme Court's statements that are necessary to its decision, but even to the Supreme Court's dictum. *See Yaeger v. Murphy*, 291 S.C. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987) ("But those who disregard dictum, either in law or in life, do so at their peril."). This duty on our part imposes a corresponding duty on the Supreme Court to speak carefully, to let us know with specificity when it has changed the law, and to describe the law in realistic terms that we and other courts may readily understand and apply.

That corresponding duty also applies to us. Pursuant to that duty, it is this Court's responsibility to guide the summary court to which this case will be remanded, and other South Carolina courts, on how to implement the Supreme Court's ruling in *Mitchell*. It is not enough for us to follow the State's suggestion that we merely quote the *Mitchell* plurality and let our trial courts figure out what it meant.

I firmly believe the Supreme Court did not change the law. Rather, the State bears the burden of proving exigent circumstances. As has always been the case, when the State chooses not to obtain a warrant before taking the blood of a suspect without her consent, the State must actually prove "that the exigencies of the situation made that course imperative." *McDonald*, 335 U.S. at 456, 69 S. Ct. at 193, 93 L. Ed. at 158; *see also Mitchell*, 139 S. Ct. at 2534, 204 L. Ed. 2d at 1047 ("And under the exception for exigent circumstances, a warrantless search is allowed when 'there is compelling need for official action and no time to secure a warrant.'" (quoting *McNeely*, 569 U.S. at 149, 133 S. Ct. at 1559, 185 L. Ed. 2d at 705)); 139 S. Ct. at 2537, 204 L. Ed. 2d at 1050 ("Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bradley Sanders, Petitioner,

v.

South Carolina Department of Motor Vehicles and Columbia Police Department, Respondents below,

Of whom South Carolina Department of Motor Vehicles is the Respondent.

Appellate Case No. 2019-000693

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 27990
Heard May 21, 2020 – Filed September 2, 2020

AFFIRMED

Heath Preston Taylor, of Taylor Law Firm, LLC, of West Columbia, for Petitioner.

Frank L. Valenta Jr., Philip S. Porter, and Brandy Anne Duncan, all of the South Carolina Department of Motor Vehicles, of Blythewood, for Respondent.

CHIEF JUSTICE BEATTY: The South Carolina Department of Motor Vehicles (DMV) suspended the driver's license of Bradley Sanders (Sanders) pursuant to South Carolina's implied consent statute after he refused to take a blood-alcohol test following his arrest for driving under the influence (DUI). The suspension was upheld by the Office of Motor Vehicles and Hearings (OMVH), the Administrative Law Court (ALC), and the court of appeals. *See Sanders v. S.C. Dep't of Motor Vehicles*, 426 S.C. 21, 824 S.E.2d 454 (Ct. App. 2019). We affirm.

I. FACTUAL/PROCEDURAL BACKGROUND

On November 21, 2012, at approximately 4:10 a.m., the Columbia Police Department dispatched an officer to Whaley Street after a single vehicle ran off the road and struck a tree. Upon arrival, the officer found Sanders standing nearby at a gas station, bleeding from the head. The officer questioned Sanders and noticed that he slurred his words, had an odor of alcohol, and appeared to be "off-balance," both physically and mentally. Sanders denied being in an accident, but his personal belongings and blood were found inside the wrecked vehicle, and he could not explain how he injured his head. Sanders was taken by ambulance to a hospital emergency room, where he was found to have extensive head and neck injuries.

The officer advised Sanders of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and informed him that he was under arrest for DUI. The officer also gave Sanders notice, both verbally and in writing, of his rights under South Carolina's implied consent statute. *See* S.C. Code Ann. § 56-5-2950 (2018) (implied consent law). A hospital employee indicated to the officer that Sanders was unable to submit to a breath test. As a result, the officer asked Sanders to take a blood-alcohol test. Sanders refused. No blood sample was collected.

The DMV issued a Notice of Suspension to Sanders informing him that it had suspended his driver's license for refusing to submit to testing in accordance with the implied consent statute. Under the statute, the South Carolina General Assembly has declared that "[a] person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination [thereof]." *Id.* § 56-5-2950(A).

Sanders challenged the license suspension in a contested case hearing before the OMVH. The issue before the OMVH centered on whether Sanders had refused to submit to a test pursuant to section 56-5-2950. Because Sanders was asked to submit to a blood test, the hearing more specifically focused on whether the officer was justified in requesting a blood sample because licensed medical personnel had determined Sanders was unable to submit to a breath test.[1]

The officer testified that he requested the blood sample after a hospital employee indicated Sanders was unable to submit to a breath test. The officer stated he personally observed the employee in the emergency room and saw that she wore a hospital identification badge that identified her name and title as "Angela Albright, RN."

The officer also provided a one-page, standardized form, the "South Carolina Law Enforcement Division - Urine/Blood Collection Report" (SLED Report), which documented the officer's investigation. The officer indicated on the form that Sanders had been arrested for an offense related to intoxication and was advised of his implied consent rights. There was also a section for completion by licensed medical personnel, which contained alternative statements describing whether blood and/or urine samples had been sought or collected. The following statement was marked regarding Sanders:

> A blood sample is requested by the arresting officer because a licensed medical person has informed the officer that the subject is unable to take a breath test at this time due to any reason deemed acceptable by that licensed medical person.

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[1] Under the implied consent law, a motorist "first must be offered a breath test to determine the person's alcohol concentration." S.C. Code Ann. § 56-5-2950(A). However, an officer may request a blood sample "[i]f the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, *or for any other reason considered acceptable by the licensed medical personnel*." *Id.* (emphasis added). "If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or . . . a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing." *Id.*

In the line designated for "Name and [Title] of Licensed Medical Personnel," Nurse Albright wrote in "Angela Albright, RN," and she signed on the line reserved for "Signature of Licensed Medical Personnel." The officer signed the bottom of the form, documenting that his request for a blood sample had been "Refused." Sanders also signed to confirm that he received a copy of the SLED Report.

Sanders's counsel objected to the SLED Report stating that, although Nurse Albright "may well be a registered nurse," he could not determine whether she actually was one because she was not there to cross-examine as to her credentials, and anyone "can have hospital garb on," citing *State v. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2005).[2] Sanders's counsel also argued he should be able to cross-examine Nurse Albright as to her reason *why* Sanders could not take a breath test (he noted the underlying reason was not specified on the SLED Report). Sanders's counsel asserted the officer's testimony on these points would be hearsay.

The officer reiterated that he personally witnessed Nurse Albright wearing a hospital identification badge with her name and the designation of her title as "RN" and saw her performing her duties in the emergency room. He also noted that Nurse Albright had identified her hospital title on the SLED Report as "RN." The officer lastly added that he was told that the reason *why* Sanders could not supply a breath sample was because Sanders "would not be able to get out [of the hospital emergency room] in a timely manner in order to provide that breath sample." *See* S.C. Code Ann. § 56-5-2950(A) ("A breath sample taken for testing must be collected within two hours of the arrest."). No contemporaneous objection was made by Sanders's counsel to the officer's additional statement regarding the underlying reason *why* medical personnel found Sanders could not provide a breath sample (the inability for Sanders to be discharged from the emergency room within the two-hour time limit).

Sanders's counsel provided the officer with a copy of Sanders's medical records and asked him to recite for the record the portions that counsel had highlighted about Sanders's diagnosis and symptoms. The officer read the portions stating Sanders was diagnosed with "[s]calp contusions, scalp laceration[s], cervical strain, and [a] closed head injury," and that the common symptoms of a head injury

[2] In *Frey*, the motorist challenged the admission of his blood alcohol test results at his criminal trial on a DUI charge, and the court of appeals held a hospital employee wearing generic scrubs with no indication of his position at the hospital was not shown to be licensed medical personnel.

could include, among other things, dizziness, headaches, and "slow bleeding or other problems inside the head." Sanders's counsel asked the officer, "Does it sound like he may have had a concussion and was out of it?" The officer declined to discuss this point.

Sanders then testified as to his injuries and medical condition following the accident. At his counsel's urging, Sanders also recited the findings in his medical records, confirming he was diagnosed with "[s]calp contusions, scalp lacerations, cervical strain, and [a] closed head injury." Sanders testified that he "had no clue" what happened after the accident and "was very disoriented," and he stated he did not recall being in the hospital or being asked to submit a blood sample. During cross-examination, Sanders conceded that he went to Five Points at approximately 1:00 a.m. the night of his arrest and "probably had two [alcoholic drinks], maybe part of a third" before his one-car accident shortly after 4:00 a.m. Sanders stated that the last thing he remembered was driving down the street towards the tree, and the rest of the evening was very "fuzzy" and "foggy," as the only other thing he recalled was waking up in jail with blood encrusted in his hair.

During closing remarks, Sanders's counsel made a general request to renew his hearsay objection. In the alternative, counsel asserted Sanders had "absolutely no knowledge of what was going on" after the accident because Sanders "had a significant head injury, had a concussion" and he did not "remember anything until he woke in jail the next morning" with "blood all over the back of his head."

The OMVH issued a written order upholding the suspension. The OMVH found Sanders was lawfully arrested for DUI and was advised of his implied consent rights. The OMVH found the officer made a reasonable request for a blood sample after being informed by licensed medical personnel that Sanders was unable to submit to a breath test. The OMVH noted Sanders had argued this information was hearsay because he did not know if Nurse Albright was an RN and he did not have the opportunity to question her as to the reason why she made this finding. The OMVH "conclude[d] that the testimony was not hearsay because it was not admitted to prove that [Sanders] was actually unable to leave, only that the blood test was warranted because licensed medical personnel determined he was unable to provide a breath sample." The OMVH further concluded that the officer "presented a prima facie case that the person who told him and signed the form [the SLED Report] was licensed medical personnel - she was in the hospital, treating patients, represented herself as a nurse, and wore a name tag that indicated she was a registered nurse," and Sanders made no attempt to refute this evidence.

Sanders sought review by the ALC, which affirmed the OMVH's ruling and upheld the suspension of Sanders's driver's license. The court of appeals affirmed. *Sanders v. S.C. Dep't of Motor Vehicles*, 426 S.C. 21, 824 S.E.2d 454 (Ct. App. 2019). This Court granted Sanders's petition for a writ of certiorari.

II. STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the "substantial evidence" rule as the standard for judicial review of a decision of an administrative agency. *Lark v. Bi–Lo, Inc.,* 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). The appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings or conclusions are affected by an error of law, clearly erroneous in view of the substantial evidence in the record, or are arbitrary, capricious, or characterized by an abuse of discretion. *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 594, 654 S.E.2d 284, 287 (Ct. App. 2007).

