The Supreme Court of South Carolina

Re: Pilot Program for the Designation of Secure Leave Periods by Lawyers

Appellate Case No. 2018-000122

ORDER

The South Carolina Bar requests this Court adopt procedures allowing lawyers to designate secure leave periods, during which they may be excused from being called for trials and hearings in the courts of this state. The purpose of adopting these procedures is to allow lawyers to schedule times when they are free from the urgent demands of professional responsibility in the legal profession, which may serve to enhance not only the overall quality of their personal and family lives, but also permit lawyers to better fulfil their professional obligations.

We hereby adopt a Pilot Program for the Designation of Secure Leave Periods by Lawyers. The procedures in this Pilot Program are designed to enable lawyers to easily schedule secure leave periods in advance, without requiring court approval, that are universal and govern all the courts of this state. The procedures are also intended to minimize the amount of work and effort lawyers must expend in designating leave, and also the work many of our clerks of court and other personnel responsible for scheduling matters must perform in filing or recording secure leave designations, by automating the process to the maximum extent currently possible.

We also emphasize, consistent with the South Carolina Bar's original proposal, that the procedures set forth in this Pilot Program are intended to supplement, rather than replace, the current processes of honoring letters and orders of protection in individual matters on a day or period of days. Accordingly, judges should not decline to issue letters or orders of protection solely on the basis of the existence of this pilot program. Nevertheless, we are hopeful the creation of this process may

reduce the volume of requests for protection for vacation that judges are requested to consider.

Designation of Secure Leave

(a) Authorization; Application. Any lawyer who is admitted to practice in South Carolina may designate secure leave periods as provided by this order, during which that lawyer is protected from appearing in a trial, hearing, or other court proceeding. Designated secure leave applies in any court in the Unified Judicial System.

(b) Length; Number. A secure leave period shall consist of one complete calendar week, from Monday to Friday. Lawyers may not designate single days or portions of weeks for secure leave. A lawyer may designate up to three (3) calendar weeks of secure leave during a calendar year.

(c) Designation; Service. A lawyer shall utilize the functions of the Attorney Information System (AIS) to electronically designate a secure leave period. Secure leave must be designated in AIS at least ninety (90) days before the beginning of the secure leave period and before any trial, hearing, deposition, or other proceeding has been scheduled during that designated secure leave period. The lawyer may print or save a .pdf version of the secure leave designation using the features of AIS.

> **(1) Electronic Transmission to Certain Courts.** Designations entered into AIS by a lawyer will be electronically shared by AIS to certain courts and will be viewable by court personnel in the Case Management System (CMS) of that court. AIS will electronically share secure leave designations to:
>
> > **(A)** the court of common pleas;
> > **(B)** the court of general sessions;
> > **(C)** the office of the master-in-equity;
> > **(D)** the magistrates courts;
> > **(E)** those municipal courts which utilize the statewide CMS.
>
> **(2) Submitting Secure Leave Designations to the Family and Probate Courts.** In order to avoid scheduling issues in the family courts and the

probate courts, a lawyer shall, within one (1) business day of entering secure leave in AIS, mail or otherwise submit a court-approved secure leave designation form, together with a copy of the secure leave designation confirmation from AIS, to:

(A) the clerk of the family court of the county where that lawyer predominantly practices;[1] and

(B) each probate court in which the lawyer is counsel of record at the time the lawyer designates secure leave in AIS.

(3) Service. A lawyer who makes a secure leave designation shall promptly serve that designation upon all parties of record in cases where that lawyer has made an appearance. The version to be served may be accessed by utilizing the "Print Confirmation" feature in AIS, which will produce a .pdf document that includes all of that lawyer's current and future secure leave designations. Service may be made in any form authorized by the rules applicable to that matter.

(d) Effect. Except as provided in paragraph (g), upon the electronic designation of a secure leave period in accordance with this order, the secure leave designation shall be deemed allowed without further action of any court, and neither the lawyer nor any party represented by the lawyer shall be required to appear at any in-court or remote proceeding, including a deposition or court-annexed alternative dispute resolution proceeding, unless the lawyer consents. Once final in AIS, a secure leave designation may not be amended by the lawyer[2] or by the court, except as provided in paragraph (g) of this order. A lawyer is not required to file or submit a secure leave designation with any court, except as provided in paragraphs (c)(2) and (e) of this order.

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[1] Since the entry of a secure leave designation by single clerk will be shared with all other clerks in the family court case management system, lawyers should submit a single secure leave designation to the county family court in which they predominantly practice.

[2] Lawyers are advised to exercise care in selecting a secure leave period. Since a secure leave designation will be electronically shared with courts that rely on these designations in scheduling proceedings, a designation may not be withdrawn or amended once it is final.

(e) Proceedings Scheduled During Designated Secure Leave Period. If a proceeding is scheduled during a designated secure leave period, and the lawyer wishes to exercise the right to secure leave, the lawyer shall promptly file and serve on all parties to that matter a copy of the designation and a request that the proceeding be continued or rescheduled. If the proceeding was scheduled by a person or agency who is not a party to the action or is not a clerk of court, the lawyer shall, in addition to filing the notice and serving all parties to the action, serve notice of the designation on that person or agency. The proceeding shall be rescheduled unless the court finds the designation did not comply with the provisions of this order or that the secure leave designation was made solely to hinder the timely disposition of a matter. No motion fee shall be charged for filing proof of a secure leave designation.

(f) Filing and Service Deadlines. A secure leave designation shall not toll or otherwise extend the deadlines to file and/or serve pleadings and other papers or documents in the courts.

(g) Action by Court. The court may enter an order revoking a secure leave designation upon a finding that the designation did not comply with the provisions of this order or that the secure leave designation was made solely to hinder the timely disposition of a matter.

(h) Inherent Power. Nothing in this order shall prevent a court from employing its inherent power to permit a lawyer to be protected from appearing in a proceeding or proceedings on a day or period of days or from continuing a proceeding where appropriate. Furthermore, the procedures in this order are not intended to supplant the current procedures for requesting protection for other reasons.

(i) Period; Forms. This pilot program shall become effective immediately. Unless modified, extended, or rescinded by order of this Court, this Pilot Program shall be effective for the calendar years of 2023 and 2024. The attached forms are approved for use in the family and probate courts.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 16, 2022

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF _____	)	**NOTICE OF**
	)	**SECURE LEAVE**
	)	
In re: Secure Leave for Lawyers	)	
	)	
	)	
	)	
_____	)	
[Attorney Name and Bar Number]	)	
	)	

Pursuant to the Supreme Court of South Carolina's Order dated November 16, 2022_____, [ATTORNEY NAME AND BAR NUMBER] provides notice that the attorney has designated the week(s) of _____for secure leave.

