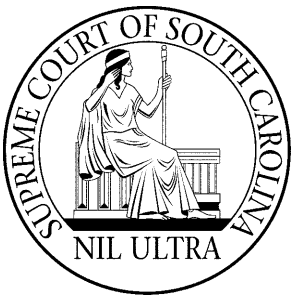

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40
October 25, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Shawn Lee Wyatt, Petitioner.

Appellate Case No. 2016-001303

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lancaster County
DeAndrea G. Benjamin, Trial Court Judge

Opinion No. 27743
Heard June 14, 2017 – Filed October 25, 2017

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General William M. Blitch Jr., both of Columbia, and Solicitor Randy E. Newman Jr., of Lancaster, for Respondent.

JUSTICE FEW: Shawn Lee Wyatt appeals his convictions for attempting to furnish contraband to a prisoner and possession with intent to distribute cocaine, cocaine base, and marijuana. He argues the trial court erred by not suppressing two eyewitness identifications. We affirm the trial court's decision not to suppress the primary identification. We find, however, the police identification procedure was not *unnecessarily* suggestive, and thus the trial court should have addressed

the suppression question only under the first prong of *Neil v. Biggers*.[1] As to the other identification, we find no error. We affirm Wyatt's convictions.

I. Facts and Procedural History

At approximately 5:45 a.m. on July 12, 2013, Kershaw Correctional Institute Officer Joe Schnettler was at his post in a watch tower when he observed a man run from the woods to the fence surrounding the prison. Schnettler watched the man throw eight packages over the fence, and then run back into the woods. During the incident—which lasted no more than thirty seconds—Schnettler radioed other prison officers and announced each time the man threw another package over the fence. Schnettler estimated his distance from the man to be eighty or ninety yards. After the incident, Schnettler described the suspect as a "white man" wearing "long jean shorts and a dark shirt."

A few minutes later, Kershaw Correctional Institute Officer Brenda Lippe was driving to work when she passed a man walking away from the prison on Highway 601.[2] When Lippe arrived at work, she heard about the incident at the fence, and told the correctional officer in charge of contraband, Corporal Christopher Hunt, she had seen a man walking away from the prison on Highway 601. She described him as "a light skinned black gentleman with a nice neat haircut, black shirt and . . . charcoal-colored shorts."

The correctional officers informed the Lancaster County Sheriff's Office that there was a "black male wearing a black shirt and jean shorts" walking on Highway 601 who may have been involved with a contraband incident at the prison. At approximately 6:00 a.m., Deputy Charles Kirkley saw Wyatt walking along Highway 601. Kirkley stopped Wyatt and asked for his identification. Kirkley then informed Hunt he found the suspect.

Hunt and Schnettler left the prison and drove to the side of the road where Kirkley was holding Wyatt. Schnettler asked Kirkley to let Wyatt out of the car so he could see Wyatt standing up. After looking at him, Schnettler said, "Yeah, that's the guy I saw." When asked at trial "what about the appearance of that man enabled you to say that," Schnettler testified it was the "clothing he was wearing

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[1] 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

[2] Kershaw Correctional Institution is located on Highway 601.

and how light the skin was on his legs." Schnettler stated, "The skin color of his legs looked different" because his calves were "shiny."

Kirkley put Wyatt back in the patrol car and drove to the prison so Lippe could identify him. When they arrived, Kirkley, Hunt, and Wyatt got out of the car and stood next to it. Lippe—who was in a watch tower forty or fifty yards away—positively identified Wyatt as the man she had seen walking on Highway 601 a few minutes earlier.

The contents of the packages thrown over the fence were tested and determined to be powder cocaine, cocaine base,[3] and marijuana. Based on the identifications made by Schnettler and Lippe, the State charged Wyatt with attempting to furnish contraband to a prisoner, possession with intent to distribute cocaine, possession with intent to distribute cocaine base, and possession with intent to distribute marijuana.

Prior to trial, Wyatt moved to suppress the identifications. The State argued against suppression under both prongs of *Biggers*. However, the trial court analyzed only the second prong, and found the "procedures used in this arrest did not create a substantial likelihood of irreparable misidentification." The court denied Wyatt's motion to suppress. The jury convicted Wyatt of all charges, and the trial court sentenced him to ten years in prison. The court of appeals affirmed Wyatt's conviction in an unpublished opinion. *State v. Wyatt*, Op. No. 2016-UP-162 (S.C. Ct. App. filed Apr. 6, 2016). We granted Wyatt's petition for a writ of certiorari.

II. Identification Evidence

When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-pronged inquiry to determine whether due process requires suppression. *Biggers*, 409 U.S. at 198-200, 93 S. Ct. at 381-82, 34 L. Ed. 2d at 410-11; *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). First, the court must determine whether the identification resulted from "unnecessarily suggestive" police identification procedures. *Biggers*, 409 U.S. at 198-99, 93 S. Ct. at 381-82, 34 L. Ed. 2d at 410-11; *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. The Supreme Court of the United States has repeatedly emphasized "that due

[3] *See* S.C. Code Ann. § 44-53-110(9) (Supp. 2016) ("Cocaine base is commonly referred to as 'rock' or 'crack cocaine.'").

process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v. New Hampshire*, 565 U.S. 228, 238-39, 132 S. Ct. 716, 724, 181 L. Ed. 2d 694, 707 (2012) (citing *Manson v. Braithwaite*, 432 U.S. 98, 107, 109, 97 S. Ct. 2243, 2249, 2250, 53 L. Ed. 2d 140, 149, 151 (1977), and *Biggers*, 409 U.S. at 198, 93 S. Ct. at 382, 34 L. Ed. 2d at 411); *see also Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (describing the trial court's task under the first prong as determining "whether the identification resulted from unnecessary and unduly suggestive police procedures"). If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong. *See United States v. Sanders*, 708 F.3d 976, 984 (7th Cir. 2013) (citing *Perry* for the proposition that "courts will only consider the second prong if a challenged procedure does not pass muster under the first"); *State v. Dukes*, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013) (same).

If, however, the court determines the procedures were both suggestive and unnecessary, the court must then determine "whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 198-99, 93 S. Ct. at 382, 34 L. Ed. 2d at 411).

As the Supreme Court stated in *Perry*, "Only when [the] evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' have we imposed a constraint [on admissibility] tied to the Due Process Clause." 565 U.S. at 237, 132 S. Ct. at 723, 181 L. Ed. 2d at 706 (quoting *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 674, 107 L. Ed. 2d 708, 720 (1990)).

Wyatt argues the trial court erred by not suppressing Schnettler's and Lippe's identifications because the procedures used were unnecessarily suggestive and created a substantial likelihood of misidentification. We address each identification separately.

A. Schnettler's Identification

Schnettler's identification of Wyatt occurred during a single person showup procedure, which is where police present a single suspect to an eyewitness for possible identification. The showup procedure here took place near the prison property approximately fifteen minutes after the crime was committed.

1. Suggestiveness

Wyatt argues the State conceded the first prong of *Biggers* during the suppression hearing. The State counters that it conceded single person showup procedures are suggestive, but never conceded the procedure was unnecessary under the circumstances. During his argument against Wyatt's motion to suppress, the solicitor stated, "Your Honor, I concede that the showup procedure is suggestive, I think it's inherently suggestive, that doesn't mean that it's automatically a cause for suppression." The solicitor continued,

> I think one thing you have to think about in this case is these are not civilian witnesses who are called upon to identify somebody who might be a suspect in the crime. These are trained law enforcement officers who as Officer Schnettler said are taught, number one, to observe and record information mentally and then to report the information so that correct procedures can be undertaken to resolve the situation that has occurred.

We read the State's concession that the procedures were "inherently suggestive" not to concede its position under the first prong of *Biggers*, but rather to frame its argument on the question of necessity. The ensuing argument that the witnesses were "trained law enforcement officers" who have a duty "to report the information so that *correct procedures* can be undertaken *to resolve the situation* that has occurred" is an argument about the necessity of the procedures. Therefore, although the State conceded the police procedures were suggestive—and we agree—the analysis under the first prong is not complete without considering the necessity of the procedures.

2. Necessity

In *Perry*, the Supreme Court illustrated the necessity requirement by discussing *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). The *Perry* Court explained that in *Stovall* the police performed a showup procedure by bringing the defendant to the witness's hospital room. 565 U.S. at 237-38, 132 S. Ct. at 724, 181 L. Ed. 2d at 706. "The witness was the only person who could identify or exonerate the defendant; the witness could not leave her hospital room; and it was uncertain whether she would live to identify the defendant in more neutral circumstances." 565 U.S. at 238, 132 S. Ct. at 724, 181 L. Ed. 2d at 706. The *Perry* Court explained its analysis from *Stovall*, "Although the police-arranged

showup was undeniably suggestive, the Court held that no due process violation occurred. Crucial to the Court's decision was the procedure's necessity . . . ." *Id.*[4]

In *Gibbs v. State*, 403 S.C. 484, 744 S.E.2d 170 (2013), we explained other situations in which the circumstances may make suggestive police identification procedures necessary:

> where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.

403 S.C. at 494, 744 S.E.2d at 175 (quoting *State v. Mansfield*, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000)).

We find the showup procedure used for Schnettler's identification was necessary under the circumstances. First, Kirkley found Wyatt walking on Highway 601 near the prison approximately fifteen minutes after Schnettler had seen someone throw contraband over the fence. The black shirt and dark jean shorts Wyatt was wearing matched the description Kirkley received from the correctional officers. Because Schnettler had not been able to observe the suspect's facial features, but

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[4] Other courts have denied suppression under the first prong of *Biggers* because the circumstances of the case rendered suggestive police procedures necessary. *See, e.g.*, *United States v. Hawkins*, 499 F.3d 703, 707-08 (7th Cir. 2007) (finding "the showup, while suggestive, was [not] unduly so" because "there was a good reason for the failure to resort to a less suggestive alternative"); *State v. Addai*, 778 N.W.2d 555, 565 (N.D. 2010) ("The 'unnecessarily or impermissibly suggestive' prong is separated into two inquiries: '(1) whether the identification is suggestive, and (2) whether there is a good reason for not using a less suggestive procedure.'"); 778 N.W.2d at 566 ("Showup identifications conducted close in time and proximity to the crime may be necessary to ensure the correct person has been apprehended, the perpetrator is not still at large, and an innocent person is not being held."); *see also State v. Dubose*, 699 N.W.2d 582, 593-94 (Wis. 2005) (following *Stovall* and holding "an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary").

rather had described him primarily in terms of the clothes he was wearing that left his distinctive calves exposed, the best opportunity for Schnettler to say whether the suspect was the man he saw was right then, before the suspect could change his appearance. By conducting the showup procedure immediately, Kirkley was able to quickly determine whether Wyatt was the person who threw the contraband into the prison, or whether Wyatt should be released because he was innocent and the sheriff's office needed to continue its search before other suspects could leave the area. *See Hawkins*, 499 F.3d at 707-08 (discussing showup identifications conducted "close in time and proximity to the scene of a crime" and stating "[s]uch identifications both protect innocent individuals from unnecessary arrest and help authorities determine whether they must continue to search for the actual perpetrator"); *United States v. Martinez*, 462 F.3d 903, 910 (8th Cir. 2006) ("Police officers need not limit themselves to station house line-ups when an opportunity for a quick, on-the-scene identification arises. Such identifications are essential to free innocent suspects and to inform the police if further investigation is necessary.").

Second, the vague description the correctional officers gave Kirkley of a "black male wearing a black shirt and jean shorts"—without Schnettler's identification—raises serious questions as to whether Kirkley had probable cause to arrest Wyatt. *See State v. Baccus*, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006) ("Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested."). While Kirkley had reasonable suspicion to briefly detain Wyatt based on Wyatt's close proximity to the prison and the descriptions from Schnettler and Lippe, we doubt this was sufficient to establish probable cause. At oral argument, a justice of the Court asked Wyatt's counsel, "If Deputy Kirkley had picked up Wyatt on the side of the road with the two descriptions he had from Schnettler and Lippe . . . but did not conduct the showup . . . would he have had probable cause to make an arrest." Counsel answered, "Probable cause – likely not at the time he stopped him . . . ." *See Dubose*, 699 N.W.2d at 594 (stating "[a] showup [is] necessary . . . [if] the police lacked probable cause to make an arrest" without it).

Finally, we question whether there were other procedures Kirkley could have used that would have been less suggestive. The characteristics Schnettler described observing in the suspect were not features that could have been presented in a typical photographic lineup. Schnettler testified he was unable to observe the typical attributes used to make identifications in lineups—things like hairstyle, hair color, and facial features. "I was not looking at facial features," he stated, "I was

looking at what he was doing, so I can't do facial features." Instead, Schnettler focused his observation on attributes he could observe from eighty or ninety yards away—the "clothing he was wearing and how light the skin was on his legs." Under these circumstances, a photograph lineup would require police to present Schnettler with photographs of other people with similar characteristics as Wyatt—wearing black shirts, jean shorts, with their calves visible. Such a lineup would be unworkable.

"[W]hat triggers due process concerns is police use of an unnecessarily suggestive identification procedure . . . ." *Perry*, 565 U.S. at 232 n.1, 132 S. Ct. at 721 n.1, 181 L. Ed. 2d at 703 n.1. The procedure used for Schnettler's identification was suggestive, but the suggestive procedure was necessary under the circumstances of this case. Under the first prong of *Biggers*, therefore, the trial court correctly denied the motion to suppress.

B. Lippe's Identification

We begin our review of the trial court's analysis as to Lippe by observing that her identification was of little consequence to the outcome of the trial. She did not witness the crime, and her testimony proved only a fact already established conclusively: that Wyatt was walking away from the prison on Highway 601 just before 6:00 a.m. *See Liverman*, 398 S.C. at 141, 727 S.E.2d at 427 (discussing factors to be considered when deciding if an error was harmless, including "the importance of the witness' testimony in the prosecution's case" and "whether the testimony was cumulative"). In addition, there is evidence in the record to support the trial court's finding that "no substantial likelihood of misidentification existed" under the second prong of *Biggers*. *See* 398 S.C. at 138, 727 S.E.2d at 426 (listing five factors a court should consider in determining the reliability of an identification under the second prong: (1) "the witness's opportunity to view the perpetrator at the time of the crime," (2) "the witness's degree of attention," (3) "the accuracy of the witness's prior description of the perpetrator," (4) "the level of certainty demonstrated by the witness at the confrontation," and (5) "the length of time between the crime and the confrontation").

III. Conclusion

The trial court was correct not to suppress Schnettler's identification. However, the court should have considered the necessity of the police procedures under the first prong of *Biggers* instead of going straight to the second prong. We find the procedure used for Schnettler's identification was necessary under the first prong.

We affirm the decision not to suppress Lippe's identification. Wyatt's convictions are **AFFIRMED**.

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

JUSTICE HEARN: I concur in the result reached by the majority; however, I write separately because I believe certiorari was improvidently granted. From my reading of the solicitor's colloquy with the trial judge, the State acknowledged the procedure was inherently suggestive and then moved immediately to discuss the second prong of *Biggers*. Therefore, I believe the trial judge properly understood the State to have conceded the procedure was unnecessarily suggestive and couched her ruling in terms of whether a substantial likelihood of irreparable misidentification existed. Thus, I would dismiss the writ of certiorari as improvidently granted.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

Raheem D. King, Respondent/Petitioner.

Appellate Case No. 2015-001278

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27744
Heard September 7, 2016 – Filed October 25, 2017

AFFIRMED AS MODIFIED

Attorney General Alan Wilson and Senior Assistant Deputy Attorney General Deborah R. J. Shupe, both of Columbia; Solicitor Scarlett A. Wilson, of Charleston, all for Petitioner/Respondent.

Chief Appellate Defender Robert M. Dudek, of Columbia, for Respondent/Petitioner.

CHIEF JUSTICE BEATTY: A jury convicted Raheem D. King of the attempted murder[1] and armed robbery of a Charleston cab driver and the related charge of possession of a firearm during the commission of a violent crime. The trial judge sentenced King to an aggregate term of thirty-five years' imprisonment for armed robbery and the weapon charge, and a concurrent term of ten years' imprisonment for attempted murder.

On appeal, the Court of Appeals affirmed King's convictions for armed robbery and possession of a firearm during the commission of a violent crime, but reversed and remanded King's conviction for attempted murder. *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015). In so ruling, the Court of Appeals found the trial judge: (1) erred in charging the jury that "[a] specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm"; (2) erred in admitting the hearsay testimony of an investigating officer; (3) correctly charged the jury the permissive inference of malice from the use of a deadly weapon; and (4) did not abuse his discretion in allowing the State to publish to the jury a recording of a phone call made by King while he was incarcerated. The Court of Appeals concluded the trial judge's errors warranted reversal of King's conviction for attempted murder, but found no prejudice as to his convictions for armed robbery and possession of a firearm during the commission of a violent crime.

After the Court of Appeals denied the parties' petitions for rehearing, this Court granted their cross-petitions for a writ of certiorari to review the rulings of the Court of Appeals as outlined above. For reasons that will be discussed, we affirm as modified.

I. Factual / Procedural History

On November 26, 2010, at 4:06 a.m. a customer, who identified himself as "Kevin," called Yellow Cab requesting to be picked up at 1808 Carlton Street in North Charleston. The operator recorded the customer's telephone number from Yellow Cab's caller identification, but noted that the number did not match the telephone number verbally identified by the customer. At 4:11 a.m., Dario Brown was dispatched to the address. Brown was familiar with the Carlton Street area

[1] The offense of attempted murder, as codified in section 16-3-29 of the South Carolina Code, is defined as follows: "[a] person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015) (emphasis added).

because he had lived on the street for several years and his aunt had lived at 1809 Carlton Street, which was located directly across the street from 1808 Carlton Street. Brown expected his cousin to be the customer since he lived in the area and Brown, in the past, had picked up his cousin at the same location and time of night.

When he arrived at the pick-up location, Brown saw a man crossing the yard of 1809 Carlton Street, the location of his aunt's home which was abandoned at that time. As the man got into the backseat of the cab, which was illuminated by the dome light, Brown noticed the man was not his cousin. Brown then turned around, looked at the man directly in his face, and asked why he came from the abandoned house. The man replied that it was his yard. The two men argued as Brown continued to question the customer about whether he lived at 1809 Carlton Street.

