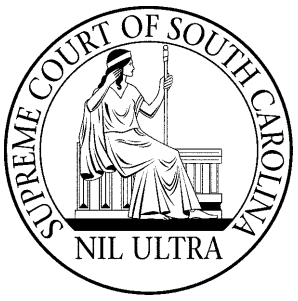

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
August 7, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anderson County, Petitioner-Respondent,

v.

Joey Preston and the South Carolina Retirement System, Defendants,

Of whom Joey Preston is the Respondent-Petitioner and the South Carolina Retirement System is the Respondent.

Appellate Case No. 2017-001898

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
Roger L. Couch, Circuit Court Judge

Opinion No. 27912
Heard February 20, 2019 – Filed August 7, 2019

VACATED AND REMANDED

James Theodore Gentry and Wade S. Kolb, III, both of Greenville, and Alice W. Parham Casey, of Columbia, all of Wyche Law Firm, for Petitioner-Respondent.

Candy M. Kern-Fuller, of Upstate Law Group, LLC, of Easley, and Lane W. Davis, of Nelson Mullins Riley &

Scarborough, LLP, of Greenville, both for Respondent-Petitioner.

Justin R. Werner, of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: In November 2008, the Anderson County Council (2008 Council) approved a $1.1 million Severance Agreement for county administrator Joey Preston (Preston). In January 2009, a new county council (2009 Council) was sworn in, and filed the present action in November 2009 seeking to invalidate the Severance Agreement. The circuit court ruled that, despite tainted votes, the Severance Agreement was valid and also held: (1) public policy rendered neither the Severance Agreement nor the vote adopting it void; (2) Preston did not breach a fiduciary duty because he owed no duty to disclose Council members' personal conflicts of interest; (3) the County failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation; (4) the 2008 Council's approval of the Severance Agreement was neither unreasonable or capricious nor a product of fraud and abuse of power; (5) the County's constructive trust claim no longer remained viable; (6) rescission was unavailable as a remedy; (7) the County had unclean hands; (8) adequate remedies at law barred the County from invoking the court's equitable jurisdiction; (9) the County breached the covenant not to sue in the Severance Agreement by bringing this lawsuit; and (10) the issue concerning the award of attorney's fees should be held in abeyance pending the final disposition and filing of a petition.

A panel of the Court of Appeals, which included then Chief Judge Few, heard oral argument in this case in June 2015. In February 2016, Chief Judge Few was elected as a Justice of this Court. Thereafter, on August 16, 2017, the Court of Appeals affirmed in part and reversed in part with a notation indicating Associate Justice Few as "not participating."

This Court granted the parties' cross-petitions for writs of certiorari to review the Court of Appeals' published decision, wherein the Court of Appeals held:

> We affirm the circuit court's finding that Preston owed no fiduciary duty to inform the 2008 Council of improper votes and his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation. The circuit court also properly declined the County's invitation to apply

> the single tainted vote rule . . . . We hold the court erred, however, in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum, and accordingly, we reverse. Although we agree with the circuit court that rescission is not an available remedy because the parties cannot be returned to their status quo ante, we reverse the court's finding of unclean hands. We further reverse the court's finding that the County could not invoke its equitable powers because an adequate remedy at law existed. Lastly, we reverse the court's holding that the County breached the terms of the Severance Agreement by bringing the instant action.

Anderson Cty. v. Preston, 420 S.C. 546, 583, 804 S.E.2d 282, 301 (Ct. App. 2017).

For the reasons explained below, we now vacate the decision of the Court of Appeals; find the Severance Agreement invalid due to the County's lack of a quorum; and remand to the circuit court to determine the exact amount that Preston must refund the County.

I. Factual and Procedural History[1]

Prior to the approval of the Severance Agreement, the political environment in Anderson County involved lawsuits between sitting council members and Preston, both personally and as the County Administrator.

The 2008 Council consisted of Chairman Michael Thompson (Thompson) and Council members Larry Greer (Greer), Ron Wilson, Gracie Floyd (Floyd), Robert Waldrep (Waldrep), Cindy Wilson, and Bill McAbee (McAbee).

In June 2008, primary challengers ousted three incumbent members of the 2008 Council: Tommy Dunn defeated Thompson, Tom Allen defeated McAbee, and Eddie Moore defeated Greer. Some of the primary victors, as well as Waldrep and Cindy Wilson, ran on platforms calling for examination into and possible reform of the financial and governance practices of the Preston administration.

From June to December 2008, Waldrep and Cindy Wilson held a series of meetings with Moore, Dunn, and Allen at Waldrep's office. During these meetings,

[1] Unless otherwise noted, the facts are taken from the Court of Appeals' opinion.

the participants laid out an agenda for the 2009 Council that included firing the law firm for the County and hiring a new one; hiring a financial investigator or auditor; designating Moore as chairman; drafting resolutions for the first meeting; implementing a hiring freeze; and addressing the position of county administrator and various other personnel matters.

After the primary elections, Preston retained Robert Hoskins (Preston's Attorney) as his counsel. On September 25, 2008, Preston's Attorney notified the 2008 Council of Preston's anticipatory breach of contract claim, stating the following:

> [I]t has come to Mr. Preston's attention that certain existing Council members have made statements that they and certain newly elected Council Members intend, after January 2009, to prevent him from carrying out his duties as County Administrator . . . . Preston considers the intent of certain members of Council and their allies to prevent him from performing his job as an anticipatory breach of his employment contract . . . . [T]he political and personal agenda of the obstructionists has rendered his ability to serve the people of Anderson County beyond January 1, 2009 impossible.

In response, the 2008 Council referred Preston's claim to its personnel committee—chaired by Ron Wilson—and hired Tom Bright, an employment attorney, to advise the County on the matter. Bright then interviewed all seven members of the 2008 Council, as well as the county attorney, to receive their input.

On October 23, 2008, Preston's attorney delivered a letter to Bright, in which he alluded to a number of causes of action and tort claims Preston planned to assert against current and incoming Council members. In the letter, however, he offered to settle Preston's anticipatory breach claim and "all claims against the County and the two individual Council [m]embers [he] previously mentioned." Under this proposed settlement, Preston would resign and execute a complete release of all claims against the County, Waldrep, and Cindy Wilson in exchange for the County paying $1,276,081 in damages: $827,222 for the total amount of pay and benefits due under his employment agreement (the Employment Agreement); $356,087 to the South Carolina Retirement System (SCRS) to purchase seven years, seven months, and twenty-three days of service credits to allow him to retire immediately with a full pension; and $92,772 to his health reimbursement account for retiree health benefits.

