The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF GREGORY ALAN NEWELL, PETITIONER

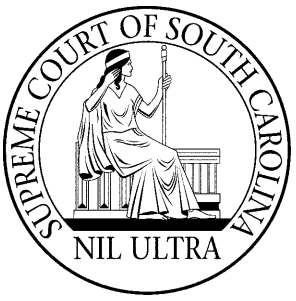
Petitioner was definitely suspended from the practice of law for nine (9) months. *In the Matter of Gregory Alan Newell*, 349 S.C. 40, 562 S.E.2d 308 (2002). Petitioner has now filed a petition seeking to be reinstated.

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

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

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

Columbia, South Carolina
April 12, 2018



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 18, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lori Dandridge Stoney, Respondent,

v.

Richard S.W. Stoney Sr., Petitioner,

and Theodore D. Stoney Jr., Petitioner.

Appellate Case No. 2016-002076

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
The Honorable Peter R. Nuessle, Family Court Judge

Opinion No. 27758
Submitted November 29, 2017 – Filed December 20, 2017
Vacated, Substituted, and Refiled April 18, 2018

REVERSED AND REMANDED

Charles H. Williams, of Williams & Williams, of Orangeburg, Donald Bruce Clark, of Charleston, and James B. Richardson Jr., of Columbia, for Petitioners.

J. Michael Taylor, of Taylor/Potterfield, of Columbia, and Peter George Currence, of McDougall, Self, Currence & McLeod, of Columbia, for Respondent.

PER CURIAM: Petitioners each seek a writ of certiorari to review the decision of the court of appeals in *Stoney v. Stoney*, 417 S.C. 345, 790 S.E.2d 31 (Ct. App. 2016). In *Stoney*, the court of appeals directed the family court judge to conduct a new trial after holding the judge abused his discretion or otherwise erred in regards to multiple issues. Finding error in the standard of review applied by the court of appeals on issues III to XI, we grant the petitions, dispense with further briefing, reverse the court of appeals, and remand the case to the court of appeals to decide the appeal applying the appropriate standard of de novo review articulated in *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011).[1]

In *Lewis*, this Court extensively analyzed the applicable standard of review in family court matters and reaffirmed that it is de novo.[2] We noted that, while the term "abuse of discretion" has often been used in this context, it is a "misnomer" in light of the fact that de novo review is prescribed by article V, § 5 of the South Carolina Constitution. *See* S.C. Const. art. V, § 5 (stating in equity cases, the Supreme Court

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[1] We vacate our previous opinion in this case, and substitute this opinion. *See Stoney v. Stoney*, 421 S.C. 528, 809 S.E.2d 59 (2017).

[2] *Lewis* did not address the standard for reviewing a family court's evidentiary or procedural rulings, which we review using an abuse of discretion standard. *See, e.g.*, *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (stating on appeal from the family court "the admission or exclusion of evidence is within the trial judge's discretion" (citing *Fields v. Reg'l Med. Cent. Orangeburg*, 363 S.C. 19, 25-26, 609 S.E.2d 506, 509 (2005))); *Gov't Employee's Ins. Co., Ex parte*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007) (stating on appeal from the family court, "The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court."); *Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013) (stating on appeal from the family court, "The decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP is within the sound discretion of the trial judge.").

"shall review the findings of fact as well as the law, except in cases where the facts are settled by a jury and the verdict not set aside").

We observed that de novo review allows an appellate court to make its own findings of fact; however, this standard does not abrogate two long-standing principles still recognized by our courts during the de novo review process: (1) a trial judge is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the finding of the trial judge.

In the current appeal, the court of appeals cited *Lewis*, but it veered from a complete application of this benchmark. The court of appeals repeatedly referenced an "abuse of discretion" standard throughout its findings, which culminated in a reversal and remand for a new trial on numerous issues. As recognized by the parties, once the court of appeals found error in one aspect of the family court judge's ruling, it impacted other components, creating a "domino effect."

Although appellate courts have been citing *Lewis* for the appropriate standard of review in family court matters since its publication in 2011, there appears to be lingering confusion over the actual implementation of this standard. This is evidenced by the fact that in some decisions the courts have cited *Lewis* while also simultaneously referencing cases citing an abuse of discretion standard.[3] In addition, some attorneys continue to cite an abuse of discretion standard in their briefs to this Court. This trend is troubling in light of the fact that application of the correct standard of review is often crucial in an appeal. *See Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002) (highlighting the critical importance of a court's standard for review). For these reasons, we reiterate that the proper standard of review in family court matters is de novo, rather than an

