The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF HOWARD B. HAMMER, PETITIONER

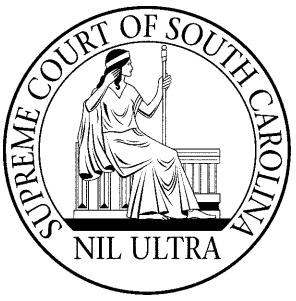
Petitioner was definitely suspended from the practice of law for one year. *In the Matter of Howard B. Hammer*, 415 S.C. 610 and 784 S.E.2d 678 (2016). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
November 29, 2017



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46
December 6, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5498-State v. Sandy Lynn Westmoreland	Pending
5500-Willliam Huck v. Avtex Commercial	Pending
5506-State v. Marvin R. Brown	Denied 12/6/17
5510-State v. Stanley L. Wrapp	Pending
5513-DIRECTV, Inc. v. S.C. Dep't of Revenue	Pending
5514-State v. Robert Jared Prather	Granted 12/6/17
5517-Kiawah Resort v. Kiawah Island	Pending
5518-State v. Derek V. Collier	Pending
5519-Robert J. Burke v. Republic Parking Systems, Inc.	Pending
5520-State v. Earmest S. Daise	Pending
2017-UP-355-George Hood v. Jasper County	Pending
2017-UP-358-Jeffrey D. Allen v. SCBCB	Pending
2017-UP-359-Emily Carlson v. John Dockery	Pending
2017-UP-362-Edward Spears v. SCDEW	Pending
2017-UP-378-Ronald Coulter v. State	Pending
2017-UP-379-Johnny Tucker v. SCDOT	Pending
2017-UP-383-State v. Vincent Missouri	Pending
2017-UP-385-Antonio Gordon v. State	Pending
2017-UP-387-In the matter of the care and treatment of Kenneth Burris	Pending
2017-UP-391-State v. Sean Robert Kelly	Pending

2017-UP-403-Preservation Society of Charleston v. SCDHEC Pending

2017-UP-406-State v. Jerry McKnight, Sr. Pending

2017-UP-412-United Auto Insurance v. Willie Freeman Pending

2017-UP-417-State v. Christopher Wells Pending

2017-UP-422-Estate of Edward Mims v. S. C. Dep't of Disabilities Pending

2017-UP-425-State v. Esaiveus F. Booker Pending

2017-UP-427-State v. Michael A. Williams Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5382-State v. Marc A. Palmer Pending

5387-Richard Wilson v. Laura B. Willis Pending

5391-Paggy D. Conits v. Spiro E. Conits Pending

5419-Arkay, LLC v. City of Charleston Pending

5431-Lori Stoney v. Richard Stoney Pending

5432-Daniel Dorn v. Paul Cohen Pending

5438-The Gates at Williams-Brice v. DDC Construction Inc. Pending

5441-State v. David A. Land Pending

5442-Otha Delaney v. First Financial Pending

5447-Rent-A-Center v. SCDOR Pending

5449-A. Marion Stone III v. Susan B. Thompson Pending

5450-Tzvetelina Miteva v. Nicholas Robinson Pending

5451-Pee Dee Health v. Estate of Hugh Thompson, III (3) Pending

5452-Frank Gordon, Jr. v. Donald W. Lancaster	Pending
5460-Frank Mead, III, v. Beaufort Cty. Assessor	Pending
5462-In the matter of the Estate of Eris Singletary Smith	Pending
5467-Belle Hall Plantation v. John Murray (David Keys)	Pending
5469-First Citizens Bank v. Park at Durbin Creek	Pending
5471-Joshua Fay v. Total Quality Logistics	Pending
5473-State v. Alexander Carmichael Huckabee, III	Pending
5475-Sara Y. Wilson v. Charleston Co. School District	Pending
5476-State v. Clyde B. Davis	Pending
5477-Otis Nero v. SCDOT	Pending
5479-Mark M. Sweeny v. Irene M. Sweeney	Pending
5483-State v. Shannon Scott	Pending
5485-State v. Courtney S. Thompson and Robert Antonio Guinyard	Pending
5486-SC Public Interest v. John Courson	Pending
5487-State v. Toaby Alexander Trapp	Pending
5488-Linda Gibson v. Ameris Bank	Pending
5489-State v. Eric T. Spears	Pending
5490-Anderson County v. Joey Preston	Pending
5492-State v. Demario Monte Thompson	Pending
5496-State v. John W. Dobbins, Jr.	Pending
5499-State v. Jo Pradubsri	Pending
5501-State v. Lorenzo B. Young	Pending

5502-State v. Preston Ryan Oates	Pending
5503-State v. Wallace Steve Perry	Pending
5504-John Doe 2 v. The Citadel	Pending
5511-State v. Lance L. Miles	Pending
5515-Lisa McKaughan v. Upstate Lung and Critical Care	Pending
5516-Charleston County v. University Ventures	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2016-UP-402-Coves Darden v. Francisco Ibanez	Pending
2016-UP-408-Rebecca Jackson v. OSI Restaurant Partners	Pending
2016-UP-424-State v. Daniel Martinez Herrera	Pending
2016-UP-485-Johnson Koola v. Cambridge Two (2)	Pending
2016-UP-486-State v. Kathy Revan	Pending
2016-UP-519-Live Oak Village HOA v. Thomas Morris	Pending
2016-UP-528-Betty Fisher v. Bessie Huckabee and Lisa Fisher v. Betty Huckabee	Pending
2016-UP-529-Kimberly Walker v. Sunbelt	Pending
2017-UP-002-Woodruff Road v. SC Greenville Hwy. 146	Pending
2017-UP-009-In the matter of Daryl Snow	Pending
2017-UP-013-Amisub of South Carolina, Inc. v. SCDHEC	Pending
2017-UP-015-State v. Jalann Williams	Pending
2017-UP-025-State v. David Glover	Pending

2017-UP-029-State v. Robert D. Hughes	Pending
2017-UP-031-FV-I, Inc. v. Bryon J. Dolan	Pending
2017-UP-037-State v. Curtis Brent Gorny	Pending
2017-UP-040-Jeffrey Kennedy v. Richland Sch. Dist. Two	Pending
2017-UP-043-Ex parte: Mickey Ray Carter, Jr. and Nila Collean Carter	Pending
2017-UP-046-Wells Fargo v. Delores Prescott	Pending
2017-UP-054-Bernard McFadden v. SCDC	Pending
2017-UP-059-Gernaris Hamilton v. Henry Scott	Pending
2017-UP-065-State v. Stephon Robinson	Pending
2017-UP-067-William McFarland v. Mansour Rashtchian	Pending
2017-UP-068-Rick Still v. SCDHEC	Pending
2017-UP-070-State v. Calvert Myers	Pending
2017-UP-071-State v. Ralph Martin	Pending
2017-UP-082-Kenneth Green v. SCDPPPS	Pending
2017-UP-096-Robert Wilkes v. Town of Pawleys Island	Pending
2017-UP-103-State v. Jujuan A. Habersham	Pending
2017-UP-108-State v. Michael Gentile	Pending
2017-UP-118-Skydive Myrtle Beach, Inc. v. Horry County	Pending
2017-UP-124-Rudy Almazan v. Henson & Associates	Pending
2017-UP-137-In the matter of Calvin J. Miller	Pending
2017-UP-139-State v. Jeffrey Lynn Chronister	Pending