As Brown began to drive toward the dead-end of Carlton Street to make a U-Turn, he heard the man "cocking a pistol." Brown testified that when he turned around the man had raised the gun to his face and demanded money. Brown stated that he gave the man his "give away" money, which is a stack of small bills cab drivers keep readily available in the event they are robbed, then placed his hands in the air. Brown testified the man demanded more money and pointed the gun at the back of Brown's head. At that point, with his hands in the air, Brown attempted to move the gun with his elbow and forearm. According to Brown, he tried to reason with the man, stating "[you] [don't] have to do this." Brown testified the man ignored his pleas and demanded more money.

Brown then opened his cab door and attempted to flee but was too scared to move because the gun was still placed at the back of his neck. When Brown looked into the man's eyes, he believed the man was going to shoot him. As Brown tried again to move the gun away from his face, the man shot Brown in the elbow. The shot entered Brown's elbow and exited through his forearm.

After being shot, Brown jumped out of the cab and ran toward the dead-end of Carlton Street. Brown testified, at one point, he looked behind him and the man was "two steps behind [him]." Brown then ran toward a yard and attempted to jump over the fence, but ended up flipping over the fence due to his injured arm. When he fell over the fence, he landed on his back fracturing a vertebra in the process.

According to Brown, the man reached over the fence with a gun and shot at Brown "maybe six or seven" times. Brown testified that none of the bullets hit him and he was able to crawl behind a nearby van at which point he used his cellphone to call police.

At 4:20 a.m., Officer Jennifer Butler with the North Charleston Police Department was dispatched to 1808 Carlton Street and arrived within one minute of the call. When she arrived, Officer Butler saw an empty cab with the engine still running "that had run into a pole on the side of the road." Officer Butler then saw Brown and called EMS. During that time, several other officers and a canine unit responded to the scene.

As part of their investigation, Officer Butler and a detective canvassed the surrounding neighborhood. As a result of this "knock-and-talk," Officer Butler testified, over defense counsel's objection, that she talked to two people and learned that there were "[a]pproximately three or four shots" fired that night. Despite a two-hour search of the area, the officers did not find the suspect and only recovered one bullet casing inside the cab.

Three days later, officers showed Brown a six-person photographic lineup that did not include a photograph of King. Brown, however, did not identify anyone from the lineup. Officers then contacted the cellphone company, Cricket Wireless, to determine who subscribed to the cellphone number used to contact the cab company on the night of the robbery. Cricket Wireless informed investigators that the phone number was registered to "Kevin King" with a 1991 date of birth and address listed as 3440 Elliott Street. By cross-referencing DMV records, investigators located Raheem King, who had the same date of birth and a similar residence address as the Cricket Wireless subscriber.

Based on this information, the police compiled a second photographic lineup that contained King's photograph. When Brown viewed this lineup, he immediately identified King and expressed that he was "100 percent sure" of his identification. The next day, King was arrested and charged with attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime.

From the detention center, King made sixty-three calls in one month to the cellphone number used to call the cab company on the night of crime. During the first phone call, which was made immediately following his arrest, King provided an unidentified person with a pin number to the cellphone. Over the objection of defense counsel, the trial judge permitted the State to publish to the jury the entire fifteen-minute recording.

As part of the instructions to the jury, the trial judge explained the offenses of armed robbery, attempted armed robbery, attempted murder, assault and battery of

a high and aggravated nature ("ABHAN"), assault and battery in the first-degree, and possession of a firearm during the commission of a violent crime.

With respect to attempted armed robbery, the judge instructed, in part, that:

> An attempt is an effort to accomplish a crime which does not succeed. An attempt includes a specific intent to do a particular criminal act along with that act falling short of the act intended. The State must show more than mere preparation and intent. It must be some overt act committed and the effort to commit the crime. Intent means intending the results which actually occurred not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant in other circumstances from which you may naturally and reasonably infer intent.

The judge then instructed that a person commits the offense of attempted murder if the "person with the intent to kill attempts to kill another person with Malice Aforethought either expressed or implied." As part of his instruction, the judge charged that "[m]alice may be inferred from conduct showing a total disregard for human life." Further, over the objection of defense counsel, the judge charged that: (1) "[i]nferred malice may also arise when the deed is done with a deadly weapon"; and (2) "[a] specific intent to kill is not an element of Attempted Murder but it must be a general intent to commit serious bodily harm."

During deliberations, the jury sent a note to the trial judge expressing confusion over the difference between the definition of attempted murder and ABHAN. In response, the judge gave a supplemental instruction indicating that ABHAN does not require malice. Ultimately, the jury found King guilty of attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime.

On appeal, the Court of Appeals affirmed King's convictions for armed robbery and possession of a firearm during the commission of a violent crime, but reversed and remanded King's conviction for attempted murder. *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015). After the Court of Appeals denied the parties' petitions for rehearing, this Court granted, in part, the parties' cross-petitions for a writ of certiorari to review the decision of the Court of Appeals.

II. Standard of Review

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

III. Discussion

A. Requisite *Mens Rea* for the Statutory Crime of Attempted Murder

The State contends the Court of Appeals erred in holding that attempted murder, as defined by section 16-3-29 of the South Carolina Code, is a specific-intent crime. In support of this contention, the State claims the Court of Appeals incorrectly based its conclusion on common law "attempt" cases and dicta from this Court's decision in *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), stating that a common law attempted murder charge "would require the specific intent to kill."

In contrast to the authorities cited by the Court of Appeals, the State directs this Court's attention to case law involving the common law crime of assault and battery with intent to kill ("ABWIK"), which held that ABWIK does not require a specific intent to kill. Because the attempted murder statute "uses language virtually identical to common law ABWIK," the State reasons that the General Assembly effectively codified the common law offense of ABWIK. As a result, the State avers the statutory offense of attempted murder does not require a specific intent to kill but, rather, a general intent will suffice.

Alternatively, even if the Court determines that attempted murder is a specific-intent crime, the State maintains any jury instruction error was harmless beyond a reasonable doubt. Given the judge instructed the jury on "common law attempt as a specific intent to commit the underlying offense" and the statutory elements of attempted murder, including "intent to kill" and "malice aforethought," the State claims all elements of attempted murder were in fact charged and, thus, effectively negated the judge's charge that attempted murder was a general-intent crime.

We agree with the Court of Appeals that "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime." *King*, 412 S.C. at 411, 772 S.E.2d at 193. Because the

phrase "with intent to kill" in section 16-3-29 does not identify what level of intent is required, the Court of Appeals properly looked to the legislative history of section 16-3-29 and appellate decisions holding that "attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime." *Id.* at 409, 772 S.E.2d at 192. Further, while we agree with the State that the statement referenced from *Sutton* constitutes dicta, it is still an accurate statement of law. *Id.* ("'Attempted murder would require the specific intent to kill,' and 'specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense.'" (quoting *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285)).

Nevertheless, despite our agreement with the conclusion reached by the Court of Appeals, we find it necessary to expand on the analysis. Specifically, because the Court of Appeals did not sufficiently parse section 16-3-29, it neglected to address the implications of the phrase "malice aforethought, either express or implied."

While it may seem counterintuitive for the attempt of a crime to require a higher level of *mens rea* than that of the completed crime, this is the majority rule and a rule that our appellate courts and General Assembly have followed. Consequently, as will be discussed, we hold that a specific intent to kill is an element of attempted murder as codified in section 16-3-29.

"The highest possible mental state for criminal attempt, specific intent, is necessary because criminal attempt focuses on the dangerousness of the actor, not the act." 22 C.J.S. *Criminal Law: Substantive Principles* § 156, at 221-22 (2016). Thus, "[a]s the crime of attempt is commonly regarded as a specific intent crime and as it is logically impossible to attempt an unintended result, prosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness, attempted felony murder, or attempted manslaughter." *Id.*

Based on these general principles, the majority of courts in other jurisdictions have concluded that attempted murder requires the specific intent to kill. *See generally* Jeffrey F. Ghent, Annotation, *What Constitutes Attempted Murder*, 54 A.L.R.3d 612, §§ 3, 12.5 (1973 & Supp. 2017) (collecting state and federal cases identifying what constitutes the crime of attempted murder, including whether specific intent is a requisite element). In reaching this conclusion, these courts have differentiated between the required mental states for attempted murder and murder.

For example, in *Keys v. State*, 766 P.2d 270 (Nev. 1988), the Supreme Court of Nevada found that it was error for the trial court to refuse to instruct the jury that the specific intent to kill is an essential element of the crime of attempted murder.

Recognizing that this issue presented "a continuing source of confusion," the court sought to clarify this area of criminal law by distinguishing the crime of attempted murder from murder by analogizing express malice to a specific intent to kill. *Id.* at 272-73. The court explained:

> Attempted murder can be committed only when the accused's acts are accompanied by *express malice,* malice in fact. One cannot *attempt* to kill another with implied malice because there "'is no such criminal offense as an attempt to achieve an unintended result.'" An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "implied malice." One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.
>
> An attempt to kill with express malice is, on the other hand, completely consistent with the specific intent requirement of the crime of attempt. Express malice is the "deliberate intention unlawfully" to kill a human. Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

Id. at 273 (citations omitted) (second emphasis added).

Although our appellate courts have not issued an expository opinion like that of the Supreme Court of Nevada, we believe the decisions, when viewed as a whole, reach the same conclusion. Like other jurisdictions, South Carolina has not been immune from conflicting case law regarding levels of criminal intent. However, this confusion appears to have arisen out of the relationship between the crimes of murder and ABWIK. *See* 23 S.C. Jur. *Homicide* § 34, at 215 (1994) (recognizing ambiguity in case law regarding whether a specific intent to kill is required for the crime of ABWIK); *see also State v. Jeffries*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) ("At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion." (citation omitted)).

Significantly, the two crimes were originally designated as one offense. *See State v. Jones*, 133 S.C. 167, 172, 130 S.E. 747, 749 (1925) (recognizing that offense of "assault and battery with intent to kill and murder" contained "all the elements of murder except the death of the party assailed"), *overruled by State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Yet, while the offenses of ABWIK and murder ultimately evolved into two discrete crimes, courts assigned conflicting mental states to each offense. *See, e.g.*, *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) (concluding evidence was sufficient to sustain conviction for murder although there was "no actual intent to kill or injure another, there [was] evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice"); *State v. Hilton*, 284 S.C. 245, 248, 325 S.E.2d 575, 576 (Ct. App. 1985) ("Assault and Battery with intent to kill requires a finding of a specific intent to kill."), *overruled by State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996); *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000) (affirming defendant's convictions for murder of intended victim and ABWIK of unintended victim; noting that the required mental state for ABWIK, like murder, is malice aforethought and concluding that ABWIK conviction was supported by the doctrine of transferred intent).

Not until this Court's decision in *Foust* was there any attempt at clarity. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 51 (1996). In *Foust*, the Court was tasked with determining what level of intent is necessary to sustain a conviction for ABWIK. *Id.* Initially, the Court noted that "South Carolina caselaw on the requisite intent to commit [ABWIK] is ambiguous." *Id*. at 14, 479 S.E.2d at 51. The Court attributed this ambiguity to "the fact that [ABWIK] has been defined as the unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." *Id*. As a result, the Court noted that "[a] number of cases since *Jones* have reiterated that [ABWIK] requires both an intent to kill **and** malice." *Id.* at 15, 479 S.E.2d at 51. While the Court acknowledged that these "cases indicate that **some** intent must be demonstrated before an accused may be convicted of [ABWIK]," it did "not believe they stand for the proposition that a **specific** intent to kill must be shown." *Id*. Accordingly, the Court held that "it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State." *Id*. The Court then instructed that "in charging juries the law of [ABWIK], South Carolina trial judges should give a standard 'intent' charge, but need not advise the jury that the defendant must have a **specific** intent to kill before he may be convicted of [ABWIK]." *Id.* at 16, 479 S.E.2d at 52 (footnote omitted).

In 2000, ten years prior to the statutory enactment of the crime of attempted murder, this Court declined to adopt the common law crime of attempted murder.

State v. Sutton, 340 S.C. 393, 398-99, 532 S.E.2d 283, 286 (2000). In *Sutton*, the defendant was convicted of ABWIK, attempted murder, and possession of a firearm during the commission of a violent crime. *Id*. On appeal, the Court of Appeals vacated Sutton's attempted murder conviction and sentence, finding ABWIK and attempted murder are, in essence, the same offense. *Id*. at 395, 532 S.E.2d at 284. This Court affirmed as modified the decision of the Court of Appeals. *Id*. at 399, 532 S.E.2d at 286.

Citing *Foust*, this Court noted that "a specific intent is not required to commit [ABWIK]." *Sutton,* 340 S.C. at 396, 532 S.E.2d at 285. Premised on this principle, the Court distinguished the common law offense of attempted murder from the common law offense of ABWIK by concluding that attempted murder requires a specific intent to kill, while ABWIK does not require a specific intent. *Id*. at 397, 532 S.E.2d at 285 ("Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill." (citation omitted)). Instead, the Court explained that ABWIK requires the same general intent as murder and is often described as follows: "if the victim had died from the injury, the defendant would have been guilty of murder." *Id*. at 396, 532 S.E.2d at 285. The Court concluded there was no need to adopt the common law offense of attempted murder because South Carolina's "common law offenses of [ABWIK] and [AWIK] (assault with intent to kill) adequately cover the conduct which attempted murder would include." *Id*. at 398-99, 532 S.E.2d at 286.

While *Sutton* has continued to be cited, as evident by the Court of Appeals' decision in the instant case, the underlying basis for the Court's statement regarding attempted murder has never really been challenged. *See, e.g.*, *State v. Wilds*, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003) (citing *Foust* and *Sutton*, discussing express and implied malice, and concluding permissive inference of malice, which arose out of defendant's reckless use of automobile, was sufficient to support ABWIK conviction).

In 2007, the Court of Appeals in *State v. Kinard*, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007), initiated a challenge by pointing out the inconsistencies in our state's case law regarding "malice aforethought." In *Kinard*, the defendant was convicted of first-degree burglary and ABWIK. *Id.* On appeal, Kinard, contended the trial judge erred in refusing to explicitly charge the jury on the general intent required to convict for ABWIK. *Id*. at 502, 646 S.E.2d at 168. The Court of Appeals disagreed, finding the judge's charge on "malice aforethought" was sufficient as it implicitly included the required mental state for ABWIK. *Id.* at 503, 646 S.E.2d at 169-70. In so ruling, the court recognized that "malice aforethought encompasses

both the specific and general intent to commit murder." *Id.* at 504, 646 S.E.2d at 169. Thus, because ABWIK encompasses each of the required elements of murder except for the death of the victim, the court found that "it is axiomatic that malice aforethought be the mental state to commit [ABWIK]." *Id*.

However, despite this conclusion, the court recognized the confusion in our state's jurisprudence concerning the requisite mental state for murder and ABWIK. The court stated:

> While we are mindful of previous opinions from the appellate courts of this state which have treated intent to kill and malice as separate requirements, we, much like both parties and the trial judge below, fail to discern any significant difference between general intent to kill and malice aforethought as they pertain to ABIK. Since the definition of malice aforethought encompasses general intent to kill, we find it difficult to reconcile a manner in which one could find malice aforethought and yet not find general intent to kill. Further, we read the *Foust* opinion as the elimination of this artificial distinction. In stating that some general intent such as that heretofore applied in murder cases in this state was sufficient to prove ABIK, the *Foust* court was establishing malice aforethought as the necessary general intent. Since malice aforethought undoubtedly has been established as the intent required in murder cases, we necessarily arrive at the above conclusion. Moreover, our state Supreme Court reaffirmed malice aforethought as the required mental state for ABIK in an opinion decided four years subsequent to *Foust*. *Fennell*, 340 S.C. at 275, 531 S.E.2d at 517. Accordingly, we find the trial court's jury instruction, which properly charged the jury regarding malice aforethought, to be without error. The jury was given a proper "intent" charge.

Id. at 505, 646 S.E.2d at 170.

Kinard identifies what is missing from the Court of Appeals' analysis of section 16-3-29 of the South Carolina Code. Specifically, the Court of Appeals focused on the phrase "with intent to kill" in isolation and did not consider the remainder of the statute concerning "malice aforethought." Had the court done so, the decision would have been much clearer as to why attempted murder requires a specific intent to kill.

Additionally, it is necessary to address both parts of section 16-3-29 as it demonstrates that the General Assembly created the offense of attempted murder by purposefully adding the language "with intent to kill" to "malice aforethought, either express or implied" to require a higher level of *mens rea* for attempted murder than that of murder. Moreover, the addition of the "with intent to kill" language effectively negates the State's claim that the General Assembly merely codified ABWIK. Because our case law, particularly *Foust*, establishes "malice aforethought" as the required mental state for ABWIK, the additional language of "with intent to kill" clearly elevates the required mental state above a general-intent crime.[2]

While we are convinced that this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29 as aptly noted by the author of the concurring opinion. However, unlike the concurring opinion, we find the legislative history, when read in its entirety, supports our conclusion.[3]

Section 16-3-29 is part of the "Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the "Act")," which was enacted in response to a report submitted to the General Assembly by the South Carolina Sentencing Reform Commission (the "Commission"). *South Carolina Sentencing Reform Commission Report* (Feb. 1, 2010).[4] This Commission was established by the General Assembly

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[2] We note that our interpretation of section 16-3-29 is consistent with other attempt statutes that require a "specific intent." *See, e.g.*, S.C. Code Ann. § 25-1-2895 (2007) (defining "attempts" in Military Code as "An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending even though failing to effect its commission, is an attempt to commit that offense.").

[3] In support of its position, the concurring opinion references a single provision of the legislative history. *See* Act No. 273, § 7.C, 2010 S.C. Acts 1937, 1950 (stating, in relevant part, that "whenever in the 1976 Code [of Laws] reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29"). We believe the concurring opinion misconstrues this phrase. Like the Court of Appeals, we find "the Legislature included the statement '[ABWIK] . . . means attempted murder' to avoid any confusion as to how the new crime of attempted murder affects the operation of other statutes that contain the phrase 'assault and battery with intent to kill'." *King*, 412 S.C. at 411, 772 S.E.2d at 193.

