The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

S.C. Code Ann. § 34-31-20 (B) (Supp. 2018) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 2, 2019, the first edition after January 1, 2019, listed the prime rate as 5.50%. Therefore, for the period January 15, 2019, through January 14, 2020, the legal rate of interest for judgments and money decrees is 9.50% compounded annually.

s/ Donald W. Beatty C. J.
FOR THE COURT

Columbia, South Carolina
January 4, 2019

The Supreme Court of South Carolina

In the Matter of Leah Garland, Petitioner

Appellate Case No. 2018-002238

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 27, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

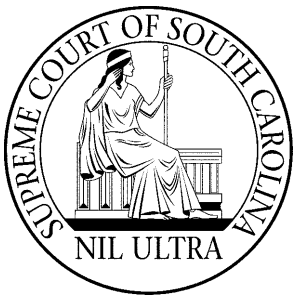
Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered of it is subsequently located.

FOR THE COURT

BY Daniel E. Shearouse
CLERK

Columbia, South Carolina
January 2, 2019



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 4, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2019-UP-008-State v. Randall Matthew Simpson

2019-UP-009-Karen Jean McSweeney Quaiel v. Timothy James Quaiel

2019-UP-010-Peach REO, LLC v. Blalock Investments, LLC

PETITIONS FOR REHEARING

5588-Brad Walbeck v. The I'On Company	Pending
5590-State v. Michael L. Mealor	Pending
5598-Emily S. Brown v. Grady C. Odom	Pending
5602-John McIntyre v. Securities Commissioner of South Carolina	Pending
5604-Hazel v. Blitz U.S.A., Inc.	Pending
5605- State v. Marshell Hill	Pending
5606-George Clark v. Patricia Clark	Pending
2018-UP-340-Madel Rivero v. Sheriff Steve Loftis	Pending
2018-UP-368-Laurent Britton v. Charleston County	Pending
2018-UP-389-Gloria Terry v. Robert Terry, Sr.	Pending
2018-UP-402-Three Blind Mice, LLC v. Colony Insurance	Pending
2018-UP-414-James Thorpe v. Town of Bowman	Pending
2018-UP-417-State v. Dajlia S.Torbit	Pending
2018-UP-420-Mark Teseniar v. Fenwick Plantation	Pending
2018-UP-421-SCDSS v. Steven D. Gilstrap	Pending
2018-UP-423-Wells Fargo Bank v. William Hudspeth	Pending
2018-UP-426- Andra Jamison v. SCDC	Pending
2018-UP-430-SCDSS v. Kendra D. Cantrell	Pending

2018-UP-433-Robert DeCiero v. Horry County	Pending
2018-UP-437-State v. Marcus C. Johnson	Pending
2018-UP-439-State v. Theia D. McArdle	Pending
2018-UP-454-State v. Timothy A. Gertel	Pending
2018-UP-458-State v. Robin Herndon	Pending
2018-UP-461-Mark Anderko v. SLED	Pending
2018-UP-473-Ivery M. Chestnut v. Mashell Chestnut	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5561-Innovative Waste v. Crest Energy	Pending
5562-Raymond Farmer v. CAGC Insurance	Pending
5563-Angel Gary v. Lowcountry Medical	Pending
5564-J. Scott Kunst v. David Loree	Pending
5566-Tyrone York v. Longlands Plantation	Pending
5568-Amisub of South Carolina, Inc. v. SCDHEC	Pending
5571-William Crenshaw v. Erskine College	Pending
5573-Skydive Myrtle Beach v. Horry County	Pending
5574-State v. Jeffrey D. Andrews	Pending
5579-State v. Nathaniel Wright	Pending
5581-Nathan Bluestein v. Town of Sullivan's Island	Pending
5582-Norwest Properties v. Michael Strebler	Pending
5583-Leisel Paradis v. Charleston County	Pending

5586-State v. Sha'quille Washington	Pending
5587-In the matter of Tynslee Elizabeth Fields	Dismissed 12/18/18
5589-State v. Archie M. Hardin	Pending
5591-State v. Michael Juan Smith	Pending
5592-State v. Aaron S. Young, Jr.	Pending
5593-Lori Stoney v. Richard Stoney	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2018-UP-080-Kay Paschal v. Leon Lott	Pending
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending
2018-UP-191-Cokers Commons v. Park Investors	Pending
2018-UP-231-Cheryl DiMarco v. Brian A. DiMarco	Pending
2018-UP-244-Albert Henson v. Julian Henson	Pending
2018-UP-250-Morningstar v. York County	Pending
2018-UP-260-Kenneth Shufelt v. Janet Shufelt	Pending
2018-UP-269-Carleton Cantrell v. Aiken County	Pending
2018-UP-273-State v. Maurice A. Odom	Pending
2018-UP-281-Philip Ethier v. Fairfield Memorial	Pending
2018-UP-317-Levi Thomas Brown v. State Farm	Pending
2018-UP-318-Theresa Catalano v. Jack Catalano	Pending
2018-UP-333-Roosevelt Simmons v. Mase and Company	Pending
2018-UP-335-State v. Samuel E. Alexander, Jr.	Pending
2018-UP-339-State v. James Crews	Pending

2018-UP-349-Verma Tedder v. Darlington County	Pending
2018-UP-352-Decidora Lazaro v. Burriss Electrical	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mark Lawrence, individually and on behalf of others similarly situated, Plaintiff,

v.

General Panel Corp., a division of Perma "R" Products, Inc., Defendant.

Appellate Case No. 2017-002350

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Richard M. Gergel, United States District Judge

Opinion No. 27856
Heard September 19, 2018 – Filed January 4, 2019

CERTIFIED QUESTION ANSWERED

Blake A. McKie and J. Rutledge Young III, both of Duffy & Young, LLC, of Charleston, for Plaintiff.

Everett A. Kendall II, and Richard E. McLawhorn, both of Sweeny Wingate & Barrow, P.A., of Columbia, for Defendant.

JUSTICE FEW: This Court accepted the following certified question from the United States District Court for the District of South Carolina:

> Did South Carolina Act 27 of 2005 amend section 15-3-640 of the South Carolina Code (Supp. 2018) so that, in an action for damages based upon a defective improvement to new-construction real property, the date of "substantial completion of the improvement" is measured from the date of the certificate of occupancy (unless the parties establish a different date by written agreement), superseding the Supreme Court of South Carolina's decision in *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001)?

I. Facts and Procedural History

Mark Lawrence constructed his home near Mount Pleasant, South Carolina, using structural insulated panels manufactured by General Panel Corporation. Structural insulated panels—referred to in the residential construction industry as SIPs—are a structural alternative to traditional wood-frame construction. Lawrence claims faulty installation of the General Panel SIPs used in constructing his home allowed water intrusion, which in turn caused the panels to rot, damaging the structural integrity of his home. He brought this claim in federal district court alleging General Panel was liable for providing defective installation instructions to the subcontractor installing the SIPs.

General Panel filed a motion for summary judgment in the district court. The motion was based on section 15-3-640—a statute of repose—which provides, "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement." General Panel's entitlement to summary judgment under section 15-3-640 depended on the date of "substantial completion." The subcontractor completed the installation of the SIPs in Lawrence's home by March 2007. The home was not finished, however, until over a year later. Charleston County issued a certificate of occupancy on December 10, 2008. Lawrence filed his lawsuit against General Panel on December 8, 2016, more than eight years after installation of the SIPs, but less than eight years after the certificate of occupancy was issued.

II. *Ocean Winds* and the 2005 Amendments

In *Ocean Winds*, also a certified question from the district court, the entity that "developed, built, and owned a condominium project on Seabrook Island" brought a

lawsuit against the manufacturer of windows installed in the condominium buildings. 347 S.C. at 417, 556 S.E.2d at 378. The developer sought indemnity for liability the developer might incur to the homeowners' association for water intrusion and other structural problems resulting from defective windows. *Id.* The certified question in that case asked us to determine whether the section 15-3-640 statute of repose[1] ran from "substantial completion of the installation of the windows or . . . substantial completion of the building as a whole." 347 S.C. at 418, 556 S.E.2d at 378. We held "the statute of repose began running when installation of the windows was complete." 347 S.C. at 419, 556 S.E.2d at 379.

Under *Ocean Winds*, therefore, the date of substantial completion for installation of the SIPs in Lawrence's home was March 2007. As the district court found in its certification order, "If *Ocean Winds* is still good law, Plaintiff's claims are barred." However, as the district court also found, "If *Ocean Winds* has been superseded by [the 2005 amendments to section 15-3-640], the statute of repose does not bar any of Plaintiff's claims."

The 2005 amendment that is important to this case added a sentence to section 15-3-640. The new sentence provides, "For any improvement to real property, a certificate of occupancy . . . shall constitute proof of substantial completion of the improvement . . . , unless the contractor and owner . . . establish a different date of substantial completion." Act No. 27, 2005 S.C. Acts 107, 110; § 15-3-640. We accepted this certified question from the federal district court to determine whether the Legislature intended to "supersede" our holding in *Ocean Winds* when it added that sentence to section 15-3-640. Lawrence argues the Legislature intended the date of substantial completion always to be the date of the issuance of a certificate of occupancy. General Panel argues that was not the Legislature's intent.

III. Analysis

We begin our analysis of what the Legislature intended by amending section 15-3-640 by considering subsection 15-3-630(b)—the definition of "substantial completion"—which the Legislature has not changed since the subsection was originally enacted in 1970. *See* Act 1071, 1970 S.C. Acts 2397. First, if the Legislature intended the date of substantial completion always to be the date of

[1] At that time, the statute of repose was thirteen years. *See Ocean Winds*, 347 S.C. at 418, 556 S.E.2d at 378 (quoting section 15-3-640). The Legislature reduced the repose period to eight years as part of the 2005 amendments. Act No. 27, 2005 S.C. Acts 107, 109.

issuance of a certificate of occupancy, the obvious best step to achieve that purpose would be to amend the definition of the term. The fact the Legislature did not amend the definition—or the subsection that contains it—indicates to us it was not the Legislature's intent to make the date uniform in all cases.

Second, the text of subsection 15-3-630(b) defines substantial completion as "that degree of completion of a project . . . or a specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose for which it was intended." S.C. Code Ann. § 15-3-630(b) (2005). If the Legislature intended the date of substantial completion always to be the date of the certificate of occupancy, which occurs only upon completion of the entire project, it would no longer be necessary to provide that substantial completion could be "completion of . . . a specified area or portion" of a project, as subsection 15-3-630(b) continues to provide. To interpret the 2005 amendments as Lawrence argues would render the "specified area or portion" language—perhaps the entirety of subsection 15-3-630(b)—meaningless. *See Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) ("the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless" (citing *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004))).

Third, subsection 15-3-630(b) was the basis of our decision in *Ocean Winds*. There, we found the windows "were 'a specified area or portion' of the larger condominium project." 347 S.C. at 419, 556 S.E.2d at 379 (quoting subsection 15-3-630(b)). We then held, "Upon their incorporation into the larger project, . . . Ocean Winds . . . could use the windows 'for the purpose for which [they were] intended.'" *Id.* (quoting subsection 15-3-630(b)). We held "the statute of repose began running when installation of the windows was complete." *Id.* We specifically stated, "The definition of 'substantial completion' contained in § 15-3-630 requires this result." *Id.* If the Legislature intended to "supersede" our holding in *Ocean Winds*, it was necessary to address the basis of our holding—subsection 15-3-630(b). It makes no sense for the Legislature to "supersede" our interpretation of subsection 15-3-630(b) by amending a different section—15-3-640.

We find, therefore, the Legislature did not intend the date of substantial completion to be the date of the issuance of a certificate of occupancy in all cases. Our conclusion is supported by consideration of the obvious purpose the Legislature legitimately had in adding the new sentence to section 15-3-640 in 2005. When a project is nearing completion, there are often ongoing issues the contractor or a

subcontractor must address. For example, the installation of a sprinkler system, a sound system, or even the heating and air conditioning system, is frequently followed up by months—even years—of adjustments, upgrades, or repairs. This work could potentially extend the date of substantial completion for that "specified area or portion," or the entire project. The purpose of the new sentence was to provide prima facie "proof of substantial completion," despite any ongoing work on a particular area or portion. Under the revised version of section 15-3-640, the statute of repose begins to run at the latest on the date of the certificate of occupancy, even if there is ongoing work on any particular part of the project.