2017-UP-145-Cory McMillan v. UCI Medical Affiliates	Pending
2017-UP-158-State v. Rion M. Rutledge	Pending
2017-UP-169-State v. David Lee Walker	Pending
2017-UP-209-Jose Maldonado v. SCDC (2)	Pending
2017-UP-217-Clarence B. Jenkins v. SCDEW	Pending
2017-UP-225-State v. Joseph T. Rowland	Pending
2017-UP-228-Arrowpoint Capital v. SC Second Injury Fund	Pending
2017-UP-229-Arrowpoint Capital v. SC Second Injury Fund	Pending
2017-UP-233-Martha Perez v. Alice Manufacturing	Dismissed 11/29/17
2017-UP-236-State v. Dennis E. Hoover	Pending
2017-UP-237-State v. Shane Adam Burdette	Pending
2017-UP-241-Robert Lester, Jr. v. Marco and Timea Sanchez	Pending
2017-UP-245-State v. Dameon L. Thompson	Pending
2017-UP-249-Charles Taylor v. Stop 'N' Save	Pending
2017-UP-258-State v. Dennis Cervantes-Pavon	Pending
2017-UP-262-In the matter of Carl M. Asquith	Pending
2017-UP-263-State v. Dean Nelson Seagers	Pending
2017-UP-264-Jerry Hogan v. Corder and Sons, Inc.	Pending
2017-UP-265-Genesie Fulton v. L. William Goldstein	Pending
2017-UP-272-State v. Wayland Purnell	Pending
2017-UP-279-Jose Jimenez v. Kohler Company	Pending

2017-UP-282-Mother Doe A v. The Citadel	Pending
2017-UP-289-Marion Stone v. Susan Thompson	Pending
2017-UP-293-SCDSS v. Janet Bright	Pending
2017-UP-296-Rivergate Homeowners' v. WW & LB	Pending
2017-UP-300-TD Bank v. David H. Jacobs	Pending
2017-UP-324-State v. Mario Valerio Gonzalez Hernandez	Pending
2017-UP-331-SCDSS v. Nina Ward	Pending
2017-UP-336-Clarence Winfrey v. Archway Services, Inc.	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2017-UP-339-State v. John H. Dial, Jr.	Pending
2017-UP-340-Jimmy Boykin v. Zady Burton	Pending
2017-UP-354-Adrian Duclos v. Karen Duclos	Pending
2017-UP-356-State v. Damyon Cotton	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Jared Prather, Appellant.

Appellate Case No. 2014-001500

Appeal From Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 5514
Heard April 11, 2017 – Filed September 6, 2017
Withdrawn, Substituted, and Refiled December 6, 2017

REVERSED AND REMANDED

Elizabeth Anne Franklin-Best, of Blume Norris & Franklin-Best, LLC, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

KONDUROS, J.: In this criminal case, Robert Jared Prather appeals his convictions of murder and armed robbery, arguing (1) the State's expert witness's

testimony was not proper rebuttal testimony, not scientifically valid, and invaded the province of the jury; (2) the expert's testimony was not properly produced during discovery; (3) the State "sandbagged" the defense with the expert's rebuttal testimony; (4) Prather's codefendant's statement was inadmissible hearsay and violated Prather's Confrontation Clause rights; (5) the trial court erred in denying Prather's motion for a directed verdict; (6) the State's actions in pursuing factually inconsistent theories in Prather's and his codefendant's cases denied Prather's right to due process; (7) the trial court denied Prather due process because it did not allow him to introduce a statement made by an unavailable witness; and (8) the trial court violated Prather's Fourth Amendment rights because it did not suppress evidence produced as the result of a fatally defective warrant. We reverse and remand.

FACTS

A grand jury indicted Prather for the murder of Gerald Stewart (Victim), armed robbery, and first-degree burglary.[1] Prather was originally tried in October of 2009, but that trial resulted in a hung jury. At the second trial, Officer Ronald Suber testified he went to the hospital on April 22, 2005 in response to a sexual abuse claim involving a male victim. Officer Suber indicated Prather told him that he, Phillips, and Victim were drinking at Victim's residence and Phillips passed out on the couch. Officer Suber explained Prather stated he left the residence and when he returned, Victim answered the door completely nude. According to Officer Suber, Prather claimed Victim asked him if he knew Phillips "likes to have his dick sucked." Officer Suber said Prather explained he pushed his way past Victim and found Phillips in a bedroom "wearing nothing but his boxer shorts and asleep on the bed." Officer Suber testified Prather said, "I beat the shit out of [Victim] and those were devastating blows." Officer Wayne Kleckley testified Prather also told him "he beat up" Victim. Officer Suber transported Prather to the police station for "investigative purposes" after he learned Victim was dead.

Donna Sharpe, a nurse, testified Phillips told her all he remembered was waking up in his boxers. Sharpe stated Prather admitted he beat Victim and he was "probably still laying there." Sharpe explained Prather asked her if he could wash his hands

[1] Prather's codefendant, Joshua Phillips, was also indicted for these charges, but he accepted a deal with the State to plead guilty to armed robbery and voluntary manslaughter.

because he hated getting blood on them and he laughed. Sharpe testified Prather asked, "I'll probably go to jail for this, won't I?" Sharpe asked if he meant for beating Victim, and Prather replied "yes, I beat him. But he's alive though, maybe barely though."

Officer Brandon Field testified he was dispatched to check on Victim at his residence at approximately 5:30 a.m. on April 22, 2005. Officer Field explained he found Victim dead "underneath a blanket, kind of on [his] knees, knelt down, like face-down on the couch." Virginia Youmans, a medical technician, testified Victim had "what appeared to be markings or carvings more or less on the small of [his] back or the lower back area where you[r] pants and shirt would meet." Youmans stated the word carved was "rapist." Officer Al Stuckey stated he discovered an adult sex toy, a dildo, underneath Victim's armpit at the crime scene.

Dr. Janice Ross, a pathologist, testified Victim suffered bruising around his eye, scalp, and lips; a fractured nose and ribs; scratch marks on his thigh and buttocks; and a burn mark on his finger, which was likely from a cigarette. She stated Victim's blood test revealed 0.279 percent alcohol and Valium in his system. Dr. Ross believed Victim's death was caused by an irregular heartbeat, due to the stress of a beating and his enlarged heart. She opined a healthier person could have survived the beating. Dr. Ross explained she could not rule out suffocation as a contributing cause because of the position of Victim's body.