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[3] *See, e.g., McKinney v. Pedery*, 413 S.C. 475, 776 S.E.2d 566 (2015); *Crossland v. Crossland*, 408 S.C. 443, 759 S.E.2d 419 (2014); *Wilburn v. Wilburn*, 403 S.C. 372, 743 S.E.2d 734 (2013); *Woods v. Woods*, 418 S.C. 100, 790 S.E.2d 906 (Ct. App. 2016); *Ricigliano v. Ricigliano*, 413 S.C. 319, 775 S.E.2d 701 (Ct. App. 2015); *Srivastava v. Srivastava*, 411 S.C. 481, 769 S.E.2d 442 (Ct. App. 2015); *Hawkins v. Hawkins*, 403 S.C. 228, 742 S.E.2d 677 (Ct. App. 2013); *Lewis v. Lewis*, 400 S.C. 354, 734 S.E.2d 322 (Ct. App. 2012); *Sheila R. v. David R.*, 396 S.C. 41, 719 S.E.2d 682 (Ct. App. 2011); *Moeller v. Moeller*, 394 S.C. 365, 714 S.E.2d 898 (Ct. App. 2011); *Reed v. Pieper*, 393 S.C. 424, 713 S.E.2d 309 (Ct. App. 2011).

abuse of discretion, and encourage our courts to avoid conflating these terms in appeals from the family court.

Accordingly, we reverse the decision of the court of appeals and remand this case for consideration of the issues on appeal applying the de novo standard.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant,

and

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control, and Kiawah Development Partners, II, of whom South Carolina Department of Health and Environmental Control is, Appellant, and Kiawah Development Partners, II, is Respondent.

Appellate Case No. 2016-000707

Appeal From The Administrative Law Court
The Honorable Ralph King Anderson, III, Administrative Law Judge

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Opinion No. 27790
Heard September 27, 2017 – Filed April 18, 2018

AFFIRMED AS MODIFIED

Amy Elizabeth Armstrong, of South Carolina Environmental Law Project, of Pawleys Island and Bradley David Churdar, of South Carolina Department of Health and Environmental Control, of Charleston, for Appellants.

G. Trenholm Walker and Thomas P. Gressette, Jr., both of Walker Gressette Freeman & Linton, LLC, of Charleston, for Respondent.

JUSTICE HEARN: This case comes to the Court a second time following an order issued by the Administrative Law Court (ALC) ordering the installation of an erosion control structure along the shoreline of the Kiawah River on Captain Sam's Spit. Because we find a portion of the structure authorized by the ALC is not supported by substantial evidence, we affirm the order as modified, as more fully explained herein.

FACTUAL BACKGROUND

The complete history of litigation surrounding the installation of erosion control structures on Captain Sam's Spit can be found in our earlier opinion, *Kiawah Develop Partners, II v. South Carolina Department of Health and Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014). The litigation arose after Respondent Kiawah Development Partners, II (KDP) applied for a permit to build an erosion control structure consisting of a bulkhead and revetment along the Kiawah River on Captain Sam's Spit in order to facilitate residential development of the upland property. The South Carolina Department of Health and Environmental Control (DHEC) denied the majority of the permit but granted a 270-foot portion to protect public access to Beachwalker Park. Thereafter, the ALC held a contested case hearing where KDP challenged DHEC's denial of the majority of the requested permit, and the South Carolina Coastal Conservation League (the League) contested the issuance of the permit for the 270-foot structure and sought to uphold the denial of the remainder of the permit. After the ALC ruled in favor of KDP and issued an order authorizing the installation of a bulkhead and revetment running 2,783 feet along the shoreline, both DHEC and the League appealed to this Court. We reversed and remanded the ALC's order, finding several errors of law in its application of the

public trust and various provisions of the Coastal Zone Management Act[1] (CZMA). *See id.* at 44, 766 S.E.2d at 723.

On remand, the ALC reconsidered the evidence presented at the hearing and authorized the installation of a 270-foot tandem bulkhead and revetment along the shoreline adjacent to the parking lot of Beachwalker Park, as well as a vertical bulkhead only that spanned an additional 2,513 feet along the shoreline of Captain Sam's Spit. Now on appeal, DHEC argues the ALC erred in approving the structure aside from the 270 feet protecting access to Beachwalker Park, while the League contests the entirety of the erosion control structure.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review in appeals from the ALC. S.C. Code Ann. § 1-23-610(B) (Supp. 2017). The Act constrains an appellate court from reweighing the evidence presented to the ALC, but the appellate court may reverse or modify a decision if the ALC's findings or conclusions are:

> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

[1] Title 48, Chapter 39 of the South Carolina Code (2008 & Supp. 2017).

In determining whether the ALC's decision is supported by substantial evidence, the Court need only find evidence from which reasonable minds could reach the same conclusion as the ALC. *Hill v. S.C. Dept. of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

DISCUSSION

I. Substantial Evidence

DHEC and the League both contend the ALC erred by approving the construction of 2,513 feet of vertical bulkhead, without a revetment, because this structure is not supported by substantial evidence. We agree.