III. DISCUSSION

Sanders contends the decision of the court of appeals should be reversed due to a lack of substantial evidence in the record to support the suspension. Specifically, Sanders argues the court of appeals erred in (1) determining there was substantial evidence that Nurse Albright qualified as licensed medical personnel, and (2) holding the statements used to establish his alleged inability to submit to a breath test were not hearsay. We disagree. We begin with an overview of the remedial purpose of the implied consent statute, along with a consideration of the proper scope of a civil suspension hearing, as we believe these two points provide the appropriate framework for our decision.

A. Remedial Purpose of Implied Consent Statute

"Being licensed to operate a motor vehicle on the public highways of this state is not a property right, but is merely a privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare." *Peake*, 375 S.C. at 595, 654 S.E.2d at 288. "The implied consent laws are driven by public policy considerations." *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 522, 613 S.E.2d 544, 548 (Ct. App. 2005).

"One immediate purpose of the implied consent statute is to obtain the best evidence of a driver's blood alcohol content at the time when the arresting officer reasonably believes him to be driving under the influence." *Leviner v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 409, 411, 438 S.E.2d 246, 248 (1993); *see Skinner v. Sillas*, 130 Cal. Rptr. 91, 95 (Ct. App. 1976) (stating the purpose of the statute is to take the test soon after arrest because "alcohol in the blood system dissipates quickly").

It also promotes traffic safety by expeditiously removing dangerous drivers from the public roadways in a summary civil procedure. *See Nelson*, 364 S.C. at 522, 613 S.E.2d at 548 ("The State has a strong interest in maintaining safe highways and roads."); *see also Krueger v. Fulton*, 169 N.W.2d 875, 878 (Iowa 1969) ("It is obvious the purpose of the Implied Consent Law is to reduce the holocaust on our highways part of which is due to the driver who imbibes too freely of intoxicating liquor. The civil license revocation provided for under the Implied Consent Act was intended to protect the public from the irresponsible driver and not merely punish the licensee." (citation omitted)).

"An operator of a motor vehicle in South Carolina is not required to submit to alcohol or drug testing; however, our legislature has clearly mandated that should one choose not to consent to such testing, his or her license must and shall be suspended . . . ." *Nelson*, 364 S.C. at 522, 613 S.E.2d at 548. "Were drivers free to refuse alcohol and drug testing without suffering penalty, the current system of detecting, testing, and prosecuting drunk drivers would simply fail." *Id.* at 522, 613 S.E.2d at 548–49.

The South Carolina General Assembly has imposed a greater length of suspension for refusing to consent to testing than for those who take a test and have an alcohol concentration below a certain threshold and have no prior convictions. *Id.* at 522, 613 S.E.2d at 549. "The disparity in suspensions demonstrates the legislative concern over an individual[']s refusal to consent to testing." *Id.* at 523, 613 S.E.2d at 549; *cf. Quintana v. Mun. Court*, 237 Cal. Rptr. 397, 401 (Ct. App. 1987) ("The purpose of the implied consent statute is to fulfill the need for a fair, efficient and accurate system of detection and prevention of driving under the influence. That purpose is obviously thwarted by the inebriated driver who refuses the test. . . . He has thus proven to be more dangerous to the public than the inebriated driver who has consented to a test." (citations omitted)).

A civil license suspension is distinguishable from the criminal prosecution on the DUI charge. The provisions for an administrative suspension are liberally construed to advance the statute's purpose of promoting the public interest, and decisions restricting the application of implied consent laws are narrowly construed. *See State v. Price*, 333 S.C. 267, 273 n.7, 510 S.E.2d 215, 218 n.7 (1998) (stating the fact that the State affords procedural due process to a motorist prior to suspending a driver's license does not transform the suspension from a remedial sanction into a punitive one); *see also Illinois v. Johnson*, 758 N.E.2d 805, 811 (Ill. 2001) (stating "the implied-consent statute is remedial in nature and, therefore, 'should be liberally construed' to preserve its overall purpose" (citation omitted)); *Minnesota v. Juncewski*, 308 N.W.2d 316, 319 (Minn. 1981) (observing decisions restricting the application of the implied consent law are to be narrowly construed (citation omitted)); *Wisconsin v. Reitter*, 595 N.W.2d 646, 652 (Wis. 1999) ("Given the legislature's intentions in passing the statute, courts construe the implied consent law liberally.").

B. Scope of Administrative Suspension Hearing

In furtherance of the goals described above, the General Assembly has statutorily prescribed the permissible scope of an administrative hearing challenging the suspension of a driver's license. The statute contemplates an expeditious civil review but also "guards against an automatic or rote elimination of this [important] interest." *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 148, 705 S.E.2d 425, 431 (2011). As with the penalties imposed, the General Assembly has differentiated the scope of the review based on whether the motorist submitted to—or refused to submit to—testing.

Section 56-5-2951(F) sets forth the permissible scope of the suspension hearing in cases where a motorist has *refused* to submit to testing as follows:

> (F) A contested case hearing must be held after the request for the hearing is received by the [OMVH]. *The scope of the hearing is limited to whether the person*:
>
> (1) was lawfully arrested or detained;
>
> (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]

> (3) refused to submit to a test pursuant to Section 56-5-2950 . . . .

S.C. Code Ann. § 56-5-2951(F)(1)-(3) (2018) (emphasis added).

There has been no dispute as to the first two factors to support the suspension: Sanders was properly arrested and he was informed of his implied consent rights. Therefore, the suspension hearing turned on the third factor, refusal to submit to a test pursuant to the implied consent statute. *See id.* § 56-5-2951(F)(3); *see also City of Columbia v. Moore*, 318 S.C. 292, 296, 457 S.E.2d 346, 348 (Ct. App. 1995) (observing the law implies a person's consent to testing, "[b]ut this consent is only to chemical tests under the procedure plainly set forth in the statute").

The officer was authorized to ask for a blood test if any of the exceptions in section 56-5-2950(A) applied. *See* S.C. Code Ann. § 56-5-2950(A) (stating an officer need not offer a breath test "[i]f the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, *or for any other reason considered acceptable by the licensed medical personnel*" (emphasis added)). The court of appeals determined the record here supported the conclusion that the officer's request for a blood test was authorized because licensed medical personnel determined Sanders was unable to submit to a breath test.

C. Licensed Medical Personnel

We first consider Sanders's argument that the court of appeals erred in finding there was substantial evidence in the record showing Nurse Albright was licensed medical personnel because the finding was based on hearsay.

This Court has recognized that the South Carolina Rules of Evidence (SCRE) are applicable to driver's license suspension hearings. *McCarson*, 391 S.C. at 147, 705 S.E.2d at 430 (citing S.C. Code Ann. § 1-23-330(1) (2005); Rule 1101(d)(3), SCRE). *McCarson* involved a dispute over the first statutory factor (whether the arrest was lawful), and the Court held that the DMV must present admissible evidence of probable cause. *Id.* at 149, 705 S.E.2d at 431. The Court noted hearsay is defined as "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," and stated hearsay is not admissible absent an exception. *Id.* at 146, 705 S.E.2d at 430 (quoting Rule 801(c), SCRE).

Under the implied consent statute, "licensed medical personnel" includes "physicians licensed by the State Board of Medical Examiners, *registered nurses [RNs] licensed by the State Board of Nursing*, and other medical personnel trained to obtain [blood and urine] samples in a licensed medical facility." S.C. Code Ann. § 56-5-2950(A) (emphasis added) (providing only licensed medical personnel as defined in the statute may take blood and urine samples and that the samples "must be obtained and handled in accordance with procedures approved by SLED").

Although Sanders argued at the hearing that he should have been able to cross-examine Nurse Albright as to whether she qualified as licensed medical personnel, personal attendance by the hospital employee has never been required to establish this fact. *See State v. Frey*, 362 S.C. 511, 514, 608 S.E.2d 874, 876 (Ct. App. 2005) (stating, in a DUI trial, that the "suggestion that [the hospital employee's] qualifications could be established *only* by his presence and testimony at trial is specious"). This fact, like any other, may be shown by several means.

The officer testified as to his first-hand observations of Nurse Albright, noting that she wore a hospital identification badge providing her name and title as an "RN," and he saw her performing the duties commensurate with the position of an RN in the emergency room. These personal observations by the officer during his investigation are not hearsay and constitute admissible evidence of Nurse Albright's status. *See State v. Evans*, 316 S.C. 303, 311, 450 S.E.2d 47, 52 (1994) (stating an investigator's testimony was "based on *personal* observations" and "was not merely relating what he was told by others," so it did not constitute hearsay); *see also State v. Salisbury*, 343 S.C. 520, 525, 541 S.E.2d 247, 249 (2001) (stating "[t]he officers' personal observations and opinions of Salisbury's actions, appearance, and condition constitute direct evidence because it is based on the officers' actual knowledge of the situation").

The officer's recollection of Nurse Albright's nametag is significant because, under South Carolina law, "[a] licensed nurse must clearly identify himself or herself as officially licensed by the board [State Board of Nursing]." S.C. Code Ann. § 40-33-39 (2011). To that end, a licensed nurse is required to "wear a clearly legible identification badge or other adornment at least one inch by three inches in size bearing the nurse's first or last name, or both, *and title as officially licensed*." *Id.* (emphasis added). Consequently, Nurse Albright was required under South Carolina law to wear a badge clearly identifying her licensure status during her employment with the hospital.

While Sanders belatedly opines to this Court that Nurse Albright could have engaged in a false "holding out" regarding her status (citing a news article about a "fake doctor"), Sanders made no contemporaneous attempt at the suspension hearing to allege that Nurse Albright engaged in any misleading conduct in this regard, nor did he dispute the officer's substantive testimony regarding Nurse Albright's status as an RN. Sanders could have rebutted the DMV's prima facie case, without the need to cross-examine Nurse Albright, by investigating Nurse Albright's licensing status (or alleged lack thereof) himself.[3] *See generally id.* § 40-33-30(B) (providing it is unlawful for a person to use the designation "APRN," "RN," or "LPN" or any variation thereof, "or [to] use any title, sign, card, or device to indicate that the person is a nurse . . . unless the person is actively licensed" by the State Board of Nursing). Instead, Sanders relied solely on a hearsay objection, which we have found to be without merit. Accordingly, the court of appeals did not err in finding there is substantial evidence in the record showing Nurse Albright is licensed medical personnel.

D. Officer's Request for a Blood Sample

Sanders next contends the court of appeals erred in holding there was substantial evidence in the record to support the officer's request for a blood sample, as the evidence of his alleged inability to submit to a breath test was inadmissible hearsay.