Ronald Rabon testified he was Victim's roommate. He had moved in approximately a week before the incident after having met Victim in an alcohol rehabilitation facility. Rabon testified he had only recently discovered Victim was a homosexual, and he planned to move out. He stated he returned from work the day of the incident and Prather and Phillips were drinking with Victim at his residence. Rabon was in and out of his room throughout the evening, also drinking, and he testified he saw Phillips hit Victim twice and bust Victim's lip. Victim fell onto a chair, and Prather and Rabon told Phillips to stop. Rabon testified he, Prather, and Phillips left the residence to buy cocaine. Rabon explained that after they returned, Prather left again. Rabon claimed he went to his bedroom and when he emerged he observed Phillips and Victim in activity of a "sexual nature." He later observed Phillips and Victim on Victim's bed. Rabon

later heard Prather yelling for Phillips. Rabon testified he went to sleep and woke up "with about four cops standing over me."[2]

Prather took the stand in his defense. He testified he and Phillips had spent the afternoon at Victim's house drinking and hanging out. Prather indicated that at one point, Victim and Phillips got into a fight outside the residence. Prather stated the fight broke up, but when they came back inside Phillips hit Victim twice again until Rabon and Prather told him to stop. The parties were in and out throughout the afternoon and evening replenishing alcohol and cigarettes. Finally, Prather claimed he left Victim's residence to buy cocaine. When he returned, Victim "came out [of] the bedroom completely naked with an erection" and told him Phillips "liked his dick sucked." Prather stated he wanted to take Phillips home but Victim told him "you're not going any fucking where." Prather testified he hit Victim three times because Victim grabbed his arm and he wanted to get away. Prather stated he "jumped up and went to the bedroom door" and found Phillips "in his bed in his boxers." Prather claimed "there was a dildo on the bed by [Phillips]'s feet." Prather testified he and Phillips went to the living room and Phillips "was screaming and upset and kicking" Victim. Prather claimed that as they were leaving, Phillips went back inside to get his shoes and Prather waited in his vehicle for about ten minutes. Prather testified Victim was still alive when he left. Prather explained he and Phillips eventually went to the hospital, where Prather told hospital staff Victim had raped Phillips.

On cross-examination, Prather denied telling Officer Suber he "beat the shit out of [Victim] and those were devastating blows." Prather claimed he hit Victim only three times as necessary to defend himself against a larger man. Prather stated he was not responsible for "leaving [Victim] in this condition," including beating him on the sofa, carving rapist on his back, or covering him with a blanket.

After the defense rested, out of the presence of the jury, the State informed the trial court it intended to call Paul LaRosa, an expert on crime scene analysis, as a reply witness "to explain the crime scene." Prather argued the reply testimony was not an "appropriate response to the testimony given by the defendant." The State asserted it was appropriate rebuttal testimony because Prather claimed "he left the house and that anything done after he left was done by Mr. Phillips."

---

[2] Rabon testified he is half-deaf in one ear and sleeps very soundly if he falls asleep on that side.

LaRosa testified he worked at South Carolina Law Enforcement Division (SLED) as a special agent for eighteen years and worked in the crime scene unit for six years. LaRosa stated he was "currently assigned to the behavioral science unit as a criminal profiler" and his duties included reconstructing crime scenes to determine the natural flow of the crime. LaRosa testified he "trained under [a] court qualified crime scene analyst" and "went through intensive training with our Department of Mental Health." LaRosa stated he completed his crime scene analysis training in a two-month long program with the Federal Bureau of Investigation. LaRosa explained he previously testified as an expert in crime scene reconstruction and assessment but this was "the first time as a crime scene analyst through the behavioral science program."

LaRosa stated he never physically examined the crime scene but rather reviewed photographs and a video of the crime scene along with reports regarding how police found Victim's body and Victim's autopsy report. LaRosa indicated he went over this case with two other crime scene analysts at SLED and they agreed with his analysis. LaRosa testified that the carving in Victim's backside and placement of the dildo, coupled with the opposing behavior of covering Victim, led him to believe there were "two specific personalities [and therefore] two offenders within that crime scene." LaRosa admitted he had not made criminal profiles for Prather, Phillips, or Victim because he "couldn't get a complete victimology, I couldn't look at their past histories, their psychological files or any of that." On cross-examination, LaRosa testified he also reviewed the transcript from Prather's first trial and "some of" Phillips's statements but claimed he did not use the statements in his analysis. LaRosa indicated the information provided to him by the prosecution was sufficient for him to determine "how many offenders were in the scene." LaRosa admitted he had "not looked at any mental health history from Mr. Prather, Mr. Phillips[,] or [Victim]."

Prather argued LaRosa's testimony was not proper reply testimony, it did "not possess enough scientific validity," and LaRosa was not "qualified as an expert in this area and never has been accepted as one." The trial court found the testimony appropriate on rebuttal based on Prather's claims as to what had occurred the night of the crime. The court explained under *State v. White*,[3] an expert witness can

[3] 382 S.C. 265, 273-74, 676 S.E.2d 684, 688 (2009) (explaining an expert may satisfy the qualification threshold and any "defects in the amount and quality of

meet the qualification threshold and it is "up to the jury to believe . . . an expert witness." The court found LaRosa "sufficiently convinced the court that he qualifies as an expert in the field of crime scene analysis with regard to . . . crime scene assessment, behavioral analysis." The court also found the testimony was "sufficiently relevant, probative, and reliable." The court cautioned the State "no identification can be made as to who did what and no suggestion can be made to the jury as to their conclusion as to who did what." Prather objected to the court's ruling, arguing LaRosa's testimony would invade the province of the jury.

In the presence of the jury, LaRosa explained an offender uses "staging" to alter "the crime scene from what truly happened. It is to get law enforcement . . . on a different idea." He testified the carving of the word rapist on Victim's backside did not impact the actual murder and was a "superficial wound." LaRosa explained, "It's the offender's way of saying, hey, look at this guy. Not only is he a bad guy, he's bad enough that somebody's carving rapist in his back." He testified, "Whether . . . that is what they believe or not, I can't say, but they want to project that to the first responders that this guy's a rapist." LaRosa stated the placement of the dildo was "another example of evidence that is not necessary to commit the crime." He continued "not only is this offender, the personality wanting to carve rapist into this individual[']s back, he finds that one item for shock value to show what type of rapist he is and . . . places it gently underneath his arm pit." Additionally, LaRosa testified, "This is a classic case of undoing, which is covering up the victim with a blanket and pillow. It is symbolically erasing what has occurred in the scene." LaRosa stated the theories of staging and undoing "are in absolute conflicts with each other." He concluded there were "[t]wo distinct offenders who [in] the heat of the moment one of them decides to carve the word rapist and place an adult sex toy, a dildo next to him, and the other one taking blankets and wanting to erase, to just undo what has just occurred." He also stated, "I can't tell which offender, if both of them were not participating in the crime itself, of the physical assault, but there were two offenders that have different personalities, different behaviors at the end while the victim is dying."

The jury found Prather guilty of murder and robbery. The trial court sentenced Prather to ten years' imprisonment for robbery and thirty years' imprisonment for

---

education or experience go to the weight to be accorded the expert's testimony and not its admissibility"; a trial court may take the same approach with the reliability factor "after making a threshold determination for purposes of admissibility").

murder, to run concurrently. Prather filed a motion for a new trial, arguing the trial court erred by allowing LaRosa's reply testimony and qualifying him as an expert in "crime scene analysis." The trial court denied Prather's motion. This appeal followed.

LAW/ANALYSIS

I. Rebuttal Testimony

Prather argues the trial court erred in permitting LaRosa's testimony on reply. We agree.