After receiving the letter, Bright met with the personnel committee to discuss how the County should address the matter. In his notes outlining Preston's claims and the County's options, Bright stated Preston had no anticipatory breach or constructive discharge claim. Bright also advised the committee that, under this Court's ruling in *Piedmont Public Service District v. Cowart* (*Cowart II*), 324 S.C. 239, 478 S.E.2d 836 (1996), the County had a good argument that Preston's Employment Agreement was voidable—and therefore had no value—because it purported to extend his employment beyond the term of the Council that approved it. Nevertheless, Bright also told the committee if the County were to lose, then it could face up to $2 million in litigation costs going forward. Thus, Bright advised the 2008 Council it could (1) do nothing, (2) leave the issue for the 2009 Council to decide, (3) terminate Preston and pay him nothing, or (4) settle with Preston and pay out his contract. As to the fourth option, Bright cautioned that citizens may go after former Council members for giving away their money if the 2008 Council chose to settle. After considering the options, the personnel committee directed Bright "to go and talk to Preston's Attorney and try and get the best deal you can."

Following several weeks of negotiations, Bright emailed Preston's Attorney a copy of a proposed Severance Agreement and release of all claims on November 18, 2008. That evening, the 2008 Council voted to amend the agenda to consider the Severance Agreement, voted for its approval, voted to approve budget transfers to fund it, and then voted to reapprove it on reconsideration. The 2008 Council approved the Severance Agreement, and the budget transfers to fund it, by a 5–2 vote. After the votes, the 2008 Council voted to hire Michael Cunningham as the new county administrator and adjourned without conducting any further business.

Pursuant to the terms of the Severance Agreement, Preston agreed to resign as county administrator on November 30, 2008, and release all claims against the County and any of its Council members regarding his employment. In exchange, Preston received $1,139,833—less state and federal withholdings—from the County. The County also agreed to contribute $359,258 to the SCRS "to pay for retirement service credits," paid Preston $780,575 "in the form of a severance benefit," and gave Preston title to the 2006 GMC Yukon he was using as a County vehicle.

The newly constituted 2009 Council held its first meeting on January 6, 2009, during which it voted to hire a new law firm and a financial investigator to review

Cunningham's employment contract, investigate the manner in which he was hired, and review the actions taken by the 2008 Council on November 18, 2008.[2]

Thereafter, the County sued Preston and named SCRS as a defendant, alleging causes of action for (1) violation of the State Ethics Act,[3] section 2-37(g) of the Anderson County Code of Ordinances (the County Code), and the common law; (2) violation of public policy; (3) breach of fiduciary duty; (4) fraud; (5) constructive fraud; (6) negligent misrepresentation; (7) capriciousness, unreasonableness, and fraud; (8) fundamental and substantial breach of the Severance Agreement; (9) breach of fiduciary duties relating to back-dated documents; (10) constructive trust; and (11) unjust enrichment. SCRS filed an answer and cross-claim against Preston in response to the County's complaint. The County later amended its complaint to include additional factual allegations. Preston filed answers to the County's complaint and amended complaint, asserting counterclaims against the County and SCRS. The County then filed replies to Preston's counterclaims and amended counterclaims.

The matter was tried without a jury from October 29, 2012, to November 5, 2012. In its May 3, 2013 order (the Final Order), the court granted judgment in favor of Preston on all causes of action as well as his counterclaim against the County.

In the Final Order, the circuit court disqualified four 2008 Council members for improperly participating in the votes approving the Severance Agreement. The court found Thompson voted in violation of section 2-37(g)(4)(e) of the County

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[2] In *Bradshaw v. Anderson County*, this Court held South Carolina Code section 4-9-660 (1986) of the Home Rule Act expressly authorized the 2009 Council—operating under a council–administrator form of government—to directly engage professionals "for the purpose of inquiries and investigations." 388 S.C. 257, 263, 695 S.E.2d 842, 845 (2010). The Court found the 2009 Council had the authority to investigate the 2008 Council's business and financial practices, "especially concerning contracts related to the former and current County Administrators." *Id.* at 258, 695 S.E.2d at 842. According to the Court, it would be absurd to require the county administrator, "who is answerable to the council and not the electorate, to investigate himself." *Id*. at 263, 695 S.E.2d at 845.

[3] S.C. Code Ann. § 8-13-700 (2009). We cite to the code section in effect at the time of the alleged misconduct, the amendment of which is irrelevant to the outcome of this case.

Code because he was seeking future employment from the County through Preston at the time of the vote. The court likewise found Ron Wilson's vote violated subsections 2-37(g)(4)(a) and (e) because Ron Wilson's daughter had recently received a substantial financial benefit from Preston after he extended her personal services contract with the County. Although Waldrep and Cindy Wilson voted against the Severance Agreement, the court found their votes violated section 2-37(g) because both had a "financial interest greater than that of the general Anderson County public," and their participation created "a substantial appearance of impropriety." Given that "Preston agreed not to pursue any further claims against any County Council member," the court found Waldrep and Cindy Wilson "had a direct economic interest"—regardless of the vote's outcome—and should not have participated while Preston maintained a lawsuit against them individually.

After disqualifying four of the seven members,[4] the court—relying upon *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), and section 2-37(g)(3) of the County Code—nevertheless found "a majority of those present and properly voting approved Preston's Severance Agreement." The court also held: (1) public policy neither rendered the Severance Agreement nor the vote adopting it void; (2) Preston did not breach a fiduciary duty because he owed no duty to disclose Council members' personal conflicts of interest; (3) the County failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation; (4) the 2008 Council's approval of the Severance Agreement was neither unreasonable or capricious nor a product of fraud and abuse of power; (5) the County's constructive trust claim no longer remained viable; (6) rescission was unavailable as a remedy; (7) the County had unclean hands; (8) adequate remedies at law barred the County from invoking the court's equitable jurisdiction; (9) the County breached the covenant not to sue in the Severance Agreement by bringing this lawsuit; and (10) the issue concerning the award of attorney's fees should be held in abeyance pending the final disposition and filing of a petition.

In light of the circuit court's Final Order, the County filed a motion to alter or amend the judgment as well as a post-trial motion to amend its complaint. The circuit court denied both post-trial motions in an order (the Post-Trial Order) dated

[4] Neither party appealed the circuit court's disqualification of the four votes, thus it is the law of the case. *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (stating, "[f]ailure to argue is an abandonment of the issue and precludes consideration on appeal").

November 8, 2013. The Court of Appeals affirmed in part and reversed in part. This Court granted the parties' cross-petitions for writs of certiorari.

II. Discussion

A. Quorum – Court of Appeals

Preston argues this Court should vacate the decision rendered by the Court of Appeals because the panel lacked a quorum of three judges and, instead, issued an opinion authored by only two judges.

In response, the County maintains that section 14-8-80(d) of the South Carolina Code (2017) allows the vote of only two judges to issue an effective opinion. According to the County, *State v. McMillian*[5] simply requires that three judges be present during oral argument, which occurred here.