[4] This Report may be found at:

in 2008 to address the "[r]ising recidivism rates, increasing prison populations, limited sentencing alternatives and re-entry programs, and mounting correctional costs for both state and local governments." *Id*. at 1. In its report, the Commission offered numerous recommendations to address these issues. Of significant import, the Commission recommended that the General Assembly:

> Enact legislation to restructure by statute the degrees of assault and battery, including the existing common law and statutory offenses, so that the common law offense of "Assault and Battery of a High and Aggravated Nature" is abolished, and the statutory offense of "Assault and Battery with Intent to Kill" (Section 16-3-620), is repealed. In the legislation, establish graduated offenses of "Assault and Battery," to include "Attempted Murder," "Aggravated Assault and Battery," and "Assault and Battery," with commensurate penalties.

Id. at 21-22.

The General Assembly followed this recommendation as evident by the language in the Preamble to the Act. Specifically, the Preamble states that the Act: (1). adds section 16-3-29 "so as to *create* the offense of attempted murder and provide a penalty"; (2). "create[s] various levels and degrees of assault and battery offenses"; (3). amends section 16-3-610, relating to assault with a concealed weapon, "so as to reference *the new offenses of attempted murder* and assault and battery"; (4). is enacted "to *repeal* sections 16-3-312, 16-3-620, 16-3-630, and 16-3-635 all dealing with various assault and battery offenses"; and (5). is enacted "to *repeal* certain common law assault and battery offenses." Act No. 273, 2010 S.C. Acts 1937 (emphasis added).

In turn, these directives were codified in sections 16-3-29 and 16-3-600. *See State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) ("Through the passage of the [Omnibus Crime Reduction and Sentencing Reform Act of 2010] the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. In place of these offenses, the Act codifies attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600."). Notably, a person convicted of attempted murder faces a potential sentence of thirty years' imprisonment in contrast to the potential twenty-year sentence previously provided for ABWIK. S.C. Code Ann. § 16-3-29 (2015)

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http://www.scstatehouse.gov/Archives/CitizensInterestPage/SentencingReformCommission/CombinedFinalReport020110SigPage.pdf.

(providing for offense and penalty of attempted murder); *Id*. at § 16-3-620 (2003) (identifying offense and penalty of ABWIK), *repealed by* Act No. 273, 2010 S.C. Acts 1937.

Considering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a "specific intent to kill" as an element.[5] Accordingly, we agree with the Court of Appeals that the trial judge erred in charging the jury that a specific intent to kill is not an element of attempted murder. Further, we agree that this error cannot be deemed harmless.

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[5] In an argument related to the State's attempted murder charge issue, King posits, as an additional sustaining ground, the Court of Appeals erred in summarily affirming the trial judge's decision to instruct the jury that malice may be inferred from the use of deadly weapon. Because we affirm the decision of the Court of Appeals regarding the requisite *mens rea* for attempted murder, we decline to address King's additional sustaining ground. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (citing Rule 220(c), SCACR and stating, "The appellate court *may* review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment" (emphasis added)).

While we find it unnecessary to address King's additional sustaining ground, we would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of the word "implied" in section 16-3-29 is arguably inconsistent with a specific-intent crime. *See Keys v. State*, 766 P.2d 270, 273 (Nev. 1988) (stating, "[o]ne cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result" (citation and internal quotation marks omitted)). Moreover, if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600. *See* S.C. Code Ann. § 16-3-600 (2015 & Supp. 2016) (identifying levels and degrees of assault and battery offenses).

B. Admissibility of Officer's Statements Regarding Investigation

The State argues the Court of Appeals erred in ruling Officer Butler's testimony regarding what she learned during her investigation of the crime scene constituted inadmissible hearsay. Contrary to the Court of Appeals' interpretation, the State asserts that *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013),[6] and *State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004), *aff'd as modified by* 374 S.C. 313, 649 S.E.2d 479 (2007),[7] support the admission of Officer Butler's "limited testimony." Specifically, the State claims that Officer Butler's testimony, like that of the investigators in *Kromah* and *Weaver*, did not impermissibly repeat statements made by individuals she interviewed. Rather, her testimony merely relayed what she learned as part of her investigation of the crime scene.

Further, the State contends that, even if Officer Butler's testimony constituted inadmissible hearsay, any error in its admission was harmless beyond a reasonable doubt. Unlike the Court of Appeals, the State believes Officer Butler's testimony regarding multiple shots fired did not affect the jury's determination that King was guilty of attempted murder. According to the State, the Court of Appeals' conclusion was based on the incorrect assumption that "the only way the jury could find attempted murder was to believe multiple shots were fired." In contrast, the State asserts the undisputed testimony that King fired one shot inside the cab was sufficient for the jury to find King possessed the requisite intent to kill, including a specific intent to kill.

We agree with the Court of Appeals that the trial judge erred in admitting the testimony of Officer Butler. We find the Court of Appeals correctly distinguished

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[6] *See State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) (concluding that investigator's testimony about actions he took after conversations he had with three-year-old victim was admissible as the investigator did not directly relate to the jury any statements made by the child and the defense had an opportunity to cross-examine the investigator).

[7] *See State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004) (holding that investigator's statement that "all of the evidence led to" or pointed to defendant did not constitute inadmissible hearsay given the investigator never repeated statements made to him by individuals at the crime scene and the testimony was in response to questions asked on cross-examination), *aff'd as modified by* 374 S.C. 313, 649 S.E.2d 479 (2007) (affirming but modifying Court of Appeals' analysis that police had probable cause for warrantless search of defendant's vehicle).

Officer Butler's testimony from that found admissible in *Kromah* and *Weaver*. Further, we agree with the Court of Appeals that any error in the admission of the testimony would have only affected the jury's determination of the attempted murder charge. Additionally, like the Court of Appeals, we conclude that the error, if combined with the erroneous attempted murder jury instruction, was not harmless as to the attempted murder charge.

However, despite our agreement with the ultimate conclusion of the Court of Appeals, we decline to rely on the supporting authority cited in the opinion. Specifically, the Georgia case cited by the Court of Appeals is now of questionable value as a state statute has been enacted to address this issue.[8] Moreover, the Eleventh Circuit case has since been abrogated.[9] Accordingly, given the subsequent history of these cases, we modify the Court of Appeals' analysis.

We find the disposition of this issue involves a straightforward hearsay analysis. "Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (quoting *In re Care & Treatment of Harvey*, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003)); Rule 801(c), SCRE. "Hearsay is not admissible unless there is an applicable exception." *Brockmeyer*, 406 S.C. at 351, 751 S.E.2d at 659; Rule 802, SCRE.

Here, as correctly recognized by the Court of Appeals, Officer Butler's testimony was hearsay as it was based exclusively on what the witnesses told her during the neighborhood canvas and was offered to prove that King fired more than one gunshot. Further, we do not discern, nor has the State cited, any exception to the hearsay rule that would provide for the admissibility of the testimony.

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[8] The Court of Appeals noted that *Weems v. State*, 501 S.E.2d 806 (Ga. 1998) was decided under a former provision of the Georgia Code. *King*, 412 S.C. at 414 n.2, 772 S.E.2d at 195 n.2. However, in 2013, the Georgia legislature substantially revised the state's rules of evidence. *See Parker v. State*, 769 S.E.2d 329 (Ga. 2015) (recognizing that Georgia's new Evidence Code took effect on January 1, 2013).

[9] *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005), *abrogated in part by Davis v. Washington*, 547 U.S. 813 (2006) (concluding that victim's statements, during 911 phone call "interrogation," identifying her assailant were non-testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004)).

Nonetheless, even with this straightforward analysis, we believe it is necessary to caution prosecutors against using "investigative information" as it appears this is an attempt to circumvent the rules against hearsay. *See, e.g.*, *Lewis v. State*, 80 So. 3d 442, 444 (Fla. Dist. Ct. App. 2012) (concluding that investigating officer's testimony that he developed a suspect and, in turn, a photographic lineup, after speaking with two non-testifying witnesses constituted inadmissible hearsay; stating, "[w]here the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement offered to prove the defendant's guilt, the testimony is not admissible" (citation omitted)); *State v. Magee*, 143 So. 3d 532, 537 (La. Ct. App. 2014) ("The fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, *but may not be used as a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule*." (emphasis added)).

We are persuaded by the explanation offered by the Supreme Court of Kentucky. *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015). In *Ruiz*, the court attempted to dispel any misconception that testimony from an investigating officer regarding the content of out-of-court statements was admissible. Specifically, the court explained:

> An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. If it is relevant and probative *only* to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. And, as any other statement, if the out-of-court statement made to a police officer has relevance and probative value that is *not* dependent upon its truthfulness, and it is *not* offered into evidence as proof of the matter asserted, then by definition the evidence is *not* hearsay.
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> * * *
>
> In such circumstances, because the out-of-court statement would not be subject to the hearsay rule, its admissibility would be determined by application of other rules of evidence. So-called "investigative hearsay" is still, fundamentally, hearsay. There is no special kind of evidence known as "investigative hearsay;" we have no rule of evidence called the "investigative hearsay rule." Use of the term imparts no

> meaningful information to the analysis that is not otherwise supplied by the word "hearsay."

Ruiz, 471 S.W.3d at 680-82 (citations and footnote omitted).

Based on this reasoning, we caution against the use and admission of "investigative information." While it may be couched in terms of explaining an officer's conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state's rules against hearsay.

C. Admissibility of Detention Center Phone Call

King argues the Court of Appeals erred in summarily affirming the judge's decision permitting the State to publish to the jury a recording of a fifteen-minute phone call King made while incarcerated. Because the State's purpose in introducing the recording was to establish King's ownership of the cellphone number used to contact the cab company, King asserts this could have been accomplished by introducing detention center phone logs. Further, King maintains that any probative value of the recording was outweighed by the danger of unfair prejudice created by the recording, which contained a profanity-laced conversation between King and another individual that inferred King had been charged with prior crimes similar to those for which he was currently on trial.

For several reasons, we agree with King that the trial judge abused his discretion in admitting the recorded phone conversation. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." (citation omitted)).[10]

First, the judge adamantly refused to listen to the recording prior to publishing it to the jury. By failing to listen to the recording or requiring the State to produce a transcription of the recording for his review, we find the judge abused his discretion.

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[10] We reject the State's contention that King waived this issue because he declined the trial judge's offer to redact the recording prior to publication to the jury. King presented an "all or nothing" objection to the recording as it would have been futile to redact the objectionable language and content from the recording. Had a redaction been possible, the recording would have been of no value to the State.

See State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (stating that "[i]t is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly").

Second, without listening to the recording, the judge was unable to determine whether the probative value outweighed any unfair prejudice. *See State v. Dial,* 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial [court's] decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (internal quotation marks omitted)); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."). While the recording was relevant to the State establishing King's ownership of the cellphone that called the cab company, it was not the only evidence that could have served this purpose. Rather, the testimony of Sergeant Kevia Heyward, who was employed at the detention center, and the detention center call logs clearly established that King called this number sixty-three times in one month. Further, the State could have agreed to the request that it stipulate to King's ownership of the cellphone.

Third, the limited probative value of the recording was outweighed by the unfair prejudice to King. The fifteen-minute recording is riddled with profanity, racial slurs, and impermissible references to King's prior bad acts. *See State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.").

Taking all of these factors into consideration, we find the Court of Appeals erred in affirming the admission of the recording. However, we conclude that this error does not warrant reversal of all convictions as advocated by King. While this serves as another basis to reject the State's position that any error with respect to the attempted murder charge was harmless, it does not have the same significance for the charges of armed robbery and possession of a firearm during the commission of a violent crime. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.").

Because the recording is very difficult to understand, we question whether the jury in fact was influenced by it. In any event, it was not enough to affect the jury's

determination of the armed robbery and related weapon charge as the emphasis of King's defense was focused on the requisite level of intent for attempted murder, in particular the conflict over the number of shots fired. Further, there was no real dispute over the charge of armed robbery as Brown positively identified King as the suspect and testified in detail that he gave King the "give away" money in response to King pointing the weapon at his head. Consequently, we conclude that the admission of the recording does not warrant reversal of King's convictions for armed robbery and possession of a firearm during the commission of a violent crime. *See State v. Black*, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012) ("To warrant reversal, an error must result in prejudice to the appealing party.").

IV. Conclusion

In conclusion, we agree with the Court of Appeals' decision to affirm King's convictions for armed robbery and possession of a firearm during the commission of a violent crime and to reverse and remand King's conviction for attempted murder. Yet, we clarify that the offense of attempted murder, as codified in section 16-3-29 of the South Carolina Code and viewed in its entirety, requires a specific intent to kill. Further, we conclude, based on our state rules of evidence, that Officer Butler's testimony should not have been admitted as it constituted inadmissible hearsay regardless of the fact that it was offered by the State to explain Officer Butler's investigation. However, like the Court of Appeals, we find the admission of this testimony constituted harmless error. Finally, in contrast to the Court of Appeals, we hold that the trial judge erred in admitting the recording of King's detention center phone call. Nevertheless, we conclude the admission of the recording constituted harmless error.

Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

Acting Justices DeAndrea Gist Benjamin and J. Mark Hayes, II, concur. Acting Justice Costa M. Pleicones concurring in result only. KITTREDGE, J., concurring in a separate opinion.

JUSTICE KITTREDGE: I concur in result. I write separately because I construe section 16-3-29 of the South Carolina Code[11] differently than the majority.

Before addressing the attempted murder statute, I note my complete agreement with the majority's analysis and conclusion concerning the error in the admission of the challenged portions of Officer Jennifer Butler's testimony. While the admission of this evidence was harmless as to the armed robbery and firearm possession charges, the evidence was not harmless beyond a reasonable doubt as to the attempted murder charge. I similarly agree with the majority that the trial court abused its discretion in admitting the entirety of Raheem King's jail telephone call recording. Nevertheless, for the reasons persuasively advanced by the majority, I find the error in the admission of the telephone call recording harmless as to the armed robbery and weapon charges.

I turn now to what I view as the primary issue before the Court, for our construction of the attempted murder statute will have significant implications, at least until the legislature responds and clarifies the ambiguity in section 16-3-29. The question is easily stated—whether the section 16-3-29 offense of attempted murder is a specific intent crime—but not easily answered. I commend Chief Justice Beatty on a well-reasoned, scholarly opinion, but I respectfully reach a different conclusion. I do so on the basis that our singular focus is to determine the legislative intent expressed in section 16-3-29.

Section 16-3-29 provides that "[a] person who, *with intent to kill*, attempts to kill another person *with malice aforethought, either expressed or implied*, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015) (emphasis added). For conduct to fall within the scope of the statute requires an "intent to kill," as well as malice aforethought, which may be "either expressed or implied." *Id.* Each of these phrases on its own is clear, but when they are combined, the intent of

[11] "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015).

the legislature is not.

The majority and I agree that the statutory language creates an ambiguity—"with intent to kill" speaks to a specific intent crime while "malice aforethought, either expressed or implied" points to a general intent crime. I would resort to legislative history to resolve the tension between the two phrases. At this point, however, the majority "expand[s] on the analysis" and reviews the majority rule that attempt crimes generally require a specific intent. We are further presented with case law from other jurisdictions that follow the general rule. But as I see it, our *sole* task is to discern what the South Carolina General Assembly intended in section 16-3-29.[12]

South Carolina's common law offense of "assault and battery with intent to kill" (ABWIK) does not follow the general rule discussed by the majority. For many years, there was confusion as to the intent requirement in the offense of ABWIK. In 1996, this Court definitively answered the question and held the common law offense of ABWIK requires only a showing of general intent, as encompassed by the requirement of "malice aforethought, either express or implied." *State v. Foust*, 325 S.C. 12, 14–15, 479 S.E.2d 50, 51 (1996) ("As this Court has recognized that a specific intent is not required to commit murder, the logical inference is that, likewise, a specific intent is not required to commit [ABWIK]." (footnote omitted)).

Thereafter, in 2010, the legislature repealed the common law offense of ABWIK and replaced it with the statutory offense of attempted murder in section 16-3-29. As a matter of statutory construction, we are to presume the legislature knew the law on ABWIK when it repealed the common law offense and replaced it with the attempted murder statute. *See, e.g.*, *Grier v. Amisub of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) ("In ascertaining the meaning of language used in a statute, we presume the General Assembly is 'aware of the common law, and

[12] Because the heart of this case lies at the intersection of legislative and criminal intent *in South Carolina*, in my view, decisions of other states' courts interpreting their own particular laws are of little help.

where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.'" (quoting *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997))). If ever there was any doubt as to the legislature's intent, the act that created section 16-3-29 surely removed it, stating that, with two exceptions not applicable here, "wherever in the 1976 Code [of Laws] reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29." Act No. 273, § 7.C, 2010 S.C. Acts 1937, 1950.

At this point in my analysis, I conclude that section 16-3-29 represents the codification of the common law offense of ABWIK. In this regard, I am persuaded by the legislature's use of the verbatim definition of ABWIK in the section 16-3-29 offense of attempted murder. I resolve the ambiguity in the "with intent to kill" language and the seemingly contradictory "with malice aforethought, either expressed or implied" language by resorting to our case law defining the elements of ABWIK, especially the requisite level of intent. We know from *Foust* that "it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State." *Foust*, 325 SC at 15, 479 S.E.2d at 51. If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime? I would therefore conclude that a specific intent to kill is not an element of the offense of attempted murder found in section 16-3-29, notwithstanding that the phrase "with intent to kill" is included in the statute. Similarly, I know with certainty that a specific intent to kill is not an element of ABWIK, although the phrase "with intent to kill" is included in the name of the common law crime. For these reasons, I would affirm the trial court's finding and related jury instruction that "[a] specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm."[13] *State v. King*, 412 S.C. 403, 407, 772 S.E.2d 189, 191 (Ct. App. 2015).

[13] For the same reasons, I would affirm the trial court's "permissive inference of malice from the use of a deadly weapon" instruction, an issue the majority does not reach. *See State v. King*, 412 S.C. 403, 418, 772 S.E.2d 189, 197 (Ct. App. 2015). Given that I am in the minority in believing that the attempted murder statute requires only a general intent, I would caution against any implied malice instruction in a future prosecution under section 16-3-29. For the reasons pointed

While the majority's analysis of the general law concerning attempt and specific intent is enlightening, I respectfully do not believe it reflects our legislature's intent in enacting section 16-3-29—and here, that's the only intent that matters.