Attorney certifies that the secure leave was designated in AIS at least ninety (90) days before the beginning of the secure leave period and before any trial, hearing, deposition, or other proceeding has been scheduled during this designated secure leave period**.**

_____

Attorney Name: _____
S.C. Bar No.: _____
Address: _____
Phone: _____
Email: _____

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
	)	_____JUDICIAL CIRCUIT
COUNTY OF _____	)	
	)	**NOTICE OF**
	)	**SECURE LEAVE**
In re: Secure Leave for Lawyers	)	
	)	
	)	
_____	)	
[Attorney Name and Bar Number]	)	
	)	

Pursuant to the Supreme Court of South Carolina's Order dated November 16, 2022,

Re: Pilot Program for the Designation of Secure Leave Periods by Lawyers,

_____, [ATTORNEY NAME AND BAR NUMBER] provides
notice that the attorney has designated the week(s) of _____for secure leave.

Attorney is providing this notice to the Clerk of Court for the Family Court in this County because this is the county of predominant practice for the lawyer.

Attorney certifies that the secure leave was designated in AIS at least ninety (90) days before the beginning of the secure leave period and before any trial, hearing, deposition, or other proceeding has been scheduled during this designated secure leave period**.**

_____

Attorney Name: _____
S.C. Bar No.: _____
Address: _____
Phone: _____
Email: _____

SCCA 500 (11/2022)

Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

MEDIA RELEASE

November 17, 2022

The Judicial Merit Selection Commission found the following judicial candidates qualified and nominated at the public hearings held November 14-17, 2022:

Supreme Court

Seat 4	**The Honorable David Garrison "Gary" Hill,** Greenville, SC **The Honorable Aphrodite Konduros,** Simpsonville, SC **The Honorable Stephanie Pendarvis McDonald,** Charleston, SC

Court of Appeals

Seat 1	**The Honorable Blake A. Hewitt,** Conway, SC
Seat 2	**Whitney B. Harrison,** Columbia, SC **The Honorable Grace Gilchrist Knie,** Campobello, SC **The Honorable Letitia H. Verdin,** Greenville, SC

Circuit Court

15th Judicial Circuit, Seat 1	**Amanda A. Bailey,** Myrtle Beach, SC **B. Alex Hyman,** Conway, SC
At-Large, Seat 3	**Patrick C. Fant III,** Greenville, SC **Doward Keith Karvel Harvin,** Florence, SC **S. Boyd Young,** Columbia, SC

Family Court

1st Judicial Circuit, Seat 3	**Mandy W. Kimmons,** Ridgeville, SC **Margie A. Pizarro,** Summerville, SC
9th Judicial Circuit, Seat 6	**Julianne M. Stokes,** Daniel Island, SC
12th Judicial Circuit, Seat 1	**Philip B. Atkinson,** Marion, SC **Alicia A. Richardson,** Britton's Neck, SC
At-Large, Seat 7	**The Honorable Thomas T. Hodges,** Greenville, SC
At-Large, Seat 8	**The Honorable Rosalyn Frierson-Smith,** Columbia, SC

Administrative Law Court

Seat 5	**Stephanie N. Lawrence,** Columbia, SC **The Honorable Crystal Rookard,** Boiling Springs, SC

The Judicial Merit Selection Commission found the following judicial candidates qualified at the public hearings held November 14-17, 2022:

Master-in-Equity

Pickens County	**John D. Harjehausen,** Easley, SC **Adam B. Lambert,** Easley, SC **Kimberly S. Newton,** Seneca, SC

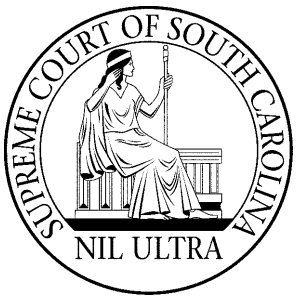
Retired

Circuit Court	**The Honorable Edgar Warren Dickson,** Orangeburg, SC **The Honorable Tommy Hughston,** Charleston, SC
Family Court	**The Honorable Arthur Eugene "Gene" Morehead III,** Florence, SC **The Honorable Dana A. Morris,** Camden, SC

As a reminder, the record remains open until the final report is issued at 12:00 Noon, Tuesday, January 17, 2023. Accordingly, judicial candidates are not free to seek or accept commitments until that time.

The election is currently scheduled for Noon on Wednesday, February 1, 2023.

Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows: Erin B. Crawford, Chief Counsel, Post Office Box 142, Columbia, South Carolina 29202, (803) 212-6689 or Lindi Putnam, JMSC Administrative Assistant, (803) 212-6623.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
November 23, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Christopher G. Jacob, Respondent.

Appellate Case No. 2022-001256

Opinion No. 28122
Submitted November 4, 2022 – Filed November 23, 2022

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Sara Parker Morris, both of Columbia, for the Office of Disciplinary Counsel.

Barbara Marie Seymour, of Clawson & Staubes, LLC, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension of up to six months. We accept the Agreement and suspend Respondent from the practice of law in this state for six months. The facts, as set forth in the Agreement, are as follows.

I.

After graduating from law school, Respondent was employed with a law firm as a law clerk. Upon being admitted to practice in November 2017, Respondent became an associate with the firm in an hourly position. The firm used computer software to track working hours in real time, and throughout 2018, Respondent

used the software to clock in and out during times when he was not in the office or otherwise working in an effort to inflate his hours and increase his pay.[1] At tax time, Respondent's supervising attorney discovered the discrepancy and confronted Respondent on January 24, 2019. The total amount of overpayment was $17,722.74. Respondent initially denied misconduct, but later admitted what he had done. When Respondent's supervisor expressed his ethical duty to report Respondent's misconduct, Respondent requested an opportunity to self-report.

On February 4, 2019, Respondent self-reported his misconduct to ODC and included a signed restitution agreement in which Respondent agreed to repay the law firm in full. Within six months, Respondent complied with the restitution agreement and repaid the debt in full.

II.

Respondent admits that his misconduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4 (d) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (prohibiting conduct prejudicial to the administration of justice). Respondent also admits his conduct is grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (prohibiting violations of the Rules of Professional Conduct); and Rule 7(a)(5) (engaging in conduct demonstrating an unfitness to practice law).

In his affidavit in mitigation, Respondent expresses remorse and explains that his preoccupation with financial security arose from his disadvantaged upbringing. Respondent explains that he erred in allowing his desperation to prove his personal worthiness and to achieve financial security to eclipse his better judgment. Respondent also states he has worked with several counselors to understand why he committed misconduct.

[1] As Respondent did not bill clients directly, no client overpaid as a result of Respondent's misconduct.

III.

We accept the Agreement and suspend Respondent from the practice of law in this state for a period of six months. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR. Within thirty days, Respondent shall pay or enter into a reasonable payment plan for the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct. Within six months, Respondent shall complete the Legal Ethics and Practice Program Ethics School.[2]

DEFINITE SUSPENSION.

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

[2] We decline to require Respondent to appear before the Committee on Character and Fitness as a condition of reinstatement.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nathenia J. Rossington, Respondent,

v.

Julio A. Rossington, Petitioner.

Appellate Case No. 2022-000715

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Berkeley County
The Honorable Michael S. Holt, Family Court Judge

Opinion No. 28123
Submitted November 3, 2022 – Filed November 23, 2022

REMANDED

Brett Lamb Stevens, of Stevens Law, LLC, of Columbia, for Petitioner.

Megan Catherine Hunt Dell, of Dell Family Law, P.C., of Charleston, for Respondent.

Suzanne E. Groff, of Charleston, Guardian ad Litem.