"On a panel [of the Court of Appeals], three judges shall constitute a quorum, and the concurrence of a majority is necessary for the reversal of the judgment below." S.C. Code Ann. § 14-8-80(d) (2017).

In *McMillian*, only two of three Court of Appeals judges were present at oral argument. *State v. McMillian*, 349 S.C. 17, 19, 561 S.E.2d 602, 603 (2002). However, "[a]rguments proceeded over the objection of counsel for McMillian . . . and the Court of Appeals affirmed in an unpublished opinion signed by three judges." *Id.* at 20, 561 S.E.2d at 603.

On appeal, this Court held "three judges are necessary to constitute a quorum of the Court of Appeals, and a concurrence of the majority is necessary for reversal of the judgment below." *Id.* The Court added, "[t]his Court has recognized that no valid act can be done in the absence of a quorum." *Id.* at 20, 561 S.E.2d at 603–04; *Gaskin v. Jones*, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942) (holding that the Governing Board of Florence County did not have power to transact business when members of the Board left the room during the meeting). However, despite finding the Court of Appeals erred in hearing the case without a quorum, the *McMillian* Court, citing judicial economy, addressed the merits of McMillian's appeal. *McMillian*, 349 S.C. at 21, 561 S.E.2d at 604.

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[5] 349 S.C. 17, 561 S.E.2d 602 (2002).

We find section 14-8-80(d), read in conjunction with *McMillian*, provides that, in the absence of a quorum, the Court of Appeals cannot issue a valid opinion. *See McMillian,* 349 S.C. at 17, 561 S.E.2d at 602 (finding a quorum constitutes three judges, and no valid act can be done in the absence of a quorum).

We take this opportunity to clarify that a quorum is required throughout the proceedings, including the issuance of the opinion.[6] Thus, because the panel did not have the quorum needed to reverse the circuit court, the Court of Appeals did not have the authority to reverse the judgment below. As a result, we vacate the opinion of the Court of Appeals. However, due to the unsettled law of *McMillian* at the time of oral argument, and in the interest of judicial economy, we proceed to the merits of the dispute.

B. Severance Agreement

The County challenges the validity of the Severance Agreement on the ground there was an absence of a quorum when Council voted.

1. Issue Preservation

Preston argues the Court of Appeals erred in concluding the County could raise the County quorum issue in its post-judgment motion under Rule 59(e), SCRCP. According to Preston, the County failed to preserve its quorum theory of relief by neglecting to raise the issue before, during, or at any time during the six months between the circuit court's conclusion and issuance of the final judgment.

In support of this contention, Preston maintains that the parties argued the validity of Cindy Wilson's and Waldrep's votes on numerous occasions during trial. Preston claimed at trial and now claims in his brief that his affirmative defense "Some or all of the claims asserted in the County's Complaint . . . are barred by the holding of *Baird [] v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)[,]" encompasses the fact that the votes of Cindy Wilson and Waldrep were challenged in conjunction with the votes of McAbee, Michael Thompson, and Ron Wilson and, as a result, the parties presented arguments that would have invalidated four votes. Therefore, according to Preston, the County should have raised the quorum issue prior to, or during, trial.

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[6] This ruling shall apply prospectively.

In response, the County maintains that the quorum issue did not exist until the circuit court issued its order invalidating four votes. According to the County, the Rule 59(e) motion was the appropriate method to address the circuit court's grant of relief not sought in the pleadings, based on an issue that was never raised at trial.

We note neither party sought relief specifically based on the absence or existence of a quorum. Furthermore, the trial record is absent of either party mentioning the lack of a quorum, advancing an argument for or against a quorum, or presenting arguments explaining how any disqualification might affect a quorum. Thus, the question of whether a quorum existed first arose when the circuit court invalidated the votes of four Council members due to conflicts of interest in the Final Order.

Consequently, the County's Rule 59(e) motion was the proper means by which to raise the argument that the Severance Agreement should be invalidated because the 2008 Council passed it in the absence of a quorum. *See Fryer v. S.C. Law Enf't Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006) (stating, "[a] post-trial motion must be made when the [circuit] court either grants relief not requested or rules on an issue not raised at trial"). Because the circuit court, in denying the County's motion to reconsider, addressed the merits of the County's quorum argument in the alternative, the County's argument was properly raised to and ruled upon by the circuit court and, thus, preserved for review on appeal.

2. Absence of a Quorum

The County argues that, as a result of the circuit court's disqualification of four members, the 2008 Council was powerless to act with only three members to vote.

In contrast, Preston contends that for purposes of calculating a quorum, the County Code does not take into account a council-member's voting capacity but, instead, is only concerned with the Council members' "physical presence at the meeting site."

Section 2-37(g)(3) of the County Code provides, "Except where otherwise specified in these rules, a majority vote of those members present and voting shall decide all questions, motions, and other votes." Additionally, section 2-37(d) defines a quorum as follows:

> A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

In the instant case, the circuit court invalidated four of the Council member's votes. After removing the improper votes, the circuit court held that a majority of the members present and voting passed Preston's Severance Agreement.[7]

Section 2-37(d) requires that "a quorum consist of a majority of the Council" and in the absence of such no quorum exists. Additionally, this Court determined in *Garris* that a member disqualified due to a conflict of interest may not be counted for purposes of a quorum. *See Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (stating, "[a] member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter").

Here, a majority of the seven-member Council requires four members to constitute a quorum. After removing the disqualified votes, however, only three of the Council members could count towards the quorum. *Id.* As such, a quorum did not exist. Accordingly, the circuit court erred in considering the four disqualified votes in its quorum calculation. Therefore, because the Council acted without the quorum necessary for taking valid action, the Severance Agreement is null and void.

C. Remedy

The County argues the excess payments Preston received, and will receive, from January 1, 2009, until he turns sixty years' old (approximately $1,333,000)

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[7] The vote approving the Severance Agreement passed 5–1–1, with Thompson and Ron Wilson voting Aye; Cindy Wilson voting Nay; Waldrep Abstaining (adjusted vote, passed 3–0–1). The motion to transfer funds passed 5–2, with Thompson and Ron Wilson voting Aye; Waldrep and Cindy Wilson voting Nay (removing improper votes, passed 3–0).

could be redirected from Preston to the County as part of a remedy. Furthermore, according to the County, the purchase of service credit on Preston's behalf means that Preston will receive benefit amounts after age sixty that will exceed what he would have received without such a purchase, totaling $833,000 of additional benefits (with a present value at the time of trial of $180,000). Therefore, the County asserts a claim for unjust enrichment.

SCRS contends that any request for relief against a retired member of the SCRS must be consistent with the anti-alienation provisions of section 9-1-1680 of the South Carolina Code (2009), which provides that retirement benefits are generally exempt from legal process, but may be subject to the doctrine of constructive trust.[8]

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another. Unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009).