At the suspension hearing, the officer testified that he requested a blood test after arriving at the emergency room and being advised by licensed medical personnel (Nurse Albright) that Sanders was not able to take a breath test. Sanders's counsel made a general hearsay objection, arguing Nurse Albright should be present

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[3] The DMV notes that whether an individual holds a medical license is publicly verifiable information that is readily available on the website of the South Carolina Department of Labor, Licensing, and Regulation, and it states this Court could take judicial notice of Nurse Albright's licensing status under Rule 201, SCRE. Our review of the government website indicates Nurse Albright has been licensed as an RN since 1999 and her current South Carolina license is valid through April 2022. *See* S.C. Dep't of Labor, Licensing, & Regulation, https://llr.sc.gov/. This information is obviously compelling, but we need not rely on it in reaching our decision as there is substantial evidence in the record as to Nurse Albright's status.

so he could question her as to her qualifications and the reason *why* she found Sanders was unable to take a breath test:

> [A]nybody can have hospital garb on . . . [the] defense needs to be able to cross-examine that particular person on his or her credentials. Secondly, this [SLED Report] doesn't say he wasn't able to leave the hospital. It says for some reason deemed acceptable by the licensed medical personnel. We have a right to ask that licensed medical personnel what that reason was. And we can't ask that person that reason without that person being here and we're not sure, again, she may well be a registered nurse, but we don't know that for sure and we don't have a right to cross-examine her credentials . . . .

As explained in the preceding section, hospital employees do not have to attend a proceeding for their qualification as licensed medical personnel to be established. *Frey*, 362 S.C. at 514, 608 S.E.2d at 876. Further, we categorically reject the assertion that Nurse Albright's presence was required at this summary proceeding so Sanders could challenge *the underlying reason why* licensed medical personnel found he could not take a breath test. The reason for the licensed medical personnel's determination is clearly outside the statutorily limited scope of the hearing procedure set forth by the General Assembly. *See* S.C. Code Ann. § 56-5-2951(F)(1)-(3) (stating the scope of the suspension hearing is limited to whether the person (1) was lawfully arrested or detained, (2) was given a written copy of and verbally informed of the rights enumerated in section 56-5-2950, and (3) refused to submit to a test pursuant to section 56-5-2950).

Here, the officer relied on the exception that licensed medical personnel found the motorist could not submit to a breath test. S.C. Code Ann. § 56-5-2950(A). The General Assembly has not required officers to question the judgment of licensed medical personnel or obtain a second opinion as part of the implied consent procedure. Nor has it authorized courts to engage in a post hoc analysis of the validity of the determination that the motorist could not take a breath test. The reason needs only to be one that is "considered acceptable *by the licensed medical personnel,*" per S.C. Code Ann. section 56-5-2950(A) (emphasis added). *See Reitter*, 595 N.W.2d at 652 ("The law requires no more than what the implied consent statute sets forth.").

The soundness of this procedure is readily apparent. Sanders asserts that, if given the opportunity, he would have cross-examined Nurse Albright as to whether his medical treatment could have been expedited to secure his discharge sooner (theoretically to permit breath testing).[4] Asking Nurse Albright to opine on this question is of dubious value, particularly where Sanders never specifically testified that he would have submitted to a breath test if one had been requested. Sanders's testimony centered on the nature of his injuries, and he maintained he did not recall being asked to take a blood test, nor anything else about his time in the hospital. *Cf. Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 627 S.E.2d 751 (Ct. App. 2006) (holding the driver showed no prejudice from the fact that he did not receive a copy of the implied consent form from the officer, where the driver did not argue that he did not receive his implied consent rights at all or that he would have provided a blood test if he had received the implied consent rights in writing), *aff'd*, 382 S.C. 567, 677 S.E.2d 588 (2009).

The essential question here is—Did the officer comply with the implied consent statute in requesting a blood sample from Sanders? The limited scope of the administrative hearing is to test the conduct of *the officer* (not medical personnel) by requiring *the officer* to have probable cause for the arrest, to advise the motorist of his implied consent rights, and to request tests in compliance with the procedure outlined in the implied consent statute (which the motorist refused). S.C. Code Ann. § 56-5-2951(F)(1)-(3). Whether the licensed medical personnel was infallible in her determination is not within the limited scope of this administrative proceeding.[5] The critical fact is that the determination, whether correct or not, was communicated to the officer and, thus, justified the next step in his investigation— the request for a

[4] As a practical matter, when a motorist is transported to the hospital due to injuries severe enough to warrant emergency treatment, it will be highly unlikely that the person will be discharged in time to meet the statutory window for taking a breath test (within two hours of arrest).

[5] Considering the remedial purpose of the implied consent statute and the statutory scope of the suspension hearing, we find the General Assembly did not intend the suspension hearing to be a forum for competing medical experts.

blood sample.[6] We agree with the court of appeals that the evidence offered to explain or support the officer's investigation does not constitute hearsay.[7]

Officers are required to administer the implied consent statute in accordance with procedures developed by SLED and to issue reports any time tests are requested. *See generally* S.C. Code Ann. § 56-5-2950(I) ("A person required to submit to tests by the arresting law enforcement officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence."); *see also id.* § 56-5-2950(A) (stating "[t]he breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. . . . Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.").

Nurse Albright signed the SLED Report, as did Sanders, so he was contemporaneously informed of Nurse Albright's determination (that he could not submit a breath sample) and he was given a copy of the SLED Report, all in

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[6] *Cf. Andros v. Oregon ex rel. Dep't of Motor Vehicles*, 485 P.2d 635 (Or. Ct. App. 1971) (holding whether there were reasonable grounds for the officer's request to take a chemical test did not depend on whether the driver *was in fact under the influence* of intoxicating liquor; rather it was dependent on whether the arresting officer *had reasonable grounds to believe* that to be so).

[7] *See, e.g.*, *State v. Brown,* 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (holding "an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken"); *State v. Sims*, 304 S.C. 409, 420, 405 S.E.2d 377, 383 (1991) (holding the officer's testimony from an out of court declarant was offered to explain the officer's actions regarding the defendant and was not inadmissible hearsay), *cert. denied*, 502 U.S. 1103 (1992); *State v. Thompson,* 352 S.C. 552, 559, 575 S.E.2d 77, 81 (Ct. App. 2003) (finding testimony about a bystander's statement to the police was not hearsay because it was not offered to prove the truth of the matter asserted but rather to explain the officer's reason for going to the defendant's home); *State v. Kirby,* 325 S.C. 390, 396, 481 S.E.2d 150, 153 (Ct. App. 1996) (concluding testimony by a police officer about a dispatcher's call reporting drugs and firearms in a car was not hearsay where offered to explain the reason for the initiation of police surveillance of the vehicle in question).

compliance with the officer's reporting duties. While we conclude the information communicated to the officer was not hearsay for purposes of this implied consent hearing, we note that, if Sanders believed the officer's testimony that Nurse Albright had made a determination of any kind was also false, he always had the recourse of rebutting it by calling her as a witness himself.

Lastly, we observe that, at the hearing, Sanders's counsel urged the OMVH to overturn the suspension on the alternative ground that Sanders "had a significant head injury, had a concussion," and did not "remember anything until he woke in jail the next morning" with "blood all over the back of his head." Sanders testified that he could not remember anything from the time of the accident until he woke up in jail, and he described himself as "very disoriented," "fuzzy," "foggy," and having "no clue" as to his surroundings after his accident. It is unclear how counsel intended this assertion to provide a legal basis for overturning the suspension, and Sanders does not rely on it here. We note, however, that the implied consent statute provides that if a motorist has an injury to the mouth, is *unconscious*, or dead, a breath test need not be requested, and this determination need not be made by licensed medical personnel. *See* S.C. Code Ann. § 56-5-2950(A) (exceptions); *State v. Kimbrell*, 326 S.C. 344, 348, 481 S.E.2d 456, 458 (Ct. App. 1997) (observing while these grounds need not be based on the judgment of licensed medical personnel, the evidence must reveal a reasonable basis to support them). Even if Sanders were rendered unconscious, however, the result would not have been the excusal of all testing; rather, under the statute, it would have justified the officer's request for a blood test.

IV. CONCLUSION

We conclude the substantial evidence in the record supports the DMV's suspension of Sanders's driver's license.

AFFIRMED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur. FEW, J., concurring in a separate opinion.

JUSTICE FEW: I concur with the majority. I write to share my thoughts on whether the nurse's statements are hearsay. As with many hearsay questions, it is actually not a hearsay question. It is a statutory interpretation question. Sanders argues subsection 56-5-2950(A) of the South Carolina Code (2018) requires the State to prove a suspect was "physically unable to provide an acceptable breath sample." The Department argues subsection 56-5-2950(A) requires only that the State prove the medical professional had an "acceptable" reason for determining the suspect was "physically unable" to provide a breath sample. If we resolve this dispute over statutory interpretation, we will answer the hearsay question. In other words, once we determine what subsection 56-5-2950(A) requires the State to prove at the hearing, the answer to the hearsay question follows without serious controversy.

Under Sanders' interpretation of the subsection, the question at the hearing is, "Was the suspect 'physically unable to provide an acceptable breath sample.'" If Sanders is correct, the State would need the nurse's statements to be true to prove Sanders' physical condition. Necessarily, the State would offer the statements in evidence for the purpose of proving the truth of the matter asserted in the statements. The statements—in that event—would be hearsay.

The Department, however, is correct. I do not believe subsection 56-5-2950(A) can be read to require the State to prove the suspect's physical condition. As the Chief Justice explained, proving such a subjective point of medicine is beyond the scope the General Assembly intended for these hearings. "Whether the licensed medical personnel was infallible in her determination is not within the limited scope of this administrative proceeding." Rather, the most sensible reading of subsection 56-5-2950(A) is it requires only that the State prove the licensed medical professional made the determination the suspect was "physically unable" for a reason the professional "considered acceptable." *See State v. Stacy*, 315 S.C. 105, 107, 431 S.E.2d 640, 641 (Ct. App. 1993) ("[W]e hold that the statute requires a licensed [professional] . . . to determine whether an acceptable reason exists for finding that a person is unable to provide an acceptable breath sample."). Thus, to prove what subsection 56-5-2950(A) requires, it is not necessary that the professional's statements be true. The State may offer the statements in evidence for the sole purpose of proving the statements were made, and the statements are not hearsay.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Don Weaver, Appellant,

v.