PER CURIAM: Petitioner seeks a writ of certiorari to review the court of appeals' reversal of the family court's order in this matter. *Rossington v. Rossington*, Op. No. 2022-UP-025 (S.C. Ct. App. filed Jan. 12, 2022). We grant the petition on Petitioner's Questions 1, 2, and 4 and deny the petition on Petitioner's Question 3.

This action was commenced in 2017. The matter of physical and legal custody of the parties' minor child has been in contention for almost six years—since the child was two months old. We regret the delay caused in part by our state's court system and acknowledge considerable changes and milestones could occur for a minor child during such a substantial delay that may alter the determination of an arrangement created in the best interests of the child. Indeed, it is more than likely the amount of time that has passed since the family court's order has resulted in a stale record incapable of reflecting facts and circumstances from which the current best interests of the child can be determined. *See Davis v. Davis*, 356 S.C. 132, 135, 588 S.E.2d 102, 103 (2003) (holding the best interests of the child is the court's paramount consideration in child custody matters).

Accordingly, we dispense with briefing, remand this matter to the family court for a trial *de novo* on the custody issue to ensure the custody determination is based on the current best interests of the child, and direct the family court to revise the award of attorney's fees in light of the new trial on the custody issue. *See Georgetown Cnty. Dep't of Soc. Servs. v. Phipps*, 278 S.C. 64, 65, 292 S.E.2d 184, 185 (1982) (remanding to the family court for a trial *de novo*, with the full right of each party to submit evidence and be heard on custody, due to the considerable amount of time—three years—that had elapsed between the original custody order and this Court's decision in the matter); *Dorn v. Criddle*, 306 S.C. 189, 193, 410 S.E.2d 590, 593 (Ct. App. 1991) (remanding a child custody matter for a trial *de novo* after a three-year lapse between court proceedings resulted in a stale record); *Cook v. Cook*, 280 S.C. 91, 93, 311 S.E.2d 90, 91 (Ct. App. 1984) (remanding a child custody matter for a trial *de novo* after a four-year lapse between court proceedings resulted in a stale record). If either party wishes to appeal the order of the family court after a trial *de novo*, the appeal shall be filed directly with this Court.

REMANDED.

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

The Supreme Court of South Carolina

Re: Expediting Appeals in Matters Involving Child Custody and Visitation

Appellate Case No. 2022-001278

ORDER

In 2011, this Court issued an administrative order mandating that appeals involving child custody in termination of parental rights proceedings, adoption proceedings, and any Department of Social Services actions involving the custody of a minor child be expedited. *RE: Expediting Appeals from Termination of Parental Rights Proceedings, Adoption Proceedings, and/or Department of Social Services Actions Involving Custody of a Minor Child*, S.C. Sup. Ct. Order dated October 20, 2011.

For the same compelling reasons that appeals in those cases should be expedited—in recognition of the need for stability in children's lives—this order expands the scope of the 2011 order to include domestic relations actions involving child custody and visitation. These appeals shall be expedited by the Supreme Court and the Court of Appeals as provided below.

To facilitate expediency, there will be a presumption against granting motions for extensions of time to file petitions, returns, briefs, records, and other documents. A motion for an extension of time will only be granted in the most extraordinary of circumstances and for the most compelling reasons in the interest of justice.

As to appeals to the Court of Appeals, the Court of Appeals shall expedite consideration of appeals as follows. Once the case is fully briefed, the case will be scheduled for the next practicable term of court. Notice of oral argument must be sent at least fifteen days prior to any scheduled argument. A written opinion from the court shall be filed within thirty days of being assigned to a panel or hearing oral argument, whichever is later. However, if the case warrants additional consideration, the time for filing an opinion may be extended.

As to matters before this Court, a petition for a writ of certiorari to the Court of Appeals in child custody or visitation cases must be given priority and will be considered by the Court as expeditiously as possible. Where certiorari is granted or where the matter is pending before the Supreme Court on direct appeal, oral argument shall be held, if at all, at the next practicable term of Court after the briefs are filed. Notice of oral argument must be sent at least fifteen days prior to any scheduled argument. The Court shall file a written opinion within thirty days after the case being submitted for consideration or within thirty days after hearing oral argument. However, if the case warrants additional consideration, the time for filing an opinion may be extended.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 17, 2022

The Supreme Court of South Carolina

Re: Amendments to Rules 413 and 502, South Carolina Appellate Court Rules

Appellate Case No. 2022-000837

ORDER

By Order dated September 28, 2022, this Court amended the Rules for Lawyer Disciplinary Enforcement (RLDE) and the Rules for Judicial Disciplinary Enforcement (RJDE), which are found in Rule 413 and Rule 502 of the South Carolina Appellate Court Rules. We find a further amendment is necessary to clarify the intent of one of these changes with respect to the service of a subpoena on a non-party during an investigation.

Pursuant to Article V, Section 4 of the South Carolina Constitution, the last sentence of 14(c)(1), RLDE, Rule 413, SCACR is amended to read:

> A subpoena directed to a non-party shall be served on the non-party as provided in Rule 4(d) or (j) of the South Carolina Rules of Civil Procedure; provided a copy of the subpoena is not required to be served on the lawyer if issued pursuant to Rule 15(b)(1) of these rules.

Additionally, the last sentence of Rule 14(c)(1), RJDE, Rule 502, SCACR, is amended to read:

> A subpoena directed to a non-party shall be served on the non-party as provided in Rule 4(d) or (j) of the South Carolina Rules of Civil Procedure; provided a copy of the subpoena is not required to be served on the judge if issued pursuant to Rule 15(b)(1) of these rules.

The amendments are effectively immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 17, 2022

The Supreme Court of South Carolina

In the Matter of William John Sims, Respondent.

Appellate Case No. 2022-001623

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

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

Columbia, South Carolina
November 21, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Xzariera Okevis Gray, Appellant.

Appellate Case No. 2019-001109

Appeal From Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5951
Heard June 9, 2022 – Filed November 23, 2022

AFFIRMED IN PART AND REMANDED

Appellate Defenders Susan Barber Hackett and Sarah Elizabeth Shipe, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Michael D. Ross, and Solicitor David M. Stumbo, all of Columbia, for Respondent.

KONDUROS, J.: Xzariera Okevis Gray appeals his convictions for murder and possession of a weapon during the commission of a violent crime. Gray asserts the trial court erred by (1) denying him immunity from prosecution pursuant to the

Protection of Persons and Property Act (the Act),[1] (2) admitting into evidence a surveillance video of the shooting, and (3) denying his motion for a new trial without a hearing. We remand for the trial court to make specific findings that support its determination of whether Gray is, or is not, entitled to immunity under the Act.

FACTS

During the early morning hours of August 26, 2017, officers from the Greenwood Police Department heard a gunshot. Believing the gunshot had come from nearby Gray Street, the officers drove down that street and observed several people outside of Ricky Grant's residence. A woman one street over flagged the officers down and directed them to Demetrius "Meatball" Fueller (Victim). Victim was lying on the ground and unable to communicate with the officers, but they could see he had been shot in the abdomen because he was not wearing a shirt. Paramedics arrived and transported Victim to the hospital, where he went into cardiac arrest. Hospital personnel were unable to resuscitate Victim. An autopsy revealed a single gunshot wound to Victim's abdomen caused him to bleed to death.