"[S]ubject to the doctrine of constructive trust ex maleficio . . . the right of a person to an annuity or a retirement allowance or to the return of contributions . . . are exempted from levy and sale, garnishment, attachment, or any other process . . . ." S.C. Code Ann. § 9-1-1680 (2009).

Because we hold that the Severance Agreement is void, it is clear Preston realized a benefit that would be inequitable for him to retain in the absence of the agreement. Thus, we must address the appropriate remedy.

Initially, we emphasize that Preston and the County both played a part in creating the toxic environment of the County Council and the contentious litigation that ensued. Members of the 2008 Council used FOIA requests and the media to create a toxic atmosphere while Preston doled out benefits to key members prior to the vote on the Severance Agreement.

Additionally, we are cognizant of the fact that Preston cannot be returned to his position of County Administrator. Furthermore, Preston concedes that he can no

[8] SCRS takes no position on the underlying merits of the dispute.

longer revive his prior legal claims against the County nor claims against certain Council members from the 2008 Council because they are time-barred and the evidence (text messages and emails) he could have unearthed no longer exist.

The value of the severance package was $1,139,833.00 (less withholdings). After consideration of all the variables, we hold that the $355,848.95 payment to SCRS is not recoverable.[9] Further, we find the County shall not be entitled to a refund or reimbursement from SCRS for the difference.[10] However, the County shall recover the total amount the County paid in cash to Preston pursuant to the Severance Agreement, plus the value of the 2006 County vehicle. Therefore, we remand to the circuit court to determine the amount the County is entitled to recover from Preston in the form of a civil judgment.

III. Conclusion

For the reasons explained above, we vacate the decision of the Court of Appeals; find the Severance Agreement invalid due to the County's lack of a quorum; and remand to the circuit court to determine the exact amount that Preston must refund the County.[11]

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[9] A SCRS program director provided in an affidavit that, at the time of the affidavit, the County had paid a total of $355,848.95 to SCRS to purchase 7 years, 7 months, and 23 days of additional service credit for Preston. As of the date of the affidavit (September 11, 2012), SCRS had paid Preston accumulated monthly benefits totaling $329,561.24. According to the director, by December 2012, SCRS would have paid $360,313.52 in retirement benefits to Preston since January 2009.

[10] SCRS no longer has any liability as a stakeholder to return funds to the County, because the full amount of the County's service purchase payment made to SCRS on Preston's behalf has now been exhausted through the payment of retirement benefits to Preston. Thus, the County is not entitled to any lump-sum distribution of the present value of Preston's benefits or any other special distribution from SCRS.

[11] Because our decision is dispositive, we decline to address the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

VACATED AND REMANDED.

KITTREDGE, HEARN and JAMES, JJ., and Acting Justice Stephanie McDonald, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Antrell R. Felder, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-001173

ON WRIT OF CERTIORARI

Appeal From Sumter County
D. Craig Brown, Circuit Court Judge

Opinion No. 27913
Submitted June 17, 2019 – Filed August 7, 2019

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan Wilson and Deputy Attorney General Donald J. Zelenka, both of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: A jury convicted Antrell Felder of murder and possession of a firearm during the commission of a violent crime. Following a

hearing on Felder's application for post-conviction relief ("PCR"), the PCR court issued an order denying and dismissing Felder's application. We find the PCR court erred in determining trial counsel was not ineffective. Accordingly, we reverse the PCR court's decision and remand this matter to the court of general sessions for a new trial.

I. FACTS

Shortly after midnight on July 18, 2008, Kayla McFadden and her cousin, Antrell McFadden, were walking to a gas station in Sumter. On the way, the McFaddens saw a car drive down the street towards them. They subsequently observed a man get out of the car, shoot the victim, and drive away.

Kayla testified the shooter was driving a white car with tinted windows, but she did not know the type of car. Antrell also testified the car was white with tinted windows. Kayla described the shooter as wearing a hat, white shirt, and dark pants. Similarly, Antrell described the shooter as wearing a red and black hat, white shirt, and blue jeans. Both McFaddens testified the victim was not wearing a hat. Detective William Lyons of the Sumter Police Department responded to the 911 call about the shooting. When he arrived at the scene, he observed a red baseball hat in the roadway.

After the McFaddens provided statements at the police station, Lyons and another detective, Jason Potteiger, drove them home. While on the way, the officers noticed a white car pass them at Willow Morand Apartments. The car "caught [their] attention," and the "[McFaddens] made comments like, it looks like the vehicle. That can be the vehicle, I'm not sure." Because the officers were traveling with the McFaddens, they asked another officer to investigate. The officer went to Willow Morand Apartments and determined Felder's sister-in-law lived there. Felder's girlfriend was driving the vehicle (a white Buick), and it was registered to Felder's mother.

When Lyons and Potteiger returned to the police station, they learned of a burglary that had occurred on Harry Street. Lyons testified the 911 call about the burglary came in at 12:37 AM, and the 911 call about the shooting came in around 12:38 or 12:39 AM. The officers began investigating whether there was a connection between the two incidents. Lyons testified he never drove the distance

between the two locations, but he believed it would take less than a minute in a vehicle to get from one location to the other.

Lyons returned to the McFaddens' home around 6:30 PM (approximately eighteen hours after the shooting) to show them a lineup. Antrell indicated that he recognized two people, one of whom was Felder who was labeled as "No. 2." However, neither Kayla nor Antrell was able to identify anyone in the lineup as the shooter, and both testified they could not see who fired the gun.

Fingerprint experts examined the red hat recovered from the crime scene and found two fingerprint images on a gold label affixed to the hat. One of the fingerprints was identified as belonging to Felder. The second fingerprint could not be positively identified. In addition, law enforcement found Felder's DNA inside the hat, as well as the DNA of an unknown person.

Police confiscated the Buick on the same day as the shooting. During trial, Lyons viewed photographs of the vehicle and stated it appeared tint had been removed from the windows.[1] Lyons admitted, however, that there was no official report or handwritten documents stating window tint had been removed. Lyons also stated the Buick in the photographs had white handles, though a third witness told police the shooter's car had silver handles. Furthermore, a crime scene investigator testified he found blood in the Buick on a receipt and the radio controls, but the blood belonged to Felder. Law enforcement did not find any blood or DNA evidence belonging to the victim in the car.

At trial, the State moved to admit a summary of Felder's oral statement to police. Trial counsel expressly stated he did not object to the admission of the evidence. Potteiger testified he spoke with Felder at the police station and prepared a typed summary of Felder's oral statement. Potteiger then read the summary out loud, including the following portion:

> Antrell Felder began by stating he was 26 years old, that his date of birth was [redacted] 1982, and that he lived at [redacted]. **He related that he was currently on bond for a lynching charge** . . . .