The structure KDP identified in its application for a critical area permit consisted of two components: a vertical bulkhead and a sloping revetment. Throughout the original hearing and on remand, the record indicates KDP maintained the vertical bulkhead and sloping revetment constituted one unified structure. The testimony presented to the ALC illustrated each component served a complementary function: the vertical bulkhead would prevent erosion of the upland and the revetment would prevent erosion of the sandy shoreline along the toe of the bulkhead.[2] Taken alone, neither structure would accomplish the results desired by KDP. In fact, KDP's project engineer, Mitchell Bohannon, testified a vertical bulkhead alone, without anything to protect the toe against reflective wave energy, would cause "even more exacerbated erosion." With that understanding, KDP's engineers designed the structure as a tandem bulkhead and revetment. Additionally, Dr. Rob Young, the League's expert in coastal geology, explained how the sand from the upland dunes acted like a conveyor belt to feed the shoreline along the Kiawah River. Young testified that the vertical bulkhead would choke off this supply of

[2] Additionally, this testimony is consistent with the definitions of "bulkhead" and "revetment" contained in Title 48, Chapter 39. A "bulkhead" is defined as "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(1)(b) (2008). A "revetment" is defined as "a sloping structure built along an escarpment or in front of a bulkhead to protect the shoreline or bulkhead from erosion." S.C. Code Ann. § 48-39-270(1)(c) (2008).

sand, effectively shutting down the conveyor belt that replenishes the eroded sand and eliminating the beach as it currently exists.

In approving a permit for the vertical bulkhead only, the ALC impermissibly authorized an entirely distinct structure from that which KDP applied for—one that lacked any evidentiary support. The parties did not present *any* testimony that could serve as a basis for the ALC's authorization of the bulkhead only. To the contrary, all of the evidence in the record indicated the revetment was critical to protect the toe of the bulkhead from increased erosion. Without the revetment, the expert testimony established that a bulkhead alone would exacerbate erosion in the long run, ultimately making the bulkhead itself susceptible to collapse. Thus, the ALC's authorization of the bulkhead only was contrary to the reliable, probative evidence contained in the record.

The error of this decision is twofold: (1) the testimony supports the conclusion that this structure would fail in the long run without a revetment to protect the shoreline from erosion, and (2) the bulkhead alone would be more injurious to the public's use of the critical area because the existing shoreline would ultimately be lost to erosion, without any source of upland sand to replenish it. The result would therefore jeopardize upland property owners and have detrimental effects on the public's use of the critical area. With the loss of shoreline, the public could no longer use the area for the recreational purposes many citizens currently enjoy.

For the reasons we enumerated in our previous opinion, we decline to amend the ALC's order by authorizing a revetment to complement the vertical bulkhead because of the revetment's impact on the public trust. *See Kiawah*, 411 S.C. at 30, 766 S.E.2d at 716 (explaining "that only the developer, not the *public*, would benefit from the construction of this enormous bulkhead and revetment") (emphasis in original). Instead, we modify the ALC's order by approving only the 270-foot bulkhead and revetment along the Beachwalker Park access area because that structure is supported by substantial evidence, and protecting the parking lot is manifestly important to ensuring the public can continue to enjoy access to its public tidelands.

II. Additional Claims

If DHEC and the League presented unified views on the entirety of the ALC's order, our analysis of the substantial evidence issue would dispose of the need to address the remaining issues raised by the parties. However, we recognize the interests of the parties diverge with regard to the 270-foot structure along the Beachwalker Park access area. While DHEC agrees with the ALC's authorization of this section of the structure, the League contests this decision. Based on our review of the record and the applicable law, we dispose of the remainder of the League's challenges summarily. We find no error in the ALC's decision to authorize a permit for the erosion control structure in that area. The evidence of public benefit from protecting the parking lot is abundant, and the structure is essential to ensuring the public may continue to enjoy access to its public tidelands on the Spit. On the other hand, the installation of the structure in this area will have a *de minimis* impact on the public trust lands because the record indicates that area of the riverbank is not of a high recreational or ecological value. Accordingly, the ALC did not err in ruling that the 270-foot bulkhead and revetment provide the maximum benefit to the people. *See* S.C. Code Ann. § 48-39-30(D) (2008) ("Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits.").

The League also argues the ALC erred in its interpretation of Regulation 30-11(C)(1) (2011).[3] We find no error in the ALC's interpretation of the regulation as applied to the 270-foot structure. Ensuring continued access to Beachwalker Park by protecting the parking area is in line with the current character of the Spit as a valued recreational destination. Failing to protect this public access could diminish the public's interest in keeping the critical area on the Spit in its current pristine condition. Moreover, throughout the litigation, DHEC has agreed with the ALC's decision to grant a permit for the 270 feet adjacent to the parking lot. Accordingly, the ALC's order in this regard is consistent with DHEC's interpretation of the regulation.

[3] Regulation 30-11(C)(1) states that in its analysis under Section 48-39-150 of the South Carolina Code (2008 & Supp. 2017), DHEC must consider "The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area."

Lastly, the League argues the ALC erred in its feasible alternatives analysis pursuant to Regulation 30-12(C) (2011). Under our standard of review, we find no reversible error in the ALC's analysis with regard to the 270-foot section because there is evidence in the record to suggest building the structure in that limited location is critical to protecting the Beachwalker Park parking lot.