In May 2018, a Greenwood County grand jury indicted Gray for murder and possession of a weapon during the commission of a violent crime. Prior to trial, Gray sought immunity from prosecution pursuant to the Act. At the immunity hearing, Gray testified that on August 25, 2017, he was visiting with Grant at Grant's house on Gray Street. Gray recalled that around midnight, he and Grant got into Grant's car to go to a neighborhood nightclub. According to Gray, Victim approached Grant's car and knocked on the window. When Victim learned Grant and Gray were going to the nightclub, he asked to join.

Gray then described an altercation with Victim that had occurred in Grant's yard a couple of weeks earlier. Gray claimed that Victim's brother chased him around a car with a gun. After Gray escaped into Grant's house, Victim's brother left. Shortly after, Victim arrived with the gun. Gray stated that he went back into Grant's house while others in Grant's yard persuaded Victim to leave.

[1] *See* S.C. Code Ann. §§ 16-11-410 to -450 (2015).

Gray testified that Grant was aware of the prior incident and asked him if he was comfortable with Victim riding with them to the nightclub. Gray told Grant that it was his car, and Grant let Victim in; the three went to the nightclub together. Once there, Grant and Victim entered the nightclub while Gray remained in the parking lot socializing with friends.

After a few hours, Grant and Gray rode back to Grant's house without Victim, and they continued visiting into the early morning hours of August 26, 2017. Gray testified that Victim returned to Grant's house about an hour later and confronted him about the prior incident. Grant told Victim and Gray to go outside because they were being loud. Gray stated that he went outside and started to walk home but returned to Grant's house so that Grant would drive him home. Gray claimed that Victim followed Gray back into Grant's house, and Grant again told them to go outside.

Gray recalled that when he and Victim returned to the porch, Victim swung at him; however, Gray was inconsistent on whether Victim hit him or missed. Gray testified that he and Victim then began "tussling" in Grant's yard. During the scuffle, Gray claimed that he saw Victim reach for a gun in his waistband. Gray testified that he also reached for the gun and briefly struggled with Victim for control of the weapon.

According to Gray, he gained control of the gun and stumbled backward. Gray claimed that Victim began to charge at him as he stumbled backwards. Gray admitted that he shot Victim once, and Victim then ran away. Gray also testified that he and Victim were the only two people in Grant's yard at the time of the shooting.

To contradict Gray's testimony, the State presented testimony from Grant and another witness, Raymond Kennedy. Grant recalled that Victim hid his gun in the bushes before entering the nightclub, and both Grant and Kennedy testified the argument between Gray and Victim arose over Victim's missing gun rather than their prior altercation. Kennedy also testified that Gray's brother was standing next to Gray when Gray shot Victim.

Additionally, the State introduced a surveillance video that showed the shooting. One of Grant's neighbors, Jeovani Vacquec, testified that he owned and operated the security system that recorded the video. Vacquec stated that he had eight

cameras around his house that all fed into a hard drive that recorded the images and displayed them on a monitor. Vacquec recalled that officers viewed the video from the camera that faced Gray Street and collected the portion that showed the shooting. Vacquec testified that he knew the cameras functioned properly because he checked them regularly. Vacquec explained that the time stamp on the video was incorrect because he did not set the correct date or time when he installed the security system.

Gray objected to the video's admission because the time stamp on the video did not match the alleged time of the incident and Vacquec was not contemporaneously watching his monitor as the shooting occurred. The trial court determined the incorrect time stamp did not affect the video's admissibility because Vacquec explained that he did not set the time when he installed the security system. The trial court also found that Vacquec authenticated the video and admitted it for the hearing.

At the conclusion of the immunity hearing, Gray argued he was entitled to immunity because he was in a place he had a right to be and he satisfied the Act's requirements. While the State conceded Gray was in a place he had a right to be, it argued that whether Gray satisfied the elements of self-defense was a jury question due to the conflicting evidence. The State noted the discrepancy between Gray's testimony that Victim possessed the gun in his waistband and Grant and Kennedy's testimony that the argument between Gray and Victim arose over Victim's missing gun. The State also emphasized that the surveillance video contradicted Gray's testimony because it showed that when Gray shot Victim, a third individual was standing beside him and Victim was not rushing towards him.

The trial court found that Gray was in a place he had a right to be as Grant's invited guest; however, the trial court ruled that Gray failed to prove by a preponderance of the evidence that he was entitled to immunity. The trial court explained that its ruling was "based upon the varying evidence and the open question of whether [Gray was] entitled to a self-defense [jury] instruction . . . ." The trial court also stated that it was "passing upon the credibility of the witnesses who have testified . . . ."

In response, Gray cited *State v. Cervantes-Pavon*[2] and asserted that "just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity. The court must sit as the fact-finder at [t]his hearing, weigh the evidence presented, and reach a conclusion under the Act." The trial court explained that if it "had a hundred percent or very firm belief" in Gray's version of events, "it would be a different outcome, obviously." The trial court elaborated, "[T]o the extent that [Gray's] testimony would have been corroborated by others who were present at the scene, the [c]ourt might be more inclined to say that the defense has met the burden of proving it by the preponderance of the evidence." The trial court concluded that it declined Gray's motion "[i]n light of the conflicting evidence . . . and the open question of whether this is, in fact, a case of self-defense . . . ."

After the immunity hearing, Gray moved in limine to prohibit the State from presenting Vacquec's surveillance video to the jury. Gray reiterated his arguments that the video should not be admitted into evidence because the timestamp was incorrect and Vacquec was not contemporaneously watching his monitor as the shooting occurred. Additionally, Gray argued the video was not admissible under Rule 403, SCRE, because its low quality made it difficult to discern what it showed.

Regarding authentication, the State conceded that no one could testify as to what happened on the video; however, the State argued that Vacquec could testify that his security system recorded the video and the camera faced Gray Street. Regarding Rule 403, SCRE, the State argued that the surveillance video was relevant because it showed the shooting. The State maintained that the quality of the video was a matter of its credibility, which was something for the jury to weigh. The State also contended that the video would not cause confusion and asserted it would help the jury better understand the witnesses' testimony.

The trial court again admitted the surveillance video over Gray's objections. The trial court ruled that the State had sufficiently authenticated the video because Vacquec stated he owned and operated the security system and explained the video's incorrect timestamp. The trial court also acknowledged Gray's Rule 403, SCRE, argument but ruled that the video depicted relevant information.

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[2] 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

The State began its case-in-chief by calling Vacquec as a witness. Vacquec's testimony was consistent with his immunity hearing testimony, and the surveillance video was published to the jury. The State also presented Grant and Kennedy as witnesses again, and their testimony was consistent with their immunity hearing testimony.

After the State rested, Gray took the stand in his own defense. Gray's testimony was mostly consistent with his immunity hearing testimony, but Gray stated that Victim initially got upset when he returned from the nightclub because Gray and Grant were laughing at him. Gray claimed that Victim then confronted him about their prior altercation. Gray also testified that Victim's punch missed, Victim was wearing a shirt or tank top during their scuffle, and Gray closed his eyes when he fired the gun.