Recreation District, Recreation Commission of Richland County, Paul Brawley, as Auditor of Richland County and David A. Adams, as Treasurer of Richland County, Respondents.

Appellate Case No. 2019-000920

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

Opinion No. 27991
Heard February 11, 2020 – Filed September 2, 2020

AFFIRMED

John E. Schmidt III and Melissa J. Copeland, of Schmidt & Copeland, LLC, of Columbia, for Appellant.

Charles H. McDonald and William C. Dillard Jr., of Belser & Belser, PA, of Columbia, for Respondents Recreation District and Recreation Commission of Richland County; and Bradley T. Farrar, of Richland County Attorney's Office, of Columbia, for Respondents Paul Brawley and David A. Adams.

CHIEF JUSTICE BEATTY: Don Weaver ("Appellant") brought this declaratory judgment action to challenge the constitutionality of S.C. Code Ann. section 6-11-271 (2004), which addresses the millage levied in certain special purpose districts. The circuit court found Appellant failed to meet his burden of establishing any constitutional infirmity. We affirm.

I. FACTS

Appellant owns property and is a taxpayer in the Recreation District, a special purpose district created to fund the operation and maintenance of parks and other recreational facilities in the unincorporated areas of Richland County. The Recreation Commission of Richland County, which oversees those facilities, is governed by an appointed board of commissioners. Richland County's Auditor and Treasurer administer the levy and collection of taxes for the Recreation District, as well as Richland County.

Appellant instituted this action in 2017 against the Recreation District, the Commission, the Auditor, and the Treasurer (collectively, "Respondents"), seeking a declaration that Act No. 397, 1998 S.C. Acts 2389, in particular the part that added section 6-11-271, violates several provisions of the South Carolina Constitution, including article X, section 5 (prohibiting taxation without representation); article III, section 34 (prohibiting special legislation); and article VIII, section 7 (regarding Home Rule by counties), as well as the Home Rule Act, S.C. Code Ann. sections 4-9-10 to -1230 (1986 & Supp. 2019).

Section 6-11-271 was added by the South Carolina General Assembly for the stated purpose of clarifying the authority of certain special purpose districts—those without elected governing bodies—to levy millage and provide governmental services after this Court found another provision, Act No. 317, 1969 S.C. Acts 382, was unconstitutional. In *Weaver v. Recreation District*, a case that was also instituted by Appellant, the Court held Act No. 317 violated the prohibition on taxation without representation because it authorized the levying of taxes on property in a special purpose district without any oversight by an elected body. 328 S.C. 83, 87, 492 S.E.2d 79, 81–82 (1997) (citing S.C. Const. art. X, § 5).

The Court held "the legislative power to tax may not be conferred on a purely appointive body but must be under the *supervisory control* of elected bodies . . . ." *Id.* at 86, 492 S.E.2d at 81 (emphasis added). The Court reasoned "the power to fix and levy a tax should only be conferred upon a body which stands as the direct

representative of the people, to the end that an abuse of power may be directly corrected by those who must carry the burden of the tax." *Id.* (quoting *Crow v. McAlpine*, 277 S.C. 240, 244–45, 285 S.E.2d 355, 358 (1981)). The Court concluded Act No. 317 was an impermissible delegation of legislative authority because it gave "the Recreation Commission *the complete discretion* to determine its annual budget, and to levy anywhere from one to five mills taxes to meet its budget." *Id.* at 87, 492 S.E.2d at 81 (emphasis added). The Court recognized that its holding could disrupt the financial operation of numerous special purpose districts, boards, and commissions throughout the state, so it applied the decision prospectively (beginning December 31, 1999), "to give the General Assembly an opportunity to address this problem." *Id.* at 87–88, 492 S.E.2d at 82.

In response to *Weaver*, the General Assembly added section 6-11-271 of the South Carolina Code in 1998. *See* S.C. Code Ann. § 6-11-271 (2004) ("Millage levy for special purpose district."). Subsection (A) defines the term "special purpose district" to mean any special purpose district or public service authority, however named, created by the General Assembly prior to March 7, 1973. *Id.* § 6-11-271(A).

Subsections (B) and (C) apply only to special purpose districts whose "governing bodies . . . are not elected but are presently authorized by law to levy [millage] for operations and maintenance." *Id.* § 6-11-271(B)(1), (C)(1). Subsection (B) concerns districts that were then authorized to levy millage up to a certain limit, and (C) concerns districts then having no limit as to the millage amount. *Id.* The General Assembly instructed that, beginning in fiscal year 1999, "[t]here must be levied annually in each special purpose district described" (i.e., those described in (B)(1) and (C)(1)), tax millage equal to the amount imposed in fiscal year 1998. *Id.* § 6-11-271(B)(2), (C)(2).

The General Assembly outlined several methods for a special purpose district to attempt to alter this tax millage. Subsection (D) provides a special purpose district may request that the county election commission conduct a referendum proposing a modification of the millage. *Id.* § 6-11-271(D). If the voters approve, the "modification in tax millage shall remain effective until changed in a manner provided by law." *Id.*

Subsection (E) authorizes all special purpose districts located wholly in one county to modify their millage limits, "provided the same is first approved by the governing body of the district *and by the governing body of the county* in which the district is located by resolutions duly adopted." *Id.* § 6-11-271(E)(1) (emphasis

added). However, any modification is only temporary, as the General Assembly stipulated that "[a]ny increase in millage effectuated pursuant to this subsection is effective *for only one year*." *Id.* (emphasis added).

Appellant alleged in his complaint in the current action that the addition of section 6-11-271 still imposes taxation without representation because it allows the Commission, an appointed body, to levy taxes on property within the Recreation District without any oversight from elected representatives, and he further alleged the statute is special legislation that violates Home Rule. The circuit court ruled Appellant did not meet his burden of establishing any constitutional infirmity, finding the statute (1) does not impose taxation without representation, (2) is not special legislation, and (3) does not violate Home Rule. Appellant challenges all three findings by the circuit court.[1]

II. STANDARD OF REVIEW

"This Court has a very limited scope of review in cases involving a constitutional challenge to a statute." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Id.* "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.* (citing *Westvaco Corp. v. S.C. Dep't. of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995)). "A possible constitutional construction must prevail over an unconstitutional interpretation." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (citation omitted).

[1] The Auditor and the Treasurer filed a joint brief taking no position on the statute's validity and stating they would abide by the Court's decision in the performance of their ministerial duties. Accordingly, references to the arguments of Respondents hereinafter shall refer to the Recreation District and the Commission, which filed a joint brief supporting the circuit court's ruling.

III. DISCUSSION

A. Taxation without Representation

Appellant first argues section 6-11-271 is unconstitutional because it violates the South Carolina Constitution's prohibition on taxation without representation.

Article X, section 5, of our state constitution provides, in relevant part: "No tax . . . shall be established . . . without the consent of the people or their representatives lawfully assembled." S.C. Const. art. X, § 5.

Appellant argues the General Assembly's passage of section 6-11-271 "is inconsistent in part with *Weaver*" and should, therefore, be invalidated. He notes subsection (B)(1) refers to unelected bodies that "are presently authorized by law to levy for operations and maintenance," but under *Weaver*, "unelected bodies are not authorized to levy taxes," so the General Assembly's enactment "did not correct the taxation without representation issue . . . and instead reiterated and relied on the very provisions that were struck by the Court as unconstitutional."

Appellant further argues subsections (B)(2) and (C)(2) "initially appear to have millage rates set by statute and, consequently, by the General Assembly," but they use the amount imposed in fiscal year 1998, which is the rate impermissibly imposed prior to *Weaver*, so "the taxation without representation by the Commission is made permanent by statute."

Appellant asserts that, in addition to the problem of using the millage amounts originally set by the unelected bodies, an additional problem exists in subsection (E)(1) because it states millage limitations may be modified "provided the same is first approved by the governing body of the district and by the governing body of the county in which the district is located by resolutions duly adopted." Appellant maintains subsection (E)(1) "therefore provides that the unelected bodies previously setting millage rates are kept in a position of authority as to require that these unelected bodies first approve any change in the millage rates." Appellant states, "This makes the authorized, governing body of a district directly responsible to the very unelected bodies that are not authorized to set millage rates due to such being a violation of taxation without representation."

Finally, Appellant contends "[t]he special legislation continues the current [funding] rate to infinity" because "taxpayers have no recourse to seek to reduce this

funding and they have no public, elected body to seek redress for grievances related to the use of those levied funds."

We hold Appellant has not met his heavy burden of proving section 6-11-271 imposes taxation without representation in violation of article X, section 5, of the South Carolina Constitution. *See Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013) ("The party challenging the statute bears the heavy burden of proving that 'its repugnance to the constitution is clear and beyond a reasonable doubt.'" (quoting *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 134–35, 568 S.E.2d 338, 344 (2002)).

In enacting the statute, the General Assembly, not the Commission, created the (initial) tax to be imposed in special purpose districts. There can be no question that the General Assembly is a body of duly elected, direct representatives of the people of South Carolina. *See, e.g.*, *Crow v. McAlpine*, 277 S.C. 240, 244, 285 S.E.2d 355, 358 (1981) ("The taxing power is one of the highest prerogatives of the General Assembly. Members of this body are chosen by the people to exercise the power in a conscientious and deliberate manner. If this power is abused, the people could, at least, prevent a recurrence of the wrong at the polls."); *Trs. of Wofford Coll. v. City of Spartanburg*, 201 S.C. 315, 321, 23 S.E.2d 9, 11 (1942) (stating "[t]he power of taxation is a legislative power, and knows no limitations, except those imposed expressly or by plain implication in the State or Federal Constitution," and noting "[t]he legislative power of the people of the State of South Carolina is vested in the General Assembly").

Appellant's assertion that the General Assembly somehow created a permanent situation of taxation without representation because it chose to implement the rates previously used in the various districts is without merit. In electing to set the initial millage at an amount equivalent to the most-recent fiscal year levels, the General Assembly exercised its own authority to impose the taxes based on a logical starting point, and it was a decision made by an elected body whose members are the direct representatives of the people.[2] *See Crow*, 277 S.C. at 244, 285 S.E.2d at

[2] To the extent Appellant also more narrowly maintains section 6-11-271 improperly continues the millage rate "fixed by legislators elected by taxpayers from counties other than Richland County," because "every member of the legislature elected by Richland County taxpayers could have voted against Section 6-11-271 and it would have passed," we note Appellant did not plead this assertion as a basis for relief in

358 (stating an abuse of the General Assembly's taxing power is subject to the response of taxpayers at the polls); *accord Weaver*, 328 S.C. at 86, 492 S.E.2d at 81.