[1] Potteiger also testified the lines across the main window in the car appeared to be consistent with the removal of tint.

Potteiger continued to read the remainder of the summary, which indicated Felder was hanging out at his sister-in-law's home on July 17. Felder stated someone he knew called him at 11:59 PM and told him four men were in the process of breaking into his home. Felder, accompanied by several family members, went to his house to investigate, but he left the home before police arrived. He told police that shoes, hats, and some clothing were taken from his home. Felder intimated he went back to his sister-in-law's apartment and then to visit a woman in Red Bay. According to Felder, he arrived in Red Bay between 12:25 and 12:35 AM, and he did not leave the area until 3:00 AM.

The defense did not call any witnesses and rested immediately after the State rested. At the conclusion of the trial, the jury convicted Felder, and the trial court sentenced him to concurrent terms of forty-two years for the murder conviction and five years for the weapons possession conviction. On direct appeal, the Court of Appeals affirmed Felder's convictions and sentences. *State v. Felder*, Op. No. 2013-UP-437 (S.C. Ct. App. filed Nov. 27, 2013).

Felder subsequently filed a PCR application, alleging, *inter alia*, ineffective assistance of counsel. During the PCR hearing, Felder's attorney asked lead trial counsel, Shaun Kent, whether he would describe the State's evidence as strong. Kent stated: "Not really. I mean, it was a strong circumstantial case; but it wasn't the best case, I thought." Kent testified he discussed the planned stipulations with Felder, and that Felder "understood everything." During cross-examination, the following colloquy occurred:

> Q: But because he had mentioned in his oral statement to the police being on bond for lynching at the time as prior acts, did you make objection to the entrance -- including his oral statement without redaction -- of those particular pieces of fact based on prior acts and prejudicial?
>
> A: I don't remember but I don't think I did. No, Tim. And if I didn't, based on your question, that would be a mistake.

Kent indicated he did not believe the outcome of the trial would have been different if the reference to the lynching charge had been excluded.

Felder's other trial counsel, Ray Chandler, also testified at the PCR hearing. When asked whether the lynching reference changed the outcome of the trial, Chandler responded: "You could argue it in retrospect . . . . I would argue it hard in retrospect." Chandler went on to explain that the defense's theory was Felder could not have gotten from his home to murder the victim within three minutes. Chandler then added: "So that seemed to be our theory at reasonable doubt. Whether our client had a pending charge or not was not as important to me as was getting across to the jury that he couldn't have done it."

The PCR court ultimately denied Felder's request for relief and dismissed his application with prejudice, finding:

> Trial Counsel credibly testified that he discussed this stipulation before the trial and Applicant did not raise this issue; Applicant understood and agreed with the decision to stipulate. The statement was a voluntary statement given by Applicant to law enforcement, and it is unlikely that Applicant could have kept it out of evidence.

This Court granted Felder's petition for a writ of certiorari to consider whether the PCR court erred in determining Felder's trial counsel was not ineffective in allowing the admission of the un-redacted summary of Felder's statement to police.

II. STANDARD OF REVIEW

"In a PCR case, this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "However, this Court gives no deference to the PCR court's conclusions of law, and we review those conclusions de novo." *Id.* (citing *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

III. LAW/ANALYSIS

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a PCR applicant must show: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To show deficient performance, an applicant must prove "counsel's

representation [fell] below an objective standard of reasonableness." *Id.* at 688. To demonstrate prejudice, an applicant must show "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Smith v. State*, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010) (quoting *Strickland*, 466 U.S. at 694).

a. Deficient Performance

The PCR court found "it is unlikely that Applicant could have kept [the statement] out of evidence." We disagree. Although the summary of Felder's oral statement was likely admissible, the specific mention of his lynching charge was wholly inadmissible under Rule 609, SCRE, which permits the admission of *convictions*—not charges.[2] The reference to Felder's lynching charge was also inadmissible under Rule 404(b), SCRE, as improper character evidence. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). Even assuming the lynching charge was admissible, there is a reasonable probability that the trial court would have excluded it. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

Trial counsel had at least two opportunities to prevent the inclusion of the lynching charge, and he failed to object even once. First, during pre-trial motions, trial counsel indicated he did not have any objections under *Jackson v. Denno*[3] to the validity or voluntariness of Felder's oral statement to law enforcement. Second, when the State moved during trial to admit the summary of Felder's oral statement, trial counsel expressly stated he did not object to the admission of the evidence. In

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[2] The notes to Rule 609 state: "[Subsection A] . . . allows impeachment with a *conviction* for any crime which carries a maximum sentence of death or imprisonment for more than one year." Rule 609 note, SCRE (emphasis added); *see Clark v. Cantrell*, 332 S.C. 433, 450, 504 S.E.2d 605, 614 (Ct. App. 1998) ("Rule 609(a), SCRE, does not permit mere charges to be used as impeachment evidence.").

[3] 378 U.S. 368, 380 (1964) ("A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined.").

addition, when Potteiger mentioned the lynching charge, trial counsel failed to object and ask for a curative instruction. Because trial counsel's error fell below an objective standard of reasonableness, we conclude trial counsel's performance was deficient.

b. Prejudice

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). The PCR court should also evaluate "the strength of the State's case in light of all the evidence presented to the jury." *Id.* Generally, "the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* However, "the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id.* at 189, 810 S.E.2d at 844.

i. Specific Impact of Counsel's Error

Because trial counsel allowed the admission of the un-redacted summary, the jury learned Felder had a pending lynching charge at the time of the murder. The reference to the lynching charge was indisputably propensity evidence that served no purpose other than to prejudice Felder. In this case, the risks associated with propensity evidence were heightened due to the specific crime—lynching. The word "lynching" is extremely problematic in itself. It immediately evokes a visceral reaction and a grim mental image. The lynching reference could reasonably cause a juror to presume Felder was a violent person and deserving of a guilty verdict.

Because Felder did not take the stand, the summary of his oral statement (by way of Potteiger's testimony) was the sole means by which Felder gave his side of the story. Accordingly, it is reasonable to believe the jury focused—at least to some extent—on the summary because it provided Felder's version of events. Further, the State entered the summary into evidence as an exhibit, and the jury received a copy to consider during their deliberations. Thus, it is misleading to say the lynching charge was merely mentioned in passing.