The jury began deliberating at 12:40 p.m. on May 9, 2019. Immediately before the jury exited the courtroom at 12:18 p.m., the trial court informed them that lunch would arrive in about an hour. At 5:43 p.m., the jury sent the trial court a note that contained its third request to watch a portion of the video. The trial court played that portion of the video and then gave the jury a laptop that could play the entire video so they could watch it while deliberating. The note also indicated that some jurors were concerned about their children at home. The trial court allowed the jurors to call their families but directed them to continue their deliberations afterward.

At 8:58 p.m., the trial court received another note requesting another phone call and a smoke break. The note also stated "we are pretty deadlocked at 10:2." The trial court gave the jury a choice between resuming deliberations that evening or reconvening the following Monday.[3] The trial court explained that "[t]here is no set limitation on jury deliberations. However long you deliberate is entirely in your discretion."

The jury continued deliberating. At 10:50 p.m., the jury returned guilty verdicts for both murder and possession of a weapon during the commission of a violent crime. Given the late hour, the trial court delayed Gray's sentencing hearing. On May 14, 2019, the trial court sentenced Gray to consecutive sentences of thirty-five

[3] May 9, 2019, was a Thursday, and May 10, 2019, was a state holiday.

years' imprisonment for murder and five years' imprisonment for possession of a weapon during the commission of a violent crime.

On May 23, 2019, Gray filed a motion for a new trial, alleging that the jury was unduly influenced to reach a verdict. Gray noted that the jury deliberated for about ten-and-a-half hours without dinner and informed the trial court that it was "pretty deadlocked at 10:2" two hours before it returned the guilty verdicts. Additionally, Gray presented one juror's Facebook post that stated she "just couldn't leave without a verdict." Gray requested a hearing on the motion so the trial court could ask each juror if they felt undue pressure to reach a verdict.

The trial court denied Gray's motion for a new trial without a hearing. The trial court stated that the jury indicated it was "struggling to reach a verdict" but not deadlocked. The trial court noted that "a lengthy deliberation, standing alon[e], does not warrant conducting an inquiry into the nature of the jury deliberations." Regarding the lack of dinner, the trial court explained that it had ordered the jury a late lunch, and the jury room contained "crackers, snacks, and drinks" the jurors could consume. Additionally, the trial court determined that Gray's requested inquiries were prohibited by Rule 606, SCRE, because they "would cause the jurors to reveal the subject matter of their deliberations." The trial court found that the juror's Facebook post did "not cause the [c]ourt sufficient concern to warrant the drastic step of questioning all twelve . . . jurors." This appeal followed.

STANDARD OF REVIEW

"The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Reyes*, 432 S.C. 394, 401, 853 S.E.2d 334, 337 (2020) (quoting *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* at 401, 853 S.E.2d at 338 (quoting *Bryant*, 372 S.C. at 312, 642 S.E.2d at 586).

LAW/ANALYSIS

I. Immunity under the Protection of Persons and Property Act

Gray asserts the trial court erred by failing to sit as the fact-finder at his immunity hearing. We agree.[4]

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [appellate] court[s] review[] under an abuse of discretion standard of review." *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (quoting *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). "[T]he relevant inquiry is . . . whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019). "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the [trial] court to deny immunity; the [trial] court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *Cervantes-Pavon*, 426 S.C. at 451, 827 S.E.2d at 569. "[T]he [trial] court, in announcing its ruling, should at least make specific findings on the elements on the record." *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019).

Here, the trial court impermissibly abdicated its role as the fact-finder at Gray's immunity hearing. The trial court was required to make specific findings supporting its decision that this court could review on appeal. While the trial court ruled that Gray did not prove by a preponderance of the evidence that he was entitled to immunity, the record contains no specific findings that support that determination. *Compare Andrews*, 427 S.C. at 182, 830 S.E.2d at 14 ("[W]hile the [trial] court may not have set forth every detail of its analysis in the record, the record [wa]s nevertheless adequate for a reviewing court to determine that the [trial] court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of [our supreme court's]

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[4] Because we remand, we do not address Gray's other contentions as to the immunity issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting appellate courts need not address remaining issues when disposition of an issue is dispositive).

precedent."), *with State v. McCarty*, Opinion No. 28116 (S.C. Sup. Ct. filed Sep. 21, 2022) (Howard Adv. Sh. No. 34 at 38-39) (finding the court of appeals erred in upholding the trial court's denial of immunity because the trial court did not make specific findings that appellate courts could review).[5]

The trial court's reasoning for denying Gray immunity reveals that it deferred to the jury rather than sit as the fact-finder at the immunity hearing. The trial court stated it was "passing upon the credibility of the witnesses who have testified" and twice explained that it denied Gray immunity due to the conflicting evidence and the "open question" of whether Gray was entitled to a self-defense jury instruction. The trial court concluded that "such matters are best left to the finders of fact, namely the trial jury." Consequently, the trial court failed to sit as the fact-finder at Gray's immunity hearing. Accordingly, we remand for the trial court to make specific findings that support its determination of whether Gray is, or is not, entitled to immunity under the Act.

II. Surveillance Video

Gray asserts the trial court erred by admitting into evidence surveillance video of the shooting. We address his two arguments in turn.

A. Authentication

Gray contends that the State failed to properly authenticate the video. We disagree.

"[E]vidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018). A witness with knowledge may authenticate evidence by testifying that "a matter is what it is claimed to be." Rule 901(b)(1), SCRE. "The authentication standard is not high, and a party need not rule out any possibility the evidence is not authentic." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019) (citation omitted), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020). "The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims." *Id.*

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[5] In fairness to the learned trial judge, Gray's immunity hearing occurred before *Andrews* and *McCarty* were published.

The State authenticated the surveillance video with Vacquec's personal knowledge. Vacquec testified that he owned and operated the security system that recorded the video. Vacquec also testified that the camera that recorded the video faced Gray Street. Vacquec explained that the time stamp on the video was incorrect because he did not set the correct date or time when he set up the security system. It is irrelevant that Vacquec was not contemporaneously watching his monitor or at the scene of the shooting; his personal knowledge sufficiently authenticated the video. Accordingly, we affirm as to this issue.

B. Rule 403

Gray also contends that the surveillance video's limited probative value was substantially outweighed by the danger of confusing and misleading the jury. We disagree.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE. "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "[T]he more essential the evidence, the greater its probative value." *Id.* (alteration in original) (quoting *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007)). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *Id.* "[T]he burden [is] on the opponent of the evidence to establish [its] inadmissibility." *State v. King*, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018).

The surveillance video's probative value was not substantially outweighed by the danger of confusing or misleading the jury. The surveillance video was highly probative because it provided an alternative perspective of the shooting that was objective and neutral. Moreover, the surveillance video clearly contradicted some of Gray's testimony. Despite the dark image, the video clearly shows more than two people in and around Grant's yard at the time of the shooting. Therefore, the surveillance video was highly probative.