The admission of reply testimony is within the sound discretion of the trial court. *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). "Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief." *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). Testimony that is "arguably contradictory and in reply to" that offered by the defense is admissible. *Todd*, 290 S.C. at 214, 349 S.E.2d at 340. However, reply testimony should be limited to that which refutes or rebuts testimony presented by the defendant. *See State v. Durden*, 264 S.C. 86, 90, 212 S.E.2d 587, 589 (1975) (finding reply testimony proper noting "[t]he reply testimony did not go beyond a refutation of that which the [defendant]'s witness had asserted"); *State v. Garris*, 394 S.C. 336, 351, 714 S.E.2d 888, 896 (Ct. App. 2011) (affirming admissibility of reply testimony that rebutted the defendant's claim he did not own a pistol or fire one on the day in question); *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) (finding admission of rebuttal testimony appropriate when "[t]he Commission properly limited the rebuttal evidence strictly to a reply to [the appellant]'s evidence, and the Commission's Order demonstrates clearly that [the respondents'] rebuttal evidence was related only to the specific issues raised by [the appellant's witness]").

In *Durden*, in which the defendant was convicted of killing his wife's ex-husband, the wife "testified that she had on occasions called the police to their home because of rowdy conduct of the [victim] on her premises." 264 S.C. at 90, 212 S.E.2d at 589. In reply, the State called a police officer who denied this testimony and testified the police had not received any calls about the victim. *Id.* Our supreme court found the officer's "reply testimony was made necessary by the evidence which the [defendant] had submitted. The reply testimony did not go beyond a

refutation of that which the [defendant]'s witness had asserted." *Id.* The court reasoned it could "hardly be argued that the [defendant]'s counsel was taken by surprise." *Id.* Accordingly, the court found "no error." *Id.* at 90, 212 S.E.2d at 590.

In *Garris*, the defendant argued "the trial court erred in denying his request to call an expert to rebut the reply testimony given by the State's expert." 394 S.C. at 350, 714 S.E.2d at 896. Our court explained the defendant "took the stand and testified he did not have or handle a gun the day he was arrested [but] fired a rifle the day before." *Id.* In response, the State called "a SLED agent who performed a gun residue analysis on samples taken from [the defendant's] hands." *Id.* at 350-51, 714 S.E.2d at 896. In proffered testimony, the agent opined the defendant had fired a pistol; the defendant objected because this information was not in the agent's report and the defendant had just learned about it during the proffered testimony. *Id.* at 351, 714 S.E.2d at 896. However, the trial court allowed the "testimony to be presented to the jury to rebut [the defendant's claim] he did not own a pistol or fire one." *Id.* Our court found the agent's "testimony was properly limited to a reply to" the defendant's testimony because the State put the agent on the stand to rebut the defendant's "testimony that he did not own a pistol and had not shot one the day of the incident." *Id.*

Furthermore, in *State v. McDowell*, the defendant was convicted of murdering his sixteen-year-old son by shooting him in the head, and the defendant told the police his "third shot was fired after [the victim] had fallen to the floor." 272 S.C. 203, 205, 249 S.E.2d 916, 917 (1978) (per curiam). "At trial, however, [the defendant] testified the third shot was fired in rapid succession to the second shot while [the victim] was standing." *Id.* The defendant argued the trial court "erred by permitting the examining pathologist to testify for the State on reply that the victim's head was resting against a hard, flat object at the time the third shot was fired." *Id.* at 206, 249 S.E.2d at 917. The basis for the defendant's argument was his "contention that this testimony should have been introduced during the State's case[-]in[-]chief and was improper reply testimony." *Id.* Our supreme court found the testimony "was in reply to the [defendant]'s testimony that the third shot was fired while the victim was still standing," and was unnecessary until the [defendant] testified in direct opposition to his earlier statements." *Id.* at 206-07, 249 S.E.2d at 917.

Unlike the previous cases, LaRosa's testimony was not proper reply testimony because the rebuttal should have been limited to refuting Prather's testimony, rather than to complete the State's case-in-chief. Prather claimed he waited in his vehicle for about ten minutes after Phillips went back inside Victim's residence. He denied carving rapist in Victim's back and covering Victim with a blanket, and he claimed he merely saw "a dildo on the bed by [Phillips]'s feet." In reply, LaRosa opined there were "two distinct offenders" in this crime scene because there were "two specific personalities." LaRosa testified in detail about staging and undoing, why someone would carve rapist in a victim's back, and about the level of anger associated with superficial cutting. LaRosa opined the offenders used the dildo "for shock value to show what type of rapist [Victim] is" and the blanket to "symbolically eras[e]" what had occurred at the scene.

Prather did not testify to the number of perpetrators or to anyone's motives for carving rapist, for the placement of the dildo, or for covering Victim with a blanket at the scene.[4] He did not testify to any of the conduct surrounding these events. He did not testify they happened in a specific manner or for a specific reason but simply denied doing them or being present when they occurred. Such broad expert testimony on reply "explain[ing] the crime scene" could not reasonably be anticipated by Prather. *See McGaha v. Mosley*, 283 S.C. 268, 277, 322 S.E.2d 461, 466 (Ct. App. 1984) ("Since reply testimony is limited to issues raised by the defense, the element of surprise is eliminated when reply is properly restricted."); *Durden*, 264 S.C. at 90, 212 S.E.2d at 589 (finding "reply testimony did not go beyond a refutation of that which the appellant's witness had asserted[,]" and

---

[4] We are not convinced by the dissent's citation to the following testimony that Prather testified one person committed the crime and associated acts, regardless of what the jury may have inferred from it.

"[State]: And Joshua Phillips was alone in the house for eight to ten minutes?"

"[Prather]: "Somewhere around there."

Prather's answer to the compound question is more responsive to the length of time that passed than the number of individuals in the house or what Phillips did while inside. The remaining testimony cited by the dissent is a basic denial of the crime. Additionally, the record demonstrates Victim's roommate remained in the house after Prather claims to have left.

therefore it could "hardly be argued that the appellant's counsel was taken by surprise").

Accordingly, we conclude the trial court abused its discretion in allowing LaRosa's testimony on reply as it was not limited to refuting or rebutting specific testimony from Prather, but was general testimony as to the circumstances of the crime.

II. Harmless Error

The State contends the admission of LaRosa's reply testimony was harmless beyond a reasonable doubt because Prather admitted he assaulted Victim, and LaRosa's testimony did not identify Prather as the second perpetrator. We disagree.

"Whether an error is harmless depends on the circumstances of the particular case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" *Id.* (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). "[O]ur 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." *State v. Tapp*, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012).

In this case, the jury was presented with testimony regarding prior statements by Prather to police and the emergency room nurse that he had beat up Victim and had struck him with "devastating blows" and had "beat the shit" out of Victim. Prather admitted in his trial testimony he struck Victim three times as necessary to defend against a larger man. Both Rabon and Prather testified Phillips had hit Victim earlier in the evening, and Rabon claimed to have seen Victim and Phillips in what appeared to be a sexual encounter. Prather testified Phillips hit and kicked Victim after Prather returned to the house and retrieved Phillips from the bedroom. According to Prather, Phillips went back inside to get his shoes while Prather waited in his car. At that point, it was within the jury's province to determine what version of events was more credible based on all the evidence and testimony.