Had trial counsel objected, it is almost certain the trial court would have excluded the reference to Felder's lynching charge under the South Carolina Rules

of Evidence, particularly Rule 609.[4] Consequently, but for trial counsel's error, the jury would have never heard any mention of Felder's lynching charge.

ii. Strength of the State's Case

The evidence in this case was primarily circumstantial. The State's strongest evidence was the red baseball hat recovered from the crime scene. However, the hat contained Felder's DNA as well as the DNA of an unknown individual. Moreover, two fingerprints were found on the hat—one belonging to Felder and another that could not be positively identified. Ultimately, the baseball hat proved only that Felder possessed the hat at some point in time, and it did not directly link Felder to the murder or crime scene.[5]

Both Kayla and Antrell testified they did not see the shooter, and neither could identify Felder as the shooter in a lineup. *See Smalls*, 422 S.C. at 192, 810 S.E.2d at 845 ("The fact [the witness] could only narrow it down to two people in the photographic lineup undermines—not supports—the notion of overwhelming evidence."). Here, when presented with a lineup, neither witness even so much as indicated that Felder *might* have been the shooter.

The evidence regarding the vehicle was also circumstantial. Neither Kayla nor Antrell was certain the car they saw on the way home was the shooter's car. Moreover, a third witness told law enforcement the car had silver handles, whereas the Buick had white handles. The McFaddens described the shooter's vehicle as having tinted windows. The Buick did not have tinted windows (though two officers testified the windows appeared to have had the tint removed). Furthermore, law enforcement was unable to find any of the victim's blood or DNA in the Buick.

There is no evidence in the record that conclusively links Felder to the murder. Accordingly, one could hardly say "overwhelming evidence" of Felder's guilt exists. *See Smalls*, 422 S.C. at 192, 810 S.E.2d at 845 ("[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . [it]

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[4] There was a discussion of Felder's lynching charge at the end of the trial, in which the trial court stated: "I don't think the lynching is admissible under . . . 609. Prior convictions. And a pending charge would not be admissible. So the one charge that could be used against him would be the -- not the lynching, but the other."

[5] Felder also told police that hats were stolen from his home.

must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard . . . cannot possibly be met.").

After weighing trial counsel's error against the strength of the State's case, we conclude the error creates a reasonable probability that the outcome of Felder's trial would have been different had trial counsel acted to exclude the reference to the lynching charge.

IV. CONCLUSION

Based on the foregoing, we find the PCR court erred in determining trial counsel was not ineffective. Accordingly, we reverse the PCR court's decision and remand this matter to the court of general sessions for a new trial.

REVERSED AND REMANDED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wadette Cothran and Chris Cothran, Petitioners,

v.

State Farm Mutual Automobile Insurance Company and Robert Tucker, Defendants,

of which State Farm Mutual Automobile Insurance Company is the Respondent.

Appellate Case No. 2018-000235

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
L. Casey Manning, Circuit Court Judge

Opinion No. 27914
Heard May 29, 2019 – Filed August 7, 2019

REVERSED

Charles Logan Rollins II, Hawkins Law Firm, of Spartanburg, for Petitioners.

Robert William Whelan, Charles R. Norris, of Charleston, and C. Mitchell Brown, of Columbia, all of Nelson Mullins Riley & Scarborough, LLP, for Respondent.

JUSTICE FEW: Section 38-77-144 of the South Carolina Code (2015) provides that no-fault personal injury protection (PIP) insurance coverage "is not subject to a setoff." This appeal requires us to consider whether section 38-77-144 prohibits an automobile insurance carrier from reducing its obligation to pay PIP benefits to its insured by the amount of workers' compensation benefits the insured received for medical expenses. We hold that it does.

I. Facts and Procedural History

Wadette Cothran incurred approximately $40,000 in medical expenses from injuries she received in an automobile accident. Her employer's workers' compensation carrier paid all of her medical expenses. She was also covered by her automobile insurance policy issued to her and her husband Chris by State Farm Mutual Automobile Insurance Company. The State Farm policy provided PIP coverage with a limit of $5,000. However, State Farm refused to pay her any PIP benefits for medical expenses based on a "Workers' Compensation Coordination" provision in the policy. The "Coordination" provision states,

> Any Personal Injury Protection Coverage provided by this policy applies as excess over any benefits recovered under any workers' compensation law or any other similar law.

The Cothrans filed this lawsuit against State Farm alleging breach of contract and bad faith refusal to pay insurance benefits.

The circuit court granted summary judgment to the Cothrans on the breach of contract claim, finding the "Coordination" provision violated section 38-77-144. The court of appeals reversed. *Cothran v. State Farm Mut. Auto. Ins. Co.*, 421 S.C. 562, 808 S.E.2d 824 (Ct. App. 2017). We granted the Cothrans' petition for a writ of certiorari. We reverse the court of appeals, and reinstate the summary judgment.

II. Section 38-77-144

We begin with the text of section 38-77-144.

> There is no personal injury protection (PIP) coverage mandated under the automobile insurance laws of this State. Any reference to personal injury protection in Title 38 or 56 or elsewhere is deleted. If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a setoff.

§ 38-77-144.

We focus on the language "the [PIP] coverage . . . is not subject to a setoff." The term "setoff" is not defined in our Insurance code. Therefore, we apply the term's "usual and customary meaning." *Perry v. Bullock*, 409 S.C. 137, 140-41, 761 S.E.2d 251, 253 (2014). Merriam-Webster defines "setoff" as "something that is set off against another thing" and as "the discharge of a debt by setting against it a distinct claim in favor of the debtor." *Setoff*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988). The term is defined in BLACK'S LAW DICTIONARY as, "A defendant's counterdemand against the plaintiff, arising out of a transaction independent of the plaintiff's claim," and, "A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor." *Setoff*, BLACK'S LAW DICTIONARY (11th ed. 2019).

However, the term "setoff" is also commonly used to describe any reduction in the amount a defendant or insurance company would otherwise be obligated to pay on a claim, when the right to the reduction arises as a result of a payment from a third party. Our courts have used the term for this meaning in numerous cases. In *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012), for example, the plaintiff filed suit to recover funds she claimed should have been paid to her, but were wrongly paid to other parties. 397 S.C. at 471, 724 S.E.2d at 190. Before trial, the defendant who made the contested payment settled. At the conclusion of trial, the jury found the defendants who received the payment had done so wrongfully, and they must pay the funds to the plaintiff. *Id.* These defendants argued the judgment to be entered against them must be reduced by the amount the plaintiff received before trial in settlement. *Id.* The parties, the trial court, and the court of appeals framed the question as whether the non-settling defendants were entitled to a "setoff" because of this third-party payment. The court of appeals held that "before entering judgment on a jury verdict, the court must reduce the amount of the verdict to

account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." 397 S.C. at 471-72, 724 S.E.2d at 190. The court described this as a "setoff" that arises by operation of law. 397 S.C. at 472, 724 S.E.2d at 190 (citing *Ellis v. Oliver*, 335 S.C. 106, 111, 515 S.E.2d 268, 271 (Ct. App. 1999)). *See also Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 217, 734 S.E.2d 142, 146 (2012) (finding the trial court properly reduced a jury verdict against one defendant by the amount paid in settlement by different defendants, and calling that a "set-off"); *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 436, 813 S.E.2d 288, 291 (Ct. App. 2018) (stating, "A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles," and calling that a "setoff" (quoting *Welch v. Epstein*, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000))); *Ellis*, 335 S.C. at 109, 515 S.E.2d at 270 (addressing whether a defendant was entitled to a "set-off" to reduce the judgment against him by the amount a third party paid the plaintiff for his medical expenses).