Additionally, the danger that the surveillance video would have confused the jury was limited. While the quality of the surveillance video made it difficult to discern

what happened, the jury was able to replay the video, or portions of it, as many times as it wanted to. Therefore, allowing the jury to view the surveillance video was unlikely to cause confusion, and its probative value outweighed any danger that it would. Accordingly, we affirm as to this issue.

III. Motion for a New Trial

Gray asserts the trial court erred by denying his motion for a new trial without a hearing. Gray contends he should have been allowed to ask all twelve jurors whether the length of their deliberations, lack of dinner, or their understanding of whether a verdict had to be rendered had an impact on their verdict. We disagree.

A posttrial motion "may, in the discretion of the court, be determined on briefs filed by the parties without oral argument." Rule 29(a), SCRCrimP. "Generally, juror testimony is not allowed regarding the deliberations of the jury or internal influences." *State v. Pittman*, 373 S.C. 527, 553, 647 S.E.2d 144, 157 (2007). However, "a juror may testify . . . whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Rule 606(b), SCRE.

Additionally, "where [an] allegation of improper internal influence potentially affects fundamental fairness, the court may accept juror testimony to ensure due process." *Pittman*, 373 S.C. at 553, 647 S.E.2d at 157. Our supreme court has recognized only two allegations that implicate fundamental fairness: (1) allegations that the jury's verdict was the result of racial or gender intimidation, *Winkler v. State*, 418 S.C. 643, 667-68, 795 S.E.2d 686, 699 (2016) (Hearn, J., concurring), and (2) allegations that the jury participated in premature deliberations, *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999). Allegations that jurors misunderstood the law are insufficient to implicate fundamental fairness. *See Pittman*, 373 S.C. at 555, 647 S.E.2d at 158 (2007) ("[A] jury's misapprehension of the law is not enough to impeach a verdict.").

The trial court did not abuse its discretion in denying Gray's motion for a new trial without a hearing. The trial court aptly recognized that Gray's requested inquiries are prohibited by Rule 606(b), SCRE. The juror's Facebook post did not indicate that any extraneous prejudicial information or outside influence had an impact on the jury's deliberations; it also did not indicate that Gray's verdict was reached as a result of racial or gender intimidation or that the jury began deliberating

prematurely. Therefore, Gray's requested inquiries would have involved juror testimony about internal influences unrelated to fundamental fairness. Accordingly, we affirm as to this issue.

CONCLUSION

The trial court did not abuse its discretion in admitting the surveillance video into evidence and denying Gray's motion for a new trial without a hearing. However, the trial court failed to sit as the fact-finder at Gray's immunity hearing. Accordingly, Gray's case is

AFFIRMED IN PART AND REMANDED.

WILLIAMS, C.J. and VINSON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Martha Foster Watts, Appellant,

v.

Ricky W. Chastain, Sheriff Laurens County, South Carolina, Respondent.

Appellate Case No. 2019-001514

Appeal From Laurens County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5952
Submitted October 3, 2022 – Filed November 23, 2022

AFFIRMED

Thomas J. Thompson, of Townsend & Thompson, LLP, of Laurens, for Appellant.

Carly H. Davis and Russell W. Harter, Jr., both of Chapman, Harter & Harter, P.A., of Greenville, for Respondents.

THOMAS, J.: This is a personal injury case filed by Martha Foster Watts against the Sheriff of Laurens County involving a car accident. At trial, the court admitted a video into evidence over Watts' objection. On appeal, Watts argues she is entitled to a new trial because (1) the video was unfairly prejudicial to the verdict

and (2) defense counsel's closing argument unfairly prejudiced the outcome. We affirm.

FACTS

The night of August 15, 2013, Watts was traveling on Highway 76 in South Carolina when her vehicle collided with another vehicle that had, in a matter of seconds before, been involved in a collision with a Laurens County Sheriff's Deputy.[1] Watts alleged personal injuries and asserted a negligence claim against Ricky W. Chastain, the Sheriff of Laurens County.[2] Chastain denied liability under the South Carolina Tort Claims Act and alleged comparative fault on behalf of Watts.

Prior to trial, Watts filed a motion in limine, objecting to Chastain's use of a copy of a nearby private recycling business' surveillance video on the grounds that (1) it was not an exact copy of the original video; (2) Chastain did not show the original video was unavailable through no fault of his own; (3) it was altered in substance and edited; (4) the playback speed was inaccurate; (5) it did not show the collisions at issue; (6) it did not fairly and accurately represent the time between the first and second collisions; (7) the image was too blurry to be useful to the jury; and (8) it was inherently prejudicial to Watts.

During the trial, Watts filed a motion to suppress the video and all evidence derived from it. After an in-camera hearing, the court found the video was admissible because the probative value outweighed any unfair prejudice to Watts. Immediately before closing arguments, the court instructed counsel that they could argue what was on the video, but they could not add to it. During defense counsel's closing argument, the court overruled Watts' objections that defense

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[1] Deputy Barton Holmes was the officer involved in the first collision and his report stated that collision occurred at 10:37 pm. In a post-incident interview with Trooper (then Corporal) Al Duncan of the South Carolina Highway Patrol, Holmes said the second collision occurred five to ten seconds after the first collision. The other driver testified the second collision occurred two seconds after the first collision.

[2] Watts filed her initial complaint against the Laurens County Sheriff's Department; however, she filed an amended complaint naming only Chastain, as the Sheriff of Laurens County.

counsel's comments on the video disregarded the court's instruction not to add anything that was not depicted on the video.

At the conclusion of the trial, the jury found Chastain was not negligent. Watts filed a motion for a new trial or judgment notwithstanding the verdict (JNOV) pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure. Watts argued the surveillance video was improperly admitted into evidence at trial because the video shown to the jury at trial was a copy of the original video. She also argued defense counsel made a prejudicial and improper closing argument.

After a hearing, the trial court filed its order denying Watts' motions. The court found the video complied with Rules 1001 to 1004, SCRE, because (1) the video recorded by Trooper Duncan was a duplicate of the images shown on the surveillance video; (2) there was no genuine question raised as to the authenticity of the original video; and (3) the original video was never in the possession of Chastain and is no longer available for reasons fully explained at trial. The court also found the video was relevant evidence because it provided information and evidence as to the position of the vehicles, the timing of the two collisions at issue, the roadway conditions, and whether the motorists had their lights on. Finally, the court found there was no prejudice in defense counsel's closing argument and any remarks by counsel did not deprive Watts of a fair trial. This appeal followed.

STANDARD OF REVIEW

The grant or denial of a motion for a new trial lies within the sound discretion of the trial court. *RRR, Inc. v. Toggas*, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008). This court's standard of review is limited to determining whether there was an abuse of discretion. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.* "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

"In deciding a motion for JNOV, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party . . . ." *Gastineau v.*

Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). "[I]f more than one inference can be drawn, the case must be submitted to the jury." *Id.* "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Id.* The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. *Shupe v. Settle*, 315 S.C. 510, 515, 445 S.E.2d 651, 654 (Ct. App. 1994).

LAW/ANALYSIS

I. Video Evidence

Watts argues she is entitled to a new trial because the video was unfairly prejudicial to her. We disagree.