LaRosa testified two people were present at the crime scene and manipulated the crime scene to present a particular version of events to authorities. Such expert testimony left little room for the jury to conclude anything other than that Prather was the second offender, as the State's theory of the case was that Prather and Phillips acted in concert to take advantage of Victim. *See State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) ("[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."). Not only did LaRosa espouse *his* opinion as to the circumstances of the crime, he bolstered the credibility of his own testimony by stating his assessment of the case had been reviewed by other SLED agents who agreed with him. While Prather did not specifically object to this improper bolstering, the augmentation of LaRosa's credibility likely affected the weight given his testimony by the jury.

Finally, while not determinative in our analysis, the hung jury in Prather's previous trial supports our conclusion that LaRosa's testimony affected the outcome of this trial. *See Christopher v. Florida*, 824 F.2d 836, 847 (11th Cir. 1987) (stating the court's conclusion that the admission of defendant's confession in second trial was not harmless error was "buttressed" by defendant's first trial having ended in a hung jury); *United States v. Ince*, 21 F.3d 576, 585 (4th Cir. 1994) ("Had the case against [defendant] been as strong as the Government would have us believe, it seems unlikely that the first jury would have ended in deadlock."); *United States v. Paguio*, 114 F.3d 928, 935 (9th Cir. 1997) ("We cannot characterize the error as harmless, because the hung jury at the first trial persuades us that the case was close and might have turned on this [erroneously admitted] evidence."). According to Prather's brief, two new elements were introduced in his second trial. First, the State introduced redacted portions of Phillips' written statements in which the word rapist was spelled "rapeist." The carving on Victim's backside was spelled correctly. Second, the State introduced LaRosa's testimony on reply. We cannot assign comparative weight to this new evidence and testimony or discern with certainty how each may have influenced the jury. However, we are not convinced beyond a reasonable doubt that LaRosa's improperly bolstered, expert testimony which implicitly pointed to Prather's involvement, did not contribute to the second jury's guilty verdict. That conclusion is buttressed by the previous hung jury.

We conclude the trial court erred in allowing LaRosa's testimony because it was not proper reply testimony. Furthermore, we conclude under the totality of the

circumstances, the admission of his testimony was not harmless. Therefore, we reverse and remand to the trial court for a new trial.[5]

REVERSED AND REMANDED.

LEE, A.J., concurs.

WILLIAMS, J., dissenting.

WILLIAMS, J.: I respectfully dissent and I would affirm the circuit court.

I. Reply Testimony

In my view, the circuit court did not abuse its discretion when it admitted the State's reply testimony. Accordingly, I would affirm the circuit court as to this issue.

Reply testimony is inadmissible to complete the plaintiff's case-in-chief and should be limited to rebutting matters the defense raised. *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). "The admission of reply testimony is a matter within the sound discretion of the [circuit court]." *State v. Stewart*, 283 S.C. 104, 106, 320 S.E.2d 447, 449 (1984). However, "an abuse of discretion does not occur solely because the reply testimony is contradictory to the previously presented testimony." *Huckabee*, 388 S.C. at 243, 694 S.E.2d at 786.

At trial, Prather testified to being outside Victim's residence when the purported "staging and undoing" occurred. Moreover, Prather claimed he did not participate in any of these acts and testified Phillips was inside the residence when these acts

---

[5] Because our resolution of the prior issue is dispositive, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive). While we decline to rule on the reliability of crime scene analysis testimony in general, we find expert testimony that speculates on the motives and mindset of a perpetrator to be suspect, particularly when based on crime scene photographs, instead of viewing the crime scene in person, "some" of a codefendant's prior statements, and none of the mental health histories of the parties.

occurred. When examining his claims in the context of his entire testimony, Prather inferred that only one person committed these acts.[6] Conversely, the

[6] Specifically, Prather stated:

> [State]: Now, let's talk about this crime scene. It's your testimony that you're not the one responsible for leaving [Victim] in this condition?
>
> [Prather]: No, I'm not.
>
> [State]: That you didn't beat [Victim] down on that sofa; correct?
>
> [Prather]: That's correct. I didn't.
>
> . . . .
>
> [State]: You didn't pull his pants down and carve on him?
>
> [Prather]: No.
>
> [State]: And you didn't go into the bedroom and take this object out of the bedroom, this sex object, and place it beside [Victim]'s body, did you?
>
> [Prather]: The last time I saw it, it was at Josh's feet in that room. And, no, because I'm not touching that thing.
>
> [State]: You're not responsible for the cigarette burn on [Victim]'s finger; is that your testimony?
>
> . . . .
>
> [Prather]: No, I'm not responsible for the cigarette burn.

State's reply testimony contradicted Prather's notion that only one person participated in these acts. Importantly, the testimony was in response to Prather's testimony and was introduced to counter Prather's testimony—even though it did not directly implicate Prather. Specifically, LaRosa's testimony indicated two individuals were at the crime scene based on the types of personalities involved in "staging" and "undoing."[7] Accordingly, I do not find that the circuit court abused

---

> [State]: And you're also saying you're not the one who took this blue blanket, this comforter and covered up that body. Is that your testimony?
>
> [Prather]: Yes, sir. I don't recall seeing that blue blanket anywhere in the house.
>
> [State]: And you didn't take this blue pillow and put it over his head?
>
> [Prather]: No.
>
> [State]: And Joshua Phillips was alone in the house for eight to ten minutes?
>
> [Prather]: Somewhere around there.

[7] At trial, LaRosa testified:

> [LaRosa]: Undoing is a term that we use in crime analysis where an offender would want to erase, symbolically erase what has happened. In this case, it could be -- it's on a spectrum. You could have a lot or you can have a little, where an offender may throw a t-shirt over a victim's face because they can't look at it any more. It's not what they want -- they don't want to remember him a certain way. This is a classic case of undoing, which is covering up the victim with a blanket and a pillow. It is symbolically erasing what has occurred in the scene.

its discretion in allowing LaRosa's testimony on reply. *See State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("The admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony.").

Additionally, I disagree with Prather's remaining arguments on the admission of the reply testimony, and accordingly, would affirm the circuit court based on the lack of prejudice to Prather. "[T]he improper admission of [reply testimony] may

---

> [State]: Is staging and undoing show the same emotion [sic]?
>
> [LaRosa]: They are in absolute conflicts with each other. You have this -- I don't want to call it elaborate, but I'll call it detailed staging of taking the time to carve the word rapist in the back of the victim and then placing the adult sex toy next to him to show first responders that this guy is a rapist. Hey, look at this. They are yelling. They are expressing this is the way I want this guy to be portrayed, as a rapist. Then you have another personality that goes in and says, I'm not comfortable with that. I'm going to undo it, cover it up. You have two distinct personalities which points us to me and my opinion that you have two offenders within that scene at the same time.
>
> . . . .
>
> [LaRosa]: Yes, yes. Two distinct offenders who at the heat of the moment one of them decides to carve the word rapist and the place an adult sex toy, a dildo next to him, and the other one taking blankets and wanting to erase, to just undo what has just occurred.

not serve as the basis for reversal unless found to be prejudicial." *State v. Farrow*, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998) (per curiam).