Further, as noted by Respondents, "[t]he reference in § 6-11-271(B)(1) to unelected special purpose districts 'presently authorized by law to levy for operations' was clearly nothing more than a reasonable means to identify the class of entities affected by the opinion." Respondents correctly observe, "[T]he prospective application of Weaver had not yet taken effect when the statute was enacted," and "[t]he Weaver opinion itself [328 S.C. at 85, 492 S.E.2d at 80] used similar language, stating that 'Act No. 317 authorizes the Recreation Commission, in pertinent part . . . [t]o levy upon all the taxable property in the District a tax.'" We agree that the statutory language simply identified the relevant entities that were affected by the *Weaver* decision. The reference to special purpose districts with *unelected* boards is clearly warranted and comprises a proper class that may be distinguished from *elected* special purpose districts because elected special purpose districts retained their constitutional authority to levy taxes on property within their boundaries. Thus, the statute necessarily addresses the issues affecting districts with unelected governing boards.

As to Appellant's contention that the statute allows the approval of temporary millage modifications by the Commission along with county council, Respondents concede that subsection (E)(1) "does provide unelected governing bodies a limited procedural role in decisions to temporarily modify millage rates, [but] per the statute this can only be done with the approval of the elected governing body of the county in which the district is located." Respondents state: "In other words, any increase in the rate must be approved by the county council initially and then again on a recurring annual basis. An unelected special purpose district has no power to unilaterally increase the rate or preserve such an increase without the consent of county council."

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his complaint, and it was not ruled on by the circuit court. Consequently, it is not properly before this Court. Although not bearing on our decision, the assertion is without merit, in any event, as the enactment of section 6-11-271 affects all similarly situated special purpose districts—and their taxpayers—throughout the state, not just those in Richland County. As noted above, members of the General Assembly are the duly elected, direct representatives of the people, and there is direct recourse by taxpayers for any abuse of this legislative authority.

Although Appellant asserts subsection (E)(1) of the statute requires unelected bodies to first approve any change in millage rates, we find Appellant's argument on this point is misleading. Subsection (E)(1) does not state that the Commission must first approve a change in millage rates, without further qualification or restriction. Rather, it provides a special purpose district located entirely in one county is authorized to temporarily modify its millage limitation for one year "provided the same is *first approved* [1] by the governing body of the district *and* [2] by the governing body of the county in which the district is located by resolutions duly adopted." S.C. Code Ann. § 6-11-271(E)(1) (emphasis added). Thus, any modification sought by a special purpose district must *first* be approved by *both* the governing body of the district and the county council. A district may not unilaterally make any modifications; any modification requires the approval of county council, a duly elected, representative body.

While the statute could have been worded to perhaps state that any modification *requested* by a district may not be implemented without the approval of county council, we recognize that if there is any way to construe a statute in a way that is constitutional, it is a court's task to do so. *See Joytime Distribs. & Amusement Co.*, 338 S.C. at 640, 528 S.E.2d at 650 ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid."). With this directive in mind, we believe the reference to the district in this context merely reflects the reality that the Recreation District is an entity that can act only through its governing body, the Commission, and if the Commission would like to modify the millage (i.e., the governing board of the Recreation District approves of a modification), the modification can be implemented *only* with the oversight and approval of Richland County Council.

The General Assembly's manifest intent is that a special purpose district must obtain the approval of the elected governing body of the county, e.g., county council, before any modification in millage may occur. *Cf., e.g.*, *Spartanburg Sanitary Sewer Dist. v. City of Spartanburg*, 283 S.C. 67, 74, 321 S.E.2d 258, 262 (1984) ("In the construction of statutes, the dominant factor is the intent, not the language of the legislature. *Abell v. Bell,* 229 S.C. 1, 91 S.E.2d 548 (1956). A statute must be construed in light of its intended purposes, and, if such purpose can be reasonably discovered from its language, the purpose will prevail over the literal import of the statute."); *S.C. State Bd. of Dental Exam'rs v. Breeland*, 208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946) ("We have recently held that choice of language in an act 'will not be construed with literality when that would defeat the manifest intention of the

lawmakers' and that the court will reject the ordinary meaning of words used in a statute 'when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature.'" (citation omitted)).

Because no change may actually occur without the express approval of county council, an elected body, the prohibition against taxation without representation is not implicated here, as any rate change is, in fact, subject to the supervision of an elected body, and no modification may be made without the approval of that elected body. *See Weaver*, 328 S.C. at 86, 492 S.E.2d at 81 (stating "the legislative power to tax may not be conferred on a purely appointive body but must be under the *supervisory control* of elected bodies" (emphasis added)).

The South Carolina Constitution expressly requires a liberal construction of the constitution and laws governing local government, and it provides the "[p]owers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution." S.C. Const. art. VIII, § 17. In this case, there has been no evidence that Richland County Council has been precluded in any way from fully exercising any powers fairly implied and not prohibited by the state constitution, including the power of taxation. Subsection (E)(1) operates as a restriction on the ability of certain special purpose districts to seek or obtain a temporary modification in millage; it does not purport to be a limitation on the powers of a county's governing body. *See* S.C. Code Ann § 6-11-271(E)(1) ("All *special purpose districts* located wholly within a single county . . . are authorized to modify their respective millage limitations, *provided* the same is first approved by the governing body of the district and *by the governing body of the county* . . . ." (emphasis added)).

Moreover, as found by the circuit court, taxpayers in the Recreation District (and in other districts receiving funding under section 6-11-271), do have additional means of recourse if they disagree with any modifications made in millage. Taxpayers may seek a referendum on whether to dissolve a special purpose district or to establish an elected board to govern a special purpose district.[3]

[3] *See* S.C. Code Ann. § 6-11-2020 (2004) (procedure for referendum on dissolution of a special purpose district); *id.* § 6-11-350 (procedure for referendum on whether to elect members of the governing body of a special purpose district).

For all of the foregoing reasons, we conclude Appellant has not shown the circuit court erred in finding Appellant failed to prove section 6-11-271 violates the constitutional prohibition on taxation without representation.

B. Special Legislation

Appellant next contends section 6-11-271 does not affect all counties equally and is, therefore, special legislation that is prohibited by the South Carolina Constitution.

Article III, section 34, provides the General Assembly shall not enact local or special laws concerning an enumerated list of subjects (several specific subjects are set forth therein). S.C. Const. art. III, § 34(I to VII). Section 34 further provides: "In all other cases, where a general law can be made applicable, no special law shall be enacted." *Id.* § 34(IX). However, section 34 additionally states that "[n]othing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." *Id.* § 34(X).

"A general law is one that applies to the entire State and operates wherever the specified conduct takes place." *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 34, 484 S.E.2d 104, 107 (1997). "A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class." *Kizer v. Clark*, 360 S.C. 86, 92, 600 S.E.2d 529, 532 (2004). The overall purpose of the prohibition on special legislation "is to prevent discrimination and to assure that all persons are treated equally." *Thompson v. S.C. Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 471, 229 S.E.2d 718, 722 (1976).

"The language of the Constitution which prohibits a special law where a general law can be made applicable[] plainly implies that there are or may be cases where a special Act will best meet the exigencies of a particular case, and in no wise be promotive of those evils which result from a general and indiscriminate resort to local and special legislation." *Horry Cty. v. Horry Cty. Higher Educ. Comm'n*, 306 S.C. 416, 419, 412 S.E.2d 421, 423 (1991) (quoting *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 90, 284 S.E.2d 395, 400 (1985)). "In other words, the General Assembly must have a 'logical basis and sound reason' for resorting to special legislation." *Id.* (quoting *Gillespie v. Pickens Cty.*, 197 S.C. 217, 225, 14 S.E.2d 900, 904 (1941)).

Appellant highlights the language in subsections (B)(1) and (C)(1)—which state subsections (B) and (C) apply "only to those special purpose districts, the governing bodies of which are not elected"—and argues that, because they apply only to certain classes of special purpose districts in South Carolina (i.e., those with *unelected* governing bodies), the provisions are unconstitutional special legislation. *See* S.C. Code Ann. § 6-11-271(B)(1), (C)(1).

Noting the far-reaching and disruptive effect the lack of funding could have on special purpose districts following *Weaver*, this Court intentionally made the application of the decision prospective only to enable the General Assembly to implement appropriate responsive legislation. We agree with the circuit court that the special purpose districts with unelected governing boards affected by the *Weaver* decision "are clearly a proper class subject to the enactment of uniformly applicable general legislation." As noted by the circuit court, after *Weaver*, "elected special purpose districts, unlike unelected districts such as the Recreation Commission, retained constitutional authority to levy taxes on duly represented constituents." As a result, targeting the special purpose districts with unelected governing boards in section 6-11-271 was a necessary and logical basis on which to make a distinction, and the General Assembly treated all districts with this characteristic as a uniform class.

The General Assembly was clearly justified in its enactment of this remedial legislation, and it did not cross constitutional boundaries. This general legislation affects all special purpose districts with unelected governing bodies throughout the state, so the legislation is applied uniformly to a valid class of entities. As a result, we hold section 6-11-271 is not impermissible special legislation.[4] *See Kizer*, 360 S.C. at 92, 600 S.E.2d at 532 (stating a law that applies uniformly to all things within a proper class is a general law); *cf. Bd. of Trs. for Fairfield Cty. Sch. Dist. v. State*, 409 S.C. 119, 125–26, 761 S.E.2d 241, 245 (2014) (observing "where a special law will best meet the exigencies of a particular situation, it is not unconstitutional" (footnote omitted)).

[4] While Appellant also posits assertions as to S.C. Code Ann. section 6-11-70 (2004) (regarding the election dates for special purpose districts with elected governing bodies), we find this statute is not relevant to his constitutional arguments concerning section 6-11-271 and note it was not pled as a basis for relief in Appellant's complaint.

C. Home Rule

Appellant lastly argues section 6-11-271 is void because it violates Home Rule as set forth in the state constitution and the Home Rule Act. *See generally* S.C. Const. art. VIII, § 7 (organization of counties); S.C. Code Ann. §§ 4-9-10 to -1230 (1986 & Supp. 2019) (Home Rule Act).

Article VIII of the South Carolina Constitution was revised in 1973 and "reflects a serious effort upon the part of the electorate and the General Assembly to restore local government to the county level." *Knight v. Salisbury*, 262 S.C. 565, 568–69, 206 S.E.2d 875, 876 (1974). Section 7 of article VIII required the General Assembly (1) to pass general laws delineating "the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided"; and (2) to set forth no more than five alternative forms of county government. S.C. Const. art. VIII, § 7; *see also* James Lowell Underwood, *The Constitution of South Carolina, Vol. II: The Journey Toward Local Self-Government* 165 (1989) (discussing the impact of the amendment and Home Rule). Section 7 prohibits the enactment of special laws affecting "a specific county": "No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government."[5] S.C. Const. art. VIII, § 7.