Lawrence concedes it was at least part of the Legislature's intent to create this "latest" date for the statute of repose to begin. He argues, however, the Legislature also intended to create an "earliest" date for projects where there is a certificate of occupancy. Under Lawrence's interpretation, subsection 15-3-630(b) would have no effect on projects where a certificate of occupancy has been issued, but the subsection would control in situations where no certificate has been issued.[2] We disagree with Lawrence's interpretation. First, his argument takes us back to our original position that the obvious step for the Legislature to take to achieve what Lawrence argues was its purpose would have been to amend the definition of substantial completion. Under *Ocean Winds*, the subsection 15-3-630(b) definition of substantial completion applied in all cases. It makes no sense that the Legislature now intends the definition to apply only in some cases, but did not amend the subsection containing the definition.

Second, the interpretation Lawrence advances creates several scenarios that demonstrate his interpretation to be impractical and unreasonable. In one scenario, a homeowner who installed the foundation for his home, but significantly delayed construction of the rest of the home, could hold the foundation contractor on the hook far longer than the Legislature intended when it reduced the repose period from thirteen years to eight years. *See supra*, note 1. In another scenario, the owner of improved real estate as to which no certificate of occupancy was issued at the conclusion of the improvements could restart the repose period by seeking a certificate of occupancy years after construction was complete, conceivably even after the original eight-year period expired.[3] These scenarios demonstrate that

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[2] This interpretation, Lawrence argues, does not render the "specified area or portion" language—or subsection 15-3-630(b)—entirely meaningless.

[3] We have been able to find no provision of law that prevents a certificate of occupancy from being issued long after construction is complete.

Lawrence's interpretation of the effect of the 2005 amendments to section 15-3-640 is an impractical and unreasonable interpretation. *See Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 272, 802 S.E.2d 794, 798 (2017) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." (quoting *State v. Henkel*, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015))).

Our interpretation of the 2005 amendments to section 15-3-640, on the other hand, embraces the wisdom of subsection 15-3-630(b) and our interpretation of it in *Ocean Winds*. The SIPs are structural. Their purpose is not only to provide structure upon completion of the home, but also to provide the structure necessary for the rest of the home to be constructed. For the same reasons foundation work must precede framing, and traditional framing must be completed before almost any other portion of the home may be begun, the SIP framing system must be in place to enable other subcontractors to install electrical, flooring, roofing, sheetrock, heating and air conditioning, and even sound. Here, the certificate of occupancy for Lawrence's home was delayed until twenty months after he completed installation of his SIP structural system. As subsection 15-3-630(b) contemplates, the SIP structural system began to serve "the purpose for which it was intended" long before the date that Lawrence would have us find the statute of repose began to run.

IV. Conclusion

We answer the certified question, "No, the 2005 amendments to section 15-3-640 of the South Carolina Code (Supp. 2018) did not supersede the Supreme Court of South Carolina's decision in *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001)."

CERTIFIED QUESTION ANSWERED.

KITTREDGE and JAMES, JJ., concur. HEARN, J., dissenting in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN: I agree with the majority's view that the legislature's intent is the critical inquiry in this case, but I reach the opposite conclusion. As a result, I respectfully dissent.

In *Ocean Winds*, we declined to interpret Section 15-3-640's statute of repose, forbidding actions for damages more than 13 years following substantial completion of an improvement to property, to begin running upon issuance of a certificate of occupancy. 347 S.C. at 419-22, 556 S.E.2d at 379-80. Approximately four years following our decision, the General Assembly set out to reduce the statute of repose for construction defects and to define substantial completion.[4] The Senate proposed S. 345, to which it added the following language in an amendment: "[f]or any improvement to real property, a certificate of occupancy issued by a county or municipality shall constitute proof of substantial completion of the improvement under the provisions of section 15-3-630, unless the contractor and owner, by written agreement, establish a different date of substantial completion."[5] Thereafter, the Senate voted to amend the House version of the bill, H. 3008, with the identical provision.[6] The House agreed with the Senate's amendments,[7] and Act 27, which applies to improvements to real property for which certificates of occupancy are issued or a final inspection by a local building official is required, became law. Act No. 27, 2005 S.C. Acts 109, 123; S.C. Code Ann. § 15-3-640 (Supp. 2017).[8]

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[4] This is evidenced by the preamble of S. 345, introduced by then-Senator Larry Martin. S. 345, 116th Leg. (S.C. Jan. 26, 2005).

[5] S. 345, 116th Leg. (S.C. Feb. 2, 2005).

[6] S.C. S. Journal, 116th Leg. (Mar. 8, 2005).

[7] S.C. S. Journal, 116th Leg. (Mar. 17, 2005).

[8] The Act also created section 15-38-15 of the South Carolina Code regarding joint and several liability. Act No. 27, 2005 S.C. Acts 109, 118-19. In addition to providing a procedure for assessing such liability, the statute provided that the effective date of July 1, 2005, applied to "causes of actions relating to construction torts and to improvements to real property that first obtain substantial completion on or after July 1, 2005." *Id*. at 123. Importantly, the amendment stated "[f]or purposes of this section, an improvement to real property *obtains substantial completion when* a municipality or county issues a certificate of occupancy in the case of new

The General Assembly is presumed to be aware of our precedent interpreting its statutes. *Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). When used in a statute, the term "shall" means the action is mandatory. *Id*. In codifying the trigger for substantial completion we rejected, I believe the legislature intended to supersede our holding in *Ocean Winds*. It accomplished its goal by establishing a bright-line rule: substantial completion occurs upon issuance of a certificate of occupancy, unless the parties have contracted otherwise.

I acknowledge the General Assembly did not amend the definition of substantial completion in Section 15-3-630(b). Although it may have been the best practice to have done so, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). I believe the intent of the legislature in defining substantial completion in cases involving a certificate of occupancy or local building inspection was clear. Although the statute also shortened the statute of repose, the substantial completion amendment appears to be a classic legislative compromise aimed at providing certainty for all those involved. Moreover, the provision allowing the parties to set their own date of substantial completion promotes negotiation between those in the best position to do so: the parties to the contract.

Accordingly, I would answer the question in the affirmative.

BEATTY, C.J., concurs.

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construction, or completes a final inspection in the case of improvements to existing improvements." *Id*. (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and Edward D. Sloan Jr., individually, and on behalf of all others similarly situated, Appellants,

v.

The South Carolina House of Representatives; the South Carolina Senate; the Honorable James H. "Jay" Lucas, as Speaker of the South Carolina House of Representatives; the Honorable Hugh K. Leatherman Sr., in his capacity as President Pro Tempore of the South Carolina Senate; and the State of South Carolina, Respondents.

Appellate Case No. 2017-001638

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

Opinion No. 27857
Heard October 17, 2018 – Filed January 4, 2019

AFFIRMED

James G. Carpenter, of Greenville, for Appellants.

A. Mattison Bogan and Matthew A. Abee, both of Nelson Mullins Riley & Scarborough, LLP, and Kenneth

M. Moffitt, all of Columbia, Paul D. Harrill and Bradley S. Wright, both of McNair Law Firm, P.A., of Columbia, Attorney General Alan Wilson, Solicitor General Robert D. Cook and Deputy Solicitor General J. Emory Smith, Jr., all of Columbia, for Respondents.

JUSTICE KITTREDGE: Edward Sloan and the South Carolina Public Interest Foundation (collectively, Appellants) filed suit alleging Act 275 of 2016 violated article III, section 17 of the South Carolina Constitution (the One Subject Rule).[1] Appellants claim Act 275's title is insufficient and its provisions relate to more than one subject, violating the One Subject Rule. The trial court dismissed the complaint on numerous grounds. We do not address all of these issues but elect to resolve the appeal on the merits. While the Court has not hesitated to strike down legislation that violates the One Subject Rule, the Court has also respected the separation of powers doctrine and upheld legislation where a close question is presented. The constitutional challenge to Act 275 does not present a close question—Act 275 manifestly complies with the One Subject Rule. The trial court's dismissal of the complaint is affirmed.

I.

In 2016, the South Carolina General Assembly passed Act 275, and the Governor signed it into law. Act No. 275, 2016 S.C. Acts 1807. Act 275 has three parts, including Part I: "Governing the Improvement of the State's Transportation Infrastructure System;" Part II: "Funding the Improvement of the State's Transportation Infrastructure System;" and Part III: "Transition Provisions and Effective Date." Act No. 275, 2016 S.C. Acts at 1809, 1818, 1853 (some emphasis omitted).

The stated purpose of Act 275 was "improving the state's transportation infrastructure system." Act No. 275, 2016 S.C. Acts at 1854. Act 275 makes financial changes to the State Highway Fund and structural changes to the

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[1] *See* S.C. Const. art. III, § 17 ("Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.").

Commission of the Department of Transportation (Commission), the Secretary of Transportation, the Joint Transportation Review Committee, the Department of Transportation (DOT), and the State Transportation Infrastructure Bank. Further, Act 275's title indexes all of its key provisions. Act No. 275, 2016 S.C. Acts at 1807–55.

Appellants allege that Act 275 violates the One Subject Rule because the title does not state its general purpose and its provisions relate to more than one subject. At the trial court level, the judge dismissed Appellant's case for lack of standing and failure to state a claim. While the trial court purported to dismiss the action for failure to state a claim, it ruled upon the merits, finding Act 275 complied with the One Subject Rule. Appellants appealed arguing, among other things, that Act 275 violates the One Subject Rule. We certified this case from the court of appeals pursuant to Rules 203(d)(1)(A)(ii) and 204(a), SCACR.

II.

The issue before the Court is whether Act 275 violates the One Subject Rule.[2] For reasons we will explain, we hold Act 275 complies with the One Subject Rule and affirm on the merits.

Pursuant to the One Subject Rule, "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. art. III, § 17. "The purpose of [the One Subject Rule] is to prevent the General Assembly from being misled into passing bills containing provisions not indicated in their titles, and to apprise the people of the subject of proposed legislation and thus give them an opportunity to be heard if they so desire." *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 102 (1996) (citations omitted). The One Subject Rule "is to be liberally construed so as to uphold [an a]ct if practicable." *Id.* "Doubtful or close cases are to be resolved in favor of upholding an [a]ct's validity." *Id.* Additionally, the One Subject Rule "does not preclude the [General Assembly] from dealing with several branches of one general subject in a single

[2] While lack of standing and mootness were also issues before the Court, because Act 275 manifestly does not violate the One Subject Rule, we do not address the remaining issues. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). We further note the General Assembly, out of an abundance of caution, took action to remedy the purported constitutional defect in Act 275. Again, we need not address the legislature's actions in 2018.

act." *Id.* The One Subject Rule has two requirements: (1) the topics of an act must reasonably and inherently relate to each other, and (2) the title of an act must put the General Assembly and public on notice of its provisions. *Id.* at 87, 470 S.E.2d at 102; *Hercules Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 141–42, 262 S.E.2d 45, 48 (1980).

Appellants contend Act 275 violates the One Subject Rule because (1) the title does not state the subject in general terms; and (2) Act 275 pertains to more than one subject because it contains both structural and financial provisions and makes modifications to several different state agencies. We disagree.

The title of Act 275 provides notice to the General Assembly and public, fulfilling the title requirement and purpose of the One Subject Rule. The title requirement is satisfied if the title states the subject in general terms or indexes the key provisions of an act. *Hercules*, 274 S.C. at 142, 262 S.E.2d at 48 (finding a title is sufficient when it states the general subject of the act); *see also Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 577, 677 S.E.2d 16, 18 (2009) (holding that a title of an act need not index every provision, but when it does, it is sufficient to meet the title requirement of the One Subject Rule). Act 275's extremely lengthy title indexes all of its key provisions. Act No. 275, 2016 S.C. Acts at 1807–09. Therefore, Act 275's title puts the General Assembly and public on notice, satisfying the title requirement of the One Subject Rule.