Because my view of the evidentiary challenges is in line with the majority, I concur in the remand for a new trial on the attempted murder charge. Accordingly, I concur in result.

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out by the majority, it seems to me that the concept of implied malice has no place in a prosecution for a specific intent crime. The majority has wisely suggested that the General Assembly reevaluate the implied malice language in the statute in light of the Court's holding that attempted murder requires a specific intent to kill. The necessity of legislative action, of course, depends on the legislature's acceptance or rejection of this Court's determination of legislative intent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Neil Briggs, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2014-000693

ON WRIT OF CERTIORARI

Appeal from Spartanburg County
J. Derham Cole, Trial Judge
Robin B. Stilwell, Post-Conviction Relief Judge

Opinion No. 27745
Submitted June 15, 2017 – Filed October 25, 2017

AFFIRMED

Attorney General Alan McCrory Wilson and Assistant Attorney General Alicia A. Olive, both of Columbia, for Petitioner.

Jeremy Adam Thompson, Law Office of Jeremy A. Thompson, LLC, of Columbia, for Respondent.

JUSTICE FEW: This is a post-conviction relief (PCR) action. The PCR court granted relief and ordered a new trial. We affirm.

I. Procedural History

The State indicted Briggs for criminal sexual conduct with a minor in the first degree and lewd act upon a child,[1] and called the case to trial on August 23, 2010. The victim testified Briggs touched her "private" with his "private" and with his mouth, and the jury watched video of two forensic interviews in which the victim explained what happened. Using a special interrogatory verdict form, the jury found Briggs performed "anal intercourse," "cunnilingus," and "other intrusion" on the victim. The trial court sentenced Briggs to life in prison. The court of appeals affirmed. *State v. Briggs*, Op. No. 2012-UP-323 (S.C. Ct. App. filed May 30, 2012).

Briggs then filed this action for PCR. He claimed, among other things, his trial counsel was ineffective in permitting the forensic interviewer to give opinion testimony that she believed the victim's accusations to be true. The PCR court granted relief, vacated the convictions, and remanded to the court of general sessions for a new trial. We granted the State's petition for a writ of certiorari to review the PCR court's ruling.[2]

II. Deficient Performance

Briggs' primary claim of ineffective assistance of counsel relates to the testimony of Michele Arroyo-Staggs, who conducted the two forensic interviews of the victim. At trial, the State called Arroyo-Staggs to testify about those interviews, and moved to qualify her as an expert witness in child abuse assessment.

The PCR court found trial counsel—Max B. Singleton of Spartanburg—was deficient in three respects as to the testimony of Arroyo-Staggs. First, Singleton failed to object to the qualification of Arroyo-Staggs as an expert witness. Second, Singleton did not object to her direct examination testimony that improperly

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[1] *See* S.C. Code Ann. § 16-3-655(A) (2015) (defining criminal sexual conduct with a minor in the first degree); § 16-3-655(C) (defining criminal sexual conduct with a minor in the third degree, formerly known as lewd act upon a child)

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

bolstered the credibility of the victim. Third, Singleton intentionally elicited additional improper bolstering testimony from Arroyo-Staggs on cross-examination in which she explained the reasons she believed the victim's accusations against Briggs. The PCR court found Singleton's performance did not meet the objective standard of reasonableness by which we judge the performance of counsel under the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (stating the first prong of the *Strickland* test requires the applicant to prove "counsel's representation fell below an objective standard of reasonableness" (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. E. 2d at 693)).

A. Improper Bolstering Testimony

We begin with the PCR court's second finding, that Singleton was deficient for not objecting when Arroyo-Staggs gave improper bolstering testimony on direct examination. The PCR court focused on four points in Arroyo-Staggs' testimony. First, Arroyo-Staggs explained to the jury that before the interviews, she stressed to the victim the importance of telling the truth. Second, Arroyo-Staggs testified to her opinion the victim had not been coached. Third, Arroyo-Staggs told the jury "my role is to always find out . . . whether or not the child is able to know the difference between a truth and a lie." On this point, the solicitor asked, "Do you make an assessment to determine whether or not the child understands truth and lie before you do [the interview]," and she replied, "That's correct." Fourth, when the solicitor asked Arroyo-Staggs to "describe for the jury what a forensic interview is," Arroyo-Staggs answered, "A forensic interview is an assessment that is conducted . . . for the purpose of finding out if something happened or didn't happen." Similarly, when asked how she "assess[es] a child's competency to do a forensic interview," Arroyo-Staggs testified, "I base a lot of it on my experience and my knowledge and my training in reference to the developmental stages to figure out what has occurred."

In recent years, we have decided many cases on the question of the permissible limits of a forensic interviewer's testimony in the context of the prohibition against improper bolstering. *See, e.g.*, *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015); *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Whitner*, 399 S.C. 547, 732 S.E.2d

861 (2012); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). Under the holdings of those cases, the PCR court was correct to conclude Singleton should have objected to at least three of the categories of testimony listed. The State argues, however, the standards made clear in those cases were not so clear when Briggs was tried in 2010. Thus, the State argues, Singleton's failure to object was reasonable under the circumstances that existed at the time. This is a forceful argument, as we may not judge the reasonableness of counsel's performance by standards that developed later. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

As to the PCR court's first point, the State is correct. In 2015 in *Anderson*, we held, "There is to be no testimony" before the jury from a forensic interviewer about instructing the victim on "the importance of telling the truth" because this testimony "necessarily conveys to the jury that the interviewer and law enforcement believe the victim and that their beliefs led to the defendant's arrest, these charges, and this trial, thus impermissibly bolstering the minor's credibility." 413 S.C. at 221, 776 S.E.2d at 80. In *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), however, we held that a forensic interviewer's explanation to the jury about the importance of telling the truth was not improper bolstering. 380 S.C. at 504, 671 S.E.2d at 609. The witness in *Douglas* told the jury "we talk a lot about telling the truth and telling a lie and we make an agreement with each other that I will tell her the truth and that she will tell me the truth, if we get past that, if the child agrees to do that, we go on." 380 S.C. at 501, 504, 671 S.E.2d at 607, 609. We disagreed this was "vouching for Victim's veracity" and held, "There is no evidence whatsoever [the forensic interviewer] believed the Victim to be telling the truth." 380 S.C. at 504, 671 S.E.2d at 609. On this point, therefore, Singleton's decision not to object was reasonable under the circumstances that existed at the time.

Our decision in *Douglas* makes clear, however, that a forensic interviewer may not be permitted to give testimony that improperly bolsters the credibility of the victim. We decided *Douglas* on appeal from a ruling by the court of appeals that recognized improper bolstering testimony is inadmissible. *See State v. Douglas*, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006) ("The only reasonable

inference the jury could have drawn from Herod's testimony is that she believed the victim told the truth."), *aff'd in part, rev'd in part*, 380 S.C. 499, 671 S.E.2d 606. Our decision was not to disagree with the principle that improper bolstering testimony is inadmissible, but simply to disagree that the specific testimony at issue in that case was improper bolstering.

We also made the inadmissibility of improper bolstering clear in *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010)—six months before Briggs' trial. In *Smith*, we found trial counsel was ineffective for not objecting to testimony by a forensic interviewer that improperly bolstered the victim's credibility. 386 S.C. at 569-70, 689 S.E.2d at 633. We explained, "The forensic interviewer . . . testified without objection that she found the Victim's statement 'believable' and stated the Victim had no reason 'not to be truthful.'" 386 S.C. at 564, 689 S.E.2d at 631. We held "the forensic interviewer's . . . opinion testimony improperly bolstered the Victim's credibility," 386 S.C. at 569, 689 S.E.2d at 633,[3] and granted a new trial, 386 S.C. at 570, 689 S.E.2d at 633. We stated "we can discern no defensible basis for trial counsel's failure to challenge the forensic interviewer's objectionable testimony." 386 S.C. at 568, 689 S.E.2d at 633.

Smith demonstrates the central point of the prohibition against improper bolstering: a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim. The forensic interviewer's testimony in *Smith* that she found the victim's testimony "believable" directly conveyed her opinion as to the victim's credibility. Our holding that trial counsel was ineffective in failing to object to the testimony made it clear that when a forensic interviewer gives testimony that directly reveals her opinion on the victim's credibility, it is improper bolstering. However, we also found counsel ineffective for failing to object when the interviewer testified "the victim had no reason not to be truthful." This testimony indirectly conveyed her opinion on the victim's credibility. Therefore, *Smith* stands for the principle that there is "no defensible basis for trial counsel's failure to challenge" the testimony of a forensic

[3] We also held counsel's failure to object to inadmissible hearsay quoted by the forensic interviewer corroborating the victim's testimony was deficient performance. 386 S.C. at 568, 689 S.E.2d at 633. The "opinion" testimony, however, was the testimony the victim was "believable" and "had no reason not to be truthful."

interviewer given for the purpose of revealing—directly or indirectly—the witness's opinion as to the credibility of the victim.

Even before *Smith*, however, the law was already clear that no witness may give an opinion as to whether the victim is telling the truth. In *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989), the defendant made a pretrial motion "to prevent any testimony by one witness as to their opinion about the credibility of another witness." 297 S.C. at 393, 377 S.E.2d at 302. The trial judge agreed to the premise of the motion, stating he "didn't know of any provision that allows one witness to give their opinion relative to the credibility of another opinion by another witness." *Id.* During the trial, the solicitor asked the victim's treating psychiatrist, "Based on your examination and your observations of [the victim], are you of the impression that her symptoms are genuine?" *Id.* We found the question improper. 297 S.C. at 394, 377 S.E.2d at 302.

After *Dawkins* in 1989, certainly after *Douglas* in 2009 and *Smith* in 2010, reasonably competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose. When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering. The question we have struggled with is whether the testimony at issue indirectly conveys that. In 2009 in *Douglas* we held testimony the forensic interviewer instructed the victim to tell the truth was fine, 380 S.C. at 504, 671 S.E.2d at 609; in 2015 in *Anderson* we held it is impermissible, 413 S.C. at 221, 776 S.E.2d at 80. Our inability to be clear as to this first point of testimony renders reasonable Singleton's failure to object to it, because we may not judge counsel's performance on standards that developed later.

The question to which we now turn is whether Arroyo-Staggs' testimony on the other three points constituted improper bolstering in 2010 when Briggs was tried.

Arroyo-Staggs' testimony that the victim had not been coached—the second point as to which the PCR court ruled Singleton should have objected—is similar to the "no reason not to be truthful" testimony we found improper in *Smith*. After a series of questions about the general nature of coaching in which Arroyo-Staggs defined it as "when the child is being coerced to think about the [accusation] from somebody else's viewpoint," the State asked,

Q: When you were talking about coaching earlier and certain indications of a child having been coached, did you pick up on any of those during your interview with the victim?

A: I would say that in the first interview I really tried to assess that, as well as the second interview, and I did not find any evidence.

This testimony was arguably offered for the purpose of conveying the witness's opinion about the credibility of the victim, and thus could be improper bolstering. This is a point, however, as to which we will be very careful. Under certain circumstances, it may be proper for the State to ask an expert about coaching. For example, if defense counsel accused the child's mother or father in opening statement or on cross-examination of coaching the child to make an accusation they knew to be untrue, such a line of questioning to an expert could be admissible. One can even envision a scenario in which coaching is implied, or otherwise becomes an issue without such a direct accusation. Under any of those circumstances, where the testimony is offered to address coaching as a disputed issue, it may be reasonable for counsel to decide not to object. *But see Stone v. State*, 419 S.C. 370, 386, 798 S.E.2d 561, 570 (2017) (stating "trial counsel should have objected to those components of the . . . testimony as to which counsel felt he had a reasonably persuasive argument for exclusion").

In this case, Singleton testified his approach to the trial was not based on the victim having been coached, but on the opposite set of circumstances. In particular, when asked at the PCR trial, "Going into the [general sessions] trial, what was your strategy," Singleton testified his strategy was "to say that it didn't happen, because nobody, her mother, her grandmother, nobody believed the child, that it happened." In his opening statement, Singleton told the jury "the father didn't report it for over a month," even when "he knew . . . the child was going . . . back to live with [Briggs]." As to the mother, Singleton told the jury, "It's not that she didn't believe [the victim] for a day or two. She didn't believe her for over a year." Thus, rather than painting a picture of a child coached by her parents to make a false accusation, Singleton painted a picture of a child who stood by her accusation despite the fact her parents did not support her.

Contrary to this strategy, however, Singleton also told the jury in his opening statement that the child's mother was telling "anybody that would listen" that "the father of the child was putting all of this in her head." Thus, Singleton made the question of whether someone coached the child to make a false accusation an issue in the case. Although Arroyo-Staggs' opinion that the victim had not been coached arguably provided an indirect indication to the jury that she believed the victim, the State has a good argument that it offered the opinion to respond to Singleton's statement in opening that made coaching an issue, not for the purpose of bolstering. Under these circumstances, we do not believe Arroyo-Staggs' testimony that the child had not been coached was improper bolstering, and we decline to hold that Singleton's failure to object to it was deficient performance.

We find, however, Arroyo-Staggs' testimony that her "role" was to determine whether the child knows the difference between the truth and a lie—the PCR court's third point—and that her "purpose" was "finding out if something happened" or "to figure out what has occurred"—the fourth point—clearly conveyed to the jury that she believed the victim. As we will explain, Singleton's failure to object to this testimony was deficient performance.

We have recognized that a forensic interviewer may serve dual purposes in child sex abuse cases. First, they serve an evidentiary purpose. As we explained in *Kromah*, a forensic interviewer is "a person specially trained to talk to children," her "job . . . is . . . to collect facts," and her "purpose is to prepare for trial." 401 S.C. at 357, 737 S.E.2d at 499. In this regard, as we explained in *Anderson*, "The sole purpose of her jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject." 413 S.C. at 220-21, 776 S.E.2d at 80. Thus, the evidentiary purpose of a forensic interviewer is to use her skills in interviewing a child to enable the child to speak, so the jury—not the forensic interviewer—may determine "if something happened."

We have also recognized that forensic interviewers serve an investigatory purpose. In *Kromah*, we stated, "Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process." 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. In *Anderson*, we recognized that one "purpose of [a forensic] interview is to allow law enforcement to determine whether a criminal investigation is warranted." 413 S.C. at 221, 776 S.E.2d at 80. In both *Kromah*

and *Anderson*, however, we specifically held that this investigatory purpose should not be discussed in the forensic interviewer's testimony before the jury. *Kromah*, 401 S.C. at 357-58 n.5, 737 S.E.2d at 499 n.5; *Anderson*, 413 S.C. at 221, 776 S.E.2d at 80.

In this explanation in *Anderson* and *Kromah* of the dual purposes of forensic interviewers, we did not create new standards by which to assess the admissibility of evidence, nor to judge the performance of counsel. Rather, we simply applied to specific factual situations the longstanding rule of law that no one may invade the province of the jury. We observed long ago it is "axiomatic" that "the credibility of the testimony of these witnesses is for the jury," *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977), and recently "we have confronted instances where the State has . . . sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim," *Whitner*, 399 S.C. at 559, 732 S.E.2d at 867.

In this case, by informing the jury she conducted the forensic interviews for the purpose of finding out whether the sexual abuse happened, Arroyo-Staggs went far beyond her role as a person who collects facts for the jury to use in the jury's determination of whether the victim was telling the truth. Arroyo-Staggs invaded the province of the jury and testified she had already made that determination. This testimony directly conveyed to the jury that she believed the victim. Similarly, her testimony that she made the determination the child understood the difference between a truth and a lie before she conducted the interviews is not part of her evidentiary role. Arroyo-Staggs' testimony not only revealed to the jury that she believed the child knew the difference, but she also indirectly revealed she believed the subsequent disclosure in the interview was the truth.[4] There was no

[4] Arroyo-Staggs' testimony that her role was to make the determination of whether the child knew the difference between the truth and a lie is different from the testimony the majority in *Douglas* found not to be improper bolstering. *See* 380 S.C. at 504, 671 S.E.2d at 609 (finding a forensic interviewer's explanation to the jury about the importance of telling the truth, and seeking an agreement with the child to tell the truth, was not improper bolstering). In *Douglas*, the witness acted as instructor, but Arroyo-Staggs testified she acted as decision-maker. Any

purpose for this testimony except to bolster the victim's credibility, and thus it was improper.

Finally, if Singleton decided not to object to Arroyo-Staggs' direct testimony based on a valid trial strategy, we would find his performance reasonable despite the inadmissibility of the evidence. *See Watson v. State*, 370 S.C. 68, 72-73, 634 S.E.2d 642, 644 (2006) (finding counsel's performance was not deficient in making the decision not to object to "inadmissible" testimony because his strategy—that doing so "might lead to the more damaging introduction" of other evidence—was valid). That is not a concern in this case because Singleton's strategy of showing nobody believed the victim, and thus the abuse did not happen, could not have been advanced by allowing Arroyo-Staggs to testify she believed her. In addition, Singleton testified he had no strategy to support his failure to object to Arroyo-Staggs' testimony, and he did not even consider objecting. If Singleton did not consider objecting, he could not have decided not to object as a matter of strategy.

We agree, therefore, that Singleton should have objected when Arroyo-Staggs gave improper bolstering testimony during her direct examination. We find the PCR court correctly concluded Singleton's performance in failing to object to Arroyo-Staggs' testimony on these two points was deficient under the first prong of *Strickland*.

B. Cross-Examination

The PCR court's third finding of deficiency was that Singleton elicited improper bolstering testimony from Arroyo-Staggs on cross-examination. Singleton asked,

> Q: I guess what I'm trying to ask is if she can't pinpoint the time, not, you know, a specific date or—but around a holiday or a birthday or something like that, I guess, I mean, how can you assess if she's telling—I mean, how can you as an expert determine if she's telling the truth if she

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witness who tells the jury she has decided questions of fact invades the province of the jury.

can't tell you exactly around about the time when it happened, around some specific event or holiday?

A: I can definitely assess it, which I have I believe accurately and appropriately, again, basing it on age appropriateness, information she's provided. And I don't even recall in the interviews if I asked specifically what date that that occurred. So it can be that I didn't ask.

Q: Right. But it doesn't concern you that when you ask a child how many times it happened and they say one and then they go all the way up to a thousand times, that doesn't concern you?

A: No, sir, it does not concern me, not in this particular case.