In the instant case, I do not believe LaRosa's reply testimony prejudiced Prather. LaRosa's testimony was general in nature and only sought to establish the presence of two people at the crime scene, rather than to establish Prather as the sole perpetrator. Moreover, LaRosa's testimony regarding the personality traits of those involved in the crime was offered to show the differing and distinct personalities that would engage in staging and undoing, which ultimately supported his conclusion that two people participated in the crime scene. LaRosa made no mention of Prather's name or any of Prather's personality traits during his reply testimony. Indeed, LaRosa did not offer his testimony as evidence of Prather's involvement in the crime; rather, LaRosa discussed the distinct personality traits to demonstrate that two individuals necessarily participated.

Last, regardless of whether the reply testimony was proper, I would find the circuit court's admission of reply testimony to be harmless error. *See State v. McClellan*, 283 S.C. 389, 393, 323 S.E.2d 772, 774 (1984) ("However, [when] guilt is proven by competent evidence and no rational conclusion can be reached other than the accused's guilt, a conviction will not be set aside because of insubstantial errors not affecting the result."). Prather's admission to striking Victim; other witnesses' testimony that Prather claimed: to have struck Victim with "devastating blows," to have left Victim barely alive, and that he needed to wash the blood off of his hands; and the pathologist's testimony that Victim's death was caused by an irregular heartbeat that resulted from the stress of a beating and an enlarged heart provide competent evidence to establish Prather's guilt in this case. Moreover, I respectfully disagree with the majority's view that the additional evidence of LaRosa's testimony affected the outcome of this trial; particularly to their point that LaRosa's testimony left the jury with only the conclusion that Prather was the second offender. *See State v. Black*, 400 S.C. 10, 30, 732 S.E.2d 880, 891 (2012) (determining the error to be harmless after a review of the entire record and finding the admission of additional evidence against the defendant "could not reasonably have affected the jury's result in this case"). In the instant case, prior to LaRosa's testimony, evidence that stolen items were found in Prather's vehicle and on Phillips; that blood was found on Prather's sock and on the back of his shirt; and that a knife was found in Prather's car indicated Prather and Phillips were involved in Victim's murder and supported the State's theory of the case. Accordingly, any error resulting from the State's reply would be harmless.

In conclusion, I would affirm the circuit court's admission of the reply testimony because it was properly admitted. Furthermore, I do not believe Prather established he sustained any prejudice. Last, I would affirm the circuit court because any error Prather may have established by the admission of the reply testimony would be harmless.

II. Remaining Issues

In addition to Prather's argument regarding reply testimony, he also argues that: (1) LaRosa's testimony was not properly produced during discovery; (2) the State committed prosecutorial misconduct when it "sandbagged" the defense with LaRosa's testimony; (3) the introduction of a portion of Prather's codefendant's statement to the police was inadmissible hearsay, unreliable, irrelevant, and violated Prather's Confrontation Clause rights; (4) the circuit court improperly denied Prather's motion for a directed verdict; (5) the State denied Prather's right to due process when it pursued factually inconsistent theories in Prather's and his codefendant's cases; (6) the circuit court denied Prather due process when it did not allow him to introduce a statement from an unavailable witness; and (7) the circuit court violated Prather's Fourth Amendment rights when it did not suppress evidence produced as a result of a fatally defective warrant.[8] I would affirm the circuit court as to Prather's remaining issues on appeal.

1. Regarding Prather's arguments that LaRosa's testimony was not properly produced during discovery and the State committed prosecutorial misconduct when it "sandbagged" the defense with LaRosa's testimony, I would find these issues unpreserved. Prather did not raise these issues during the in camera hearing or at trial; instead, Prather first raised these arguments in his motion for a new trial. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); *see also State v. King*, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999) (finding that a party cannot raise an evidentiary issue for the first time in a new trial motion). Thus, I would affirm the circuit court as to these two issues.

[8] The majority did not address these issues because its holding was dispositive.

2. Similarly, I would find the circuit court did not abuse its discretion by allowing the State to introduce a portion of the statement of Prather's co-defendant—Phillips—to the police, in which Phillips misspelled rapist.[9] As to whether the statement was inadmissible hearsay under the South Carolina Rules of Evidence; unreliable; and irrelevant, I would find this argument unpreserved. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94 (("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector."). Prather did not object to the statement's admissibility on these grounds or as hearsay during the in camera hearing or contemporaneously during trial. Rather, Prather specifically raised an objection to the admissibility of the statement based solely on the exclusion of testimonial evidence under the Confrontation Clause. Thus, I believe Prather's assertion that portions of Phillips' statement are inadmissible, unreliable, and irrelevant is unpreserved.

Regarding Prather's Confrontational Clause argument, I would find the circuit court did not abuse its discretion because the State only introduced two words from a six page document and redacted every other remaining word. The admission of a redacted statement does not violate the Confrontation Clause when the statement does not incriminate the defendant on its face, even though "its incriminating import was certainly inferable from other evidence that was properly admitted against [the defendant]." *State v. Evans*, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). Here, Prather's rights were not violated because only the two misspelled words from Phillips' statement to the police were admitted with the remaining six page document being redacted. Furthermore, "rapeist" does not incriminate Prather on its face, even though its incriminating nature was inferable from other admissible evidence, and Prather had the opportunity to cross-examine Officer Jones, who testified to witnessing Phillips spell the word incorrectly. Thus, I would affirm the circuit court on this issue.

[9] Phillips spelled the word "rapeist."

3. As to Prather's argument that the circuit court erred in denying his motion for a directed verdict, I would find evidence supports the circuit court's findings. *See Sellers v. State*, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) ("When ruling on a [defendant's] motion for directed verdict, a [circuit] court is concerned with the existence of evidence, not its weight."); *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002) (finding the appellate court may only reverse the circuit court if no evidence supports the circuit court's ruling); *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.").

Specifically, Prather asserts the State failed to prove proximate cause existed between his actions and Victim's death. However, the record demonstrates the circuit court properly denied Prather's motion for a directed verdict because evidence supported submitting this issue to the jury. *See State v. Dantonio*, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008) ("A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased." (citation omitted)). Indeed at trial, witnesses testified Prather admitted to severely beating Victim. Moreover, the pathologist testified the stress of the beating and an enlarged heart caused the death of Victim. Accordingly, I would affirm the circuit court's denial of Prather's motion for a directed verdict.

4. As to whether Prather's rights to due process were denied because the State pursued factually inconsistent theories in Prather's and Phillips' cases, I would find this issue unpreserved. Prather failed to raise this issue to the circuit court at trial or in his post-trial motion. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."); *State v. Varvil*, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) ("Constitutional arguments are no exception to the rule, and if not raised to the [circuit] court are deemed waived on appeal.").

5. As to whether the circuit court abused its discretion by not allowing Prather to introduce a statement from an unavailable witness, I would affirm the circuit

court's ruling because, notwithstanding the statement containing two levels of hearsay, I believe the statement to law enforcement does not fall under the present sense impression or excited utterance exceptions to the rule against hearsay. *See* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the [South Carolina Supreme Court] or by statute."); Rule 803(1), SCRE (defining "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"); Rule 803(2), SCRE (defining "excited utterance" as "[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"); *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014) (finding victim's mother's statement to a 911 operator—in which victim's mother stated victim's boyfriend broke into the house, beat up victim, and raped victim—was inadmissible hearsay not covered by the present sense impression exception because the mother did not perceive the rape contemporaneously while she made the statement); *State v. Davis*, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) ("[S]tatements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule.").