Further, all of Act 275's provisions reasonably and inherently relate to the same general subject; the improvement of the state's transportation infrastructure system. It is of no consequence that Act 275 deals with several different state agencies. We have held that the General Assembly can deal with several branches of a general subject in a single act. *See Keyserling*, 322 S.C. at 86, 470 S.E.2d at 102 (finding the One Subject Rule does not prevent the General Assembly from dealing with several branches of a general subject); *S.C. Pub. Serv. Auth. v. Citizens & S. Nat'l Bank of S.C.*, 300 S.C. 142, 162, 386 S.E.2d 775, 787 (1989) (concluding it "would be impractical and time-consuming to require the legislature to pass a separate act on every separate branch of a subject"). It is then for the Court to determine whether an act's provisions reasonably and inherently relate to one general subject. An act's provisions reasonably and inherently relate to the same subject if they provide the means to facilitate that subject. *Keyserling*, 322 S.C. at 87, 470 S.E.2d at 102. We find the structural changes Act 275 makes to the five state agencies (the DOT, Commission, Secretary of Transportation, Joint Transportation Review Committee, and State Transportation Infrastructure Bank)

all facilitate the General Assembly's clear purpose of improving the state's transportation infrastructure system. Therefore, all of the structural changes made to these agencies reasonably and inherently relate to this same general subject, satisfying the One Subject Rule.[3]

III.

In conclusion, the title notifies the General Assembly and public of Act 275's provisions, and all of its provisions reasonably and inherently relate to the improvement of the state's transportation infrastructure system. As a result, we hold Act 275 complies with the One Subject Rule.

AFFIRMED.

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

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[3] Appellants' reliance on *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016), is misplaced. *Lucas* is inapplicable because it dealt with a general appropriations act, meaning all provisions had to relate to the raising and spending of tax monies. Act 275 is not a general appropriations act and is not restricted to the general subject of raising and spending tax monies.

The Supreme Court of South Carolina

In the Matter of J. Marcus Whitlark, Petitioner

Appellate Case No. 2018-002129

ORDER

On March 14, 2018, Petitioner was suspended from the practice of law for a period of six months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyers Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

FOR THE COURT

BY s/Daniel E. Shearouse
CLERK

Columbia, South Carolina

December 19, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of Jairus J. V., A Juvenile Under the Age of Seventeen, Appellant.

Appellate Case No. 2016-001654

Appeal From Lancaster County
Coreen B. Khoury, Family Court Judge

Opinion No. 5607
Heard November 7, 2018 – Filed January 4, 2019

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General John Benjamin Aplin, and Assistant Attorney General Joshua Abraham Edwards, all of Columbia; and Solicitor Randy E. Newman, Jr., of Lancaster, all for Respondent.

LOCKEMY C.J.: In this appeal, Jairus J.V. (Appellant) argues the family court erred in adjudicating him delinquent for possession of a handgun with an obliterated serial number when law enforcement was able to decipher the serial number on the handgun. We affirm.

FACTS/PROCEDURAL HISTORY

Appellant was charged with discharging a firearm into a dwelling, possession of a pistol by a person under the age of eighteen, possession of a stolen handgun, discharging a firearm within the city limits, and possession of a handgun with an obliterated serial number. The charges stemmed from two separate incidents during which Appellant accidentally fired a pistol while toying with it inside his bedroom. The second incident resulted in Appellant being admitted to the hospital with a self-inflicted gunshot wound to his hand. When law enforcement recovered the handgun, the serial number appeared illegible, having been marked with deep scratches and gouges; however, officers were eventually able to decipher the number and learn the gun had been stolen.

Prior to trial, Appellant pled guilty to two counts of discharging a firearm within city limits and one count of possession of a handgun by a person under the age of eighteen. The family court held a bench trial on the charges of possession of a stolen handgun and possession of a handgun with an obliterated serial number. The facts were largely undisputed; the only issues were whether the serial number was "obliterated" within the meaning of section 16-23-30 of the South Carolina Code (2015) and whether Appellant knew or should have known the gun had been stolen.

The State took the position that the clear meaning of "obliterated," as used in the statute, was to "attempt to get [the serial] number to be unreadable." In support of this argument, the State submitted into evidence two pictures of the handgun, which depicted the serial number as indecipherable due to deep scratches. Although the State acknowledged "[i]t took four law enforcement officers who look at guns everyday [a] significant period of time before one was finally able to decipher the serial number," it contended any reasonable person would have considered the serial number unreadable.

Appellant argued the serial number had merely been scratched and therefore was not "obliterated." Furthermore, Appellant contended that because "obliterated" is an uncommon term and not defined by statute or case law, the family court must consider alternative definitions. Citing the Oxford English Dictionary, Appellant noted the term meant "to destroy utterly, to wipe out . . . annihilate, demolish, eliminate." Appellant asserted the serial number could be obliterated by means of

a "grinder" to "grind it flat," but regardless, it must be "completely done away with" in order to be considered "obliterated."

Following the trial, the family court found Appellant not guilty as to the charge of possession of a stolen handgun and guilty as to the charge of possession of a handgun with an obliterated serial number. The court sentenced Appellant to a ninety-day sentence with probation for one year to follow. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "[A]n appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). "A finding is clearly erroneous if it is not supported by the record." *State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) (quoting *State v. Shuler*, 344 S.C. 604, 620, 545 S.E.2d 805, 813 (2001). This court must affirm an adjudication of delinquency unless it is unsupported by the evidence. *In re John Doe*, 318 S.C. 527, 534, 458 S.E.2d 556, 561 (Ct. App. 1995).

LAW/ANALYSIS

Appellant contends the family court erred in adjudicating him guilty of possession of a handgun with an obliterated serial number, arguing the number was not obliterated because it was eventually recovered.

I. Section 16-23-30

Section 16-23-30(C) of the South Carolina Code (2015) provides: "A person shall not knowingly buy, sell, transport, pawn, receive, or possess any stolen handgun or one from which the original serial number has been removed or obliterated." Neither statute nor South Carolina case law defines the term "obliterated." The family court, in determining the State carried its burden of proof, made the implicit finding that Appellant's proffered definition of "obliterated" was not what the Legislature intended when drafting section 16-23-30. Because this case raises a novel question of law regarding the interpretation of a statute, we review the family court's decision de novo. *State v. Sweat*, 379 S.C. 367, 374, 665 S.E.2d 645, 649 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010)

("In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.").

"Penal statutes are strictly construed against the State and in favor of the defendant." *State v. Morgan*, 352 S.C. 359, 365, 574 S.E.2d 203, 206 (Ct. App. 2002). "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). "As such, a court must abide by the plain meaning of the words of a statute." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." *Morgan*, 352 S.C. at 366, 574 S.E.2d at 206. In doing so, we must read the statute so "that no word, clause, sentence, provision, or part shall be rendered surplusage, or superfluous." *In re Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (quoting 82 C.J.S. *Statutes* § 346).

In South Carolina, the construction of the term "obliterated" has been limited to cases addressing whether a portion of a will has been revoked. These cases extend from the presidency of Thomas Jefferson, through the year Woodrow Wilson was elected, all the way in to the first year of the Eisenhower Administration. *See Pringle v. McPherson*, 2 S.C. Eq. 524, 525 (S.C. Ch. 1807) (explaining clause in will was "obliterated; yet was quite legible"); *Brown v. Brown*, 91 S.C. 101, 74 S.E. 135, 136 (1912) (describing as "obliterated" words in a will that "had a single pen line drawn through them, leaving them thoroughly legible"); *Stevens v. Royalls*, 223 S.C. 510, 512, 77 S.E.2d 198, 199 (1953) (finding a clause in a will was obliterated when it "had been stricken by the drawing of single lines with pen through the typing, but [was] entirely legible"). In those cases, a writing is sufficiently "obliterated" so long as the testator's intent to cancel or erase is apparent on the face of the will or instrument. *See* 95 C.J.S. *Wills* § 432 ("Revocation by obliterating may be effected by drawing lines across the signatures of the testator and the witnesses, as well as by erasing, or blotting out the words of the will. A will may be 'obliterated' or 'cancelled' within the meaning of a revocation statute, even though the words are not erased or blotted out to the extent that the nature of the will before the cancellation, or its provisions, cannot be discovered. A line drawn through the writing is, doubtless, obliteration although it may leave it as legible as it was before.") (citations omitted).

Although the word "obliterated" as it is used in the parlance of wills does not require the total annihilation of the object obliterated, the definitions that Appellant rely on evidently do. Appellant cites Black's Law Dictionary, which defines "obliteration" as to "destroy; wipe or rub out; erase; erasure or blotting out of written words." Black's Law Dictionary, 741 (Abridged Sixth Ed. 1991). Additionally, the American Heritage Dictionary defines the term as to "do away with completely so as to leave no trace." American Heritage College Dictionary 942 (3d ed. 1993). In Webster's Dictionary, the term means to "blot out or wear away, leaving no traces; erase; efface." Webster's New World College Dictionary 995 (4th ed. 2008). While these definitions appear to support Appellant's view that "obliterated" means something more than to scratch out, we do not believe they capture the meaning of the word as it is used in section 16-23-30. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.").

Initially, we note section 16-23-30(C) uses the terms "removed or obliterated." While the term "removed" has varied applications, the definition most likely to be employed in the context of a "removed" serial number would be "to take off . . . to do away with; . . . to get rid of; eliminate." Webster's New World College Dictionary 1213 (4th ed. 2008). Cleary, a serial number that has been ground to dust could be considered "removed or obliterated" under any of the aforementioned definitions; however, giving meaning to both words, one of them must apply to the situation when a serial number has not been completely destroyed but is still imperceptible to the naked eye. Because the word "removed" ordinarily connotes that something has been eliminated or taken off entirely, we believe the use of the word "obliterated" implies a degree of erasure that is less demanding than "removed" but sufficient to render the serial number defaced or unreadable. This interpretation gives effect to both words and does not result in a redundancy in the statute. *See In re Matter of Decker*, 322 S.C. at 219, 471 S.E.2d at 463 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (quoting 82 C.J.S. *Statutes* § 346)). Accordingly, we reject the notion that a serial number must be completely erased to be considered "obliterated" under section 16-23-30.

Moreover, we are persuaded by the reasoning of federal courts that have addressed similar questions under federal firearms statutes and sentencing guidelines. Particularly, we believe the Ninth Circuit's opinion in *United States v. Carter*, which was the first federal appellate court opinion to construe the meaning of

"altered or obliterated" in the context of a firearms offense, lays out an appropriate standard going forward. 421 F.3d 909, 910 (9th Cir. 2005). In *Carter*, the defendant, who was facing a sentencing enhancement for possessing a firearm with an altered or obliterated serial number, argued that because law enforcement ultimately discerned the serial number using a microscope, it could not be considered "altered or obliterated" within the meaning of the federal sentencing guidelines. *Id*. After consulting various dictionaries to survey the ordinary meaning of both words, the court determined the dictionary definition of "obliterated" was inconclusive and looked to the legislative purpose behind sentencing enhancements for offenses involving altered or obliterated serial numbers.

> [The guideline] intends to "discourag[e] the use of untraceable weaponry." This purpose is advanced not only by punishing those who possess untraceable firearms, but also by punishing those who possess firearms that are more difficult, though not impossible, to trace because their serial numbers have been defaced. As this case aptly demonstrates, it may be difficult to determine, from a visual inspection alone, whether a serial number that appears defaced is, in fact, untraceable when scientific means are employed. On the street, where these guns often trade and where microscopy is rarely available, one cannot readily distinguish between a serial number that merely *looks* untraceable and one that actually *is*. At that level it is appearances that count: A gun possessor is likely to be able to determine only whether or not his firearm *appears* more difficult, or impossible, to trace.

Id. at 914-15 (quoting *United States v. Seesing,* 234 F.3d 456, 460 (9th Cir. 2001)). The court in *Carter* therefore held that for purposes of the federal sentencing guidelines, "a firearm's serial number is 'altered or obliterated' when it is materially changed in a way that makes accurate information less accessible." *Id*. at 910.

Following *Carter*, a number of other federal circuits reached substantially identical conclusions when addressing the meaning of "altered, removed, or obliterated" under the federal firearms statute or sentencing guidelines. *See United States v.*

Hayes, 872 F.3d 843, 847 (7th Cir. 2017) (holding a serial number was "altered or obliterated" when covered with paint-like substance); *United States v. Justice*, 679 F.3d 1251, 1254 (10th Cir. 2012) (interpreting the federal firearms statute and holding that "obliterate" means "to make undecipherable or imperceptible by obscuring, covering, or wearing or chipping away" (quoting Webster's Third New International Dictionary 1557 (2002))); *United States v. Perez*, 585 F.3d 880, 885 (5th Cir. 2009) (holding evidence was sufficient to show serial number "had been materially changed in a way that made its accurate information less accessible, and that it had been 'altered or obliterated'"); *United States v. Jones*, 643 F.3d 257, 259 (8th Cir. 2011) (adopting the Ninth Circuit's reasoning in *Carter* to hold that a partially defaced serial number was "altered or obliterated"); *but see United States v. Harris*, 720 F.3d 499, 503 (4th Cir. 2013) (holding a serial number that was marked with deep scratches but still legible to be "altered" rather than "obliterated"). We find these cases instructive and similarly choose to adopt the rule espoused in *Carter*. Accordingly, we hold that a serial number has been "obliterated" when "it is materially changed in a way that makes accurate information less accessible." *Carter*, 421 F.3d at 910.