A setoff, therefore, takes two primary forms. The first—not applicable here—is when person A's obligation to pay person B is reduced by the amount of B's obligation to A, regardless of whether the corresponding obligations arose from the same transaction or subject matter. *See Setoff*, BLACK'S LAW DICTIONARY. The second—which is applicable here—is when A's (State Farm's) obligation to pay B (Wadette) is reduced by the amount of C's (workers' compensation carrier's) payment to B, where A's and C's obligations to pay did arise from the same transaction or subject matter.

The Legislature obviously intended to use the term "setoff" in this second form—as we did in *Rutland*, and the court of appeals did in *Huck*, *Smith*, *Welch*, and *Ellis*—when it drafted section 38-77-144.[1] In the context of PIP coverage, we can envision

[1] Counsel for State Farm attempted to argue at oral argument that under this definition of setoff—which counsel contended was overbroad and thus ambiguous—even a deductible would be a setoff. We do not agree. An insurance company's obligation to pay is provided under the terms of the policy. A setoff is a reduction in the amount of the obligation to the extent there has been a third-party payment. If there is a deductible, the insurance company was never obligated to pay the amount of the deductible. Rather, the reduction is provided under the terms of the policy. A deductible, therefore, is not a setoff.

no situation in which an insured's obligation back to the insurer could reduce the insurer's obligation to the insured. Rather, the only thing that could ever be set off against PIP coverage is a third-party payment, such as a payment from a tortfeasor or the workers' compensation benefits Wadette received. Because "setoff" is not a situation that could arise under the first definition, the term becomes relevant in section 38-77-144 only under the second definition.

This discussion allows us to frame the issue before us more precisely. In section 38-77-144, the Legislature intended—at least in part—to prevent an insurance company that sells PIP coverage from reducing the amount of PIP it is obligated to pay because the insured received a third-party payment for the same expenses. If State Farm's "Coordination" provision has this effect, it is a setoff, and it violates the section.

Through its "Coordination" provision, State Farm attempts to designate the policy holder's opportunity to recover workers' compensation benefits as the policy holder's primary source of repayment for medical expenses. If the workers' compensation benefits equal the medical expenses—as occurred here—or if the difference between workers' compensation benefits received and the total medical expenses is less than the policy limit for PIP coverage, the "Coordination" provision becomes effective.[2] In the latter example, State Farm's obligation to pay PIP benefits would be reduced, but not eliminated. In the former example—as occurred here—the effect of the provision is that State Farm pays no PIP benefits. In this case, State Farm's obligation to pay PIP coverage to Wadette is reduced—eliminated, in fact—by the amount her employer's workers' compensation carrier paid her for medical expenses. In other words, the "Coordination" provision is a setoff.[3]

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[2] The following scenarios illustrate the effect of the "Coordination" provision. Wadette incurred approximately $40,000 in medical expenses. Her PIP benefits policy limit is $5,000. If her workers' compensation benefits were less than $35,000, the "Coordination" provision would have no effect and State Farm would owe her the policy limit. If her workers' compensation benefits were $37,500, the "Coordination" provision would take effect and State Farm would owe her $2,500. In this case, her workers' compensation benefits equaled the total amount of her medical expenses, so the effect of the "Coordination" provision would be to eliminate State Farm's obligation to pay any PIP benefits.

[3] The term "setoff" is used universally to describe the reduction of PIP benefits by the amount of a third-party payment, including workers' compensation. This is

State Farm attempts to avoid this straightforward analysis by relying on this Court's opinion in *State Farm Mutual Automobile Insurance Co. v. Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993), and in particular our statement "the Legislature intended the set-off prohibition[4] . . . to apply only to the tortfeasor," 313 S.C. at 61, 437 S.E.2d at 45. The court of appeals agreed with State Farm that *Richardson* is controlling. *Cothran*, 421 S.C. at 569, 808 S.E.2d at 828. We do not agree *Richardson* may be read as expansively as State Farm argues and the court of appeals held. *Richardson* involved a different policy provision and a different set of facts. If *Richardson* is to control this case, it must be because the reasoning is applicable here, not simply because the words we chose to explain our reasoning—when read

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explained in APPLEMAN ON INSURANCE. "More often than not, multiple sources of recovery are available to the injured insured. As long as there is no policy or statutory provision limiting or restricting multiple recovery, payments may be made under more than one policy or plan." 6 Jeffrey E. Thomas, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 66.09[1] (2019). The APPLEMAN subsection goes on to explain, "Most no-fault statutes have some sort of coordination of benefits language," like the "Coordination" provision in State Farm's policy purports to be. However, subsection 66.09[1] and the next one—subsection 66.09[2][a] entitled "Statutory Setoffs -- Workers' Compensation"—make it clear that when no-fault benefits are reduced by payments from a workers' compensation carrier, it is a "setoff." Thomas, *supra* § 66.09[2][a]; *see also* 12 Steven Plitt et al., COUCH ON INSURANCE § 171:67 (3d ed. 2018) ("[A] no-fault insurer may be entitled to setoff from the injured party's coverage amounts the insured has received from various other sources for the same injury."); 46A C.J.S. *Insurance* § 2236 (2018) ("Ordinarily, a no-fault insurance carrier is entitled to set off insured's workers' compensation benefits . . . where the workers' compensation benefits are intended to serve the same purpose as no-fault benefits, and required to be paid." (footnotes omitted)). The important point here is not that the law of other jurisdictions might permit—or even require—a setoff under the circumstances of this case, but that the effect the "Coordination" provision has in this case is universally called a "setoff."

[4] When originally enacted, and at the time this Court decided *Richardson*, section 38-77-144 was numbered 38-77-145. *See* Act No. 148, 1989 S.C. Acts 427, 470; S.C. Code Ann. § 38-77-145 (Supp. 1989); *Richardson*, 313 S.C. at 60, 437 S.E.2d at 45 (quoting S.C. Code Ann. § 38-77-145 (Supp. 1992)).

out of context—might appear to restrict the effect of the statute. As we will explain, the reasoning of *Richardson* is not applicable in this case.