Q: Why does it not concern you?

A: Well, as I said before, based on her age and based on the information that she was able to give me, what I deducted was a disclosure based on the appropriateness of the—what I saw, what I heard, her statements, behavior and affect—were all appropriate for her age.

Singleton's cross-examination question "how can you as an expert determine if she's telling the truth"—particularly the open-ended quality of the question—was sure to solicit an answer that directly bolstered the victim's credibility. Arroyo-Staggs' answer met expectations, and placed squarely before the jury her opinion that the victim was telling the truth. That question and those that followed violated a fundamental principle of cross-examination. *See* Francis L. Wellman, THE ART OF CROSS-EXAMINATION 79-80 (1903) (instructing that "no question should be put to an expert which is in any way so broad as to give the expert an opportunity to expatiate upon his own views, and thus afford him an opportunity in his answer to

give his reasons, in his own way, for his opinions, which counsel calling him as an expert might not otherwise have fully brought out in his examination").[5]

We can discern no defensible purpose for Singleton's cross-examination questions. Singleton did not provide any. As we explained earlier, Singleton testified his strategy was "to say that it didn't happen, because nobody, her mother, her grandmother, nobody believed the child, that it happened." Singleton's deficiency in these cross-examination questions was that despite this strategy, he made sure the jury knew at least one person believed the child—the expert. In the series of questions and answers quoted above, from which Singleton appears to have gained nothing for Briggs, he permitted a highly-educated, articulate, certified expert witness to provide the jury something that significantly undermined his strategy—an expert who believed the victim.

The PCR court found Singleton "compounded Arroyo-Staggs' prejudicial testimony on direct examination by repeatedly asking her [on cross], as an expert and in her professional opinion, whether or not she felt the victim was truthful." The PCR court found Singleton permitted Arroyo-Staggs to convey to the jury that she "independently reviewed the [victim's] disclosure and found it to be truthful." The PCR court also found, quoting *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94, "[t]here is no other way to interpret [Arroyo-Staggs' testimony] than to mean [she] believed the child[] [was] being truthful." We find the PCR court correctly concluded Singleton was deficient under the first prong of *Strickland* in cross-examining Arroyo-Staggs because he elicited from her and presented to the jury her direct statement that she believed the victim's accusations when nobody else did.

C. Expert Qualifications

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[5] *See* William H. Fortune, Richard H. Underwood, and Edward J. Imwinkelried, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK 428 (Aspen Publishers 2001) ("As most students of trial advocacy know, Francis Wellman authored *the* text on cross-examination, THE ART OF CROSS-EXAMINATION, widely regarded as the classic American book on the subject." (emphasis in original)).

We disagree, however, with the PCR court's finding that Singleton was deficient in not objecting to Arroyo-Staggs being qualified as an expert. Our analysis begins with *Douglas*, in which we addressed whether the trial court should have allowed a witness to be qualified as an expert in forensic interviewing. On appeal from a ruling by the court of appeals that qualifying a forensic interviewer as an expert was not error, we affirmed, but said only that it was "unnecessary" on the facts of that case. 380 S.C. at 501, 671 S.E.2d at 608. We did not say it was error,[6] and specifically recognized "there may be a case in which qualification of an expert in this field is proper." 380 S.C. at 503 n.2, 671 S.E.2d at 608 n.2. In subsequent cases, we have permitted a forensic interviewer to be qualified in related areas such as "child abuse assessment," the field in which the State offered Arroyo-Staggs as an expert. In *Anderson*, for example, while we held we do not recognize expertise in the narrow field of "forensic interview*ing*," 413 S.C. at 219, 776 S.E.2d at 79 (emphasis added), we held that a forensic interview*er* may be qualified as an expert in child abuse assessment to "testify to the behavioral characteristics of sex abuse victims," 413 S.C. at 218, 776 S.E.2d at 79. Writing in partial dissent in *Anderson*, then Chief Justice Toal—joined by Justice Kittredge—stated "forensic interviewers have a legitimate role to play in these cases, . . . may be qualified as experts in child abuse assessment[, and] may testify . . . as experts regarding matters in their expertise, such as delayed disclosure." 413 S.C. at 222, 776 S.E.2d at 81 (Toal, C.J., dissenting in part).[7]

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[6] In his dissenting opinion, Justice Pleicones interpreted the majority opinion as finding error in the qualification of the witness as an expert. 380 S.C. at 505, 671 S.E.2d at 609-10 (Pleicones, J., dissenting).

[7] In *State v. Baker*, 390 S.C. 56, 700 S.E.2d 440 (Ct. App. 2010), *rev'd on other grounds*, 411 S.C. 583, 769 S.E.2d 860 (2015), the court of appeals reviewed a trial court's decision to qualify a witness "as an expert in forensic interviewing." 390 S.C. at 67, 700 S.E.2d at 445. The court of appeals did not find error, but assuming error for the purposes of the argument, found "Baker suffered no prejudice." *Id.* On certiorari from the court of appeals' decision, then Chief Justice Toal—joined by Justice Kittredge—wrote in dissent she would find no error in the trial court's decision. *See* 411 S.C. at 592, 769 S.E.2d at 865 (Toal, C.J., dissenting) ("I would find that the trial court did not err qualifying [the witness] as an expert in forensic interviewing.").

Since *Anderson*, the court of appeals has on at least two occasions affirmed a trial court's qualification of a forensic interviewer as an expert to testify as to the behavior of child sex abuse victims. *See State v. Barrett*, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016), *cert. granted* (Mar. 24, 2017) (finding "no error" in qualifying a forensic interviewer as an expert to testify "regarding general behavioral characteristics" of child sex abuse victims); *State v. White*, 416 S.C. 135, 138, 784 S.E.2d 695, 696 (Ct. App. 2016) (finding "the trial court acted within its discretion" when it qualified "the forensic interviewer as an expert in the dynamics of child abuse").

In light of this history of permitting forensic interviewers to testify as experts, we simply cannot say it was unreasonable for Singleton to not object to the qualification of Arroyo-Staggs as an expert in child abuse assessment in the August 2010 trial.

III. Prejudice

To satisfy the second prong of *Strickland*—the prejudice prong—Briggs must demonstrate a "reasonable probability" the result of the trial would have been different if Singleton had not committed the errors we discussed above. *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.* On this point, the evidence is conflicting. On one hand, there was no physical evidence any sexual abuse occurred, and thus the victim's credibility was very important. Singleton testified the case "turned on the credibility of the little girl," and he told his client "it would come down to whether they believed her or not." In addition, as we explained in *Kromah*, the "impermissible harm" from improper bolstering "is compounded" when the witness "is qualified as an expert." 401 S.C. at 358, 737 S.E.2d at 499.[8]

[8] *Contra Douglas*, 380 S.C. at 503, 671 S.E.2d at 609 (finding the contention "the jury was likely to give [the forensic interviewer's] testimony undue weight simply because of her qualification as an expert" to be "untenable").

On the other hand, the State presented additional evidence that Briggs sexually assaulted the victim. For example, in a lengthy interview with law enforcement after he waived his right to remain silent, as one detective testified, Briggs did not strongly deny he abused the victim. In fact, the detective testified, when asked whether he was going to say he didn't sexually assault the victim, Briggs responded, "Well, I'm not going to deny it to you because you know better." Briggs told another detective he was "sick and he needed help." Briggs also made a series of strange statements in recorded phone calls from the jail that the State effectively argued were incriminating. Finally, two of Briggs' fellow prisoners testified he made incriminating statements. One testified Briggs told him "he pulled the girl off the bed. And he used to ride her on his lap playing horsey with her. And he said that one time he ejaculated. She asked what it was, and he told her it was snot." The other testified he overheard Briggs saying "he rubbed his penis in between [the victim's] legs, butt area, and until he ejaculated" and "basically he had the case beat because he didn't penetrate her."

While all of this evidence could indicate the jury was certain to find Briggs guilty—regardless of Arroyo-Staggs' improper bolstering—our decision is governed by the standard of review. We defer to a PCR court's findings of fact, and we will uphold them if there is evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The PCR court found the case "came down to the victim's believability and credibility." The PCR court found the most damaging testimony to Briggs—that of the "two jailhouse informants"—was not reliable because their "credibility is highly suspect." Finally, the PCR court found "there is a reasonable probability that the result of the Applicant's trial would have been different" if Singleton had not allowed Arroyo-Staggs to improperly bolster the victim. Giving to the factual findings by the PCR court the deference we are required by law to give, we affirm the court's finding that Briggs proved prejudice, satisfying the second prong *Strickland*.

IV. Conclusion

Briggs's trial counsel was deficient for not objecting to, and eliciting, testimony from the forensic interviewer which improperly bolstered the credibility of the victim. We **AFFIRM** the PCR court's finding that this deficiency prejudiced Briggs and **REMAND** to the court of general sessions for a new trial.

KITTREDGE, HEARN and JAMES, JJ., concur. BEATTY, C.J., concurring in result only.

The Supreme Court of South Carolina

Re: Amendments to Appendix H to Part IV, SCACR

Appellate Case No. 2017-002008

ORDER

The South Carolina Board of Paralegal Certification has submitted a proposed amendment to Appendix H to Part IV, SCACR, which contains the regulations governing the certification of paralegals in South Carolina. The proposed amendment would allow paralegals to carry forward a portion of any excess credit earned for Continuing Paralegal Education Programs from one certification year to the next.

We grant the request and amend Section XII of the Appendix to add Paragraph C, which provides as follows:

> C. A certified paralegal who accumulates in excess of ten (10) hours credit in a certification year may carry a maximum of ten (10) hours forward to the next certification year, of which one (1) hour may be professional responsibility or professionalism credit.

The amendment is effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
October 25, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert J. Burke, Respondent,

v.

Republic Parking System, Inc., Appellant.

Appellate Case No. 2015-000269

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

Opinion No. Op. 5519
Heard June 6, 2017 – Filed October 25, 2017

REVERSED AND REMANDED

Roopal S. Ruparelia and Sarah Patrick Spruill, both of Haynsworth Sinkler Boyd, PA, of Greenville, for Appellant.

Clayton B. McCullough and Jamie A. Khan, both of McCullough Khan, LLC, of Charleston, for Respondent.

THOMAS, J.: Appellant Republic Parking System, Inc. (Republic) filed this appeal following a jury verdict in favor of Respondent Robert J. Burke. Republic claims the trial court erred by denying its motions for judgment notwithstanding the verdict (JNOV) and a new trial based on many arguments including that the trial court erred by excluding its expert witness. We agree the trial court erred by

excluding Republic's expert witness and reverse for a new trial; thus, we decline to address Republic's remaining arguments.

FACTS/PROCEDURAL HISTORY

In his complaint, Burke alleged he was a customer in the George Street parking lot (the Lot) in Charleston at approximately 7:00 p.m. in January 2013. Burke claimed he parked his car and attempted to exit the Lot on foot when he tripped and fell on a "raised curb" inside the Lot. Burke asserted the curb "was virtually hidden" due to "extremely low and poor lighting conditions." Burke named as defendants Republic, Indigo Realty Company, LLC (Indigo), and the City of Charleston (the City). Burke alleged Indigo owned the Lot and leased it to the City who then contracted with Republic to operate the Lot. Burke claimed Republic operated and managed the Lot and was responsible for keeping it free of hazardous conditions, maintenance, and repairs.

Burke settled with Indigo and the City the week before trial. During a motion in limine on the morning the trial began, Burke moved to exclude Republic's expert witness, Dr. Todd Shuman. Burke admitted the City named Shuman as an expert during discovery but claimed only the City named him. Burke asserted that fact was a consideration in his decision to settle with the City.[1] Republic claimed it did not name Shuman in its discovery responses because the City had named him and did not settle with Burke until the week prior to trial. Republic claimed, however, that it did name Shuman in its pre-trial brief served the Friday before trial. Also, Republic asserted it had a fee sharing agreement with the City for compensating Shuman. Republic pointed out Burke would not be prejudiced or surprised by Shuman's testimony because he had been aware of Shuman and had taken his deposition.

The trial court inquired whether Republic ever supplemented its interrogatories, and Republic admitted it had not. The trial court then excluded Shuman because

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[1] During oral argument, Burke continued to assert he "may" not have settled with the City had he known Republic would call Shuman as an expert. However, Burke refused to state definitively that he would not have settled, and he acknowledged other strong motivations to settle with the City, including the South Carolina Tort Claims Act's cap on recovery against a government entity.

Republic failed to file a supplemental interrogatory. The trial court explained it was excluding Shuman because Republic answered interrogatories and did not identify an expert witness. The trial court noted "[a]ll [Republic] had to do was to send [Burke] a letter." When Republic attempted to restate it listed Shuman as a witness in its pre-trial brief, the trial court incorrectly stated the pre-trial brief listed him as a fact witness.

Subsequently, Republic proffered Shuman's deposition in which he testified he reviewed records related to Burke's medical care following the incident in this case. Shuman asserted there were "several reasons" Burke could have fallen and his recovery was "greatly influenced" by his preexisting medical conditions. Specifically, Shuman noted Burke's preexisting conditions that could have caused his fall in the Lot included diabetes, "significant swelling" in his feet, and a prior stroke. Shuman also claimed "the extent of [Burke's] injuries may not be as great as were initially stated" by Burke's physician. Testifying specifically about Burke's records, Shuman claimed some of the records indicated Burke's knee injury was a chronic problem in existence prior to his fall in the Lot. The jury returned a verdict in Burke's favor, and the trial court denied Republic's post-trial motion for JNOV or a new trial. This appeal followed.

ISSUE ON APPEAL

Did the trial court abuse its discretion by excluding Shuman's testimony based on Republic's failure to timely identify Shuman as an expert witness?

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). Determining whether prejudice exists "depends on the circumstances" and "the materiality and prejudicial character of the error must be determined from its relationship to the

entire case." *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). Prejudice in this context means "there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

EXCLUSION OF SHUMAN'S TESTIMONY

Republic argues the trial court abused its discretion by excluding Shuman because it failed to properly weigh the appropriate factors for determining a sanction when a party fails to timely disclose a witness. We agree.

Deciding the appropriate sanction for late disclosure of an expert witness lies within the sound discretion of the trial court. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 592, 586 S.E.2d 572, 574 (2003). "The rule is designed to promote decisions on the merits after a full and fair hearing, and the sanction of exclusion of a witness should never be lightly invoked." *Id*. (quoting *Jackson v. H&S Oil Co.*, 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975)). A trial court "is required to consider and evaluate" certain factors before excluding a witness: "(1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness'[s] name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party." *Id*. at 592, 586 S.E.2d at 574–75.

In *Barnette*, our supreme court found the trial court abused its discretion by excluding an expert witness because the trial court "made no specific finding of prejudice to the [opposing party], other than finding the late disclosure would necessitate further discovery" and there was no violation of a pre-trial order. *Id*. at 593, 586 S.E.2d at 575. *See Jenkins v. Few*, 391 S.C. 209, 219–20, 705 S.E.2d 457, 462 (Ct. App. 2010) (finding the trial court did not abuse its discretion by admitting an expert witness after considering the relevant factors). In *Jumper*, this court reversed the family court's decision to exclude a witness. 348 S.C. at 152, 558 S.E.2d at 916. This court found the family court "erred by focusing solely on the [pre-trial scheduling] order in making its decision" and failing to consider all of the relevant factors. *Id*. at 151–52, 558 S.E.2d at 916.

In *Bryson*, this court found the special referee was within its discretion to exclude a witness when the party attempting to call the witness did not notify the opposing party until the morning of trial. *Bryson v. Bryson*, 378 S.C. 502, 508, 662 S.E.2d 611, 613 (Ct. App. 2008). The court carefully examined the record and found the special referee "properly considered the *Jumper* factors" when making its decision. *Id*. This court also examined each of the factors and noted the opposing party would suffer "significant surprise and prejudice" because it would be unable to prepare for examining the witness and would have no opportunity to depose the witness. *Id*. at 509, 662 S.E.2d at 614. The *Bryson* court concluded, "[W]e find the special referee properly considered all factors set forth in *Jumper* when deciding to exclude [the witness], and therefore, the exclusion was not an abuse of discretion." *Id*.

Additionally, in *Arthur*, the trial court excluded multiple witnesses because the appellant failed to identify them within the deadline imposed by a scheduling order. *Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 338, 628 S.E.2d 894, 900 (Ct. App. 2006). Although the trial court failed to specifically enunciate the *Jumper* factors when making its ruling, this court found the trial court "did not exclude the witnesses solely on the ground of [the appellant's] failure to comply with the time limits of the scheduling order. Instead, the [trial court] made the appropriate inquiry and considered the requisite factors." *Id*. at 341, 628 S.E.2d at 902. Thus, the trial court did not abuse its discretion because it based its decision on a consideration of the *Jumper* factors, rather than the initial finding that notice of the witnesses was untimely. *Id*.

Accordingly, based on our review of the case law, a trial court has discretion to decide the sanction for a party providing untimely notice of a witness but may exclude the witness from testifying only after considering each of the *Jumper* factors. A party's failure to provide timely notice of a witness triggers the trial court's obligation to then consider the factors. Thus, when a trial court excludes a witness for the sole reason that the party attempting to call the witness failed to provide timely notice under the rules of discovery, the trial court commits an error of law, which is an abuse of discretion.

In this case, the trial court abused its discretion because it excluded Shuman on the sole basis that Republic failed to provide timely notice of its intent to call him as an expert witness. After thoroughly reviewing the discussion between the trial

court and the parties, we find the trial court based its ruling on the single finding that Republic did not serve a supplemental interrogatory. During the motion in limine, the trial court inquired whether Republic ever supplemented its interrogatories, and Republic admitted it had not. The trial court responded, "Very well, I am going to grant [Burke's] motion [to exclude Shuman]. He's not going to testify." The trial court further stated, "I am banking on the fact that you have answered interrogatories and today you've still not identified an expert witness." The trial court noted "[a]ll [Republic] had to do was to send them a letter." When Republic attempted to argue it listed Shuman as a witness in its pre-trial brief, the trial court stated the pre-trial brief listed him as a fact witness.[2]

Despite Republic's attempt to argue the *Jumper* factors including that Burke would not be surprised or prejudiced, the trial court made clear it was excluding Shuman simply because Republic failed to provide timely notice. The trial court failed to consider the *Jumper* factors, and as discussed above, such a failure is an abuse of discretion under our case law. Thus, the trial court abused its discretion by excluding Shuman when it based its decision only on Republic's failure to timely name Shuman as a witness and failed to consider the *Jumper* factors.