CONCLUSION

In reviewing the evidence presented by the parties, including lay and expert witness testimony, we affirm the ALC's decision to authorize the 270-foot bulkhead and revetment along the Beachwalker Park parking lot. However, we find there is no evidence in the record to support the authorization of the 2,513-foot bulkhead without a revetment. Therefore, we modify the ALC's order and delete the portion authorizing a permit for the bulkhead only.

AFFIRMED AS MODIFIED.

BEATTY, C.J., and JAMES, J., concur. KITTREDGE, J., concurring in result only. FEW, J., concurring in a separate opinion.

JUSTICE FEW: I concur in the majority's analysis and in the result reached through that analysis. I write separately because I believe there is one key element of that analysis that warrants further explanation. The majority states "the ALC erred by approving the construction of 2,513 feet of vertical bulkhead, without a revetment, because this structure is not supported by substantial evidence." However, it is not the structure that is unsupported by the evidence. The structure, if it is ever built, will be supported by sand. In the legal analysis, it is the ALC's finding—2,513 feet of bulkhead without a revetment satisfies the public benefit requirement of subsection 48-39-30(D)—that is not supported by substantial evidence.

Subsection 48-39-30(D) provides, "Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, ..." S.C. Code Ann. § 48-39-30(D) (2008); *see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 41, 766 S.E.2d 707, 722 (2014) (stating "any use of tidelands must be to the public benefit, which is embodied in section 48-39-30(D)'s 'maximum benefit' to the public requirement."). The ALC approved the installation of a 270-foot tandem bulkhead and revetment along the shoreline adjacent to Beachwalker Park, and an additional 2513-foot bulkhead—with no revetment—along the shoreline of Captain Sam's Spit. In doing so, the ALC necessarily found this combination of structures would provide "the maximum benefit to the people" under subsection 48-39-30(D).

The ALC's finding that the 2513-foot bulkhead without the revetment meets the public benefit requirement set forth in section 48-39-30(D) is contrary to the reliable, probative evidence contained in the record. In fact, as the majority correctly points out, "all of the evidence in the record indicated the revetment was critical to protect the toe of the bulkhead from increased erosion. Without the revetment, the expert testimony established that a bulkhead alone would exacerbate erosion in the long run, ultimately making the bulkhead itself susceptible to collapse." There is no evidence to support the ALC's finding that a bulkhead alone—without a revetment—satisfies the public benefit requirement of subsection 48-39-30(D).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Walter Tucker, Appellant.

Appellate Case No. 2015-002339

Appeal From Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5552
Heard February 5, 2018 – Filed April 18, 2018

AFFIRMED

Robert Eccles Ferguson, Jr., of Ferguson & Ferguson, LLC, of Beaufort, and Derek M. Wright, of Atlanta, Georgia, for Appellant.

Attorney General Alan Wilson, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

HILL, J.: Convicted by a jury of the murder of Quantez Greer and the attempted armed robbery of Jessica Power, Walter Tucker appeals, claiming the trial judge

erred by (1) denying his motion for directed verdict; (2) admitting prior bad act evidence against him in violation of Rules 403 and 404, SCRE; and (3) denying his motion for a new trial and refusing to hold a full evidentiary hearing on his claim of juror misconduct. We affirm.

I.

Jessica Power knew Walter Tucker from their shared interest in marijuana. When Power's friend Quantez Greer wanted to buy some, she steered him to Tucker. On September 6, 2012, Power and Greer drove to meet Tucker in Beaufort at a trailer owned by Antonio Brewer to close the deal. After Power hid $2,500.00 of Greer's cash in her purse, she and Greer walked to the front door of the trailer. Tucker let Power in, but quickly shut the door and locked it, leaving Greer outside. Once inside, Power noticed another person, later identified as Travis Polite, reclining on a couch. Tucker pointed a handgun at Power and demanded she hand over the money. When she refused, someone pushed her to the floor. Tucker fumbled with Power's purse but could not find any money in it, so he threw it back to her and again demanded she produce the money. Power testified she retrieved the money and gave it to Tucker. At this point, the drug deal went from bad to worse. Polite asked Tucker for his gun, which Tucker passed to him as Polite bounded out the front door. Power testified she then heard a gunshot outside, and Tucker, who had drawn another gun, ran out the front. Power next heard multiple gunshots coming from the yard, and she retreated further into the trailer's interior. A third man, presumably Antonio Brewer, burst from a bedroom and fled out the back door. Power then scampered out the back as well, seeking refuge under her ex-boyfriend's nearby trailer. Power testified Tucker called her on her cell phone while she was hiding and told her if she said anything about the events "he would hurt my family and kill me."

Responding to 911 calls reporting the gunshots, police arrived on scene to find Greer lying on the ground dead from what was later determined to be a gunshot wound to the chest. After further investigating the scene and interviewing witnesses, including Power and Brewer, police obtained an arrest warrant for Tucker, who was later apprehended hiding under a sink at his brother's home in Asheville, North Carolina.