The Home Rule Act passed by the General Assembly, which went into effect in 1975, dealt with these issues in a comprehensive manner. Underwood, *supra*, at 165; *see also Graham v. Creel*, 289 S.C. 165, 166, 345 S.E.2d 717, 718 (1986) (stating the General Assembly passed Act No. 288, 1975 S.C. Acts 692, the Home Rule Act, to advance the aims of the 1973 constitutional amendment). The Home Rule Act provides, for example, that counties have the authority "to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided . . . ." S.C. Code Ann. § 4-9-30(5)(a) (Supp. 2019).

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[5] "Historically, the vast majority of special purpose districts in South Carolina were created [by the General Assembly] in order to provide water or sewer services in areas within [a] county," but this power is now given to the counties by article VIII, so "there is no longer a need for special state laws to create this type of district." *Knight*, 262 S.C. at 574, 206 S.E.2d at 878–89.

The circuit court found the Home Rule Act sets forth the organization and powers of county government,[6] but it does not attempt to restrict general legislation regarding special purpose districts. In fact, section 4-9-80 of the Home Rule Act specifically states the Act does not alter the functions of existing special purpose districts or the authority of the General Assembly to pass legislation regarding such districts:

> The provisions of this chapter shall not be construed to devolve any additional powers upon county councils with regard to public service districts, special purpose districts, water and sewer authorities, or other political subdivisions by whatever name designated, (which are in existence on the date one of the forms of government provided for in this chapter becomes effective in a particular county) and such political subdivisions shall continue to perform their statutory functions prescribed in laws creating such districts or authorities except as they may be modified by act of the General Assembly . . . .

S.C. Code Ann. § 4-9-80 (1986).

The circuit court observed that, in section 6-11-271, "the General Assembly merely enacted another general law regarding this form of local government." The circuit court concluded, "The Home Rule Act does not affect the [General Assembly's] authority to enact such general laws affecting special purpose districts. Likewise, the Home Rule constitutional amendment, Art. VIII, § 7, allows the General Assembly to enact general legislation affecting existing special purpose districts."

Appellant summarily argues that this Court has held the Home Rule Act's prohibition on special legislation does not operate retroactively to abolish all special legislation that was in effect prior to the enactment of the Home Rule Act, but it does void special legislation passed thereafter, citing *Graham*.[7] Appellant maintains

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[6] *See* S.C. Code Ann. § 4-9-310 (1986) (outlining the authority of alternative forms of county government).

[7] *See Graham*, 289 S.C. at 168, 345 S.E.2d at 719 ("The Home Rule Act, while preventing the General Assembly from enacting 'special legislation' and voiding any

section 6-11-271 violates the Home Rule Act and is unconstitutional and thus, void, because under Home Rule the governing and taxing power for Richland County is found in the elected members of its county council, not special legislation that affects only a specific county.

The wording in *Graham* was a recognition that a particular county cannot be singled out for exemption from the general law. We agree with the circuit court that in section 6-11-271, the General Assembly simply enacted a general law regarding special purpose districts, and Home Rule does not restrict the power of the General Assembly to enact general laws governing existing special purpose districts. We find the statute does not affect only a particular county (or district), as alleged by Appellant, because it applies to a broad class of districts having similar characteristics. Moreover, contrary to Appellant's contention, the Richland County Council does retain its authority over taxation, as no modification in millage can be made by the Recreation District without its approval, as previously discussed in Section III(A) of this opinion. Consequently, section 6-11-271 does not violate the provisions of Home Rule.

IV. CONCLUSION

Appellant has failed to show the circuit court erred in its analysis or its determination that section 6-11-271 does not violate the constitutional prohibitions on taxation without representation and special legislation, nor does it violate Home Rule. As a result, we affirm the order of the circuit court.

AFFIRMED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

'special legislation' which contradicts the general law, does not operate retroactively to abolish all 'special legislation' which was in effect in South Carolina prior to the enactment of the Home Rule Act.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Sha'quille Washington, Petitioner.

Appellate Case No. 2018-001878

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27992
Heard March 11, 2020 – Filed September 2, 2020

AFFIRMED IN PART, VACATED IN PART, REVERSED IN PART, AND REMANDED

Jack B. Swerling, of Columbia, and Katherine Carruth Goode, of Winnsboro, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General David A. Spencer, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

JUSTICE JAMES: Sha'quille Washington ("Petitioner") was indicted for the murder of Herman Manigault and was convicted of the lesser included offense of voluntary manslaughter. The court of appeals affirmed Petitioner's conviction. *State v. Washington*, 424 S.C. 374, 818 S.E.2d 459 (Ct. App. 2018). We granted Petitioner's petition for a writ of certiorari to review the court of appeals' decision. We hold the trial court erred in giving an accomplice liability instruction, and we hold Petitioner was prejudiced by this error. Therefore, we affirm in part, vacate in part, and reverse in part, and we remand to the circuit court for a new trial on the charge of voluntary manslaughter.

I. Factual and Procedural History

On August 25, 2013, a large crowd gathered at "A Place in the Woods," a nightclub in Huger, South Carolina. Herman "Trey" Manigault (the victim in this case) and his cousin, Larry Jenkins, were among those present. According to trial testimony, Manigault told multiple people that Petitioner and Larry Kinloch, Petitioner's uncle, were following him around the establishment and staring him down. Arianna Coakley, Manigault's girlfriend, testified Manigault told her he was about to "snap" because Petitioner kept looking at him. Aja Williams, the bartender, testified Manigault said to her, "[Kinloch] going to shoot me, they going to kill me."

At closing time, a multitude of club patrons, including Manigault, Jenkins, Kinloch, and Petitioner, exited the building to the parking lot. A fight ensued in the parking lot. Testimony as to the participants in the fight, the specifics of the fight, and the shooting of Manigault varied greatly between the State's witnesses, Petitioner's witnesses, and Petitioner's statement to law enforcement.

Jenkins testified he joined the fight after at least two people hit Manigault. He could not identify who those two people were, but he testified Petitioner was "out there" during the fight. Jenkins testified he heard gunshots near the end of the fight. He checked himself for wounds and saw Manigault on the ground. Jenkins testified he saw Petitioner holding a small silver revolver in his right hand and firing towards Manigault. He testified he was 100% sure Petitioner shot Manigault.

Ms. Coakley testified that moments before the shooting, Petitioner said something to Manigault. Coakley testified Manigault responded by asking Petitioner, "what's up" and Petitioner struck Manigault with his left hand. Coakley testified Manigault slid towards the ground and Petitioner continued to hit him. Coakley said she raised a glass beer bottle to hit Petitioner but backed down when

Petitioner held a gun to her face and said, "I ain't playing, I ain't playing." Coakley testified Petitioner turned and ran, and then she heard four gunshots.

Petitioner's written statement to the police was read to the jury. Petitioner stated he arrived at the club around 2:00 a.m. and spoke to "a few ladies." He stated he walked outside, heard a commotion, and saw three people fighting. According to Petitioner, "the victim" (presumably Manigault) walked off, and an unknown person Petitioner termed "the suspect" fired a shot from a revolver at Manigault. Petitioner said he was four to five feet away from them at this point. Petitioner stated he was several feet further away from them when he heard two more shots. Petitioner stated he called the police the next morning to give a statement and clear his name after his grandmother informed him people accused him of shooting Manigault.

Kinloch testified for the State and initially denied any participation in the fight, but he eventually described his involvement as holding onto Larry Jenkins without throwing any punches. During its questioning of Kinloch, the State played a nine-minute post-shooting recorded phone conversation between Kinloch and his incarcerated brother Patrick. The solicitor quoted portions of the call while questioning Kinloch, but neither the recording nor a transcript of it was introduced into evidence. Kinloch, clearly a reluctant witness, testified he did not remember the phone call, and he did not respond to many of the solicitor's questions about the call. Apparently, Kinloch told his brother he initially fought a big, "light-skinned dude" (probably Jenkins) and then "got [Manigault] on the car. Me and him going back and forth. Dow, dow, dow [referring to three gunshots]." Kinloch also apparently told his brother he saw Petitioner shoot Manigault.

During cross-examination, Petitioner pressed Kinloch to admit he was the one who shot Manigault. Kinloch denied he shot Manigault. Petitioner asked Kinloch if he told Kenneth Quinton Grant and Darlene Washington (presumably Petitioner's grandmother) he shot Manigault. Kinloch denied this as well.

Petitioner called Erin Presnell, M.D., the forensic pathologist who conducted Manigault's autopsy, to testify as to Manigault's blood alcohol content at the time of autopsy. Before the jury, Petitioner asked Dr. Presnell, "What was the alcohol level --," and the State interjected, "Objection, Your Honor. 404," obviously a reference to Rule 404 of the South Carolina Rules of Evidence. The trial court then held an

off-the-record bench conference[1] to discuss the issue. The trial court then excused the jury and sustained the State's objection, explaining, "There has been abundant testimony as to the fact that there was drinking or not drinking by the victim, and so I have excluded this testimony, but you may continue [with a proffer of the testimony]." During the proffer, Dr. Presnell testified Manigault "had a blood-alcohol level of .235," which she categorized as "high." She testified that while she "imagined" Manigault "acted intoxicated," she could not give an opinion as to "whether he was aggressive or subdued or what his actual mannerisms were." She testified such a high blood alcohol level could have resulted in impaired judgment. The record contains no argument from the parties as to why the testimony was or was not admissible, and the trial court did not further explain its ruling. The State argued to the court of appeals that the context of the trial court's ruling made it clear the trial court excluded the testimony as irrelevant under Rule 402, SCRE. The court of appeals held the testimony was irrelevant and further held that even if it was relevant, any probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. *Washington*, 424 S.C. at 406-07, 818 S.E.2d at 476. The court of appeals also held that even if the trial court erred in excluding the testimony, Petitioner suffered no prejudice because the jury found Petitioner guilty of only voluntary manslaughter, which carried with it a finding Petitioner acted with sufficient legal provocation. *Id.* at 407, 818 S.E.2d at 476.