II. Sufficiency of Evidence

Having determined a serial number is "obliterated" when "it is materially changed in a way that makes accurate information less accessible," we address whether the evidence supports Appellant's conviction for possession of a handgun with an obliterated serial number. We find that it does.

Here, the family court viewed two pictures of the handgun, both showing the serial number to be scratched beyond comprehension. Appellant acknowledged the pictures accurately depicted the handgun. It follows that Appellant also assumed the serial number was unreadable and therefore untraceable. *See id.* at 915 ("[I]f . . . a defendant cannot visually distinguish . . . a would-be untraceable firearm from one that is in fact untraceable, it makes little sense for him to be punished in the latter circumstance but to escape punishment in the former."). While the family court knew police officers were ultimately able to discern the serial number, the question of whether the serial number was sufficiently marred to be considered "obliterated" was within the province of the fact-finder. Because there is evidence in the record showing the serial number was "obliterated," i.e. materially changed in a way that made the serial number less accessible, the family court's factual findings are not clearly erroneous. *See State v. Gordon*, 414 S.C. at 98, 777 S.E.2d

at 378 ("[A]n appellate court is bound by the trial court's factual findings unless they are clearly erroneous."). *See In re John Doe*, 318 S.C. at 534, 458 S.E.2d at 561 (stating this court must affirm an adjudication of delinquency unless it is unsupported by the evidence).

CONCLUSION

Based on the foregoing, the decision of the family court is

AFFIRMED.

THOMAS AND GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King, Appellants,

v.

Keith S. Wellin, Respondent.

Appellate Case No. 2016-001141

Appeal From Charleston County
Roger L. Couch, Circuit Court Judge
Irvin G. Condon, Probate Court Judge

Opinion No. 5608
Heard October 17, 2018 – Filed January 4, 2019

REVERSED

Robert H. Brunson, Merritt Gordon Abney, and Patrick Coleman Wooten, all of Nelson Mullins Riley & Scarborough, LLP, of Charleston, and Allen Mattison Bogan, of Nelson Mullins Riley & Scarborough, of Columbia, for Appellants.

Edward G.R. Bennett, of Evans Carter Kunes & Bennett, PA, of Charleston; Robert H. Hood, Mary Agnes Hood Craig, and James Bernard Hood, all of Hood Law Firm, LLC, of Charleston; and Tiffany Nicole Provence, of Provence Messervy, LLC, of Summerville, for Respondent.

KONDUROS, J.: Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King (collectively, Appellants) appeal the circuit court's order affirming the probate court's order that required the Wellin Family 2009 Irrevocable Trust to pay approximately $50 million to Synovus Bank as Special Conservator II for their father, Keith S. Wellin (Wellin). We reverse.

FACTS/PROCEDURAL BACKGROUND

Wellin amassed considerable wealth in his lifetime primarily consisting of shares of stock in Berkshire Hathaway, Inc. He had three children—Peter, Cynthia, and Marjorie—with his first wife and remarried three times. Wellin married his fourth wife, Wendy, in 2002. In 2003, Wellin established Friendship Partners, LP and transferred 896 shares of Berkshire Hathaway Class A stock to Friendship Partners. Wellin was a limited partner in Friendship Partners although he owned 98.9 % of its assets through a trust, the Florida Revocable Trust, for which he was trustee. A separate entity, Friendship Management, LLC, was the general partner in Friendship Partners with managerial control and the remaining ownership interest. Cynthia was the manager of Friendship Management. Also in 2003, Wellin gifted $10 million to each of his children and to Wendy as well. In 2009, Wellin established the Wellin Family 2009 Irrevocable Trust (the Trust), an intentionally defective grantor trust.[1] He named Appellants as trustees and beneficiaries of the Trust.[2] Wellin funded the Trust by transferring his interest in Friendship Partners to the Trust in exchange for a Promissory Note (the Note) for approximately $50 million with provisions for periodic interest.

As time went on, Appellants began to believe Wendy was influencing Wellin and manipulating his finances to her advantage. In July 2013, Wellin filed an action in federal district court seeking to set aside the 2003 gifts to Appellants, but not to Wendy, and the 2009 transactions that benefited his children and lineal descendants via the Trust (*Wellin I*). Appellants filed an action in probate court seeking the appointment of a conservator to protect Wellin's assets.

[1] This type of trust allows the Trust to be disregarded for federal income tax purposes so that the grantor continues to be taxed on any income realized by the Trust thereby increasing the total assets available for the Trust's beneficiaries.
[2] Trust beneficiaries include Wellin's lineal descendants beyond his three children.

In August 2013, the probate court appointed Edward Bennett as a temporary conservator, pending mediation or a full hearing, with the role of "ensur[ing] that transfers of assets are not made without fair and adequate consideration." In November of 2013, Wellin, through Bennett, delivered a document to Appellants purporting to exercise a right under the Trust to substitute certain assets in exchange for Trust assets of equal value. To effectuate this swap, Wellin forgave the Note by marking it "Paid in Full," in exchange for a 58% limited partnership in Friendship Partners. Appellants, as trustees, rejected this swap transaction.

The district court issued a temporary restraining order (TRO) in *Wellin I* enjoining Appellants from selling the Berkshire Hathaway stock. However, that TRO was dissolved. In December 2013, Friendship Partners liquidated its assets, consisting primarily of the Berkshire Hathaway stock, which was valued at approximately $157 million. The proceeds were distributed to the Trust.[3] Wellin filed an action in probate court alleging various breaches of duty against Appellants in selling the stock and distributing the majority of the proceeds to themselves (*Wellin II*). The probate court granted a TRO enjoining the Appellants from disposing of or exercising any control over any proceeds related to the liquidation, but that case was removed to the federal district court and the TRO was dissolved. The Trust tendered a check for $50 million to Bennett as payment for the Promissory Note, which was not due until 2021. Bennett rejected the payment, taking the position the Note ceased to exist after it was marked "Paid in Full" as part of the swap transaction. Bennett also demanded the Trust pay Wellin $92 million representing the value of a 58% interest in Friendship Partners.

Thereafter, in January 2014, Bennett filed an "Application for Guidance" pursuant to section 62-5-416(b) of the South Carolina Code (Supp. 2018), asking the probate court for guidance as to whether he had authority to pursue the $92 million on Wellin's behalf. The court conducted a hearing at which extensive arguments were made by counsel for Bennett, counsel for Appellants, and counsel for Wellin. At the hearing, Bennett stated he was seeking to clarify whether he, as conservator, had authority to pursue the $92 million. As the hearing progressed, Bennett eventually asked the probate court to require the Trust to pay at least the $50

[3] Appellants maintain this was done to prevent the Trust from incurring significant tax liability.

million, represented by the Note, so those funds could be protected for Wellin's benefit pending the outcome of the district court litigation.

At the hearing, Appellants admitted Wellin was entitled to $50 million under the Note if the Note was then extinguished and even stated they would be willing to pay the funds into the court. The probate court ordered the Trust to pay $50 million to Synovus Bank as a secondary conservator. Appellants filed a motion to reconsider, arguing the Promissory Note was an asset of Wellin's estate, but the $50 million was not. They maintained that accordingly, the probate court lacked jurisdiction to issue an order affecting the actual funds. They also argued the court lacked personal jurisdiction over the Trust as the children were appearing in their individual capacities in the conservatorship action, they had not been afforded due process in the absence of Bennett filing a summons and complaint seeking the $50 million, and the request should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure because the same claims were being litigated in district court.[4]

Appellants also filed a motion for voluntary dismissal of the conservatorship action pursuant to Rule 41 of the South Carolina Rules of Civil Procedure. The probate court denied the motion finding Rule 41, dealing with dismissals prior to the filing of an Answer, did not apply to this case as a petition for a conservatorship does not require an Answer.

The probate court ultimately denied Appellants' motion to alter or amend its order finding Appellants had listed the Note as an asset of Wellin's estate and admitted Wellin was entitled to payment of it. The probate court further found the Trust was subject to the court's jurisdiction because the Trust had appeared and made arguments in the matter. The probate court also concluded a sufficiently similar matter was not currently pending in district court, so dismissal under Rule 12(b)(8) was not appropriate.

Appellants appealed to the circuit court which affirmed the probate court *in toto*. However, Appellants presented a new argument regarding mootness to the circuit

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[4] Immediately following the probate court's order in this case, Wellin filed in the probate court a petition for the return of assets (the $92 million), which was then removed to the district court (*Wellin III*).

court as Wellin died in September 2014 during the pendency of the appeal to the circuit court. The circuit court determined Wellin's death did not moot the appeal regarding the propriety of the order as the outcome of the appeal could have collateral consequences to the parties in that it would require Wellin's estate to seek the same sort of protection and weighed against judicial economy. This appeal followed.

STANDARD OF REVIEW

In a probate appeal, the circuit court, court of appeals, or supreme court shall hear and determine the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) of the South Carolina Code (Supp. 2018). "[I]f the action is at law, the circuit court should uphold the findings of the probate court if there is any evidence to support them; if the action is equitable, the circuit court may make findings in accordance with its own view of the preponderance of the evidence." *In re Estate of Weeks*, 329 S.C. 251, 260, 495 S.E.2d 454, 459 (Ct. App. 1997).

LAW/ANALYSIS

Appellants contend the circuit court erred in affirming the probate court's determination it had authority to order payment of the $50 million into a protective trust. Appellants maintain the money was not part of Wellin's estate under section 62-5-402(2) of the South Carolina Code (Supp. 2018). We agree.

The probate court's jurisdiction is limited as it owes "its present existence to creation by statute, rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment and such as may be necessarily incident to the execution of the powers expressly granted." *Greenfield v. Greenfield*, 245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965).

Section 62-5-402(2) provides in pertinent part:

> After the service of the summons and petition in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the probate court in which the summons and petition are filed has:
>
> . . .

> (2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this State must be managed, expended, or distributed to or for the use of the protected person or any of his dependents . . . .

Although section 62-5-402(2) confers jurisdiction "to determine how the estate of the protected person . . . must be managed, expended, or distributed," the $50 million at issue was not part of Wellin's estate. The Note and the actual payment due thereunder are two related but distinct assets. The Note itself gives Wellin the right to demand payment of the $50 million providing all the terms of the Note are met. Although Appellants admit the Note is valid, the $50 million in payment would have only passed into Wellin's estate when the money was tendered and the Note was accepted, and marked satisfied. In this case, Wellin's position in the district court litigation and the swap transaction prevented Bennett from accepting the tender of payment by the Trust. Therefore, the $50 million was not part of Wellin's estate to be managed or protected, and the probate court erred in requiring it be deposited with Synovus Bank.

Even had the $50 million been part of Wellin's estate, the probate court lacked authority to issue the disputed order based on Bennett's failure to file a petition and summons with the probate court pursuant to section 62-5-416 of the South Carolina Code (Supp. 2018).

Section 62-5-416 deals with requests for orders in a conservatorship action. It provides:

> (a) Upon filing a petition and summons with the appointing court, a person interested in the welfare of a person for whom a conservator has been appointed may request an order (1) requiring bond or security or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator, or (5) granting other appropriate relief. The petition and summons must be served upon the conservator and other persons as the court may direct.

> (b) Upon application to the appointing court, a conservator may request instructions concerning his fiduciary responsibility. A denial of the application by the court is not an adjudication and does not preclude a formal proceeding.
>
> (c) After notice and hearing as the court may direct, the court may give appropriate instructions or make any appropriate order.

Appellants contend the Application for Guidance filed by Bennett under subsection (b) was not merely an application for guidance but a request for substantive relief requiring more than an informal application. Wellin characterizes the application as seeking a determination as to whether Bennett has a duty to pursue the $92 million Wellin may be entitled to from the proceeds of the Friendship Partners' liquidation. However, an actual reading of the application reveals Bennett is seeking more than a determination of his duty as special conservator. The application requests the probate court hold a hearing under subsection (c) and render two determinations: (1) Was Wellin's substitution of the assets effective? and (2) Was Wellin's release of his substitution power effective to turn off grantor trust status? Rendering determinations on these issues would exceed providing guidance as to Bennett's duty.