Keamber Bigelow met Tucker in Savannah in the fall of 2014 while he was awaiting trial. She testified Tucker told her he did not have anything to do with Greer's murder, but "he wasn't sure. He said he was running and that he was shooting and his adrenaline was high." Tucker told Bigelow that Power would not testify because he had threatened her, and that he needed someone named Cedrick a.k.a. Savage to

kill Polite. According to Bigelow, Cedrick drove a black Camry with a pistol hidden under the gearshift. Bigelow had, in turn, given this information to law enforcement, and an investigator located a Cedrick A. McDuffy in custody in Hampton County. His booking record showed he had "Savage" tattooed on his chest. A search of Cedrick's impounded black Camry revealed a pistol hidden in the gearshift. An incident report from a recent traffic stop of Cedrick listed Tucker and Bigelow among his passengers in the Camry.

The State tried Polite in January 2015, and a jury convicted him of Greer's murder. The State claimed Polite fired the fatal shot, but prosecuted Tucker for murder under a theory of accomplice liability, kidnapping, and armed robbery. Brewer, who had testified in Polite's trial, was shot and killed a few weeks before Tucker's April 2015 trial.

The jury convicted Tucker of murder and attempted armed robbery, but acquitted him of kidnapping. After his conviction, Tucker moved for a new trial, asserting a juror (Juror A) had not disclosed her friendship with Brewer and Quornisha Jones, a listed but uncalled State's witness. After hearing arguments from counsel and reviewing affidavits, the trial judge denied Tucker's motion for new trial and his request for further hearing on the jury misconduct issue.

II.

Tucker first claims the trial judge should have directed a verdict in his favor. We must view the evidence in the light most favorable to the State, and we see plenty to support the elements of murder and attempted armed robbery. *See State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016). Power's recounting of Tucker seizing her purse at gunpoint was sufficient proof of his specific intent to commit armed robbery. Her testimony of hearing gunshots after Tucker ran outside brandishing a pistol, together with Bigelow's testimony and evidence of Greer's cause of death, were enough to carry the murder charge to the jury on the theory of accomplice liability, as they showed he was an active participant not a mere bystander. *See State v. Harry*, 420 S.C. 290, 300, 803 S.E.2d 272, 277 (2017). Cellphone tower records, DNA evidence from a drink bottle found at Brewer's trailer, and a neighbor's testimony about seeing a dark mid-sized sedan (similar to one Tucker had previously been seen driving) leaving the area corroborated Tucker's presence at the scene when the murder was committed. Because this was sufficient evidence for a reasonable jury to find Tucker guilty beyond a reasonable doubt, we

affirm the denial of Tucker's directed verdict motion. *See Bennett*, 415 S.C. at 236–37, 781 S.E.2d at 354.

III.

We next take up Tucker's contention that the trial judge erred in allowing Bigelow to testify about Tucker's plan to engage Cedrick to kill Polite and his threatening of Power. Tucker claims this was improper character evidence forbidden by Rule 404(b), SCRE, and not reliable enough to meet the clear and convincing standard the rule sets. We must affirm a trial judge's ruling on the admission of prior bad act evidence if any evidence supports it. *State v. Perry*, 420 S.C. 643, 655, 803 S.E.2d 899, 905 (Ct. App. 2017). Evidence of witness intimidation may be admitted to show "consciousness of guilt" without running afoul of Rule 404(b)'s prohibition against propensity evidence. *State v. Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009). Proof that Tucker made the threat to kill Power satisfies Rule 404(b)'s reliability test. *See id*. at 72–73, 678 S.E.2d at 408. Still, Tucker believes Bigelow's reliability evaporated during cross-examination, or at least eroded to a level below clear and convincing. How the jury weighs intimidation evidence is irrelevant to its threshold admissibility. Equally immaterial is whether Polite knew about the threat. The relevance of a defendant's threatening of a witness rests on proof it was said, not that it was heard, for the probative force springs from the speaker's awareness of his guilt.

The trial judge's careful consideration of this critical issue was exemplary. Faithful to *Edwards*, the trial judge properly admitted evidence of Tucker's witness intimidation and was well within its discretion in finding the probative value of the evidence was not substantially outweighed by any of the risks of undue prejudice recognized by Rule 403, SCRE. *See Perry*, 420 S.C. at 660, 803 S.E.2d at 908.

IV.

We last address whether the trial judge erred by denying Tucker's new trial motion and refusing to hold a full evidentiary hearing on his claim Juror A committed misconduct.

Our state and federal constitutions guarantee a criminal defendant the right to an impartial jury, and "*voir dire* can be an essential means of protecting this right." *Warger v. Shauers*, 135 S. Ct. 521, 528–29 (2014); U.S. Const. amends. VI, XIV; S.C. Const. art. I, § 14; *see also State v. Coaxum*, 410 S.C. 320, 327–28, 764 S.E.2d

242, 245 (2014). We review a ruling on a new trial motion based on a juror's alleged concealment during *voir dire* for abuse of discretion. *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 151, 760 S.E.2d 111, 114 (Ct. App. 2014). A new trial is warranted when: (1) the juror intentionally concealed information, and (2) the information withheld would have triggered a challenge for cause or been material to a party's choice to use a preemptory challenge. *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). "[I]ntentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *State v. Galbreath*, 359 S.C. 398, 404 n.2, 597 S.E.2d 845, 848 n.2 (Ct. App. 2004).