In the instant case, Prather attempted to introduce a statement made by Jody Becknell—who was deceased at the time of the trial—to law enforcement regarding a conversation he had with Victim, wherein Victim described his injured ribs to Becknell. Becknell did not perceive Victim's rib pains, did not witness the event causing the pain, and did not have firsthand information about the event when he relayed the information to the police. Therefore, regardless of whether Victim's statements to Becknell would fall under an exception to hearsay, Becknell's statement to the police would not qualify under the excited utterance or present sense impression exceptions to the rule against hearsay. Accordingly, I would affirm the circuit court as to this issue.

6. Finally, as to whether the circuit court violated Prather's Fourth Amendment rights by not suppressing the Coca-Cola glasses and knife found in his car pursuant to a fatally defective warrant, I would find the circuit court did not commit an error because the inevitable discovery doctrine would permit admission of this evidence. *See State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, [the appellate court] applies a deferential standard of review and will reverse if there is clear

error."); *State v. Spears*, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)) (stating that the inevitable discovery doctrine—an exception to the exclusionary rule—allows for the admission of illegally obtained evidence if the prosecution can establish by a preponderance of the evidence that the evidence would inevitably or ultimately have been discovered by lawful means). Upon review of the record, I find the State satisfied its burden under the inevitable discovery doctrine when testimony detailed the police department's policy of impounding a vehicle and the department's policy of conducting a routine, warrantless inventory of an entire vehicle when impounded. Furthermore, the record demonstrates Prather's vehicle remained in the hospital's parking lot after police detained him, and the car would have been impounded. Therefore, I would find the circuit court committed no error in admitting this evidence.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Community Services Associates, Inc., Appellant,

v.

Stephen H. Wall and Maria P. Snyder Wall,
Respondents.

Appellate Case No. 2015-001795

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5525
Heard October 10, 2017 – Filed December 6, 2017

AFFIRMED

F. Ward Borden, of Jones Simpson & Newton, PA, of Bluffton, for Appellant.

Drew A. Laughlin, of Laughlin & Bowen, PC, of Hilton Head Island, for Respondents.

GEATHERS, J.: Appellant Community Services Associates, Inc. (CSA) seeks review of an order of the Master-in-Equity denying CSA's request to permanently enjoin Respondents, Stephen H. Wall and Maria P. Snyder Wall (collectively, the Walls), from renting out the first floor of their single-family residence while simultaneously occupying the upstairs guest suite. CSA argues the master erred by (1) finding the Walls' residence had only one kitchen; (2) concluding the Walls' rental activity did not violate CSA's restrictive covenants; and (3) declining to consider a letter written by Respondent Maria P. Snyder Wall (Mrs. Wall) and published in a local newspaper after the merits hearing. We affirm.

FACTS/PROCEDURAL HISTORY

On April 1, 1970, the Sea Pines Plantation Company adopted the current restrictive covenants that apply to residential and common areas within Sea Pines Plantation, a gated community on Hilton Head Island (the Covenants). Part I of the Covenants applies to all "Class 'A' Residential Areas" and includes, *inter alia*, the following restrictions:

> 5. All lots in said Residential Areas shall be used for residential purposes exclusively. No structure, except as hereinafter provided[,] shall be erected, altered, placed or permitted to remain on any lot other than one (1) detached single family dwelling not to exceed two (2) stories in height and one small one-story accessory building [that] may include a detached private garage and/or servant's quarters, provided the use of such dwelling or accessory building does not overcrowd the site and provided further[] that such building is not used for any activity normally conducted as a business. Such accessory building may not be constructed prior to the construction of the main building.
>
> 6. A guest suite or like facility without a kitchen may be included as part of the main dwelling or accessory building, *but such suite may not be rented or leased except as part of the entire premises*[,] including the main dwelling, and provided, however, that such guest suite would not result in over-crowding the site.

(emphasis added). Parts II through V, respectively, apply to only those areas designated as "Beach Residential," "Golf Fairway Residential," etc. The Sea Pines Plantation Company enforced the Covenants until CSA, a property owners' association, succeeded to the Covenants' enforcement.

In 1998, the Walls purchased their residence at 48 Planters Wood Drive in Sea Pines Plantation. According to Respondent Stephen H. Wall (Mr. Wall), the residence has one kitchen on the north side of the first floor. The second story of the residence consists of a guest suite that is accessible only by an outside staircase.

In 2012, the Walls began renting out a room in their residence through Airbnb, an online rental broker. The Walls' listing with Airbnb was titled "Hilton Head Organic B&B, Sea Pines" and indicated that the room accommodated three individuals. The Walls also cooked breakfast for their renters. After CSA expressed concern about the Walls' rental activity, the Walls changed their listing with Airbnb to the "Whole House" category and began renting out the entire first floor while living in the second-story guest suite themselves. They also dropped the title "Hilton Head Organic B&B, Sea Pines" and stopped cooking breakfast for their renters.

On September 25, 2014, CSA filed a Verified Complaint against the Walls, seeking temporary and permanent injunctions against the Walls' alleged operation of "a bed and breakfast" in their residence and the rental of merely part of the residence rather than the entire residence. In its complaint, CSA asserted that the Covenants, specifically paragraphs five and six of Part I, authorize the short-term rental of an entire residence but not part of a residence.

The Walls filed a Verified Answer asserting they advertised on airbnb.com in the "Whole House" category and that they remained in the guest suite when their whole house was rented. However, the Walls denied CSA's allegation that they were operating a bed and breakfast in their residence. The master conducted a hearing on CSA's temporary injunction request on April 7, 2015, which was continued to April 21, 2015. On this later date, the master received evidence on CSA's requests for temporary and permanent injunctions.

On May 7, 2015, the master issued an order denying CSA's requests for injunctive relief and dismissing the Verified Complaint. CSA filed a motion to alter or amend the judgment, and the master conducted a hearing on the motion on June 28, 2015. Subsequently, CSA requested the master to consider a letter to the editor of *The Island Packet*, a local newspaper, written by Mrs. Wall concerning the benefits of Airbnb versus a new hotel on the island. The master declined to consider the letter. On August 10, 2015, the master issued an order denying CSA's motion to alter or amend. This appeal followed.

ISSUES ON APPEAL

1. Did the master err by finding the Walls' residence had only one kitchen?

2. Did the master misinterpret paragraphs five and six of Part I of the Covenants?

3. Was the letter written by Mrs. Wall and published in *The Island Packet* relevant to the issues in the case?

STANDARD OF REVIEW

"This [c]ourt reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("A legal question in an equity case receives review as in law." (quoting *Sloan v. Greenville Cty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003))); *id.* ("Questions of law may be decided with no particular deference to the trial court." (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008))). "Review of the trial court's factual findings, however, depends on . . . whether the underlying action is an action at law or an action in equity." *Fesmire*, 385 S.C. at 302, 683 S.E.2d at 807 (citing *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 85–86, 221 S.E.2d 773, 775–76 (1976)).