While subsection (c) affords the probate court authority to issue an appropriate order dealing with the consequence of a hearing, it does not render meaningless the requirements of subsection (a) when the application in question is clearly seeking more from the probate court than instruction. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating statutes should be read so that no particular section is rendered superfluous).

Finally, even if the probate court had subject matter jurisdiction and authority to issue the disputed order, the order required action by the Trust, which had not been made party to the conservatorship action.

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." *Ex parte Cannon*, 385 S.C. 643, 658, 685 S.E.2d 814, 822 (Ct. App. 2009) (quoting *Stearns Bank Nat'l Ass'n v. Glenwood Falls,*

L.P., 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007)). "A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case." *Id*. (quoting *State v. Dudley*, 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct. App. 2003)).

In *Ex parte Cannon*, Cannon argued the circuit court lacked personal jurisdiction over him because he had only appeared in the case in his capacity as a personal representative, not a trustee. *Id*. at 657-58, 685 S.E.2d at 822. However, this court concluded "[b]y appearing and arguing the merits of the action multiple times before the circuit court, . . . Cannon consented to the circuit court's personal jurisdiction and waived any defense of lack of personal jurisdiction." *Id*. at 660, 685 S.E.2d at 823. In this case, Appellants, in their individual capacities, brought the conservatorship action. The Trust was never made a party to the conservatorship action. While Appellants participated in the singular hearing on Bennett's Application for Guidance, they objected to the probate court treating the Trust as a party, arguing the probate court did not "have jurisdiction over the asset. The [T]rust is not even a party to this proceeding. The owner of the asset is not here." Again, Appellants argued the probate court lacked "jurisdiction to order us to pay that note, because the party's not here who owns – who has the $50 million. That's not my clients individually, that's the [T]rust." Admittedly, Appellants' attorney at times participated in the exchange among the parties regarding depositing the $50 million into the court. However, we conclude that conduct did not rise to the level of a waiver of personal jurisdiction on behalf of the Trust when Appellants continued to voice their objections.

Based on all of the foregoing, the order of the circuit court affirming the probate court is

REVERSED.[5]

MCDONALD and HILL, JJ., concur.

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[5] We decline to rule on Appellants' remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues when a prior issue was dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Antwon Fuller, Appellant.

Appellate Case No. 2016-000672

Appeal From Aiken County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5609
Submitted September 6, 2018 – Filed January 4, 2019

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor James Strom Thurmond, Jr., of Aiken, for Respondent.

SHORT, J.: Michael Antwon Fuller appeals his convictions on charges of kidnapping, unlawful carrying of a pistol, possession of a stolen pistol, and possession of a weapon during the commission of a violent crime, arguing the trial court erred in preventing him from cross-examining his accuser (the victim) about her prior convictions for driving under the influence (DUI). Fuller also appeals the

trial court's directive that his name be placed on the South Carolina Sex Offender Registry (the registry) even though the same jury acquitted him on charges of first-degree criminal sexual conduct (CSC) and first-degree assault and battery. We affirm.[1]

FACTS AND PROCEDURAL HISTORY

In December 2013, the victim travelled from Florida to Aiken, where her brother was having surgery. The surgery went well, and the victim and her family went to the bar of the hotel where she was staying to celebrate. The victim admitted she had three alcoholic drinks during the celebration.

Later, the victim went to a convenience store, where she bought cigarettes and a four-pack of mini wine bottles. When she returned to the parking lot of the hotel, she remained in her car to smoke. Fuller approached her car to request a cigarette, and the two began talking. When the victim mentioned she was in town because of her brother's surgery, Fuller asked her to drive him to the hospital so he could visit an uncle who was a patient. Feeling she could trust him, the victim agreed to give Fuller a ride.

As they approached the hospital in the victim's car, Fuller directed the victim to pass both of the two entrances to the campus. The victim continued to drive, but soon realized there was no other entrance. As she turned to Fuller to tell him this, she felt a pistol in her cheek. Fuller then told the victim to "start driving" and hit the back of her head with the pistol. The victim became frantic and offered Fuller both her car and her money if he would let her go. Instead, however, Fuller hit the victim's head again, told her to "shut up and keep driving," and threatened to kill her. The victim started driving again, pushed on the accelerator as hard as she could, opened the door, and flung herself from the moving vehicle. She took off running, but Fuller managed to stop the car and get out. The two struggled, and Fuller demanded the victim perform oral sex on him. Instead of complying, the victim kept "spitting out" and crying. Fuller began unbuttoning the victim's pants, and the victim promised to withdraw money from an ATM to give him if he did not rape her. Fuller, apparently agreeing to the suggestion, dragged the victim back to her car and told her to drive. As they were proceeding, Fuller said he wanted to go to a friend's house first. Instead, the victim put her vehicle into reverse and continually sounded the horn while she drove backwards. Fuller told

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

the victim to stop and drive forward, hit the back of her neck repeatedly, and again threatened to kill her. In an attempt to take control of the steering wheel, Fuller crawled onto the victim's lap. The victim hit the accelerator as hard as she could, causing the car to crash and come to a stop.

After the crash, the victim noticed Fuller was draped across her body and alive but unconscious. She extricated herself and exited her car through a window. She attempted to walk to the hospital, but resorted to crawling because of her injuries. When her injuries made further movement impossible, she hid in some bushes until she saw a vehicle approach.

The approaching vehicle was operated by Betty Corley, an employee of the Aiken Council on Aging who was responsible for driving patients to appointments and dialysis treatments. Corley was on duty; however, she had no patients in her vehicle when she encountered the victim, so she drove the victim to the hospital. Corley did not see anything indicating the victim was intoxicated; however, she noticed the victim's arm and head were bleeding. The emergency room nurse who attended to the victim also observed lacerations on the back of the victim's head and abrasions on her hands and forearm area.

Master Corporal John Christopher Medlin, a uniform patrol officer with the Aiken Department of Public Safety, received a radio dispatch alerting him to the collision. The dispatch also advised of the possibility that a man with a gun was inside the wrecked vehicle. Master Corporal Medlin responded to the scene and noticed a dark SUV sitting sideways with fluids leaking from it. Using his flashlight to survey the scene, Master Corporal Medlin saw Fuller, who was apparently unconscious. Other officers arrived. Fuller, who apparently regained consciousness when lights were shone into the vehicle, was ordered to show his hands and get out of the car. Fuller exited the car unassisted by climbing from the back seat over the driver's seat, which appeared to have been broken. His pants were below his waistline, and his boxer shorts were visible. After he was placed into a patrol car, officers confiscated his pistol from the victim's vehicle.

During the drive to the police station, Fuller received *Miranda*[2] warnings even though he was not under arrest. Fuller gave the police several conflicting versions about why he was in the victim's car.

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

A detective administered *Miranda* warnings a second time when Fuller arrived at the police station. During a second interview, Fuller told the detective he came to the hotel to meet a woman who never showed up, so he struck up a conversation with the victim, who agreed to drive him home. Fuller further claimed he passed out in the victim's car during the drive and claimed the gun found in the car belonged to a friend who "happened to leave it right there with [Fuller] so [he] kept it right there in [his] pocket." Fuller denied he assaulted the victim or pulled the gun on her. He also accused the victim of being "basically drunk herself." At the detective's request, Fuller agreed to provide a DNA sample. When the detective informed Fuller he would be charged with kidnapping, Fuller asked the police to "talk to [the victim] when she's sober."

The victim told emergency room personnel she had been drinking before the accident. Furthermore, although she denied drinking any of the wine she purchased at the convenience store that night, police found only one of the mini bottles at the site of the wreck. A blood sample taken about four hours after the victim was admitted to the hospital showed her blood alcohol level was 0.065. None of the officers who interviewed Fuller or the victim believed either individual was under the influence of alcohol or drugs. However, a sample of the victim's urine taken at the hospital about the same time her blood was drawn tested positive for amphetamine, marijuana, and opiates.

A CT scan of the victim's neck revealed a fracture of her third cervical vertebra on the left side and a burst fracture of her C-6 vertebra with bones from the vertebral body being pushed into the spinal canal and compressing the spinal cord. According to Dr. James Dillon, a neurosurgeon who examined the victim, the C-6 fracture "was more consistent with being in a car collision" and "the C-3 injury [was] consistent with blunt trauma." Dr. Dillon also noted the victim's scalp laceration and abrasions on her left arm and hand. The victim later travelled by ambulance to a trauma center in Augusta, Georgia, where she underwent extensive medical procedures, including two spinal surgeries, and then to a rehabilitation facility in Augusta where she stayed for ten days to work on her memory, speech, and basic motor skills. Upon leaving the rehabilitation center in Augusta, she returned to Florida to continue her rehabilitation.

On September 4, 2014, the Aiken County Grand Jury indicted Fuller for (1) first-degree CSC, (2) first-degree assault and battery, (3) kidnapping, (4) unlawful carrying of a pistol, (5) possession of a stolen pistol, and (6) possession of a

weapon during the commission of a violent crime. A two-day jury trial on all charges took place in February 2016.

During the State's case-in-chief, Dr. Dillon was qualified as an expert witness and gave his opinion that to a reasonable degree of medical certainty the external bleeding from the victim's head and neck area was consistent with being hit with a pistol. The State also called Sergeant Daymon Lewis Spann, a police officer who met with the victim at the hospital on the night of the incident and testified that, based on his training and experience, he did not believe the victim was under the influence of alcohol or drugs. Spann confirmed that no DUI charges against the victim were pending and that law enforcement would have investigated further if it had reason to believe a driver had consumed alcohol to excess before a collision.

During her direct examination, which followed the testimonies of Dr. Dillon and Sergeant Spann, the victim testified she drank alcohol when she celebrated with her family at the hotel bar. She specifically recalled she had two glasses of wine and a fireball shot. She also admitted she took random pieces of illegally obtained Adderal to stay awake during her brother's surgery.

On cross-examination, the victim admitted to purchasing a four-pack of wine. When defense counsel asked her what happened to the wine, she replied she did not know but heard "there was objects lodged everywhere thrown out of [her] car, debris everywhere." Without objection, defense counsel also elicited an admission from the victim that she "always had an issue with alcohol." Immediately after this admission by the victim, defense counsel then asked her, "And, in fact, you have two DUIs on your record don't you?" The State objected; however, before the trial court could entertain argument on the objection, the victim responded she had one DUI conviction from 2010. Nevertheless, the trial court rejected defense counsel's argument that the evidence went toward the victim's bias and her motive to tell a lie and ordered the response stricken from the record. The victim admitted on further cross-examination that she knew it was illegal to drive under the influence.

At defense counsel's request, the trial court held an in camera hearing regarding an evidentiary matter that is not at issue in Fuller's appeal. In the jury's absence, defense counsel again raised the issue of whether the victim could be asked about her prior DUI convictions. Defense counsel argued the prior convictions showed the victim had "a strong motive to tell a lie" about the circumstances leading to the accident. The trial court rejected the argument, saying it did not "see any connection between having two DUIs and a motive for lying about being raped."

When cross-examination of the victim resumed, the victim testified without objection that she was a recovering alcoholic, had been diagnosed with depression and post-traumatic stress disorder, and was taking prescription medications for these conditions at the time of her encounter with Fuller.

Fuller did not testify on his own behalf. However, the defense presented a case-in-chief in which it presented expert testimony from a forensic toxicologist who performed a retrograde analysis of the blood sample taken from the victim several hours after the accident and opined her blood alcohol level at the time of the accident was at least 0.098. No further attempt was made on Fuller's behalf to revisit the issue of the victim's previous DUI convictions.

The jury found Fuller not guilty on the charges of CSC and assault and battery, but convicted him on the kidnapping and weapons charges. Before the trial court sentenced Fuller, defense counsel specifically requested the trial court "to make a finding that this was not in relation to a sexual assault" because the jury did not convict Fuller of either CSC or assault and battery. Defense counsel argued Fuller's acquittals on these charges warranted a finding by the trial court that Fuller would not have to register as a sex offender.[3] The State opposed the request, arguing a conviction on a CSC charge was not a statutory prerequisite to placing a criminal defendant on the registry.

The trial court sentenced Fuller to consecutive terms of (1) thirty years' imprisonment on the kidnapping charge, (2) five years' imprisonment on the charge of possession of a weapon during a violent crime, (3) five years' imprisonment on the charge of possession of a stolen pistol, and (4) one year's imprisonment for unlawful carrying of a pistol. The trial court also ordered Fuller's name to be listed on the registry. This appeal followed.