Classifying the concealment "is a fact intensive determination which must be made on a case by case basis." *Woods*, 345 S.C. at 588, 550 S.E.2d at 284. The classification carries consequences: a juror who intentionally conceals is presumptively biased; "[o]n the other hand, where the failure to disclose is innocent, no such inference may be drawn." *Id*. A party alleging innocent or unintentional nondisclosure "has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges." *Coaxum*, 410 S.C. at 329, 764 S.E.2d at 246.

During *voir dire*, the State read a list of the potential witnesses to the venire, including the names Antonio Brewer and Quornisha Jones. The trial judge then asked if any member of the venire had "ever had a close personal or social relationship with" any of the listed witnesses. No one responded affirmatively as to Brewer or Jones.

Tucker supported his new trial motion with Jones' affidavit, which stated she was a "co-worker and friends" with Juror A, and further alleged:

> About 1 week after [Juror A] served on the jury, [Juror A] saw me at work and stopped me. She ask[ed] me "what did you get yourself into girl." [Juror A] then [told] me that she had been on the jury. [Juror A] said that she believed that [Tucker] was responsible for Antonio Brewer being killed 2 weeks before trial. [Juror A] was friends with Antonio Brewer and his child's mother who

was also shot 2 weeks prior to trial.

Jones attached several social media screenshots to show she and Juror A followed each other and commented on each other's posts. The last screenshot depicted a direct message sent by Juror A to Jones several days after Tucker informed the State and the judge of his claim of juror misconduct. The direct message stated "Call me" and left a phone number.

At the hearing on Tucker's post-trial motions, Tucker asserted Jones' affidavit, combined with the screenshots, constituted a threshold showing Juror A had intentionally concealed her relationship with Jones and Brewer during *voir dire*, entitling him to a full evidentiary hearing. In response, the State introduced an affidavit from Juror A, which stated:

> I am neither friends with [Jones] nor [Brewer] . . . . I did not have any discussions about this case with [Jones] or [Brewer] . . . . I have not had any discussions where I blamed [Tucker] for the death of [Brewer].

The trial judge denied Tucker's request for a full evidentiary hearing and, in a written order, found "no credible evidence that [Juror A] concealed any information from the Court."

The unambiguous *voir dire* question asked about "a close personal or social relationship" with Jones. Ample evidence supports the trial judge's finding Juror A, who worked at a local hospital with Jones, did not conceal a close personal or social relationship with her. In her affidavit, Jones states she "would describe our relationship as co-workers and friends." The screenshots show Jones is just one of 347 people Juror A follows and one of 605 that follow her, hardly an intimate circle. When Juror A direct-messaged Jones asking her to call, Juror A left her phone number, implying Jones did not already have it. The only other communication the two had on social media occurred thirty-six weeks before: a brief, two-line exchange where Jones explained Juror A had not seen her lately because Jones was now working on a different floor. This explanation suggests a relationship confined to sporadic contact at work, and belies closeness. *See Galbreath*, 359 S.C. at 403–04, 597 S.E.2d at 847–48 (finding no intentional concealment of "close personal friendship or business relationship" by juror when affidavits demonstrated only that

juror knew members of victim/witness' family and juror's family members rented property from victim/witness' family). Even if we assumed the *voir dire* inquiry was ambiguous and could be reasonably understood as asking about *any* social relationship, however slight, with a listed witness, Tucker has not shown Juror A's failure to respond prejudiced him: he does not demonstrate how Juror A was potentially biased against him due to her tie to Jones, nor how the tie would have been material to his peremptory strike choices. *See Coaxum*, 410 S.C. at 329, 764 S.E.2d at 246 (party claiming unintentional concealment must prove prejudice by showing potential bias and materiality to strike decision); *Woods*, 345 S.C. at 588, 550 S.E.2d at 284 (unintentional concealment occurs when *voir dire* question is ambiguous).

Tucker points out another seated juror (Juror B) was excused by the trial judge before the trial began after she disclosed she worked with Jones and Jones had approached her at work, confiding she was "scared" to testify. We find Juror A and Juror B's positions categorically different, as Jones' interaction with Juror B occurred before the trial, was initiated by Jones, referred to the case and her role as a witness, and was characteristic of a close personal relationship. Both the State and Tucker agreed to Juror B's dismissal because she had gained independent knowledge about the case from Jones. Finally, Tucker's claim Juror A was biased to convict him as retribution for Brewer's demise depends on a belief in the truth of Jones' affidavit, which the trial judge deemed incredible. *See State v. Johnson*, 413 S.C. 458, 467–68, 776 S.E.2d 367, 371–72 (2015) (credibility determinations are findings of fact); *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (findings of fact will not be disturbed in criminal cases unless clearly erroneous).