Petitioner called Kevin Watson to testify, but the trial court refused to allow him to testify after concluding he disobeyed a pre-trial sequestration order. Three other witnesses called by Petitioner were Robin Williams, Tyson Singleton, and Kenneth Quinton Grant. Robin Williams testified she was talking to her cousin as they walked out of the club at closing time when she heard "a lot of fussing" and saw a young lady holding a glass bottle in Petitioner's face. According to Robin Williams, there was a van parked nearby. She testified there was a fight taking place on one side of the van, and Petitioner and the young lady were on the other side of the van. She testified Petitioner "never had a gun." She also testified she heard two gunshots about five seconds after she saw the lady holding the bottle in Petitioner's face and Petitioner "ran on the second shot." She testified she then heard two more

[1] During this trial, the trial court held over twenty off-the-record bench conferences after evidentiary objections had been made. After most of these conferences, neither the arguments of counsel nor the bases for the trial court's rulings were put on the record.

shots about three seconds apart but Petitioner was not anywhere near where those two shots were fired.

Tyson Singleton testified he was talking to Robin Williams in the parking lot when he heard three shots fired in the parking lot. He testified he did not see who fired the shots because a van blocked his view. He testified he saw Petitioner "in the road" next to some woods before the first shot was fired and Petitioner was nowhere near where any of the shots were fired. He also testified he saw Kinloch inside the club before closing time but did not see him in the parking lot after closing.

Petitioner called Kenneth Quinton Grant, Petitioner's second cousin and—according to Grant—Kinloch's best friend, to testify about a conversation Grant claimed he had with Kinloch after the shooting. Grant testified he was not present at the club when the shooting occurred; however, he testified he saw Kinloch at Kinloch's house twenty to twenty-five minutes after the shooting, and Kinloch admitted to him he shot Manigault. The State objected on hearsay grounds, and the trial court asked Petitioner if there was an exception to the hearsay rule that would allow the testimony. Petitioner responded, "[Kinloch] already testified. My God." Petitioner also argued Kinloch's statement to Grant qualified as a present sense impression under Rule 803(1), SCRE. The trial court sustained the State's hearsay objection and instructed the jury to disregard Grant's statement. Despite this ruling, Petitioner again asked Grant whether Kinloch admitted to shooting Manigault, and Grant confirmed. The State again objected, and the trial court again sustained the objection and instructed the jury to disregard the testimony.[2] Before the court of appeals, Petitioner argued Kinloch's admission to Grant was a prior inconsistent statement and therefore admissible as non-hearsay under Rule 801(d)(1)(A), SCRE.

During the charge conference, the State first argued it was entitled to an accomplice liability instruction because the defense tried to suggest Kinloch shot Manigault. The State argued to the trial court, "I don't believe there's any evidence

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[2] While this is not an issue in this appeal, during his cross-examination of Grant, the solicitor repeatedly challenged the veracity of Grant's testimony by referring to pre-trial conversations the two had about Grant's account. Since we remand this case for a new trial, we are compelled to note the court of appeals' well-reasoned holding in *State v. Sierra*, 337 S.C. 368, 379, 523 S.E.2d 187, 192 (Ct. App. 1999), that it is generally improper for the prosecutor to impeach a witness by referring to out-of-court statements allegedly made by that witness to the prosecutor.

in the record that Larry Kinloch was the shooter, but there's certainly been multiple indications from the defense during this trial that he was." The "multiple indications" referred to by the State presumably consisted of (1) Petitioner's unsuccessful attempts to introduce Grant's testimony that Kinloch told Grant he shot Manigault and (2) Petitioner's cross-examination of Kinloch during which Petitioner pressed Kinloch (a) to admit he told Grant and Darlene Washington he shot Manigault and (b) to admit he was known on the streets as the shooter. The State also argued that if a person is involved in an altercation, a defendant who participates in the altercation is criminally responsible for the end result. On this point, the State argued, "even if it was Larry Kinloch that ultimately did shoot the victim in this case, the defendant was part of the assault." Petitioner acknowledged he tried to introduce Grant's testimony that Kinloch told him he was the shooter, but Petitioner noted the trial court sustained the State's objections and instructed the jury to disregard Grant's testimony on that issue.

Over Petitioner's objection, the trial court charged the jury on accomplice liability. Two hours into deliberations, the jury asked the trial court for clarification of the law on reasonable doubt, accomplice liability, and voluntary manslaughter. A copy of the question is in the record, but the record does not reflect whether the trial court responded. Three hours later, the jury sent a note to the trial court stating it was deadlocked. The trial court gave the jury an *Allen* charge[3] and adjourned for the evening. Three hours into deliberations the next morning, the jury asked the trial court its second question, "Can we use [accomplice liability] to support legal provocation for parties acting in concert with victim? Would parties acting in concert with the victim constitute sufficient legal provocation towards actions against victim?" The trial court responded in writing, "You have been given all instructions on the law in my charge to you. Please continue your deliberations." Approximately two hours after its second question, the jury found Washington not guilty of murder but guilty of the lesser included offense of voluntary manslaughter.

Petitioner appealed and presented six arguments to the court of appeals: (1) the trial court erred in excluding Kenneth Quinton Grant's testimony on hearsay grounds; (2) the trial court erred in excluding Dr. Presnell's testimony; (3) the trial court erred in excluding the testimony of Kevin Watson; (4) the trial court erred in

[3] *Allen v. United States*, 164 U.S. 492, 501-02 (1896) (allowing a supplemental jury instruction given by the trial judge to encourage a deadlocked jury to reach an agreement).

refusing to charge self-defense; (5) the trial court erred in instructing the jury on the theory of accomplice liability; and (6) the trial court erred in giving the jury an *Allen* charge. The court of appeals affirmed. *State v. Washington*, 424 S.C. 374, 818 S.E.2d 459 (Ct. App. 2018). This Court granted Petitioner a writ of certiorari on all issues except for the propriety of the *Allen* charge. As we will explain, the trial court erred in instructing the jury on accomplice liability, and Petitioner was prejudiced by this error. We therefore reverse Petitioner's conviction for voluntary manslaughter and remand to the circuit court for a new trial on that charge.

II. Discussion

A. Exclusion of Grant's Testimony

To give clear context to our holding that the trial court erred in instructing the jury on accomplice liability, we must first review the trial court's exclusion of the testimony of defense witness Kenneth Quinton Grant. Petitioner sought to elicit Grant's testimony that twenty to twenty-five minutes after the shooting, Kinloch told Grant he shot Manigault. However, the trial court excluded the testimony as inadmissible hearsay. Petitioner argues Kinloch's alleged statement to Grant that he shot Manigault was admissible as a prior inconsistent statement under Rule 801(d)(1)(A), SCRE. Petitioner also argues Kinloch's alleged statement to Grant satisfies both the present sense impression (Rule 803(1), SCRE) and excited utterance (Rule 803(2), SCRE) exceptions to the rule against 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. Under Rule 801(d)(1)(A), a prior inconsistent statement of a witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is [] inconsistent with the declarant's testimony." Here, Kinloch was the "witness" and the "declarant" referenced in Rule 801.

When the State objected on hearsay grounds to Grant's testimony about Kinloch's statement to him, the trial court asked defense counsel, "Is there an exception?" Defense counsel responded, "[Kinloch] already testified. My God." The trial court sustained the objection but suggested defense counsel might be able to ask the question without eliciting hearsay. Defense counsel then asked Grant, "[Kinloch] said he did it?" The State again objected on hearsay grounds, and the trial court held an off-the-record bench conference, sustained the objection, and

instructed the jury to disregard Grant's testimony on the point. Immediately afterwards, there was another bench conference. Then, defense counsel resumed questioning and again asked Grant if Kinloch told him he shot Manigault. After Grant answered in the affirmative, the trial court again sustained the State's hearsay objection and again instructed the jury to disregard the testimony. There is no record of the substance of the arguments or rulings that took place during these conferences.

The court of appeals questioned whether Petitioner's prior inconsistent statement argument is preserved for appellate review. *Washington*, 424 S.C. at 396-97, 818 S.E.2d at 471. The court of appeals correctly noted the importance of parties placing their arguments on the record to preserve them for appellate review and then concluded that even if the Rule 801(d)(1)(A) issue was preserved, the trial court did not abuse its discretion in excluding Grant's testimony because Petitioner had not laid a proper foundation under Rule 613(b), SCRE, while questioning Kinloch. *Id.* at 397-98, 818 S.E.2d at 471-72. We hold defense counsel's statement to the trial court that "[Kinloch] already testified. My God" did not preserve for appellate review the argument Kinloch's alleged statement was a prior inconsistent statement and therefore not hearsay under Rule 801(d)(1)(A). *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). Consequently, we do not reach the issue of whether Petitioner laid a proper foundation under Rule 613(b) for the admissibility of Kinloch's prior inconsistent statement to Grant, and we vacate the portion of the court of appeals' opinion addressing the Rule 613(b) foundational issue.[4] Our holding on this issue shall not

[4] In many instances, bench conferences are necessary, and here, the trial court was attempting to maintain the flow of the trial by holding bench conferences instead of repeatedly sending the jury out of the courtroom. Even so, we stress the importance of placing on the record arguments and rulings that took place off the record, whether during a bench conference, in emails, or in chambers. As the court of appeals noted, "When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record." *Washington*, 424 S.C at 397, 818 S.E.2d at 471 (quoting *Smalls v. State*, 422 S.C. 174, 182 n.3, 810 S.E.2d 836, 840 n.3 (2018)). We also note that on remand, it is possible Rule 801(d)(1)(A) and Rule 613(b) can be properly employed to warrant the introduction of Kinloch's alleged statements to Grant and Darlene Washington. Ironically, if

preclude Petitioner, during retrial, from seeking admission of Kinloch's alleged statement to Grant under Rule 801(d)(1)(A) and Rule 613(b).

Petitioner also contends the court of appeals erred in affirming the trial court's ruling that Kinloch's alleged statement to Grant was not admissible under the present sense impression exception to the rule against hearsay. We agree with the court of appeals' analysis of this issue[5] and therefore affirm. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law[.]" *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

Likewise, we agree with the court of appeals' rejection of Petitioner's argument that Kinloch's alleged statement to Grant was admissible under the excited utterance exception to the rule against hearsay. *Washington*, 424 S.C. at 401-04, 818 S.E.2d at 473-74.

B. Accomplice Liability Jury Instruction

Over Petitioner's objection, the trial court instructed the jury on the theory of accomplice liability, also known as the theory of "the hand of one is the hand of all." The instruction consisted of the following points: a person who joins with another to commit a crime is criminally responsible for everything done by the other person which happens as a natural and probable consequence of the act; if two or more are together, acting together, and assisting each other in committing the offense, all are guilty; a finding of a prior arranged plan or scheme is necessary for criminal liability to attach to the accomplice who does not directly commit the criminal act; when an act is done in the presence of and with the assistance of others, the act is done by all. The foregoing is not the complete instruction given by the trial court, but it conveys the gist of the accomplice liability theory. Assuming an accomplice liability instruction was appropriate in this case, the instruction given by the trial court was correct.