"An action to enforce restrictive covenants by injunction is in equity." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). "On appeal from an action in equity, [the appellate court] may find facts in accordance with its view of the preponderance of the evidence." *Walker v. Brooks*, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015). "However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the trial judge was in a better position to assess the credibility of the witnesses." *Laughon v. O'Braitis*, 360 S.C. 520, 524–25, 602 S.E.2d 108, 110 (Ct. App. 2004). Further, "this broad scope does not relieve the appellant of [the] burden to show that the trial court erred in its findings." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012); *accord Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001).

LAW/ANALYSIS

I. Number of Kitchens

CSA argues the master erred by finding the Walls' residence had only one kitchen because the evidence shows the Walls have a kitchen in the upstairs guest suite. We disagree.

Mr. Wall testified he and Mrs. Wall kept an induction plate, a toaster oven, and a mini-refrigerator in the guest suite and they occasionally prepared food for

themselves with these appliances. Mr. Wall also stated he and Mrs. Wall washed their dishes in the guest suite. CSA argues this evidence shows the Walls had a kitchen in the guest suite because "[t]he usual and customary meaning of 'kitchen' is 'a room or area where food is prepared and cooked.'" However, even CSA's chosen definition of kitchen necessarily implies that the room is dedicated exclusively to preparing and cooking food, and there is no evidence showing that the Walls' guest suite has a room dedicated exclusively to this purpose. We agree with the master that the Walls' use of certain "dormitory-style portable appliances to store and prepare foods on the second floor does not create a kitchen, as the term is commonly used." Therefore, we affirm the master's finding that the Walls' residence had only one kitchen and this kitchen is located on the first floor.

II. Violation of Covenants

CSA also argues the master erred by concluding the Walls' activity of renting out the first floor of their residence while simultaneously occupying the upstairs guest suite did not violate the Covenants. CSA asserts the master misinterpreted paragraphs five and six of Part I of the Covenants because these two provisions, read together, require a residence to be rented in its entirety. We disagree.

"'Restrictive covenants are contractual in nature,' so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998) (quoting *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (1985)). "When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning." *Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999). Accordingly, when "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992).

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302. When such an ambiguity exists, all doubts are to be "resolved in favor of free use of the property." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Thus, "a restriction on the use of the property must be created in express terms or by plain and *unmistakable* implication." *Id.* (emphasis added) (quoting *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980)).

> "The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms["] even to accomplish *what it may be thought* the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.

Taylor, 332 S.C. at 4, 498 S.E.2d at 864 (emphasis added) (quoting *Forest Land Co. v. Black*, 216 S.C. 255, 262, 57 S.E.2d 420, 424 (1950)).

Here, the parties agreed the only provisions in the Covenants that bear on the Walls' rental activity are paragraphs five and six of Part I, which state,

> 5. All lots in said Residential Areas shall be used for residential purposes exclusively. No structure, except as hereinafter provided[,] shall be erected, altered, placed or permitted to remain on any lot other than one (1) detached single family dwelling not to exceed two (2) stories in height and one small one-story accessory building [that] may include a detached private garage and/or servant's quarters, provided the use of such dwelling or accessory building does not overcrowd the site and provided further[] that such building is not used for any activity normally conducted as a business. Such accessory building may not be constructed prior to the construction of the main building.
>
> 6. A guest suite or like facility without a kitchen *may* be included as part of the main dwelling or accessory building, *but such suite may not be rented or leased* except as part of the entire premises[,] including the main dwelling, and provided, however, that such guest suite would not result in over-crowding the site.

(emphases added).

The express terms of paragraph six require a residence with a guest suite to be rented in its entirety *when the guest suite is rented out*. However, paragraphs five

and six do not, by their express terms or by plain and *unmistakable* implication, require a residence with a guest suite to be rented in its entirety in every circumstance. *See Hardy*, 369 S.C. at 166, 631 S.E.2d at 542 ("[A] restriction on the use of the property must be created in express terms or by plain and *unmistakable* implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." (emphasis added) (quoting *Hamilton*, 274 S.C. at 157, 263 S.E.2d at 380)). Therefore, this court may not interpret paragraphs five and six to include such a requirement even if it could be reasonably implied. In other words, it is not enough for the implication to be reasonable—it must be unmistakable. *See Taylor*, 332 S.C. at 4, 498 S.E.2d at 864 ("'The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction *or implication* beyond the *clear* meaning of its terms['] even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." (emphases added) (quoting *Forest Land Co.*, 216 S.C. at 262, 57 S.E.2d at 424)).

At best, paragraphs five and six are capable of two reasonable interpretations: (1) a residence with a guest suite must be rented in its entirety in every circumstance or (2) the owners of a single family dwelling with a guest suite may stay in the guest suite themselves while renting out the remaining space. *See McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302 ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). Because the latter interpretation "least restricts the use of the property," we must adopt this interpretation. *See Taylor*, 332 S.C. at 4, 498 S.E.2d at 864 ("[When] the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property.").

Additionally, the evidence shows the Walls complied with all of the express terms of paragraphs five and six. It is undisputed that short-term rentals do not violate the requirement that all lots shall be used for residential purposes. It is also undisputed that the Walls had only their two-story dwelling on the site and did not rent out their guest suite. While the presence of a kitchen in the guest suite, which is prohibited by paragraph six, was disputed, the master properly resolved this issue in favor of the Walls. *See supra* Part I. Finally, Brett Martin, CSA's president, admitted he was not aware of CSA receiving any complaints that the Walls' use of their home was overcrowding the site, as is prohibited by paragraph six of Part I of the Covenants.

Based on the foregoing, the master properly concluded the Walls' rental activity did not violate the Covenants.

III. Post-hearing Evidence

Finally, CSA maintains the master erred by declining to consider a letter written by Mrs. Wall after the merits hearing and published in *The Island Packet* on August 2, 2015. CSA contends the master had discretion under Rules 52(b) and 59(a), SCRCP, to take additional evidence and the letter was relevant to whether the Walls actually believed their activities violated the Covenants. We disagree.

Initially, this issue is not preserved for review because CSA did not cite Rules 52 and 59 in its request for the master to consider Mrs. Wall's letter. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))).

In any event, the master properly declined to consider Mrs. Wall's letter because it was not relevant to the issues in the case. The language cited by CSA refers to Airbnb and states, "As a community, we should explore the benefits that this sustainable business model brings. We should have a town meeting and engage in healthy dialogue." In his letter requesting the master to consider this language, counsel states,

> We believe this letter demonstrates [Mrs.] Wall's actual view of the 'sustainable business model' as she described it – calling it 'a far better solution than a new hotel.' She also calls for a town meeting to 'engage in healthy dialogue' – an apparent admission that this business model does not comport with the current covenants and restrictions.

In response, the master stated, "Thank you for the message, however, I'm not going to consider matters outside the original record. Also, [CSA's] interpretation of 'healthy dialogue' seems a stretch." We agree with the master that the highlighted language is not an admission that the Walls' activities with Airbnb violated the Covenants. Therefore, even if the master was under the mistaken impression that he could not accept additional evidence, his alternative ground for excluding the letter,

its lack of relevance, was valid. *See* Rule 402, SCRE ("Evidence [that] is not relevant is not admissible."); Rule 401, SCRE ("'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.").

CONCLUSION

Accordingly, we affirm the master's order.

AFFIRMED.

SHORT and KONDUROS, JJ., concur.