Tucker insists the trial judge erred by denying him a further evidentiary hearing, asserting Jones' affidavit presented a colorable claim of intentional concealment requiring live testimony. We disagree. In *State v. Aldret*, the South Carolina Supreme Court set the procedure trial judges must follow when deciding juror misconduct claims arising after verdict. 333 S.C. 307, 315–16, 509 S.E.2d 811, 815 (1999); *see also State v. Covington*, 343 S.C. 157, 163–64, 539 S.E.2d 67, 70 (Ct. App. 2000) (adopting *Aldret* procedure in a case involving alleged intentional concealment during *voir dire*). As the party alleging misconduct, Tucker bore the burden of proving Juror A was biased or otherwise lacked ability to follow her oath. *Aldret*, 333 S.C. at 315–16, 509 S.E.2d at 815. The trial judge may consider affidavits and, if it finds them credible, should convene an evidentiary hearing. *Id.* We decline to adopt a more rigid approach as Tucker proposes, where the mere

allegation of misconduct mandates a full-blown adversarial hearing. Unless the trial judge finds the moving party's affidavits credible, our rules wisely forbid exposing jurors to open-ended inquiries into how they performed their duty. *See Tanner v. United States*, 483 U.S. 107, 120–21 (1987) ("Allegations of juror misconduct . . . raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." (citation omitted)).

Leaving credibility determinations in jury misconduct claims to trial judges means respecting their decision that they have enough evidence to weigh it at all, whether the witness' testimony is spoken or written. Assessing credibility often works best with live testimony, but a trial judge's senses still function when reviewing affidavits. One can judge credibility by appraising what and how people communicate, in person or on the page. The trial judge does not have to take the allegations as true and is free to gauge their reliability. A judge cannot, for example, be forced to 555concede the credibility of a witness' statement that the earth is flat; dressing nonsense up in an affidavit does not clothe it with eternal verity.

The trial judge had enough material before it to measure Jones' credibility. After all, Jones was a potential witness to the crimes because the State believed she had rented the getaway car. She was also the erstwhile girlfriend of Brandon Singleton, Tucker's co-defendant, who was awaiting trial on charges arising out of the robbery and murder. Jones did not give her affidavit until six months after Tucker's trial, although she claimed to have "disclosed this information previously to Brandon, but because we were arguing I was unwilling to come forward before."

We explain all of this to highlight the prime position of the trial judge to make credibility determinations, an advantage magnified when judging juror misconduct:

> [T]he reasons for refusing to interfere with the discretion of a circuit judge in matters involving the purity of the jury box and the integrity of verdicts are peculiarly strong. He is in the atmosphere of the trial, and has opportunity to estimate the character and intelligence of the jurors, as well as of the person charged with improper conversation or corrupt dealings with them . . . . These and perhaps other

> things afford the trial judge such superior means of coming to a just conclusion, that before disturbing his order on such a subject, an appellate court should require very clear evidence of abuse of discretion.

McGill Bros. v. Seaboard Air Line Ry., 75 S.C. 177, 180, 55 S.E. 216, 217 (1906). We grant "broad deference" to the trial judge's credibility conclusions in claims of jury misconduct. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). We see no error in the trial judge's finding Tucker failed to prove Juror A intentionally concealed a close relationship with Jones or harbored bias related to Jones or Brewer.

Tucker's convictions are

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bobby Randolph Sims, Appellant.

Appellate Case No. 2015-000721

Appeal From Chester County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5553
Heard November 8, 2017 – Filed April 18, 2018

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor Randy E. Newman, Jr., of Lancaster, for Respondent.

HILL, J.: Indicted for attempted murder, Bobby R. Sims claimed immunity from prosecution pursuant to the Protection of Persons and Property Act (Act), S.C. Code sections 16-11-410 to 450 (2015 and Supp. 2017). The trial court held an evidentiary hearing and denied Sims' immunity claim. Sims then pled guilty to the

lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). He now appeals, contending his assertion of immunity is a jurisdictional challenge a defendant may raise on appeal even after pleading guilty. Finding Sims' argument fits no exception to our steadfast rule against conditional guilty pleas, we affirm.

I.

Few principles of South Carolina criminal law are as ingrained as the notion that a knowing, voluntary, and intelligent guilty plea "constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." *State v. Rice*, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485 (2013). Conditional pleas are not only ignored, but condemned. *State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982) (conditional plea "is a practice not recognized in South Carolina and a practice which we expressly disapprove"). A trial court is obligated to reject a defendant's attempt to hedge his bets by offering a conditional plea, *State v. Inman*, 395 S.C. 539, 555, 720 S.E.2d 31, 40 (2011), and if it does not, the conditional plea will be vacated on appeal.

While a valid guilty plea waives "nonjurisdictional" defects and defenses, it is unclear what amounts to a jurisdictional defect to a criminal prosecution. Sims does not contest personal jurisdiction. Nor does he argue the court lacked subject matter jurisdiction over his ABHAN prosecution in the sense *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005), defines it: the very power of the court to hear and determine the class of cases of which he was convicted.