A. Rules 1001 to 1004, SCRE

Rule 1001(2), SCRE, provides "photographs" include "video tapes, motion pictures or other similar methods of recording information." Rule 1001(4), SCRE, defines a "duplicate" as "a counterpart produced by the same impression as the original . . . by mechanical or electronic re-recording . . . or by other equivalent techniques which accurately reproduces the original." Rule 1002, SCRE, states to prove the content of a recording, the original recording should be entered into evidence. Rule 1003, SCRE, allows a "duplicate" to be admitted "to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1004(1), SCRE, lists an exception to the original recording requirement and provides a copy may be admitted if all originals are lost or have been destroyed without the fault of the party desiring to prove the fact. *See Vaught v. Nationwide Mut. Ins. Co.*, 250 S.C. 65, 68-69, 156 S.E.2d 627, 628-29 (1967) (stating secondary evidence is only admissible when "the primary evidence of the fact to be proved is satisfactorily shown to have been lost or destroyed without the fault of the party desiring to prove the fact . . . ." (quoting *W.C. Beaty & Co. v. S. Ry. Co.*, 80 S.C. 527, 530, 61 S.E. 1006, 1007 (1908))). "The preliminary inquiry as to whether there had been sufficient evidence tending to prove the loss, destruction or unavailability of an original document to justify the admission of secondary evidence is an inquiry, the answer to which, in large measure, is within

the discretion of the trial [court] . . . ." *Windham v. Lloyd*, 253 S.C. 568, 573, 172 S.E.2d 117, 119 (1970).

Watts argues the video does not qualify as an admissible "print" or "duplicate" of the original, under Rules 1001, 1002, and 1003 of the South Carolina Rules of Evidence. Watts asserts Matthew Cagle, the owner of the recycling business, testified to facts proving that the video is altered from the original surveillance video because Cagle fast forwarded through some of the footage during the copying by Trooper Duncan to get to the time he wanted to start recording. Trooper Duncan also testified the video jumps a little because he did not need to record much of the surveillance before and after the collisions. Also, Watts asserts Trooper Duncan testified the video included imperfections that were not on the original surveillance video – images of himself reflected on the monitor while he copied the surveillance video and the process of copying the surveillance as it played on the monitor created a glare that was not on the original footage. Cagle also testified there was a glare on the recording.

At trial, Cagle testified the system "records in a loop, and about every six months it records over itself." He also stated there was no cassette tape he could give Trooper Duncan because it recorded on a hard drive and the only way to get a copy of the recording was for Trooper Duncan "to bring a tripod like this right here and set a camcorder on it to record the images off the monitor." Trooper Duncan testified Cagle told him there was no way to get the data off the hard drive and he used the camcorder to record the surveillance footage because he realized the evidence could be lost. Watts did not argue the original was not lost or that Chastain lost the original. Watts also did not argue the video was not a copy of the original, just that the video is fast-forwarded to the time of the collisions, does not show the collisions, and the quality is low.

The trial court found the video complied with Rules 1001 to 1004, SCRE, because (1) the video recorded by Trooper Duncan was a duplicate of the images shown on the original surveillance video; (2) there was no genuine question raised as to the authenticity of the original video; and (3) the original video was never in the possession of Chastain and is no longer available for reasons fully explained at trial. We find the evidence supports this conclusion; thus, there was no abuse of discretion by the trial court in admitting the video. *See BB&T*, 369 S.C. at 551, 633 S.E.2d at 503 ("An abuse of discretion arises where the judge issuing the order

was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support.").

B. Rule 901, SCRE

Rule 901(a), SCRE, requires authentication as a condition precedent to the admissibility of evidence and provides it "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." It further provides that authentication may be made by "[t]estimony that a matter is what it is claimed to be." Rule 901(b)(1), SCRE.

In *State v. Brown*, involving the authentication of Global Positioning System (GPS) records, our supreme court "emphasize[d] that '[n]o elaborate showing of the accuracy of the recorded data is required'; however, the State must make some showing to authenticate the records." 424 S.C. 479, 490, 818 S.E.2d 735, 741 (2018) (quoting *People v. Rodriguez*, 224 Cal. Rptr. 3d 295, 309 (Cal. Ct. App. 2017)). The court held a witness need not be an expert, but "should have experience with the electronic monitoring system used and provide testimony describing the monitoring system, the process of generating or obtaining the records, and how this process has produced accurate results for the particular device or data at issue." *Id.* at 492, 818 S.E.2d at 742. In *Rodriguez*, cited by the *Brown* court, the court also considered the authentication of GPS records and stated:

> It is settled [that] computer systems that automatically record data in real time, especially on government-maintained computers, are presumed to be accurate. Thus, a witness with the general knowledge of an automated system may testify to his or her use of the system and that he or she has downloaded the computer information to produce the recording. No elaborate showing of the accuracy of the recorded data is required. Courts in California have not required "testimony regarding the 'acceptability, accuracy, maintenance, and reliability of . . . computer hardware and software'" in similar situations. . . . The rationale is that while mistakes may occur, such matters may be developed on

> cross-examination and should not affect the admissibility of the printout or recording of the data itself.

224 Cal. Rptr. 3d at 309 (quoting *People v. Dawkins*, 179 Cal. Rptr. 3d 101, 110 (Cal. Ct. App. 2014)).

Watts argues the video was not relevant and was prejudicial to her because the video's time stamp begins twenty minutes after the collisions occurred and does not show either of the collisions at issue. Watts asserts this unresolved time discrepancy bars authentication of the original video. She asserts Cagle had no training relevant to surveillance systems, four of his system cameras did not work at the time of the wreck, and eight of the cameras did not work at the time of the trial, yet he testified his system worked well. Thus, she argues Cagle's testimony is not adequate to authenticate the original video's accuracy. She also asserts Trooper Duncan could not authenticate the video because he lacked personal knowledge and could not testify the surveillance equipment kept reliable, accurate time.

Although the time stamp of the video begins twenty minutes after the collisions occurred, Cagle testified the system is reliable and the date and time stamp was accurate. He also testified the video was a recording of what played on his surveillance monitor and that no alteration of the video occurred between the time of the accident and the time Trooper Duncan recorded it with his camcorder. Rule 901(b)(1), SCRE, provides that authentication may be made by "[t]estimony that a matter is what it is claimed to be." The *Brown* court held a witness need not be an expert, but should have experience with the electronic monitoring system used and provide testimony describing the system. 424 S.C. at 492, 818 S.E.2d at 742. Also, Trooper Duncan testified the video was a true and accurate representation of what he recorded on his camcorder when he went to Cagle's business. Thus, we find Cagle and Trooper Duncan's testimony was sufficient to authenticate the video, and the court did not err in admitting it into evidence at trial.

C. Rule 403, SCRE

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Our courts have defined unfair prejudice as "an undue tendency to suggest a decision on an improper basis." *Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (quoting *State v. Owens*, 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)). This court "reviews Rule 403 rulings pursuant to an abuse of discretion standard and gives great deference to the trial court." *Lee v. Bunch*, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007). Thus, only in exceptional circumstances should this court reverse a trial court's decision regarding the comparative probative value and prejudicial effect of evidence. *Johnson*, 389 S.C. at 534, 698 S.E.2d at 838.