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[3] *See* S.C. Code Ann. § 23-3-430(C)(15) (2007 & Supp. 2018) (requiring a defendant convicted of "kidnapping . . . of a person eighteen years of age or older" to register for the registry "except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense").

LAW/ANALYSIS

I. EVIDENCE OF THE VICTIM'S PRIOR DUI CONVICTIONS

Fuller argues the trial court should have allowed him to impeach the victim by cross-examining her about two prior DUI convictions. Fuller contends this evidence would have shown her bias and motive to fabricate an account that she was the target of a sexual assault in order to escape prosecution for a car crash that occurred while she was driving in an intoxicated state. We affirm the trial court's exclusion of this evidence.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (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." *Id.* The appellate court "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012).

Under Rule 608(c), SCRE, "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." "Evidence of a witness's bias can be compelling impeachment evidence and for that reason 'considerable latitude is allowed' to defense counsel in criminal cases 'in the cross-examination of an adverse witness for the purpose of testing bias.'" *Smalls v. State*, 422 S.C. 174, 182, 810 S.E.2d 836, 840 (2018) (quoting *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991)). "[A]nything having a *legitimate* tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony, and on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (emphasis added) (internal quotation marks and citation omitted).

We hold the trial court acted within its discretion in refusing to allow Fuller to present evidence of the victim's prior DUI convictions. Before the victim testified, the State had already called Sergeant Spann, who interviewed the victim in the hospital. Sergeant Spann testified he did not believe the victim was under the influence of alcohol when he interviewed her. Significantly, on cross-examination,

Sergeant Spann stated that (1) law enforcement would "push forward with a case" if it had information that someone had been drinking before a collision, (2) law enforcement would investigate further if it "felt there was a case to work on" that involved DUI, and (3) there was no evidence here that any DUI charges against the victim were pending.[4]

It follows that if law enforcement had sufficient evidence to charge the victim with DUI, it could have done so regardless of whether it believed her accusations against Fuller. *See* S.C. Code Ann. § 56-5-2930(A) (2018) ("It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired . . . ."). Here, there was no evidence suggesting either that the victim fabricated her account of the incident to gain sympathy from law enforcement or that law enforcement refrained from prosecuting her for DUI because it believed her accusations against Fuller. Therefore, we hold the victim's prior DUI convictions did not have a "legitimate tendency to throw light on [her] accuracy, truthfulness, and sincerity." *Brewington*, 267 S.C. at 101, 226 S.E.2d at 250.

Furthermore, even if the victim's prior DUI convictions were relevant under Rule 608(c), SCRE, the trial court acted within its discretion in excluding this evidence as more prejudicial than probative. Here, the probative value of the victim's prior DUI convictions was limited in view of her admissions in court and to medical personnel that she had several alcoholic drinks on the evening of the incident. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.). Such events would have been inadmissible to show the victim's behavior on the night in question was consistent with her prior misconduct. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). Therefore, we hold the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.

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[4] In addition, Master Corporal Medlin, whose testimony also preceded that of the victim, stated during his cross-examination that an impaired driver who caused an accident while operating a vehicle under the influence of alcohol or drugs could be charged with felony DUI if the accident resulted in severe injury or death to another person.

Finally, although the trial court barred Fuller from questioning the victim about her prior DUI convictions, evidence was presented both before and after defense counsel raised this issue that was relevant to the issues of whether the victim was drinking alcohol on the night of the accident and may have been apprehensive about being charged with DUI. This evidence included the victim's admissions that she had problems with alcohol abuse and had consumed alcohol shortly after her brother's surgery, her acknowledgment that driving under the influence was illegal, the unexplained absence of three of the four bottles of wine the victim purchased just before her encounter with Fuller, and an expert opinion that the victim's blood alcohol level was over the legal limit at the time of the accident. Although appellate review of the legal propriety of an evidentiary ruling is generally focused on the evidence and arguments that have hitherto been presented to the trial court, we must consider the entire record when determining whether a party was prejudiced by a questionable ruling. *See State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) ("[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." (quoting *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009))). Therefore, even if the trial court should have permitted Fuller to cross-examine the victim about her prior DUI convictions pursuant to Rule 608(c), we hold, based on our review of the record in its entirety, the trial court's exclusion of this evidence was not reversible error. *See State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007) ("To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice.").

II. SEX OFFENDER REGISTRY

Fuller next argues that his acquittals on the charges of CSC and assault and battery warranted a finding by the trial court that would have excused him from having his name listed on the registry. We disagree.

"Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)).

South Carolina law requires a defendant convicted of the "kidnapping . . . of a person eighteen years of age or older" to register as a sex offender "except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code Ann. § 23-3-430 (2007 & Supp. 2018).

"A trial judge is allowed broad discretion in sentencing within statutory limits." *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). In 2010, the Supreme Court of South Carolina applied this deferential standard to the review of a requirement by the family court that a juvenile register as a sex offender following his admission of delinquency to two amended charges of assault and battery of a high and aggravated nature even though charges against him for lewd acts with a minor, assault with intent to commit sexual battery, and sexual battery were dismissed. In holding the family court had good cause to order the appellant to be placed on the private sex offender registry, the Court, after quoting the rule from *Brooks*, explained the applicable standard of review as follows:

> A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant. A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support.

In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) (citations omitted).

Applying this standard of review, we hold the trial court acted within its discretion in declining to make the finding requested by Fuller that his kidnapping conviction did not include a criminal sexual offense or an attempted criminal sexual offense. In so holding, we agree with the State that if section 23-3-430(C)(15) were to be interpreted to require a defendant convicted of kidnapping to register as a sex offender only if the defendant was also convicted of a CSC offense, this section would be unnecessary because convictions for numerous CSC offenses automatically trigger the requirement of placement on the registry. *See* S.C. Code Ann. § 23-3-430(C)(1)-(6) (2007 & Supp. 2018) (listing CSC offenses for which a conviction requires registration as a sex offender).

Furthermore, a verdict of not-guilty of a crime does not preclude a finding that the defendant was guilty of attempt. The record included testimony that Fuller (1)

tried to force the victim to perform fellatio on him but she kept "spitting out," (2) made an unsuccessful attempt at forced vaginal intercourse with the victim, and (3) was in a state of partial undress when he was apprehended. Therefore, even if the kidnapping offense of which Fuller was convicted did not include a criminal offense, there was probative evidence on the question of whether the kidnapping of which Fuller was convicted included "an attempted criminal sexual offense." *See* S.C. Code § 23-3-430(C)(15) (2007 & Supp. 2018) (requiring that for a defendant to be exempt from registering as a sex offender because of a kidnapping conviction, the trial court must "make[] a finding on the record that the offense did not include a criminal sexual offense *or an attempted criminal sexual offense*" (emphasis added)); *In re M.B.H.*, 387 S.C. at 326, 692 S.E.2d at 542 ("A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant.").

CONCLUSION

We hold the trial court acted within its discretion in barring Fuller from cross-examining the victim about her prior DUI convictions. Our decision to affirm this ruling is based on our determinations that (1) this evidence lacked a legitimate tendency to discredit the victim's credibility and (2) the danger of unfair prejudice from admission of this evidence substantially outweighed its probative value. To the extent the trial court should have allowed Fuller to pursue this cross-examination, we hold the error was not reversible in view of other evidence in the record of this case. Finally, even though the jury acquitted Fuller on the charges of CSC and assault and battery, we hold the trial court acted within its discretion in ordering Fuller to register as a sex offender because of evidence that the kidnapping charge of which he was convicted included an attempted criminal sexual offense.

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lori Brown, Respondent,

v.

Heather Key, Appellant.

Appellate Case No. 2016-001575

Appeal From Aiken County
Dale Moore Gable, Family Court Judge

Opinion No. 5610
Heard November 8, 2018 – Filed January 4, 2019

REVERSED

Brian Austin Katonak, of Law Office of Brian Katonak, PA, of Aiken, for Appellant.

Bradford M. Owensby, of Brad Owensby Law Firm, L.L.C., of Aiken, for Respondent.

KONDUROS, J.: Heather Key (Mother) appeals the family court's order mandating visitation between her child (Child) and Child's paternal grandmother, Lori Brown (Grandmother). Mother maintains the family court erred in finding Grandmother established her right to visitation pursuant to section 63-3-530(33) of the South Carolina Code (Supp. 2018). We reverse.

FACTS/PROCEDURAL BACKGROUND

Mother and Grandmother's son, Justin Cantwell (Father), dated when they were teenagers. Child is a product of that relationship, born in March 2012. In April 2013, when Child was a little over one year old, Father was killed in a car accident. Approximately two weeks prior to Father's death, the relationship between Father and Mother became strained as it appeared Father had become involved with another girl. The relationship between Mother and Grandmother had also become strained as it appeared Grandmother may have been promoting this new relationship. Prior to that time, Mother and Father had spent some time together at Grandmother's home, and after Child was born, Mother and Child would come to Grandmother's house to spend time. Mother and Child would occasionally spend the night at Grandmother's house, but about half of that time, Grandmother left to spend the night with her boyfriend.

After Father's death, the relationship between Mother and Grandmother further deteriorated. For reasons that are not entirely clear, Mother opened a probate case for Father.[1] Notice regarding this matter was received by Grandmother immediately following Father's funeral—a matter that greatly upset Grandmother. A few weeks later, Mother sent a letter to Grandmother stating the probate case was being dropped and neither she nor Child desired anything from Father's estate. According to Mother, this was in response to harassment from Grandmother about the case. The letter also stated, "If you would like to check on [Child] or set up a time to see [Child], you can contact my parents at 803-[XXX-XXXX] or 803-[XXX-XXX]." Mother and Child lived with Mother's parents at all relevant times in this case.

The record demonstrates the parties communicated primarily via text messages.[2] Mother offered to let Grandmother visit with Child on several occasions but

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[1] Because Child was Father's only heir, Child would have been the beneficiary of Father's estate. The settlement of a lawsuit related to Father's accident ultimately became property of Father's estate. Otherwise, Father had no estate assets.

[2] While some of these texts were admitted at trial, they are not included in the record on appeal. However, several were read into the record or their contents were addressed in witness testimony.

wanted those visits to be supervised. Mother testified this was because Child did not have a particularly close bond with Grandmother and because significant tension existed between the parties after several incidents.[3] Mother testified she offered to let Grandmother visit with Child at least once a month for the year after Father's death. Grandmother filed a complaint against Mother in February of 2014 seeking unsupervised visitation.

Grandmother testified she could not specifically recall the date she first contacted Mother about seeing Child but indicated she had texted Mother and Mother's mother, Lisa Day, regarding her desire to visit with Child in the months after Father's death. However, none of those text messages resulted in a visit and the exchanges often deteriorated into an argument. Specifically, in June 2013, Grandmother texted Mother, asking "Can I pick [Child] up Saturday and keep her two hours?" Either Mother or Mrs. Day responded: "I understand nobody has asked to see [Child] but Billy[4]and he meets us and comes here. The one time that you asked." The record does not reveal any further communication from Grandmother at that point, but the parties agree a visitation did not occur. Grandmother testified she sent a text on June 28 seeking to pick up Child and spend a few hours together but received no response. At some point, Mother texted Grandmother stating "This is Heather and I told you from now on it has to be supervised. I'm not trying to be mean, but she's still young and you haven't been around her but a few times." In another text, Mother stated, "so you want to see [Child]. Can be supervised. Let me know. Bye." Grandmother responded, "I will not be supervised." Mother also offered to let Grandmother and her boyfriend visit Child at Grandmother's sister's home. Grandmother responded she did not get along with her sister and would just let the judge decide.

On Halloween of 2013, Grandmother requested to see Child and told Mother if she did not hear from her by 2 p.m. she was going to take the case to court. Mother responded that "because you don't want - - want to have somebody around, you can come by the house if you want to bring her something before I take her trick or treating." According to Grandmother, she did not go to Mother's house to visit because she was advised by her attorney not to do so. Two days later,

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[3] In addition to the probate matter, the parties had some dispute regarding ownership of guns and a television, and Grandmother filed a police report suggesting Mother had stolen family wedding rings, which Mother denied.
[4] Billy is Grandmother's ex-husband and Child's paternal grandfather.