Just because a court has subject matter jurisdiction over the class of cases a defendant is convicted of does not end our inquiry into whether a jurisdictional defect sufficient to survive a guilty plea exists. The jurisdictional power of the court of general sessions to adjudicate criminal cases is not unlimited. It does not include, for instance, the power to convict someone of a statute no longer in effect, *In re Terrence M.*, 317 S.C. 212, 214, 452 S.E.2d 626, 627 (Ct. App. 1994), or of a nonexistent offense. *Whitner* v. *State*, 328 S.C. 1, 5, 492 S.E.2d 777, 779 (1997).

Sims ties the jurisdictional defect to the State's lack of power to prosecute him at all. According to Sims, because immunity bars prosecution, it necessarily bars the court's power of jurisdiction over him, and the legitimacy of that power cannot be waived or conferred by a guilty plea. He does not—and could not—deny that his guilty plea operated as an admission of the conduct alleged in the indictment.

Instead, Sims claims the jurisdictional defect is consistent with the facts established by his plea.

Sims is right that the Act is more than a defense to a criminal charge; a defendant who proves his use of deadly force was justified by the Act is immune from prosecution. S.C. Code Ann. §16-11-450(A); *State v. Duncan,* 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011)("[W]e find that, by using the words 'immune from criminal prosecution,' the legislature intended to create a true immunity, and not simply an affirmative defense. . . . Immunity under the Act is therefore a bar to prosecution . . . .").

A series of federal cases acknowledge that a defendant's right not to be "haled into court" implicates the court's jurisdictional power. These cases hold a defendant who pleads guilty to something he could not be properly convicted of does not give up his right to claim he could not have been prosecuted in the first place. *Blackledge v. Perry*, 417 U.S. 21, 30 (1974) (claim attacking "the very power of the State to bring the defendant into court to answer the charge brought against him" survives guilty plea); *Menna v. New York*, 423 U.S. 61, 62 (1975) (per curiam) (where double jeopardy would bar State from "haling" defendant into court on charge, conviction must be set aside "even if the conviction was entered pursuant to a counseled plea of guilty"). Later, in *United States v. Broce*, 488 U.S. 563 (1989), the Court limited *Menna* to cases where the double jeopardy violation appears on the face of the indictment and record. We have followed *Broce*'s qualification. *State v. Thomason*, 341 S.C. 524, 528–29, 543 S.E.2d 708, 710–11 (Ct. App. 2000) (double jeopardy claim not evident from factual allegations of indictment and record waived by guilty plea).

Most recently, the Supreme Court has held a federal criminal defendant who entered an unconditional plea of guilty does not waive his right to challenge the constitutionality of the statute of conviction on direct appeal. *Class v. United States*, 138 S.Ct. 798 (2018).

As well recognized as these cases are, they lack a core guiding principle capable of reliable application. The Second Circuit has crafted a helpful synthesis, which states a federal criminal defendant who unconditionally pleads guilty may still challenge his conviction on any ground "that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect." *United States v. Curcio*, 712 F.2d 1532, 1539 (2d Cir. 1983) (Friendly, J.) (quoting Westen, *Away from Waiver: A Rationale*

for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214, 1226 (1977)). "In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be 'cured'." *Id*.

Although in South Carolina a defendant's attempt to reserve a constitutional attack on the statute of conviction renders the plea conditional and invalid, *see, e.g.*, *State v. Peppers*, 346 S.C. 502, 504–505, 552 S.E.2d 288, 289 (2001) (distinguishing *Blackledge)*; *In re Johnny Lee W.*, 371 S.C. 217, 220, 638 S.E.2d 682, 684 (2006), we find the *Curcio* formulation useful for determining whether a jurisdictional defect exists. Testing Sims' immunity claim against this standard turns up none. The defect Sims sees is the bar immunity raises to prosecution. But the right to immunity does not spontaneously appear; it is a statutory right a defendant must prove he is entitled to. So viewed, there is nothing defective in the State's prosecution of or the court's jurisdiction over a defendant asserting immunity until immunity is established. At that point, the defect incurably arises, and the court's jurisdiction departs.

We hold the viability of Sims' immunity claim ended with his plea, and under the circumstances here, his guilty plea is "a lid on the box, whatever is in it, not a platform from which to explore further possibilities." *United States v. Bluso*, 519 F.2d 473, 474 (4th Cir. 1975). Sims' statutory immunity claim warrants no exception to the rule against conditional pleas and the key role it plays in ensuring the finality of judgments. *See State v. Tucker*, 376 S.C. 412, 418, 656 S.E.2d 403, 406–407 (Ct. App. 2008) (defendant's statutory right to dismissal for violation of the Interstate Agreement on Detainers is nonjurisdictional and therefore waived by a guilty plea).

AFFIRMED.

LOCKEMY, C.J., AND HUFF, J., concur.