Furthermore, we find the trial court's error prejudiced Republic. *See State v. Cope*, 385 S.C. 274, 287, 684 S.E.2d 177, 184 (Ct. App. 2009) ("To warrant reversal, any error by the trial court in admitting or excluding expert testimony must result in prejudice."). Shuman was Republic's only expert witness to contradict Burke's expert, and his testimony would have impacted the causation and damages elements of Burke's claims. Shuman's testimony went to whether Burke's fall was caused by the Lot's conditions or a preexisting medical condition. In his deposition, Shuman testified there were "several reasons" Burke could have fallen such as diabetes, significant swelling in his feet, the long car ride preceding the fall, and other preexisting medical conditions. Shuman noted Burke had at least one other fall prior to his fall in the Lot. Shuman also asserted Burke's ability to recover was "greatly influenced" by his preexisting conditions. By excluding Shuman's testimony, the jury was not permitted to hear and consider all relevant evidence relating to causation and damages, and there is a reasonable probability the jury's verdict was influenced by the trial court's decision. *See Vaught*, 366 S.C. at 484–85, 623 S.E.2d at 378 (finding there was "a reasonable probability the jury's

[2] The pre-trial brief listed Shuman as an expert witness.

verdict was influenced by the excluded evidence because the jury was not permitted to hear and consider all relevant evidence relating to damages"). Thus, Shuman's testimony was vital to Republic's causation and damages arguments, and the trial court's exclusion of it prejudiced Republic. Accordingly, because the trial court abused its discretion by excluding Shuman's testimony and that error was prejudicial, we reverse and remand for a new trial.[3] *See id*. at 485, 623 S.E.2d at 378 (reversing and remanding for a new trial after finding the trial court committed reversible error by excluding certain evidence).

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

[3] Because our decision to grant a new trial based on the trial court's abuse of discretion is dispositive of Republic's remaining arguments, we decline to rule on them. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Earnest Stewart Daise, Appellant.

Appellate Case No. 2013-002394

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5520
Heard March 9, 2017 – Filed October 25, 2017

AFFIRMED

Allen Mattison Bogan and Phillips Lancaster McWilliams, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

MCDONALD, J.: Earnest Daise appeals his convictions for murder, assault and battery with intent to kill, possession with intent to distribute marijuana, and trafficking in cocaine. Daise argues the circuit court erred in (1) allowing a witness to offer hearsay violative of the Confrontation Clause, (2) permitting a witness to comment on the credibility of another witness, (3) admitting testimony that a victim feared Daise, (4) failing to require the State to produce materials that allegedly amount to a "handbook" on circumventing a *Batson* challenge, (5) admitting a photograph of Daise in a custodial pose, and (6) admitting two photographs in which a child victim's birthday cake is visible. Finally, Daise argues the circuit court's cumulative errors denied him a fair trial. We affirm the convictions.

I. Facts and Procedural History

Jeanine Mullen was the mother of four children, Child 1, Child 2, John Doe 1 (four years old), and John Doe 2 (two years old). Jeanine was involved in a romantic relationship with Daise—the father of John Doe 2—at the time of the murders.

On the morning of November 15, 2009, Daise left Jeanine's Beaufort County home in her white van. Video surveillance showed Daise with the van at a gas station between 11:45 a.m. and 12:18 p.m. Jeanine's attempts to reach Daise to have him return the van, which she needed to prepare for John Doe 1's fourth birthday party, were unsuccessful. Phone records established that between 11:39 a.m. and 3:52 p.m. on November 15, Jeanine called Daise eighteen times. Although most of the calls went to voicemail, the 3:52 p.m. call lasted twenty-eight seconds. Around dusk,[1] Daise was seen with the van at Eddie's Disco, where he was overheard telling someone on the phone, "Who the f*** you think you talking to?"

Sometime between 6:30 p.m. and 7:00 p.m., Jeanine's father, Frank Mullen, arrived at Jeanine's home to drop off the two older children. The group noticed Jeanine's white van parked in the driveway—the doors were open and it appeared "ransacked." Inside the home, Frank found John Doe 1's body in the kitchen and

[1] The court took judicial notice that the sun set that day at 5:22 p.m., with twilight ending at 5:48 p.m.

Jeanine's body in her bedroom.[2] Although John Doe 2 was still alive, he had also been shot and was lying near Jeanine. The only item missing from the home was a .38 pistol.

Around 2:00 a.m. on the morning of November 16, police apprehended Daise at the home of his friend, Jay Simmons. Daise had his own bedroom in the home, and a search of that bedroom revealed half a pound of marijuana, an electronic scale, ammunition commonly associated with an AK-47, a set of keys that fit the doors and ignition of Jeanine's white van,[3] twenty-six grams of crack cocaine, and Daise's cell phone. Police also documented a red smear on the door into the bedroom, noted what appeared to be "fresh" blood on the front-left pocket of Daise's blue jeans, and photographed a cut on Daise's right hand. During his initial interview, Daise denied being at Jeanine's home or driving her van.

At trial, the State introduced phone records showing Daise made nine calls to Simmons between 6:00 p.m. and 6:18 p.m. Simmons initially testified that sometime after 6:00 p.m., he picked up Daise on the side of the road and gave him a ride.[4] Simmons sent Daise a text message at 6:04 p.m. that he was "on the way." On cross-examination, Simmons admitted to sending the text but insisted he never picked up Daise. Simmons claimed police threatened to charge him as an accessory if he did not say he picked up Daise.

A trace evidence expert testified she found gunshot residue on the blue jeans Daise was wearing when he was apprehended. On cross-examination, she admitted she only found one single particle of gunshot residue on each leg of the jeans and acknowledged gunshot residue can remain on unwashed clothing for many months. She also testified there was no gunshot residue on Daise's sweatshirt.

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[2] John Doe 1 died from a gunshot wound to the head. Likewise, Jeanine died from a gunshot wound to the head, but she had an additional gunshot wound on her left thigh. The State's pathologist opined Jeanine's head wound was caused by a gun being placed directly against her head.

[3] Another set of keys, which unlocked the back door to Jeanine's home, and a purse were found in the passenger seat of the van.

[4] A police officer testified that the location where Simmons indicated he picked up Daise was 1.6 miles from the crime scene.

A DNA expert testified the red smear on the door in Simmons's home was comprised of Daise's blood. Testing revealed blood from both Daise and Jeanine on the blue jeans.

The jury found Daise guilty of two counts of murder, one count of assault and battery with intent to kill, one count of possession with intent to distribute marijuana, and one count of trafficking cocaine between ten and twenty-eight grams. Daise received sentences of life without parole on the murder charges and consecutive sentences totaling seventy years' imprisonment on the remaining charges.

II. EMT Testimony

Daise argues the circuit court erred when it allowed emergency medical technicians (EMTs) to testify about twenty-eight-month-old John Doe 2's responses to questioning regarding who caused his injuries.

Before trial, the State indicated it planned to introduce evidence that John Doe 2 told EMTs "Daddy" hurt him. Relying on *Michigan v. Bryant*,[5] the State argued the evidence was nontestimonial in nature and, therefore, did not violate Daise's right to confront his accuser. The circuit court agreed the statement was nontestimonial and allowed the State to introduce it.

At trial, EMT Scott Sampson testified that when he entered Jeanine's home, he found two individuals who appeared to be deceased. He also found John Doe 2, who was breathing, whimpering, and crying but only responsive to "painful stimuli." Sampson disrobed John Doe 2 to locate his injuries and turned him over to Paramedic Shayna Orsen.

Orsen testified she arrived on the scene with EMT Crew Chief Paramedic Danny Tinnel, who remained in the ambulance. Orsen further testified John Doe 2 was "unresponsive" and "unconscious" when he was given to her. After placing him on the stretcher, Orsen and Tinnel assessed John Doe 2 for signs of trauma and found

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[5] 562 U.S. 344, 377–78 (2011) (holding the admission of victim's statements in response to police questioning not violative of the Confrontation Clause because their primary purpose was to assist police officers during an ongoing emergency).

one bullet wound to his chest and another behind his ear. Tinnel administered an IV (normal saline fluid drip) while Orsen treated the chest wound.

On the way to the hospital, John Doe 2 became responsive. Tinnel immediately began questioning him regarding "person, place, time, and event," which Tinnel explained they do "with just about every patient." Specifically, Tinnel asked John Doe 2 for his name and it "sounded like" he responded "Dub" or "Doug."[6] Tinnel then asked John Doe 2 several more questions, including "how it happened" and "who hurt him." John Doe 2 responded "Daddy" hurt him but was unable to respond to any additional questions including "what his daddy's name was."

A. Hearsay

Daise argues the circuit court erred in allowing the challenged testimony because it constitutes inadmissible hearsay.[7]

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Id.* (quoting *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). "In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

Our review of the record reveals that at no time during the trial proceedings did Daise make a hearsay objection to the challenged testimony. *See State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is

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[6] John Doe 2's grandmother and his older half-brother testified John Doe 2's nicknames included "Dub," "Little Dub," and "J-Dub."

[7] 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 is inadmissible unless it falls within one of the enumerated exceptions to the hearsay rule. Rules 801(c) & 802, SCRE.

required to properly preserve an error for appellate review."). His only objection to John Doe 2's statement that "Daddy" hurt him was to "renew our *Crawford* [8] objection," which Daise initially made at a pretrial hearing. *See* Rule 103(a)(1), SCRE (stating a party must state "the specific ground of objection, if the specific ground was not apparent from the context"). On appeal, Daise first argued the challenged testimony was inadmissible under the medical diagnosis or treatment exception to the hearsay rule.[9] *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (explaining an argument advanced on appeal but not raised and ruled on below is not preserved). In his reply brief, Daise set forth additional arguments that the challenged testimony was inadmissible under the present sense impression[10] and excited utterance[11] exceptions to the hearsay rule. However, "an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001). Therefore, we find the hearsay arguments unpreserved for our review.

B. Confrontation Clause

Daise further argues that even if the challenged testimony is not hearsay, it violated his Sixth Amendment right to confront his accuser.

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[8] *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment's Confrontation Clause unless the witnesses are unavailable and defendants had prior opportunity to cross-examine them).

[9] Statements made for the purpose of medical diagnosis or treatment "are not excluded by the hearsay rule, even though the declarant is available as a witness." Rule 803(4), SCRE.

[10] Rule 803(1), SCRE, defines a "present sense impression" as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

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

Paramedic Tinnel testified that in response to questioning, John Doe 2 stated "Daddy" hurt him. Tinnel explained he began questioning John Doe 2 immediately after he became responsive in order to "keep him awake and talking," "find out if he had any other injuries," and "determine his level of responsiveness." Just as he does with other patients, Tinnel questioned John Doe 2 regarding "person, place, time, and event." Tinnel clarified "[t]he purpose we were going after was to determine his level of consciousness and to determine his cognitive thought process, especially with the possibility of a gunshot wound to the head."

The Confrontation Clause of the Sixth Amendment to the United States Constitution demands that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. In *Pointer v. Texas*, the United States Supreme Court held "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." 380 U.S. 400, 403 (1965).[12]

The Supreme Court again addressed the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004). Crawford was convicted of assaulting a man who allegedly tried to rape his wife. *Id*. at 38. At trial, the State introduced the wife's tape-recorded statement describing the stabbing to the police, despite the fact Crawford had no opportunity to cross-examine her. *Id.* The Court reversed Crawford's conviction and held the admission of a testimonial hearsay statement against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant. *Id.* at 54. Thus, the Confrontation Clause may operate to render otherwise admissible hearsay evidence inadmissible if it is testimonial in nature. *See id.* at 68. Although the Court declined to comprehensively define "testimonial," it did declare that the "core class of 'testimonial' statements" includes: (1) "ex parte in-court testimony or its functional equivalent"; (2) "'extrajudicial statements . . . contained in formalized testimonial materials'"; (3) statements made under circumstances leading an objective witness

[12] In pertinent part, the Fourteenth Amendment to the United States Constitution provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

to reasonably believe they would be available for use at a later trial; and (4) "[s]tatements taken by police officers in the course of interrogations." *Id.* at 51–52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)).

In *Davis v. Washington*, decided jointly with *Hammon v. Indiana*, the Supreme Court addressed the Confrontation Clause in the context of two domestic violence cases. 547 U.S. 813 (2006). Announcing what has come to be known as the "primary purpose" test, the Court explained "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose . . . is to enable police assistance to meet an ongoing emergency," however, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822. The Court found the *Davis* victim's identification of her abuser in response to initial questioning from a 911 emergency operator was nontestimonial. *Id.* at 826–29. In *Hammon*, however, the Court held that when police responded to a domestic disturbance, found the couple at home, and took a statement from the wife about the husband's abuse while the husband was in another room, wife's statements were testimonial. *Id.* at 829–34.

In *Michigan v. Bryant*, police officers responding to a radio dispatch found a man lying in a gas station parking lot with a gunshot wound to his abdomen. 562 U.S. at 349 (2011). Before the victim was removed from the scene, the police officers asked "what had happened, who had shot him, and where the shooting had occurred." *Id.* (quoting *People v. Bryant*, 483 Mich. 132, 143, 768 N.W.2d 65, 71 (2009). At trial, the officers were permitted to testify that the victim, who was now deceased, told them Bryant shot him as well as when and where the shooting occurred. *Id.* The Supreme Court held the victim's statement to police was nontestimonial because the officers' "primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his statements." *Id.* at 377. "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* at 360. "[T]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose

of the interrogation." *Id.* at 367. The Court carefully added that "giv[ing] controlling weight to the 'intentions of the police'" would be "a misreading of our opinion," instructing lower courts to consider "all of the relevant circumstances" in determining whether statements are testimonial. *Id.* at 369. "'The identity of an interrogator, and the content and tenor of his questions,' 'can illuminate the 'primary purpose of the interrogation.'" *Id.* (citations omitted).

More recently, the Supreme Court again addressed the Confrontation Clause in *Ohio v. Clark*, 135 S. Ct. 2173 (2015). Clark was convicted of felonious assault, child endangerment, and domestic violence arising from his physical abuse of his girlfriend's three-year-old son and eighteen-month-old daughter. *Id.* at 2177–78. The three-year-old's preschool teachers observed visible injuries to his eye, face, and chest. *Id.* at 2178. When the lead teacher asked, "[w]ho did this" and "[w]hat happened to you," the child responded "Dee, Dee." *Id.* The Court held the child's statement was not testimonial (even though it required his teachers to report the abuse) because "a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Id.* at 2180–81. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.* at 2180 (quoting *Bryant*, 562 U.S. at 359). In addressing "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause," the Supreme Court "decline[d] to adopt a categorical rule" but noted "such statements are much less likely to be testimonial than statements to law enforcement officers." *Id.* at 2181. The Court identified several circumstances contributing to its determination, including the fact that the questions and answers "were primarily aimed at identifying and ending the threat" and protecting the child-victim, the conversation between the child and his teachers was "informal and spontaneous," the declarant was three years old at the time of his statement, and the teachers were not "principally charged with uncovering and prosecuting criminal behavior." *Id.* at 2181–82. *See also State v. Ladner*, 373 S.C. 103, 113–15, 644 S.E.2d 684, 68990 (2007) (statements made by two-and-a-half year old girl to her caretakers immediately after the discovery of her injury were nontestimonial and, thus, not admitted in violation of *Crawford*).

We find John Doe 2's statement in response to the EMT questioning was nontestimonial. The statement occurred in an ambulance on the way to the hospital during an ongoing medical emergency—facts that distinguish this case from *Crawford*'s formal police interrogations at the station. *See* 541 U.S. at 38–40

(explaining that following his arrest, Crawford and his wife were both interrogated twice). Nor are the circumstances in this case akin to the police interrogation and battery affidavit in *Hammon*, where officers knew the identity of the attacker and questioned the victim only after they had safeguarded her from potential harm. 547 U.S. 829–34.

The conversation between Paramedic Tinnel and John Doe 2 is closer to that of a victim's identification of his or her abuser in response to initial questioning from a 911 emergency operator or a teacher. *See Davis*, 547 U.S. at 826–29; *Clark*, 135 S. Ct. at 2178. Tinnel explained "[t]he purpose we were going after was to determine [John Doe 2's] level of consciousness and to determine his cognitive thought process, especially with the possibility of a gunshot wound to the head." As the Supreme Court held in *Bryant*, we find the "primary purpose" of the questioning in this case—what is your name, how did this happen, who did this to you, and who is your daddy—was "simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his statements." 562 U.S. at 377. Tinnel's objective was to keep John Doe 2 "awake and talking," "find out if he had any other injuries," and "determine his level of responsiveness" during an ongoing medical emergency.

The Supreme Court's holding in *Clark* further supports the circuit court's conclusion and our opinion that the introduction of the challenged testimony here did not violate the Confrontation Clause. *See Clark*, 135 S. Ct. at 2181 ("The teachers asked [the child-victim] about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse."). Likewise, the conversation in the ambulance was spontaneous because Tinnel began questioning John Doe 2 immediately after he became responsive, as he testified he does "with just about every patient."

John Doe 2's very young age further reinforces our conclusion that the challenged testimony was not testimonial. *See id.* at 2182 ("Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. . . . [and research shows] young children 'have little understanding of prosecution.'"). No twenty-eight-month-old child in John Doe 2's position would intend for his statement to substitute for trial testimony. Certainly, this child, who possibly witnessed his

mother and brother shot to death and, at the very least, was left alone in a room with his dead mother and severe injuries of his own, was not making a statement for future prosecutorial use as he became responsive in the ambulance. As *Clark* explains, "a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all." *Id.* at 2182. Similarly, the circuit court cogently addressed John Doe 2's very young age in determining the statement was nontestimonial.

Finally, although the Supreme Court has declined to adopt a categorical rule that statements to individuals who are not law enforcement officers fall outside the testimonial scope of the Sixth Amendment's Confrontation Clause, the fact that John Doe 2 was speaking to an EMT during an ongoing medical emergency remains highly relevant to our determination. After a thorough review of the record before us, we find the admission of the challenged statement did not violate the Confrontation Clause. Thus, we affirm the circuit court's admission of John Doe 2's responses to the EMTs caring for him in the ambulance.