Watts argues the video is of such poor quality that its probative value is extremely low. She further asserts its probative value is far outweighed by its unfair prejudice, confusion of the issues, and tendency to mislead the jury because it is silent[3], in black and white, and does not depict either of the collisions at issue. Watts argues the full effect of the unfair prejudice caused by the video is shown in the jury's finding that Deputy Holmes was not negligent in making his left U-turn, on an unlit and very dark stretch of road at night, without a siren, without overhead flashing lights or even a turn signal, and when there were at least three other vehicles following close behind him. Further, she argues it is undisputed that the collisions were only seconds apart, but the video was used to convince the jury that there was a longer time between impacts, so as to place liability on Watts.[4] She asserts the court erred a second time by denying her a new trial as a result of this unfair prejudice.

The relevant incidents were the two collisions, and the video captured the events that occurred relative to the time of the two collisions and were re-recorded in real time. Although the video does not show the actual impact of the collisions, the trial court found the video was relevant evidence because it provided information and evidence as to the position of the vehicles, the timing of the two collisions at

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[3] Cagle and Trooper Duncan testified the original surveillance footage did not have any sound.

[4] Chastain agreed to redact all but a few of the objectionable portions of Deputy Holmes' video deposition, so Holmes' contradictory testimony that the second collision occurred 41 seconds after the first collision was not presented to the jury.

issue, the roadway conditions, and whether the motorists had their lights on. Our standard of review of the trial court's admission of evidence is limited to determining whether there was an abuse of discretion. *Lee*, 373 S.C. at 658, 647 S.E.2d at 199. We find the evidence supports the trial court's conclusion that the video was relevant evidence because it provided information as to the position of the vehicles, the timing of the collisions at issue, the roadway conditions, and whether the motorists had their lights on. Thus, there was no abuse of discretion. *See BB&T*, 369 S.C. at 551, 633 S.E.2d at 503 ("An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support.").

II. Closing Argument

Watts argues she is entitled to a new trial because defense counsel's closing argument unfairly prejudiced the outcome. We disagree.

"It has long been settled that closing arguments and objections thereto are left largely to the sound discretion of the trial judge 'who is on the scene and in much better position than an appellate court to judge as to what is improper argument under the circumstances.'" *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 599, 344 S.E.2d 157, 164 (Ct. App. 1986) (quoting *Lesley v. Am. Sec. Ins. Co.*, 261 S.C. 178, 185, 199 S.E.2d 82, 86 (1973)). "[C]onsiderable latitude is allowed counsel in drawing inferences and deductions from the evidence and in arguing the same to the jury." *Lesley*, 261 S.C. at 185, 199 S.E.2d at 85. "When [an] objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks." *McElveen v. Ferre*, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989).

Prior to closing argument, Watts sought a ruling to prevent defense counsel from commenting on the video. The court stated:

> Whatever the video shows, you can certainly argue that as they can, but if the video does not show something, then you certainly cannot – because it almost would be testifying, and certainly you cannot do that. . . . So I'll allow you to argue what is on the video, but if it's not on the video, then you can't add to it.

Watts asserts that defense counsel suggested in closing argument that the flashes of light in the video were the parties' vehicles as the collisions occurred.

> [DEFENSE COUNSEL]: Now, Barton Holmes and Ms. King all say that Barton Holmes did a U-turn. And if he did a U-turn, you could maybe see or expect where his lights would go. So Barton Holmes, according – if he had his lights on would be traveling in Lane Number 1 and make a turn that would have taken him back in the direction or faced his vehicle back in the direction of Laurens. I invite you to look at this video on Channel 5 and pay attention to what is happening before. You see lights, I'm going to suggest, moving in each direction on 76. Lights moving. At some point in time, and I'm going to suggest to you it might be right around 58:07 that the video might show you some evidence that would indicate that there [were] lights that panned around in this direction and made possibly a U-turn. But you decide that.
> [PLAINTIFF'S COUNSEL]: Your Honor, we object to this testimony . . . about the video.
> THE COURT: He can argue the video so long as he does not add anything to what the video may depict.

Watts also asserts defense counsel implied the jurors had been "trained" to be "detectives" in the case and asked the jurors to try to see things that are not on the video.

> [DEFENSE COUNSEL]: I'm going to suggest to you – and I'm not asking you to review this thing bunches of times. You review it whenever you want. But there are images in there that I think are enlightening that will support and prove important facts in this case, and they will prove, I submit to you, that there were lights on Ms. King's vehicle, Barton Holmes had lights on, and that there was a significant – and you go with your calculations about the time delay between what this video

> shows as to what appears to be the collision involving Barton Holmes and Ms. King and then the later collision involving Ms. Watts. But I'm trying to give you kind of the heads-up, the narrative, invite you to look at it again with your trained eyes, 24 eyes. You may see fine things much different than me. I invite you to do that. But I offer this to you as evidence that I submit would indicate that there were lights on out there, there was a significant time delay between these two impacts, that other vehicles move through the area without any difficulty, and that [Ms.] Watts' vehicle sometime, multiple seconds later, you figure out when that is, she collides with the King vehicle. . . .
> [PLAINTIFF'S COUNSEL]: Your Honor, we had specific directions about comments.
> THE COURT: Again, he cannot add anything that is not depicted on the video.

Watts asserts defense counsel's argument improperly suggested to the jurors that they were "detectives" and the jury's duty was to uncover evidence that was not on the video.

Watts argues the defense offered its interpretation of the video, including things that were not depicted on the video, which was contrary to the court's directives and prejudicial to her. She also argues defense counsel's closing argument was improper because it compared the jurors to radiologists and detectives, which appealed to the jurors' emotions, personal beliefs, intuitions, passion, biases and prejudices. She also asserts no expert testimony was offered in this case to interpret the video, no witness identified any vehicle on the video, and no other evidence was offered from which the jury could make an inference that any of the vehicles involved in the collisions were depicted on the video. Also, Watts asserts the court's rulings on her objections compounded the prejudice to her because it signaled to the jury that the court agreed with defense counsel's implications that if they looked well enough they would see on the video that Watts caused the wreck, despite Deputy Holmes' unsafe U-turn. Further, she maintains the court's rulings on defense counsel's improper comments were not cured by the court's general instructions to the jury, because "immediate curative instructions" were necessary.

The trial court found there was no prejudice in defense counsel's closing argument and any remarks by counsel did not deprive Watts of a fair trial. It is within the sound discretion of the trial court to determine what is an improper argument under the circumstances. *Howle*, 288 S.C. at 599, 344 S.E.2d at 164. Our courts have held considerable latitude is allowed to counsel in arguing inferences and deductions from the evidence to the jury. *Lesley*, 261 S.C. at 185, 199 S.E.2d at 85. When Watts objected to the defense counsel's remarks she deemed improper, the court ruled on the objection and instructed counsel to desist from improper remarks. *See McElveen*, 299 S.C. at 381, 385 S.E.2d at 41 ("When objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks."). Thus, we do not find the trial court abused its discretion by denying her motion for a new trial or JNOV based on defense counsel's closing argument.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.[5]

WILLIAMS, C.J., and LOCKEMY, A.J., concur.

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