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extrinsic evidence of Kinloch's alleged statement is introduced, it could render moot the dispute over the accomplice liability instruction.

[5] *See Washington*, 424 S.C. at 399-401, 818 S.E.2d at 472-73.

The court of appeals held the trial court did not err in giving the accomplice liability instruction because "there was evidence presented at trial that could support a finding that Washington had an accomplice who was the shooter." *Washington*, 424 S.C. at 420, 818 S.E.2d at 483. The court of appeals observed that aside from evidence both Petitioner and Kinloch joined together to assault Manigault, there was evidence both Petitioner and Kinloch followed Manigault around the club that night. The court of appeals also cited witness testimony that Manigault and Kinloch were "fussing," and witness testimony that Petitioner was not anywhere near the fight when the shots were fired. Thus, according to the court of appeals, "there was equivocal evidence as to who shot [Manigault], and from which the jury could have found [Petitioner]'s accomplice was the shooter." *Id.* at 421, 818 S.E.2d at 484.

For an accomplice liability instruction to be warranted, the evidence must be "equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In this case, there was evidence Petitioner was the shooter. There was also evidence Petitioner was not the shooter. The question becomes whether there was equivocal evidence the shooter, if not Petitioner, was an accomplice of Petitioner. Based on the evidence presented in this case, Kinloch is the only possible person who could fall into the category of Petitioner's accomplice. Therefore, if the record contains no evidence Kinloch was the shooter, then the accomplice liability instruction should not have been given.

The State argues Ariana Coakley's testimony that Manigault told her, "[Kinloch] going to shoot me, they going to kill me" was evidence from which a jury could conclude Kinloch was the shooter. We disagree, as this statement was not evidence Kinloch ultimately did shoot Manigault.

The State contends the testimony of Robin Williams and Tyson Singleton that they saw Petitioner running unarmed from the scene as shots were fired elsewhere creates an inference that someone other than Petitioner was the shooter. That is certainly true, but their testimony does not create any inference Kinloch—again, the only possible accomplice of Petitioner—was the shooter.

The State argues Kinloch admitted to his brother during the jailhouse telephone conversation that he was "strapped"—armed with a firearm—while at the club. We disagree with the State's characterization of the conversation. First, there is nothing in the record defining the term "strapped." Even if the term means

"armed," all we can glean from the record is that Kinloch told his brother Petitioner was strapped, and then said to his brother, "[y]ou know how we do." There is no evidence Kinloch told his brother he was armed the night of the shooting.

The State also contends Petitioner's aggressive cross-examination of Kinloch constituted evidence Kinloch could have been the shooter. The State points to Petitioner asking Kinloch on cross-examination to admit he—Kinloch—told Grant and Darlene Washington he was armed with a .357 Magnum and that he told both of them he shot Manigault. Kinloch denied these assertions. Similarly, Petitioner asked Kinloch to admit he—Kinloch—had been described "in the streets" as the shooter. Kinloch denied that assertion as well. While Petitioner very aggressively cross-examined Kinloch, the fact remains that counsel's questions and accusations were not evidence. Kinloch's refusal to admit to the statements and conduct attributed to him does not constitute evidence upon which the jury could rely to determine Kinloch was armed or that he was the shooter. Otherwise, the jury would be allowed to engage in speculation.

The State contends our reasoning in *Barber v. State*, 393 S.C. 232, 712 S.E.2d 436 (2011), supports its position that an accomplice liability instruction was proper in this case. We disagree. In *Barber*, the State presented evidence that Barber and three accomplices (Kimbrell, Walker, and Kiser) conspired to rob a drug dealer. The three accomplices testified Kimbrell remained outside the dealer's house while Barber, Kiser, and Walker went inside to do the deed. The accomplices testified Barber was armed with a .380 handgun, Kiser was armed with a rifle, and Walker was unarmed. The State also presented testimony that Kiser was the shortest of the three men who entered the dwelling. One of the robbers shot and killed the dealer and shot and wounded another man. Expert testimony established the shots fired inside the dwelling were from a .380 handgun. Two eyewitnesses inside the dwelling testified they could not identify the three intruders because the intruders' faces were covered. However, Barber elicited testimony that the shortest intruder (inferably Kiser) was armed with a rifle and that *both* of the other two intruders were armed with .380 handguns. *Id*. at 237, 712 S.E.2d at 439. This testimony placed a .380 handgun in Walker's hands, thus supporting the conclusion that either Walker or Barber was the shooter.

In *Barber*, we noted the propriety of an accomplice liability charge depended upon "whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." *Id.* We held an accomplice liability instruction was warranted because "the sum of the evidence

presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E.2d at 439.

On the record before us, Kinloch was the only person who could have been Petitioner's accomplice. There was evidence Kinloch and Petitioner acted in concert in following Manigault around the club and giving him dirty looks, there was evidence Petitioner and Kinloch (and others) fought with Manigault and Jenkins, and there was evidence Petitioner shot Manigault. However, for an accomplice liability instruction to have been warranted, there must be some evidence in the record that Kinloch shot Manigault. In *Barber*, there was evidence Barber shot the victims, and there was evidence Barber's accomplice, Walker, shot the victims. Here, there was no evidence Kinloch was armed with a firearm, and there was no evidence Kinloch shot Manigault. Kinloch was aggressively questioned as to whether he was armed and whether he shot Manigault. He denied both assertions. Was Kinloch telling the truth? Perhaps not. However, as we observed in *Barber*, an alternate theory of liability may not be charged to a jury "merely on the theory the jury may believe some of the evidence and disbelieve other evidence." 393 S.C. at 236, 712 S.E.2d at 438.

Wilds v. State, 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014), supports Petitioner's contention that an accomplice liability instruction was not proper. In *Wilds*, evidence was presented that Wilds and two confederates were walking down a street when Wilds spotted the victim and told his confederates he was going to rob the victim. The two confederates testified Wilds stopped to talk to the victim while they kept walking. They testified Wilds pulled a gun on the victim and demanded his wallet. Wilds then ordered his two confederates to beat the victim. They proceeded to do so, and Wilds shot the victim in the chest. *Id.* at 435-36, 756 S.E.2d at 388-89. In holding an accomplice liability instruction was improper, the court of appeals noted there was no evidence presented that anyone other than Wilds was the shooter and that his two confederates did not join in the robbery until after Wilds pulled a gun on the victim. *Id.* at 439-40, 756 S.E.2d at 390-91. The court of appeals observed, "Although the jury may have had doubts about [the two confederates'] testimony, an alternate theory of liability, such as accomplice liability, 'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" *Id.* at 439, 756 S.E.2d at 390 (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 438).

Here, as in *Wilds*, the jury certainly may have doubted Kinloch's testimony that he did not shoot Manigault. However, since Kinloch was the only possible

accomplice of Petitioner whose actions could result in criminal liability for Petitioner, there must be some evidence Kinloch shot Manigault. There was none.

The State also maintains the accomplice liability instruction was a proper "remedial instruction" in response to Petitioner's efforts to introduce inadmissible hearsay evidence from Grant that Kinloch told him he shot Manigault. There is no authority for the proposition that a "remedial" jury instruction may be given just in case a jury might consider evidence it has been specifically instructed by the trial court to disregard. Each time Grant testified Kinloch told Grant he shot Manigault, the trial court sustained the State's objection, ordered the testimony stricken, and instructed the jury to disregard it. Subsequently, the trial court began its instructions to the jury with this admonition:

> You are to consider only the evidence before you. If there was any testimony ordered stricken from the record, you must disregard that testimony. Mr. Foreperson, as I instructed you, you are not to allow any testimony that was stricken from the record to even be discussed in deliberations.

In a slightly different context, we have held that "[i]f the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996). Similarly, we have observed, "[a]n instruction to disregard incompetent evidence is usually deemed to have cured the error. Moreover, jurors are presumed to follow the law as instructed to them." *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (internal citations omitted). In this case, the jury was presumed to have followed the trial court's instruction to disregard Grant's testimony. We therefore reject the State's argument that the accomplice liability instruction was a proper "remedial instruction."

We also hold the trial court's accomplice liability instruction prejudiced Petitioner. The evidence that Petitioner shot Manigault was not overwhelming, as several witnesses testified Petitioner was not armed and was not in the immediate area where the shooting occurred. The insertion of the accomplice liability charge into the case invited the jury to speculate whether Kinloch—the only possible

accomplice of Petitioner—shot Manigault, when there was no evidence Kinloch was the shooter.[6]

C. Remaining Issues

The court of appeals affirmed the trial court's refusal to give a self-defense instruction. *Washington*, 424 S.C. at 410-15, 818 S.E.2d at 478-81. We affirm the court of appeals. Of course, if the evidentiary landscape changes during re-trial, the trial court shall follow the settled principle that "[t]he law to be charged to the jury is determined by the evidence presented at trial." *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008).

The court of appeals affirmed the trial court's exclusion of Dr. Presnell's testimony regarding Manigault's blood alcohol level. *Washington*, 424 S.C. at 404-07, 818 S.E.2d at 474-76. Based upon the record before us, we affirm the court of appeals on this issue. However, on remand, the trial court shall consider the evidence as presented at that time and shall rule accordingly.

The court of appeals also affirmed the trial court's exclusion of the testimony of Kevin Watson. *Id.* at 407-10, 818 S.E.2d at 476-78. We find no error in the trial court's ruling and therefore affirm the court of appeals on this issue.

III. Conclusion

For the foregoing reasons, we reverse Petitioner's conviction for voluntary manslaughter and remand for a new trial on that charge.

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[6] Our determination of prejudice does not turn upon the fact that the jury asked two questions about accomplice liability. However, the questions merit mention. In its first question, the jury asked the trial court for clarification of the law of reasonable doubt, accomplice liability, and voluntary manslaughter. The record does not reflect the trial court's response, if any. In its second question, the jury asked the trial court if it could apply the theory of accomplice liability to parties acting in concert with Manigault, the victim. The trial court advised the jury it had been fully instructed on the law. The second question indicates the jury did not fully understand the accomplice liability theory, which has no application to those acting in concert with a victim.

AFFIRMED IN PART, VACATED IN PART, REVERSED IN PART, AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, JJ., and Acting Justice D. Garrison Hill, concur.