III. Sgt. Fraser's Testimony

Daise argues the circuit court erred in allowing Staff Sergeant Jeremiah Fraser to impermissibly comment on the credibility of Jay Simmons's conflicting statements to police. Daise contends he is entitled to a new trial because witness credibility is a matter within the exclusive province of the jury, and one witness is not allowed to testify as to the truthfulness of another.

Simmons gave conflicting testimony regarding Daise's activities and demeanor on the date of the shootings. Simmons's trial testimony was consistently conflicting; he also provided conflicting accounts to law enforcement during the investigation. Specifically, on direct examination, Simmons denied talking with Daise on the evening of the murders. Simmons testified he picked up Daise approximately a mile from the crime scene after sending him the "on the way" text, dropped him off near the tracks on Poppy Hill Road, and was back home before his girlfriend arrived at 7:00 p.m. Simmons stated Daise "seemed alright" when he picked him up and he denied previously telling Sergeant Fraser that Daise acted like he had been robbed and was stressed out. On cross-examination, Simmons testified he told police he picked up Daise from the side of the road near the crime scene only after law enforcement threatened to charge him with accessory after the fact. Simmons then stated he gave Daise a "ride to the store" before subsequently

testifying he never picked up Daise at all. Simmons acknowledged texting Daise that he was "on the way" but stated he was unable to find Daise.

Thereafter, the State called Fraser to explain why police questioned Simmons on both November 15 and November 18, 2009:

> Q: [W]hen you talked to Jay Simmons [on November 18, 2009], had he been talked to already by other officers?
>
> A: Yes, he had.
>
> Q: And was the story that he gave those officers credible?
>
> A: No, it was not.
>
> . . .
>
> Q: Did you have information that led you to believe that those stories were not credible?
>
> A: Yes, we did.
>
> . . .
>
> Q: Is that why you wanted to interview him again?
>
> A: Yes, sir, that's correct.

Fraser explained Daise gave law enforcement one story before he was confronted with his cell phone and the "on the way" text but provided an alternative version of events after the confrontation.

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and

> (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Rule 608(a), SCRE. "Our courts have previously held that '[t]he assessment of witness credibility is within the exclusive province of the jury,' and that witnesses generally are 'not allowed to testify whether another witness is telling the truth.'" *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499–500 (2013) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (alteration in original)). Moreover, "[i]t is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness. This error is reversible if the accused is unfairly prejudiced thereby." *State v. Bryant*, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (quoting *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145–46 (1988)).

Considering the record as a whole, we find Fraser's testimony regarding the credibility of Simmons's conflicting statements constituted improper witness pitting. However, because Simmons gave inconsistent statements throughout his own trial testimony, he effectively impeached his own credibility. *See Thrift v. State*, 302 S.C. 535, 537, 397 S.E.2d 523, 525 (1990) ("[I]mproper 'pitting' constitutes reversible error only if the accused was unfairly prejudiced."); *State v. Hariott*, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) ("[A]n accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him."). Although a witness is generally not allowed to testify as to the truthfulness of another witness, Fraser's assertion that Simmons's November 15 statement was not credible because it was inconsistent with his November 18 statement was merely cumulative to Simmons's own inconsistent testimony. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Fraser never stated Simmons's trial testimony was not credible—only that he did not find Simmons's initial police statement credible given that Simmons initially denied owning a cell phone, which was demonstrably false. Thus, Daise was not prejudiced by Fraser's testimony.

IV. Fear Testimony

Daise challenges the testimony of Jeanine's coworker and friend, Alleen Porter, arguing the circuit court erred in admitting her testimony that Jeanine feared Daise.

At trial, the State proffered Porter's testimony. During the proffer, Porter testified Jeanine "was terrified of [Daise]" and wanted to leave him. Due to their volatile relationships, Porter and Jeanine formed a safety plan. Porter explained that she and Jeanine communicated at certain times throughout the night and on weekends to make sure each was okay. Porter also testified that she overheard arguments between Jeanine and Daise. On a specific instance, Porter overheard Daise tell Jeanine, "I'll kill you and your mother f'ing kids." The circuit court concluded Porter's testimony was admissible but explained she could not testify about why Jeanine feared Daise.

> Rule 803(3), SCRE, provides that a statement 'of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed' is not excluded by the hearsay rule.

State v. Hughes, 419 S.C. 149, 155, 796 S.E.2d 174, 178 (Ct. App. 2017). "Our supreme court has held that 'while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not.'" *Id.* (quoting *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999)). "The court cautioned that '[i]f the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—"I'm scared"—and not belief—"I'm scared because [someone] threatened me."'" *Id.* at 155–56, 419 S.E.2d at 178 (quoting *Garcia*, 334 S.C. at 76, 512 S.E.2d at 509).

In this case, the circuit court erred in admitting some of Porter's testimony; however, such admission did not cause Daise prejudice. *See State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006) ("The improper admission of hearsay is reversible error only when the admission causes prejudice.").

At trial, Porter testified Jeanine "was terrified of him" and wanted to leave him. Porter also testified about overhearing Daise threaten to kill Jeanine and her children. We find these statements were inadmissible because they not only revealed Jeanine's fearful state of mind, they described the reason for it. *See*

Garcia, 334 S.C. at 76, 512 S.E.2d at 509 ("[W]hile the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not."). Porter's statement closely emulates the testimony ruled inadmissible in *Garcia*. *See id.* at 74–76, 512 S.E.2d at 508–09 (holding a witness's testimony was improperly admitted under Rule 803 stating, "[w]hile their testimony presents circumstantial evidence of the decedent's fear of appellant and concern for her safety, the testimony improperly reveals the reason for her state of mind (i.e., that appellant had kicked and threatened to kill her)"). Nevertheless, this testimony was cumulative to Frank's testimony that his daughter feared Daise and planned to end the relationship, which was presented without objection. Accordingly, we find any inadmissible testimony was cumulative such that Daise cannot demonstrate prejudice. *See Weston*, 367 S.C. at 288–89, 625 S.E.2d at 646 (finding even if witnesses' testimony concerning victim's fear of the defendant was inadmissible, there was no prejudicial error because it was cumulative to other witnesses' testimony admitted without objection); *see also Hughes*, 419 S.C. at 156–57, 796 S.E.2d at 179 (explaining that although the circuit court erred in admitting some of the testimony, the appellant could not demonstrate the necessary resulting prejudice).

Additionally, any error in admitting Porter's testimony was harmless due to the other overwhelming evidence of Daise's guilt. *See State v. Chavis*, 412 S.C. 101, 110 n.7, 771 S.E.2d 336, 340 n.7 (2015) (stating an error in admitting certain testimony could be deemed harmless because of the existence of overwhelming evidence of guilt); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (finding the erroneous admission of hearsay testimony harmless in light of the other "abundant evidence" of defendant's guilt). Phone records revealed that between 11:39 a.m. and 3:52 p.m. on November 15, 2009, Jeanine called Daise eighteen times. Child 1 testified Daise drove the white van away from Jeanine's home on the morning of November 15. Video surveillance shows Daise had the van at a gas station shortly before noon, and he was seen driving the van near Eddie's Disco around dusk. Frank, Child 1, and Child 2 arrived back at Jeanine's around 7:00 p.m., where they saw the "ransacked" van in the driveway. Inside the home, Frank discovered Jeanine, John Doe 1, and John Doe 2. Contrary to Daise's claim that he was not in the vicinity of the residence on the evening of the incident, Simmons testified he picked up Daise about a mile from Jeanine's and dropped him off near the tracks on Poppy Hill Road. Further, when Daise was arrested, gunshot residue and traces of Jeanine's blood were found on his jeans. Thus, we find the

State presented overwhelming evidence of guilt such that any error in the admission of the "fear" statements was harmless.

V. *Batson* Materials

Daise argues the circuit court erred in refusing to require the State to produce certain prosecutorial training materials regarding jury selection. Daise asserts African-American jurors are struck disproportionately in Beaufort County, and the court's failure to require disclosure of the State's *Batson*[13] "handbook" prevented him from making a viable *Batson* challenge.

Before trial, Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission) to provide "[a]ll documents regarding jury selection, including but not limited to training documents, training agendas, manuals, policy statements or . . . advisements, correspondence with current or former prosecutors and circuit court judges." Daise stated two capital lawyers who had reviewed some of the materials suggested they were a "handbook on how to get around *Batson*." Daise also noted the circuit court had received expert testimony from a statistician who indicated that in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males.[14]

The circuit court reviewed the Commission materials in camera and ruled they did not "include any abusive instructions or teaching materials, nor use of improper technique." The court also found the materials were "generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial." We agree. *See, e.g.*, *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010)("[A]ttorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party."); *State v. Myers*, 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004)

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[13] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[14] This testimony does not appear in the record. However, the circuit judge noted she heard cases in Beaufort County every week and she had never been concerned with the racial makeup of the county's juries.

(noting Rule 5, SCRCrimP, exempts from discovery work product and internal prosecution documents which contain no impeachment or exculpatory evidence); Rule 5(a)(2), SCRCrimP ("Except as provided in [prior subsections], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case . . . .").

Similarly, our review of the approximately 1000 pages of Commission materials sealed for appellate review revealed nothing encouraging prosecutors to strike jurors for impermissible reasons—race-based or otherwise. The documents include outlines, slideshows, and handouts from various lectures and training sessions.[15] Many discuss the *Batson* framework, and some do provide general advice on how to evaluate jurors. However, nothing in the submitted documents suggests an intent to help prosecutors racially discriminate. In fact, the materials contain statements such as "the critical question is whether or not a juror can give both the State and the defendant a fair trial" and the repeated caution: "DO NOT RELY ON STEREOTYPES & PREJUDICE."

> A trial court's rulings in matters relating to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions.

Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 537, 787 S.E.2d 485, 495 (2016) (citation omitted). We find no error in the circuit court's in camera review and quashing of the subpoena to the Commission.

VI. Daise's Photograph

Daise argues the circuit court erred in admitting a photograph of him in a custodial pose (State's Exhibit 49) because it was unfairly prejudicial and implied he had a criminal record.

[15] A large number of the materials are duplicative.

State's Exhibit 49 depicts Daise standing in profile in front of two bookshelves filled with books, framed pictures, and office supplies.[16] Daise is wearing a white tank top and blue jeans. His hands are together near his beltline, and handcuffs or other restraint devices are not visible because the State digitally removed them.

The State asserted it sought to admit State's Exhibit 49 to show how Daise was dressed when he was apprehended. Daise stated he was willing to stipulate to the chain of custody for his jeans. The State responded there was no chain of custody issue and explained, "This is an issue of what he was wearing at the time law enforcement got there. That's the only photograph we have of him in the jeans."[17] Daise countered that even with the digital removal of the handcuffs, the photo depicted him in a custodial position and, thus, was substantially more prejudicial to him than probative to the State's case. In admitting the photo, the circuit court found the photo was not unfairly prejudicial and noted the State had an interest in trying its case and showing what Daise "came out in."

"For evidence to be admissible, it must be relevant." *State v. Sweat*, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted." *Sweat*, 362 S.C. at 127, 606 S.E.2d at 513. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *State v. Green*, 412 S.C. 65, 79, 770 S.E.2d 424, 432 (Ct. App. 2015) (quoting *State v. Lyles*, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008)).

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[16] The State noted the photo was taken at a police substation that is actually "a house that they use after hours."

[17] Simmons's girlfriend testified State's Exhibit 49 reflected how Daise was dressed when police apprehended him at Simmons's home on the night of November 15.

We find the circuit court did not abuse its discretion in admitting the photograph.

> The introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the [S]tate has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.

Id. at 79, 770 S.E.2d at 432 (quoting *State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) (alteration in original). In *State v. Stephens*, a defendant argued the admission of a photographic lineup was unduly prejudicial as it suggested he had a prior criminal history. 398 S.C. 314, 319–22, 728 S.E.2d 68, 71–73 (Ct. App. 2012). This court found the argument unpersuasive as the images in the lineup showed each subject wearing street clothes with their "head[s] and neck[s] against a blank background and [bearing] no identifying marks as to date, location, agency, or purpose of the photograph." *Id.* at 322, 728 S.E.2d at 72. State's Exhibit 49 was less suggestive than the photograph in *Stephens* because it showed Daise in street clothes, lacked identifying marks, *and* was not part of a lineup. The only parts of the photograph suggesting a custodial pose are Daise's profile view and the location of his hands in a position consistent with those of a person who is handcuffed from the front. However, neither of these elements suggest Daise had a prior criminal history. *See State v. Denson*, 269 S.C. 407, 413, 237 S.E.2d 761, 764 (1977) (holding the introduction of a photograph taken from a lineup did not imply the defendant had a criminal record; because there was testimony about the defendant's arrest, it was "much more likely the jury assumed the picture was taken by the police when the [defendant] was arrested").

VII. Birthday Cake Photographs

Daise argues the trial court erred in admitting photographs showing a birthday cake because they were unnecessary and aroused the jury's sympathies and prejudices by reminding them that John Doe 1 died on his fourth birthday.

The record contains two photographs (State's Exhibits 5 and 6) depicting the birthday cake inside a white box on a couch in Jeanine's living room. Neither the cake nor the box contain discernible writing. The State argued the photographs

were relevant to show there were no signs of a forced entry or burglary in the living room. The circuit court agreed, finding the photographs were probative and not "prejudicial in any way."

State's Exhibits 5 and 6 are relevant because they show the undisturbed interior of Jeanine's home, supporting the unlikeliness of a home invasion by strangers. *See* Rule 401, SCRE (stating evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Specifically, Investigator Jody Hiers testified there were no signs that anything had been broken or stolen in the living room, and she used one of the photographs to note the presence of a stereo and TV. Investigator Hiers further described how other areas of the home showed no signs of a forced entry or burglary. *See State v. Elders*, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010) ("Ordinarily, it is not an abuse of discretion to admit photographs that corroborate testimony.").

As to the danger of unfair prejudice, we agree with the circuit court that State's Exhibits 5 and 6 merely showed the family was "going to a party" and were not offered to "elicit any sympathy." Notably, the cake was inside an unmarked box and no other hallmarks of a child's birthday party were visible except a possible birthday present beneath the box. We find such photographs were not "calculated to arouse the sympathy or prejudice of the jury," and, thus, were properly admitted. *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

VIII. Cumulative Error

Daise argues the cumulative effect of the circuit court's errors warrants a new trial.

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id.*

Given our analysis above, any errors by the circuit court were not prejudicial and did not combine to affect Daise's right to a fair trial. Simmons's own contradictory

testimony mitigated any error caused by "pitting," and Porter's "fear" testimony was cumulative to other testimony admitted without objection. Thus, any error here is insufficient to warrant invocation of the cumulative error doctrine. *See id.* at 238, 746 S.E.2d at 490 (stating our courts do not apply the "plain error" rule and refusing to allow a defendant to argue that the cumulative effect of several unpreserved matters deprived him of a fair trial).

Conclusion

Based on the foregoing analysis, Daise's convictions are

AFFIRMED.

GEATHERS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dallas Paul Bessinger, Claimant,

v.

R-N-M Builders & Associates, LLC, Employer, and FirstComp, a division of Markel, Inc., Carrier,

Of whom the South Carolina Uninsured Employers' Fund is the Appellant/Respondent,

And FirstComp, a division of Markel, Inc., is the Respondent/Appellant.

Appellate Case No. 2015-002092

Appeal From The Workers' Compensation Commission

Opinion No. 5521
Heard February 7, 2017 – Filed October 25, 2017

AFFIRMED

Amy V. Cofield, of Cofield Law Firm, of Lexington, for Appellant/Respondent.

Richard Daniel Addison and Lee E. Dixon, both of Hedrick Gardner Kincheloe & Garofalo, LLP, of Columbia, for Respondent/Appellant.

THOMAS, J.: This is a cross-appeal from a final decision and order of the Appellate Panel of the Workers' Compensation Commission holding the South Carolina Uninsured Employers' Fund (UEF) responsible for Dallas Bessinger's benefits. The Appellate Panel found the workers' compensation policy between J&L Construction, LLC (J&L) and FirstComp, a division of Markel, Inc., (FirstComp) was procured by fraud and void ab initio. This case involves an unusual procedural posture where a Single Commissioner found the policy void ab initio, the Appellate Panel vacated the decision of the Single Commissioner and remanded for a "hearing de novo," a Single Commissioner once again found the policy void ab initio, and the Appellate Panel affirmed that finding in full. UEF argues (1) the Single Commissioner erred by reconsidering evidence submitted in the first hearing without ensuring a proper foundation was laid in the second hearing; (2) the Single Commissioner erred in denying UEF's motion to exclude several depositions during the second hearing; and (3) the Appellate Panel erred in finding a workers' compensation policy can be void ab initio when statute requires a party to cancel a workers' compensation policy in accordance with the statutory framework. FirstComp appeals the Appellate Panel's initial remand arguing it exceeded and failed to comply with its statutory and regulatory authority. We affirm.

FACTS

Dallas Bessinger was employed by J&L, which was operated by Emory Wilkie and John Loughery, to perform certain roofing work. On January 4, 2012, Bessinger fell from a roof sustaining injuries to his left hip, right arm, ribs, and back. Bessinger immediately went to the hospital. While Bessinger was at the hospital, Wilkie and Loughery proceeded to Midlands Insurance Center in Lexington to meet with a workers' compensation representative, TaLisa Miller. Wilkie represented to Miller that J&L had no knowledge of a prior injury or pending litigation resulting from its work. Miller then accepted a cash payment of the premium and issued a policy from FirstComp backdated to 12:01 a.m. on January 4, 2012. Bessinger attempted to file a workers' compensation claim with Miller the following Monday, and Miller immediately informed FirstComp of the potential fraud. FirstComp then informed J&L, Wilkie, and Loughery it was rescinding the policy due to fraud. Bessinger filed his Form 50 on April 19, 2012, alleging injuries to his left hip, right arm, ribs, and back. FirstComp and UEF each denied coverage.

The parties appeared before the Single Commissioner on July 18, 2012 (First Hearing), and the Single Commissioner adopted the Commission's file as part of the record after none of the participating parties objected. Bessinger testified he was working on a house in Orangeburg on January 4, 2012. Bessinger claimed he was rolling felt on the roof when "the felt came from under [him]" and he fell approximately three stories.