Grandmother contacted the Department of Social Services (DSS) to do a well-being check on Child.[5]

During the months after Father's death, Child visited with other members of Father's family—all supervised and with Mother's support. Grandmother did visit with Child in November 2014 as part of the mediation process in this case and that visit went reasonably well.[6] Grandmother testified a second visitation was set for December 2014 but when she arrived Mother and Child were not there. Mother testified her understanding was that the parties would evaluate how the November visitation went and then determine whether to have a second visitation. Mother testified she was not contacted by her attorney about a December visitation.[7]

The family court determined Mother had unreasonably denied visitation with Grandmother for a period exceeding ninety days and "there are compelling reasons for allowing grandparental visitation; to wit, this is the only child of grandmother's deceased child and the child will likely not know her or her father or the child's paternal family unless visitation is ordered." The family court ordered visitation for every fourth weekend of the month from Saturday at 10 a.m. until Sunday at 6 p.m. This appeal followed.

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *see also Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the [family] court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." *Sanders v. Sanders*, 396 S.C. 410, 415, 722 S.E.2d 15, 17 (Ct. App.

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[5] Grandmother testified she did not contact DSS in retaliation for not seeing Child on Halloween, but because she had heard someone involved with drugs was around Child.

[6] Family issues and illnesses prevented the trial of this case from occurring in a more timely manner as it had to be rescheduled twice before the 2016 hearing.

[7] The family court's order does not contain any findings regarding the credibility of the parties.

2011). "The burden is upon the appellant to convince this court that the family court erred in its findings." *Id*.

LAW/ANALYSIS

Mother contends the family court erred in its application of section 63-3-530(33) resulting in the grant of visitation to Grandmother. We agree.

Section 63-3-530(33) provides the family court has authority:

> to order visitation for the grandparent of a minor child where either or both parents of the minor child is or are deceased, or are divorced, or are living separate and apart in different habitats, if the court finds that:
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> (1) the child's parents or guardians are unreasonably depriving the grandparent of the opportunity to visit with the child, including denying visitation of the minor child to the grandparent for a period exceeding ninety days; and
>
> (2) awarding grandparent visitation would not interfere with the parent-child relationship; and:
>
> (a) the court finds by clear and convincing evidence that the child's parents or guardians are unfit; or
>
> (b) the court finds by clear and convincing evidence that there are compelling circumstances to overcome the presumption that the parental decision is in the child's best interest.

Mother argues Grandmother did not prove all the elements required by the statute, including that Grandmother was unreasonably deprived of the opportunity to visit Child for a period of ninety days. No South Carolina cases have directly addressed

the issue of what constitutes an unreasonable deprivation of the opportunity to visit for a period of ninety days as required by section 63-3-530(33).[8] However, the inclusion of the ninety-day requirement suggests our legislature seeks to curb the granting of court-ordered visitation simply because visitation is not of the quantity the grandparent would like. Such a time restriction is in line with preserving the right of parents to make decisions regarding the custody and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

Both parties acknowledge Grandmother had only visited Child twice in the years prior to trial. However, the record reveals Grandmother was offered supervised visitation with Grandmother on multiple occasions during the year following Father's death. Grandmother's central point of contention is that Mother's insistence that visitation be supervised was unreasonable.[9] We cannot agree.

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[8] In this court's recent case, *Grantham v. Weatherford*, 425 S.C. 111, 117 n.5, 819 S.E.2d 765, 768 n.5 (Ct. App. 2018), the family court's finding on this issue was not appealed.

[9] This is demonstrated by the following exchange between Grandmother and her attorney at trial:

> Q. Do you believe that visitation for you with [Child] was withheld? Rephrase the question. Sorry. Do you believe it was unreasonable and continues to be unreasonable for [Mother] to place certain demands on your visitation and/or not allow you to have individual one-on-one visitation with the child?
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> A. I do.
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> Q. Why do you believe that?
>
> A. I'm not -- I've never been in jail. Never been in trouble in my life. I've worked in law enforcement. I'm no drug head. I don't do any drugs. I don't drink. I don't go out here and hang out at bars and things. I have

Cases from other states considering this issue are instructive. Indiana courts have considered whether a refusal to give grandparents the visitation they request is sufficient to support court-ordered visitation. In *Swartz v. Swartz*, 720 N.E.2d 1219, 1222-23 (Ind. Ct. App. 1999), the court held grandparents are not automatically entitled to "have the type of visitation they want." In *In re Visitation of C.S.N.*, 14 N.E.3d 753, 761-62 (Ind. Ct. App. 2014), the court further expanded on this concept. In that case, the court considered whether the grandparents' desire for overnight visitation was sufficient to override Mother's decision to limit visitation to Sunday afternoons:

> This factor [Mother's permitting Sunday visitation] is significant because "once a parent agrees to some visitation, the dispute is no longer over whether the grandparent will have any access to the child, but instead over how often and how much visitation will occur." Where a parent has denied all visitation, the grandparent must "pursu[e] the right to have a relationship with the child." Thus, "the case for judicial intervention" is strengthened. However, where there is merely a "disagreement between parent and grandparent over how much access is appropriate[,]" judicial intervention is more likely to infringe upon the parent's fundamental right.

> a very good reputation in the community and all I want to do is just spend some time with her.

When asked why she should be allowed to see Child unsupervised on a regular basis Grandmother replied:

> A. How many other people are supervised to see the baby? - - Am I different because I lost my child? - - What I'm getting to the point at is everyone else has been able to enjoy the baby but me, my ex-husband and [Father's] family.

Id. (citations omitted).

Missouri has a similar statute to the one at issue in this case and its case law suggests the grandparents' opinion as to the quality of the visitation is not controlling in evaluating whether visitation was unreasonably denied. In a case from the Missouri Court of Appeals, the court noted:

> The grandparents argue that if we conclude the statute requires unreasonable denial of visitation for more than 90 days as a precondition to court-ordered visitation, then the trial court was still able to determine that they were in fact denied visitation for more than 90 days. They maintain that "there was some visitation within the 90 days, but that does not prohibit the trial court from finding that Mother still unreasonably denied visitation for a period exceeding 90 days." Essentially, the grandparents argue that some of their visits—such as those involving a couple of hours when dropping off gifts for the child, attending a party with the child at her daycare, or having the child in their home for several hours while they wrote thank-you notes after the father's funeral—should not count because the visits perhaps were not as long or as involved or as private as the grandparents wished. . . . This argument lacks merit.

Massman v. Massman, 505 S.W.3d 406, 413 (Mo. Ct. App. 2016).

In the present case, Grandmother saw Child in April 2013, at the time of Father's death. For the year following that, Mother testified she was willing for Grandmother to see Child but wanted the visitation supervised because of the hostility between the parties following Father's death and because Child was young and had not spent much time with Grandmother. The record reveals Grandmother's continuing and clear resistance to this condition.[10]

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[10] The record on appeal does not address any specific contact directly between the parties following their exchange on Halloween 2013. In or around October 2013, Mother filed a police report against Grandmother because of what she characterized as "blowing up her phone and following her." Mother filed a second

Examining the record as a whole, we find the family court erred in concluding Mother unreasonably deprived Grandmother of the opportunity to visit Child for a period of ninety days. With the exception of the supervised mediation visit, Grandmother refused visitation Mother offered because of the conditions Mother imposed—conditions that were reasonable under the circumstances. Instead, Grandmother insisted on unsupervised visitation and then filed the present action.

We do not suggest a parent can circumvent the statute by intentionally and disingenuously thwarting a grandparent's ability to meet the statutory requirements—for example, by allowing grandparents a fleeting visit with a child every eighty-nine days or intentionally offering visitation when parent knows grandparent cannot be available. Each case must be decided on the particular facts and circumstances presented. However, grandparents refusing to accept the type of visitation offered, provided it is reasonable, likewise fail to carry the day.

Mother could have chosen to give Grandmother the visitation Grandmother desired, but Mother is the party in the superior position in making such decisions. *See Camburn v. Smith*, 355 S.C. 574, 579, 586 S.E.2d 565, 568 (2003) ("[P]arents and grandparents are not on an equal footing in a contest over visitation."). Grandmother's continuing refusal to be supervised during visitation, threats of a lawsuit, and other antagonistic behavior only exacerbated the tension between the parties.

Furthermore, we cannot base our analysis on what Grandmother states her conduct will be in the future or that she regrets how she may have behaved in the past in the hopes that something good will result for Child. Section 63-3-530(33) is in derogation of the common law and therefore must be strictly construed. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) ("[S]tatutes in derogation of the common law are to be strictly construed."); *see also Bowen v. Bowen*, 421 S.W.3d 339, 341 (Ark. Ct. App. 2012) ("Grandparent visitation is a statutorily created right and in derogation of common law; therefore, we must strictly construe the statute."); *In re Visitation of C.R.P.*, 909 N.E.2d

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report in December after which police advised Grandmother she should not contact Mother. Mother testified, "The reason she was told not to contact was because I told her all along in those texts that she did not need to contact me unless it was about [Child], but she was contacting me about other things."

1026, 1028 (Ind. Ct. App. 2009) ("The [Grandparent Visitation Act] was enacted in derogation of the common law and must be strictly construed."); *Spears v. Weatherall*, 385 S.W.3d 547, 550 (Tenn. Ct. App. 2012) (concluding grandparent visitation statutes must be narrowly construed because they are in derogation of the parents' constitutional rights).

Because Grandmother was not unreasonably denied the opportunity to visit with Child, the family court was without authority to impose court-ordered visitation. The current discord between the parties may mean Mother will be reluctant to deal with Grandmother going forward without court intercession. However, that is a matter on which we cannot speculate and one which does not affect whether the prongs of 63-3-530(33) were satisfied at the time of trial. *See Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The court does not concern itself with moot or speculative questions."). Because this issue is dispositive, we decline to address Mother's remaining arguments on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues when a prior issue was dispositive).

Accordingly, the decision of the family court is

REVERSED.

MCDONALD and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Bubba Patterson, Appellant.

Appellate Case No. 2016-000863

Appeal From Lexington County
G. Thomas Cooper, Jr., Circuit Court Judge.

Opinion No. 5611
Heard October 3, 2018 – Filed January 4, 2019

AFFIRMED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

LOCKEMY, C.J.: James Patterson appeals his convictions of armed robbery, grand larceny, and possession of a weapon during the commission of a violent crime, arguing the trial court erred in (1) admitting DNA evidence that was not authenticated through proper chain of custody testimony, (2) admitting DNA evidence that constituted improper evidence of a prior bad act, and (3) indicating to

the jury during opening statements that a trial was "a search for the truth." We affirm.

FACTS

On the afternoon of May 9, 2012, law enforcement responded to a reported armed robbery at the K&M Jewelry Store in West Columbia. According to witnesses, a man wearing a dark suit, sunglasses, and a dark fedora entered the store and pointed a handgun at the manager, Frank Mancine. The man then proceeded to gather various items of jewelry before Mancine pulled out a concealed pistol and attempted to shoot him. Mancine's gun jammed, and the man ran outside, where his hat fell to the sidewalk. Mancine followed the man to a nearby parking lot and watched him climb into the driver's seat of a light-colored van. As the van sped away, Mancine again fired his pistol, this time hitting the van's rear hatch window.

Following an initial investigation, the West Columbia Police Department (WCPD) transported the fedora found at the crime scene to the South Carolina Law Enforcement Division (SLED) for forensic analysis. SLED subsequently collected a DNA sample from the fedora; from this sample SLED developed a DNA profile that it then entered into CODIS[1], a national DNA database for law enforcement. Based on an existing DNA profile within the CODIS system, the search identified James Patterson as matching the DNA sample taken off the hat.

SLED notified the WCPD, who then created a photographic lineup containing pictures of Patterson and four other individuals. An investigator presented the lineup to Mancine and another witness; Mancine identified Patterson as the man from the jewelry store, although the other witness could not. Later that day, the WCPD obtained a search warrant for Patterson's vehicle, which they had located in the impound lot of a towing company. The vehicle matched the description of the van seen fleeing the jewelry store, and appeared to have a newly replaced rear hatch window as well as a puncture in its interior.

Patterson was subsequently arrested in connection with the armed robbery. Following his arrest, investigators collected a separate DNA sample directly from Patterson, which they tested and matched with the DNA profile taken off the fedora found at the crime scene. Based on the match, the State indicted Patterson

[1] CODIS is an acronym for the FBI's "Combined DNA Index System."

for armed robbery, grand larceny, and possession of a weapon during the commission of a violent crime.