Following Bessinger's testimony, the Single Commissioner asked FirstComp if they had any witnesses to present other than the depositions submitted. FirstComp stated they had no other evidence to put forth. UEF did not object to the admission of the depositions.

The Single Commissioner filed a decision and order on December 18, 2012, finding that due to Wilkie and Loughery's fraudulent activity the policy was void ab initio. With respect to UEF's argument the issue was controlled by section 38-75-730,[1] the Single Commissioner found it did not alter the right of a party to rescind a contract induced by fraud. Therefore, the Single Commissioner held that the policy between FirstComp and J&L was void and UEF was liable for benefits under the Workers' Compensation Act (the Act).

UEF appealed the order to the Appellate Panel and again raised the argument that section 38-75-730 contemplates this factual situation. UEF claimed the Single Commissioner erred in finding the policy was void ab initio due to fraud. In response, FirstComp argued there is a difference between cancellation of a policy, which section 38-75-730 contemplates, and rescission of a policy.

The Appellate Panel issued its decision and order (Remand Order) on April 17, 2014, vacating the Single Commissioner's decision and finding "good grounds have been shown for the Commission to reconsider the evidence, receive further evidence, and rehear the parties or their representatives pursuant to [section 42-17-50 of the South Carolina Code (2015).]" The Appellate Panel ordered the Single Commissioner to hold a "hearing de novo." The Appellate Panel did not give any further reasoning.

The Single Commissioner held the hearing de novo (Second Hearing) on August 21, 2014. FirstComp questioned the propriety of the Remand Order because the Appellate Panel did not give any specific instructions or reasoning in the order.

[1] S.C. Code Ann. § 38-75-730 (2015).

UEF argued there is nothing in workers' compensation law allowing a policy to be void ab initio and section 38-75-730 is the only controlling law. UEF then contended the Remand Order wiped the slate totally clean regarding evidence submitted during the First Order. UEF argued there were issues regarding notice for the depositions and they were inadmissible during the Second Hearing. UEF claimed anything the Single Commissioner considered during the First Hearing was improper to consider during the Second Hearing absent independent foundation laid for the readmission of the evidence.

The Single Commissioner issued its decision and order on March 31, 2015. In the order, the Single Commissioner noted the Appellate Panel remanded the case with instruction to reconsider the evidence, receive further evidence, and rehear the parties or their representatives. The Single Commissioner found the Appellate Panel did not invalidate or exclude any evidence which was part of the record. Therefore, the Single Commissioner stated the Second Hearing was based on the evidence presented during the First Hearing and any new evidence the parties wished to offer. The Single Commissioner then found all of the elements for fraud were met and the policy was procured by fraud and void ab initio. Additionally, the Single Commissioner held section 38-75-730 contemplated cancellation of an insurance policy while the present case concerned rescission due to fraud. Finally, the Single Commissioner dismissed FirstComp from the case and ordered UEF to provide benefits to Bessinger.

Following the Single Commissioner's decision and order, UEF again appealed to the Appellate Panel, and FirstComp filed a cross-appeal. UEF argued the Single Commissioner erred by considering evidence the parties submitted during the First Hearing without a proper foundation during the Second Hearing. UEF argued the depositions were inadmissible during the Second Hearing because notice was deficient. UEF reiterated its contention that a workers' compensation policy cannot be void ab initio and section 38-75-730 should control this case.

FirstComp argued this case revolved around the difference between rescission of a policy and cancellation of a policy. FirstComp argued the policy was procured by fraud and it was entitled to rescind the policy rather than cancel the policy pursuant to section 38-75-730. FirstComp argued the Single Commissioner correctly followed the instructions of the Appellate Panel by reconsidering evidence that had already been submitted. However, FirstComp argued the Remand Order was improper because the Appellate Panel did not state any supporting facts or law.

The Appellate Panel filed its decision and order on September 5, 2015, and adopted the findings, conclusions, and orders of the Single Commissioner verbatim. Therefore, the Appellate Panel found the policy void ab initio, dismissed FirstComp from the case, and ordered UEF to provide Bessinger benefits under the Act. This cross-appeal followed.

UEF'S ISSUES ON APPEAL

1. Whether the Single Commissioner erred during the Second Hearing by considering evidence submitted during the First Hearing when FirstComp failed to lay a proper foundation for the evidence?

2. Whether the Single Commissioner erred in denying UEF's motion to exclude multiple inadmissible depositions?

3. Whether the Appellate Panel erred in finding a workers' compensation policy can be "void ab initio" or "rescinded" when South Carolina law requires a party to cancel such a policy pursuant to statute?

FIRSTCOMP'S ISSUE ON APPEAL

1. Whether the Appellate Panel erred in vacating the first order of the Single Commissioner and remanding for the Second Hearing?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act[2] governs the standard of judicial review in workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). When reviewing an appeal from the Appellate Panel, "this [c]ourt may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Corbin v. Kohler Co.*, 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). "Statutory interpretation is a question of law." *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). "This court is free to decide matters of law with no particular deference to the fact finder." *Murphy v. Owens Corning*, 393 S.C. 77, 82, 710 S.E.2d 454, 456

[2] S.C. Code Ann. §§ 1-23-310 through -400 (2005 & Supp. 2017).

(Ct. App. 2011). "But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." *Hopper*, 373 S.C. at 479–80, 646 S.E.2d at 165. "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009).

UEF'S APPEAL

1. Consideration of Evidence From the First Hearing

UEF contends the Remand Order required the Single Commissioner to conduct the Second Hearing as if the First Hearing never happened. UEF argues the Single Commissioner erred during the Second Hearing by considering evidence from the First Hearing. We disagree.

We find UEF misconstrues the nature of the Remand Order by focusing too narrowly on the phrase "hearing de novo." Although the Appellate Panel did remand for a hearing de novo, a complete reading of the Remand Order shows the purpose of the Second Hearing was to "reconsider the evidence, receive further evidence, and rehear the parties or their representatives." The instruction to "reconsider the evidence" demonstrates the Appellate Panel intended for the Single Commissioner to reconsider any evidence submitted during the First Hearing. Furthermore, this result is contemplated by the various attendant statutes and regulations. Section 42-17-50 of the South Carolina Code (2015) permits reconsideration of evidence, receipt of additional evidence, and the rehearing of parties or their representatives. Also, Regulation 67-707[3] allows a Single Commissioner to take additional evidence. Therefore, we find the Single Commissioner did not err during the Second Hearing by considering evidence submitted during the First Hearing.

2. Admissibility of Depositions

UEF argues the Single Commissioner wrongfully admitted several depositions during the Second Hearing. UEF asserts the deposition of TaLisa Miller was wrongfully admitted because there was no evidence it received proper notice of the deposition. UEF argues the depositions of John Loughery and Emory Wilkie were

[3] S.C. Code Ann. Regs. 67-707 (2012).

inadmissible because UEF did not receive notice of the depositions and was not present when they were conducted. UEF claims it is irrelevant whether the evidence was admissible in the First Hearing. We disagree.

UEF did not object to the admission of the depositions during the First Hearing or during its first appeal to the Appellate Panel. Indeed, UEF raised no argument regarding admission of the depositions until the Second Hearing. Because, as discussed above, the Appellate Panel ordered the Single Commissioner to reconsider the evidence from the First Hearing and UEF failed to object to the depositions during the First Hearing, UEF waived any ability to object during the Second Hearing. Thus, the Single Commissioner properly considered the depositions during the Second Hearing.

3. Section 38-75-730

UEF asserts a workers' compensation policy must be cancelled according to section 38-75-730 for the cancellation to be effective and can never be void ab initio. UEF argues section 38-75-730 contemplates the factual posture of the instant case and is the only method for cancelling the policy. UEF argues Bessinger cannot be denied benefits due to the fraudulent actions of employers. Because Bessinger is a third-party beneficiary of the contract, UEF asserts fraudulent actions by the employers cannot defeat his entitlement to benefits under the policy. UEF argues the language of the policy must be construed against the issuer and the policy does not allow for the type of relief sought by FirstComp. UEF also claims any fraudulent conduct by Bessinger's employers cannot void the policy because FirstComp was negligent when it issued the policy. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id*. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id*. "The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." *Id*. at 91, 533 S.E.2d at 584. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Miller Constr. Co. v. PC Constr. of Greenwood, Inc.*,

418 S.C. 186, 204, 791 S.E.2d 321, 331 (Ct. App. 2016) (quoting *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013)).

In pertinent part, section 38-75-730(a)(2) reads "[n]o insurance policy or renewal thereof may be canceled by the insurer prior to the expiration of the term stated in the policy, except for . . . [a] material misrepresentation of fact which, if known to the company, would have caused the company not to issue the policy[.]"

Our supreme court has recognized the difference between rescission and cancellation of a contract. *See Gov't Emp. Ins. Co. v. Chavis*, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970) ("[C]ancellation refers to the termination of the policy prior to the end of the policy period, and termination refers to the expiration of policy by the lapse of the policy period. Rescission is not merely a termination of contractual obligation but is abrogation or undoing of it from the beginning, which seeks to create a situation the same as if no contract ever had existed."). In *Scott v. Mid Carolina Homes, Inc.*, this Court stated:

> A contract may be rescinded for unilateral mistake only when the mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission, or when the mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement.

293 S.C. 191, 199, 359 S.E.2d 291, 297 (Ct. App. 1987), *overruled on other grounds by Ward v. Dick Dyer & Assoc., Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991).

UEF points to the North Carolina case *Oxendine v. TWL, Inc.* and urges this court to follow the statement found therein that "a workers' compensation insurance contract will . . . never be void ab initio, but must be cancelled in a manner prescribed by [the statute at issue]." 645 S.E.2d 864, 866 (N.C. App. 2007). Although *Oxendine* provides guidance and our courts give weight to decisions of North Carolina courts interpreting that state's workers' compensation statutes, we find *Oxendine* distinguishable from this case. The policy at issue in *Oxendine* was in existence for several months before the injury. *Id.* at 865. Also, the insurance carrier attempted to cancel the policy for "underwriting reasons" prior to the date

of the injury. *Id*. Following the injury, there was a dispute as to coverage and the North Carolina Workers' Compensation Commission ultimately held the carrier responsible for coverage. *Id*. On appeal, the carrier argued the employer made material misrepresentations, the content of which were not disclosed in the court's opinion, in the application for insurance which should prevent recovery under applicable law. *Id*. The North Carolina Court of Appeals disagreed, finding a statute which specifically prohibited cancellation of certain workers' compensation policies controlled. *Id*. at 866. The court ultimately held a North Carolina workers' compensation policy can never be void ab initio but must be cancelled in the manner prescribed by the controlling statute. *Id*.

Although *Oxendine* provides guidance, we find *Star Insurance Company v. Neighbors*, 138 P.3d 507 (Nev. 2006) more persuasive. As in this case, the policy at issue in *Neighbors* was not in existence at the time the injured employee fell off a roof. *Id*. at 509. The day after the incident, the employer requested the carrier reinstate its workers' compensation insurance, which had lapsed a few months prior. *Id*. The insurer required the payment of an unpaid premium and a letter from the employer verifying that no losses had occurred during the cancellation period. *Id*. The employer fraudulently stated there had been no loss, fully aware of the injury to the employee. *Id*. After the employee submitted a claim for workers' compensation benefits, the insurer denied the claim, returned the premium, and rescinded the policy based on the misrepresentation. *Id*. The issue in *Neighbors* was the interpretation of a statute similar to the one in *Oxendine* and the case at bar.[4] *Id*. In analyzing the statute, the court noted that while it afforded an insurer the right to void a policy based on misrepresentations, it also protected the employee by requiring the insurer "to provide compensation to claimants arising before the cancelation of the policy." *Id*. at 510. The court noted the apparent contradiction, stating the statute did "not clearly apply to retroactive

[4] "No statement in an employer's application for a policy of industrial insurance voids the policy as between the insurer and employer unless the statement is false and would have materially affected the acceptance of the risk if known by the insurer, but in no case does the invalidation of a policy as between the insurer and employer affect the insurer's obligation to provide compensation to claimants arising before the cancellation of the policy." Nev. Rev. Stat. § 616B.033(2) (2012).

insurance which, by definition, did not exist at the time of the injury." *Id*. The court reasoned:

> Certainly, an obligation to provide compensation under the statute is normally stimulated by an accident, the obligation normally arises under pre-existing coverage, and the term "cancellation" normally presumes the discontinuation of a pre-existing policy. Further, an anomalous situation occurs where the employer fraudulently seeks to create the "obligation to provide compensation" after the fact. Thus, when the employer has fraudulently procured retroactive or back-dated insurance for the explicit purpose of obtaining coverage for a pre-existing loss, a latent ambiguity arises in connection with the scope of [the statute].

Id. When examining the purpose of the statute, the court found, among other purposes, "the measure prohibits the practice of 'post-accident' underwriting, i.e., claim avoidance under a pre-existing policy, based upon an act of fraud that is totally unrelated to the subsequent claim or otherwise." *Id*. at 510–11. The court then stated:

> This is not a case of post-accident underwriting with regard to an existing policy. . . . [Insurer] is not attempting to avoid coverage it had placed before an accident based upon misconduct that is in no way related to the claim in question. In this instance, [the employer] obtained the policy by fraud to get coverage for this particular claim.

Id. at 511. Following this conclusion, the *Neighbors* court cited other jurisdictions that reached similar conclusions. *See id*. ("If A applies for fire insurance upon a building and fraudulently represents that he has had no fire losses, the policy may be voidable and subject to cancellation by the insurer upon discovery that the insured had had losses under circumstances making the new risk undesirable. But if he applies for insurance knowing that the building has already been destroyed by fire, conceals the fact of the prior loss and secures a policy antedated to cover the time of the loss, the policy is void and no liability ever attaches." (quoting *Matlock v. Hollis*, 109 P.2d 119, 124 (Kan. 1941))). Following the reasoning in *Matlock*,

the *Neighbors* court ultimately held that when "the 'obligation to provide compensation' under [the] statute is itself procured by post-accident fraud, [the statute] does not operate to retroactively impose coverage." 138 P.3d at 512.

This rationale has been followed by other jurisdictions. *See Century Indem. Co. v. Jameson*, 131 N.E.2d 767 (Mass. 1956); *Hunt v. Aetna Cas. & Sur. Co.*, 387 P.2d 405 (Colo. 1963); *Maise v. Delaney*, 134 N.W.2d 770 (S.D. 1965). Indeed, *Larson's Workers' Compensation Law* recognizes this general principle stating:

> The only situation in which the insurance would be defeated for all purposes by act of the employer is that in which the insurance is absolutely void ab initio, rather than voidable; this would occur if the employer attempted to insure against an accident that had already occurred, by pre-dating the insurance and fraudulently concealing the known existence of an accident within the period so covered.

14 Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law*, § 150.02[4] (2016).

Based on standard statutory construction principles, we find section 38-75-730 does not restrict a party's ability to rescind an insurance contract under the circumstances of this case. Our case law has long recognized the distinction between rescission and cancellation of a contract. *See Boddie Noell Props., Inc. v. 42 Magnolia P'ship*, 352 S.C. 437, 442–44, 574 S.E.2d 726, 728–29 (2002) (recognizing the distinction between rescission and cancellation of a contract); *First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 498, 386 S.E.2d 245, 249 (1989) (affirming the distinction between rescission and cancellation of a contract by explaining a party cannot simultaneously seek rescission damages and other remedies that essentially affirm the existence of a contract); *Chavis*, 254 S.C. at 516, 176 S.E.2d at 135 ("[C]ancellation refers to the termination of the policy prior to the end of the policy period, and termination refers to the expiration of policy by the lapse of the policy period. Rescission is not merely a termination of contractual obligation but is abrogation or undoing of it from the beginning, which seeks to create a situation the same as if no contract ever had existed."). Despite this distinction, our legislature used only the term

"cancellation" and "canceled" in section 38-75-730. If the legislature wanted to proscribe the circumstances under which a party to an insurance contract could rescind such a contract, it could have done so. However, because the legislature did not include the term "rescission" in any part of section 38-75-730, we find our common law precedents regarding rescission of a contract remain. *See Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017) (explaining the legislature's use of "differing terms" is deliberate and the words mean what they say). Thus, by its plain language, section 38-75-730 applies when a party wishes to cancel a policy already in existence at the time of a loss and not when a party seeks to rescind a policy procured by fraud to cover a pre-existing loss.

Insurance by its very nature is meant to protect against the unknown or the possibility of a loss. An insurance company issues a policy and assumes such a risk or possibility of loss. That was indeed what happened in *Oxendine*. However, in *Neighbors* and this case, the insurance company was not assuming any risk or possibility of loss. Instead, the employer attempted to gain coverage for a known loss that had already occurred. Contrary to UEF's assertions, we find section 38-75-730 does not contemplate such a scenario. Section 38-75-730 does not apply under the limited circumstances of this case, and the Appellate Panel properly found it did not bar FirstComp from rescinding the policy.

Finally, with regard to UEF's claims that FirstComp was negligent and, thus, could not prevail on a rescission claim, UEF offered no evidence other than unsupported assertions to show FirstComp's actions were negligent or in any way outside the realm of normal business practices. Thus, UEF failed to show the Appellate Panel's findings on this issue are unsupported by substantial evidence. Accordingly, we affirm the decision and order of the Appellate Panel finding a party may seek rescission of a workers' compensation policy when it was procured by fraud to cover a pre-existing loss.

FIRSTCOMP'S APPEAL

FirstComp argues the Appellate Panel erred by vacating the initial order of the Single Commissioner because the Remand Order was facially invalid and did not comply with the requirements of the Act and other applicable law. Because the Remand Order was not a final judgment, FirstComp was required to continue in the litigation and could appeal only after final judgment. The ultimate result

reached by the Appellate Panel was beneficial to FirstComp and identical to the position the parties were in prior to the remand. Because we affirm the Appellate Panel's final decision and order on the merits, the propriety of the Remand Order is merely academic. Therefore, FirstComp's appeal is moot. *See Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [a] reviewing [c]ourt to grant effectual relief.").

CONCLUSION

For the foregoing reasons, we affirm the final decision and order of the Appellate Panel of the Workers' Compensation Commission.

AFFIRMED.

LOCKEMY, C.J., and HUFF, J., concur.