At the start of Patterson's trial, the trial court made the following preliminary comment to the jury:

> It's a fundamental part of our democracy *in a search for the truth* in an effort to make sure that justice is done between the parties before the court. *Searching for the truth* and making sure that justice is done is often a slow, deliberate and repetitive process, the opposite of what you might have seen on television or in the movies or read in books. This courtroom is a place of honor dedicated to the protection and preservation of citizens' rights through what many have called the greatest justice system ever created.
>
> The attorneys appearing before you are advocates for the parties they represent, but first and foremost they are officers of this court, sworn to uphold the integrity and fairness of our judicial system and to help you *in a search for the truth*.

(emphasis added). Patterson objected, arguing these remarks were prejudicial in that they impermissibly shifted the burden of proof away from the State. The trial court overruled the objection.

During trial, the State presented testimony from an eye witness who confirmed seeing a man matching Patterson's description enter and leave the jewelry store. Mancine also testified regarding his recollection of the events, which was corroborated by surveillance footage from the store's internal camera. In addition, the State introduced testimony regarding Patterson's purchase of the van, the subsequent replacement of the rear hatch window, and the puncture in the van's interior. Finally, the State sought to introduce testimony regarding the DNA evidence that matched Patterson to the fedora, including testimony regarding the DNA database search.

First, the State presented evidence establishing DNA samples were collected from the fedora recovered at the scene and also from Patterson following his arrest.[2] Maryann Boehm was qualified as an expert witness in the fields of DNA analysis and statistical calculations. Boehm discussed the unique nature of DNA and the process for extracting, preserving, and using it for identification. She explained she developed a DNA profile for the suspect after taking a buccal swab of the inside of the fedora then locating and extracting a DNA sample. Boehm said she tested the DNA profile from the buccal swab of the hat against a DNA sample taken directly off Patterson following his arrest, resulting in an identification.[3] The buccal swab was marked and identified at trial with its assigned ID number: L12-06246.

The State then attempted to call SLED Agent Rhonda Fields to testify as to the identification of Patterson through the DNA database search; however, Patterson objected on the basis that Lieutenant David McClure, not Agent Fields, had conducted the database search that matched Patterson to the DNA from the fedora.[4] Patterson also argued the State had not established the chain of custody for the DNA profile that was already contained in the DNA database. The trial court allowed the State to proffer the testimony outside the presence of the jury prior to ruling on its admissibility.

During the proffer, Agent Fields testified she was employed in the DNA database unit at SLED and was involved in reviewing the information from the database search that identified Patterson. Agent Fields explained that once a match is identified, SLED goes through a "confirmation process" to "ensure that the original analysis was performed properly and that the same results are generated upon reanalysis." Agent Fields stated each individual DNA profile is given a separate ID number, Patterson's being SC00499452. Furthermore, each DNA match is given an identification number attributed to the search, which for Patterson's match was SA0000077927.

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[2] Patterson does not contest that the State established a complete chain of custody for the fedora or the DNA sample taken directly off Paterson.

[3] Boehm testified the probability of randomly selecting an unrelated person with a matching DNA profile was a one-in-730-quintillion chance.

[4] Lieutenant McClure retired from SLED prior to trial.

Agent Fields testified she personally reanalyzed the data after Lieutenant McClure conducted his search, and she confirmed the DNA match with Patterson's profile in the database. Agent Fields conceded, however, that she did not have the complete chain of custody for the DNA sample already in the DNA database. But in explaining how the DNA database gathers information, Agent Fields proffered for the trial court outside the jury's presence that the DNA sample was usually taken at the time an individual was arrested and that SLED has a tracking system that shows when a sample was collected for the database. Following the proffer, the trial court found the State had sufficiently authenticated the DNA sample and that Agent Fields could testify regarding the DNA database search.

In addition, Patterson objected to the DNA database testimony on the grounds it constituted evidence of a prior bad act under Rule 404(b), SCRE. Specifically, Patterson argued the evidence implied he had a prior record because that would be the only reason his DNA would be in a database in the first place. [5] The trial court overruled the objection, finding the inclusion of DNA in a database was not indicative of a prior record as DNA can be collected for a variety of reasons and from various sources.

At the conclusion of the trial, the jury convicted Patterson as indicted. The trial court sentenced Patterson to an aggregate term of twenty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (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." *Id*.

[5] Patterson has an extensive criminal record, although no evidence of his prior convictions were admitted at trial.

LAW/ANALYSIS

I. DNA Chain of Custody and Authentication

Patterson argues the trial court erred in admitting testimony that his DNA was contained in a DNA database because the State failed to authenticate and establish the chain of custody for the DNA samples used in the match. We disagree.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. That requirement can be satisfied in a number of ways, including through testimony by a witness with knowledge "that a matter is what it is claimed to be"; comparison by an expert witness "with specimens which have been authenticated"; by evidence of "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(1), (3), (4), SCRE. "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011).

In the case at bar, the DNA evidence was authenticated through the testimony establishing the DNA profile developed from the fedora matched both the DNA profile attributed to Patterson in the database and the DNA profile developed from Patterson after he was arrested. First, the State established the authenticity of the DNA profile that SLED entered into the database through the testimony of Boehm and Fields. Boehm had first-hand knowledge of the procedures that went into collecting, storing, maintaining, and testing the DNA profile, while Fields personally reviewed and verified the results of the DNA profile match. *See* Rule 901(b)(1), SCRE (allowing authentication through testimony by a witness with knowledge that a matter is what it is claimed to be). Boehm also testified regarding the distinctive characteristics of each DNA strand and the specific ID numbers assigned to the ones tested here. *See* Rule 901(b)(4), SCRE (providing evidence can be authenticated through proof of distinctive characteristics).

Moreover, the identity of each person that handled the DNA sample was conclusively established, and there was no evidence presented indicating the sample was tampered with. *See State v. Taylor*, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004) ("[I]f the identity of each person in the chain handling the

evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion is shown in the admission, absent proof of tampering, bad faith, or ill-motive."). Minor discrepancies in the chain of custody implicates the credibility of the evidence, but does not render the evidence inadmissible. *See id.* at 24-25, 598 S.E.2d at 738; *State v. Smith*, 326 S.C. 39, 41-42, 482 S.E.2d 777, 779 (1997) (affirming admissibility of blood tests even though the arresting officer stored the blood sample in his home refrigerator prior to testing, noting that there was no evidence of tampering); *State v. Kahan*, 268 S.C. 240, 244, 233 S.E.2d 293, 294 (1977) (ruling the ballistics test results of a nightgown worn by the deceased and placed in the evidence locker in a plastic bag were admissible even though there was no testimony as to the care and handling of the plastic bag containing the gown during the time it was in the evidence locker). Therefore, we find the testimony of Lieutenant McClure was not necessary to establish the authenticity of the match that first identified Patterson as a suspect.

Additionally, although a perfect chain of custody was not shown for the DNA evidence that was already contained in the CODIS database, we believe the authenticity of the DNA results were nevertheless established through the independent testing of Patterson's DNA profile. Boehm was qualified as an expert in DNA analysis and she testified she matched the DNA profile taken off Patterson after his arrest with the DNA profile taken off the fedora found at the crime scene. Both of these samples were properly authenticated at trial and are not challenged on appeal. *See* Rule 901(b)(3), SCRE (stating authentication requirement is satisfied through comparison by expert witness with specimens that have already been authenticated). Accordingly, we find no abuse of discretion and affirm as to this issue.

II. Evidence of a Prior Bad Act

Next, Patterson argues the trial court erred in admitting testimony regarding the DNA database search because it implied Patterson had a prior criminal record in violation of Rule 404(b), SCRE. *See Pagan*, 369 S.C. at 211, 631 S.E.2d at 267 (stating under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged"). Relying on our supreme court's decision in *State v. Hill*, 409 S.C. 50, 760 S.E.2d 802 (2014), Paterson asserts the State's reference to the database was highly prejudicial and outweighed any probative value. We disagree.

In *State v. Hill*, the court held that the admission of a law enforcement letter in which references were made to the CODIS database, while irrelevant and inadmissible, was not reversible error. 409 S.C. at 58, 760 S.E.2d at 806. The court noted that the publication of the letter—which referred to Hill as a "suspect" and stated that if he was charged, "an additional biological specimen must be submitted for court purposes"—could "have created an inference in a juror's mind that [Hill] had a criminal record." *Id*. at 57-58, 760 S.E.2d at 806. The court held, however, that its admission did not amount to reversible error due to it being cumulative to the other evidence of the CODIS database admitted without objection, and furthermore, the State did not attempt to admit evidence as to why Hill's DNA was in the database in the first place. *Id*.

We believe the trial court did not err in admitting the testimony regarding the database search. Initially, we believe the case at hand differs from the error in *Hill* because (1) the State did not place a letter into evidence; (2) the reference to the database did not contemporaneously refer to Patterson as a "suspect"; and (3) the State did not mention the type of database that the match came from. Here, the State's witnesses referred to the database as "the database" or "our database," rather than the "CODIS database." The State did not attempt to solicit testimony regarding the purpose of the database, nor did it bring up Patterson's prior record. Moreover, although SLED is a law enforcement agency, given the prevalence in which personal data is shared with public and private agencies for various purposes, e.g., military records and private commercial enterprises, we do not believe the testimony necessarily implied Patterson had a criminal record. *See* S.C. Code Ann. § 23-3-610 (2007) (instructing SLED to "develop DNA profiles on samples for law enforcement purposes and for humanitarian and non[-]law enforcement purposes").

Furthermore, we believe the reference to the database was relevant and highly probative because it explained a critical step in the investigation. Specifically, the database testimony explained how Patterson came to be identified as a suspect in the first place. Without the testimony, the jury would have been left to speculate as to the means law enforcement used to initially place Patterson at the crime scene. *See State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) ("Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears."). Additionally, based on the fact the jury was presented with only limited information regarding the DNA database search, and given that Patterson's DNA was independently matched with the DNA

found on the fedora, we believe any prejudice to Patterson was minimal. *See State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("[E]ven where the evidence is shown to be relevant, if its probative value is *substantially outweighed* by the danger of unfair prejudice, the evidence must be excluded." (emphasis added)); *State v. Council*, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (noting that an inadvertent vague reference to defendant's prior record will not amount to prejudicial error). Accordingly, we do not believe the trial court abused its discretion in admitting the DNA database testimony.

III. Trial Court's Opening Statement

Finally, Patterson argues the trial court's opening remarks to the jury regarding the trial being a "search for the truth" were prejudicial in that they impermissibly shifted the burden of proof away from the State. We agree the trial court erred; however, we find the remarks do not constitute reversible error under the facts of this case.

Our supreme court has consistently cautioned against using language that suggests the object of a trial is to find "the truth." *See State v. Beaty*, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) ("These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice."); *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (holding while it was improper for the trial court to charge the jury "that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties," the issue was unpreserved); *State v. Aleksey*, 343 S.C. 20, 28 n.2, 538 S.E.2d 248, 252 n.2 (2000) ("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional."); *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998) (noting jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they "[run] the risk of unconstitutionally shifting the burden of proof to a defendant"). Accordingly, we believe the trial court erred in making such statements in its comments to the jury, and we take the opportunity to reiterate our supreme court's instructions that trial courts should "avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt." *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506.

Nevertheless, we do not believe the error warrants reversal. *See State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (providing appellate courts will not set aside convictions due to insubstantial errors not affecting the result). First, the trial court's improper comments came at the beginning of trial rather than during the charge on the State's burden of proof at the end, which, we believe, is when such a statement would have the most prejudicial effect. *See Daniels*, 401 S.C at 256, 737 S.E.2d at 475 ("Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt."). Furthermore, notwithstanding the improper comments, we note the trial court gave an accurate definition of reasonable doubt later during its opening statement and again in the jury charge. *See Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251 ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error."). Additionally, the trial court gave a supplemental instruction following the jury charge that further emphasized the State's burden of proof. Finally, in light of the overwhelming evidence against Patterson, we believe the error did not contribute to the verdict. *See Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (finding error in jury charge was harmless beyond a reasonable doubt when it did not contribute to the verdict obtained). Accordingly, our review of the record reveals no prejudice sufficient to warrant overturning Patterson's conviction.

CONCLUSION

Based on the foregoing, we find no error in the admission of the DNA evidence at trial and further find the trial court's statements to the jury, while error, did not contribute to the jury's verdict. Therefore, Patterson's conviction and sentence are

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.