The question in *Richardson* was whether section 38-77-145, *see supra* note 4, invalidated a policy provision that prevented the stacking of PIP benefits from two automobile policies issued by the same insurer. 313 S.C. at 59, 437 S.E.2d at 44.[5] The insureds "incurred medical expenses in excess of $20,000 . . . [and] filed a claim for PIP benefits under two State Farm automobile insurance policies that each carried a $10,000 maximum." *Id.* State Farm paid the insureds $10,000 under one policy, but refused to make any PIP payment under the other policy. *Id.* We found the provision on which State Farm relied was not a "setoff." 313 S.C. at 61, 437 S.E.2d at 45.

Both policies at stake in *Richardson* were issued by State Farm, and the PIP coverages in each were identical. This is important for two reasons. The first reason is the policy provision defined the coverage State Farm sold to its insured; it was not an attempt to direct how separate coverages from different insurers interact. The provision in both State Farm policies stated that if there are two policies "issued by us to you," you may recover only the limits of one policy. On the other hand, had the two policies been issued by different insurers, the provision would not have applied. Thus, there was no setting off of one coverage against another. Rather, there was but one coverage, and that coverage was to be paid according to the terms of the State Farm policies. For this reason, we held "the disputed language in its policy comprises [sic] an anti-stacking[] clause rather than a set-off." 313 S.C. at 60, 437 S.E.2d at 44.

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[5] The policy provision on which State Farm relied in *Richardson* stated,

> If two or more policies issued by us to you, your spouse, or your relatives provide vehicle Medical Payments Coverage and apply to these same bodily injuries sustained . . . the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

313 S.C. at 59, 437 S.E.2d at 44.

The second reason this is important is the coverages in the State Farm policies were identical no-fault PIP. The coverages in this case—PIP coverage and workers' compensation coverage—are not the same. PIP coverage is first-party coverage a policy holder purchases to pay medical expenses no matter who is at fault in causing the accident. *See* S.C. Code Ann. § 38-77-10(4) (1989) (repealed by Act No. 148, 1989 S.C. Acts 427, 513). "The key concept embodied in PIP no fault coverage is that an injured person needs to promptly pay expenses necessarily arising out of injuries sustained, and needs support for himself and his family during the period of recuperation." *Hamrick v. State Farm Mut. Auto. Ins. Co.*, 270 S.C. 176, 180, 241 S.E.2d 548, 549 (1978); *see also* 46A C.J.S. *Insurance* § 2184 (2018) ("No-fault statutes are intended to protect persons injured in accidents involving a motor vehicle, by assuring that such accident victims receive compensation, reparations, or financial assistance, that is *certain*, and that is provided in a *prompt and expeditious fashion* . . . ." (emphasis added) (footnotes omitted)).[6] State Farm's contention that it can take insurance that is by definition primary and simply label it as "excess" in an attempt to make it not primary is a stretch under any circumstances.[7] Under section 38-77-144, it is prohibited.

Finally, we disagree with State Farm and the court of appeals that the legislative history we considered in *Richardson* supports a finding that the "Coordination"

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[6] Workers' compensation insurance is also no-fault. *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015). However, it is not first-party insurance like PIP, and its availability to an employee is subject to the provisions of the Workers' Compensation Act after potentially protracted litigation in front of the workers' compensation commission. *But see Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 285, 287, 826 S.E.2d 863, 865-66 (2019) (refocusing the commission on its "primary" role in avoiding "complicated and protracted litigation").

[7] State Farm contends the "Coordination" provision does not violate section 38-77-144 because it "is an excess clause, not a setoff." According to State Farm, "An excess clause is '[a]n insurance-policy provision . . . that limits the insurer's liability to the amount exceeding other available coverage. This clause essentially requires other insurers to pay first." (quoting *Excess clause*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

provision in this case is not a setoff.[8] The legislative history of section 38-77-144 supports our reading of the plain language of the section that the "Coordination" provision is a setoff.

As we stated in *Richardson*, the Legislature "made sweeping reforms in automobile insurance law" in 1989. 313 S.C. at 60, 437 S.E.2d at 45. We stated,

> In section 57 of [Act 148], the Legislature repealed the tortfeasor's statutory "set-off" authorized by section 38-77-290(f). *See* 1989 S.C. Acts at 513. Concurrently, in section 34 of Act 148, the Legislature expressly provided that PIP coverage was not subject to a "set-off." *See* 1989 S.C. Acts at 470. In our view, the Legislature intended for the "set-off" prohibition in section 34 of Act 148 to refer to the statute allowing reduction of a tortfeasor's liability which was repealed in section 57 of Act 148. Accordingly, we find that the "set-off" prohibited by section 34 of Act 148, now codified in section 38-77-145, is the tortfeasor's reduction in liability formerly allowed by section 38-77-290(f).

Id.

Our legislative-history focus in *Richardson* was the repeal of subsection 38-77-290(f), which—prior to its repeal—required the setoff of PIP benefits in favor of a tortfeasor. *See* § 38-77-290(f) (1989) (providing PIP "benefits received or recovered

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[8] Ordinarily, after concluding the plain language of a statute controls, we would not consider legislative history or any other indication of legislative intent. *See Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning."). We do so in this case solely to address the error of the court of appeals in relying on our legislative history analysis in *Richardson*. *See Cothran*, 421 S.C. at 570-71, 808 S.E.2d at 829 (stating "despite the language of section 38-77-144 appearing to prohibit any setoff of PIP benefits, our supreme court declared the legislative intent of that section was to prohibit tortfeasors from reducing their liability by the amount of PIP benefits" (citing *Richardson*, 313 S.C. at 61, 437 S.E.2d at 45)).

. . . must be deducted from any tort recovery, settlement, or judgment for bodily injury"). The fact the Legislature repealed the provision requiring a setoff against a tortfeasor's liability, and simultaneously prohibited any setoff against PIP coverage when it enacted section 38-77-145, *see supra* note 4, was important to us in understanding whether the anti-stacking provision was invalidated by the setoff prohibition in section 38-77-144.

It was not necessary in *Richardson* for us to discuss the fact the Legislature also repealed former subsection 38-77-290(d) in 1989. Subsection 38-77-290(d) required a setoff of workers' compensation benefits received by an insured against an insurer's obligation to pay PIP benefits. *See* § 38-77-290(d) (1989) (repealed by Act No. 148, 1989 S.C. Acts at 513) ("Benefits payable [under the PIP statute[9]] must be reduced to the extent that the recipient has recovered benefits under workers' compensation laws . . . ."). Thus, former subsection 38-77-290(d) required by law precisely what State Farm seeks to obtain in this case by policy provision. The Legislature, however, repealed the subsection. If the repeal of subsection 38-77-290(f) was useful to us in *Richardson* to understand whether an anti-stacking provision violated section 38-77-144, then the repeal of subsection 38-77-290(d) is even more important to us in understanding whether State Farm's "Coordination" provision is prohibited. In other words, the fact the Legislature repealed the legal requirement that workers' compensation benefits be set off against PIP, and simultaneously provided PIP coverage "is not subject to a setoff," is forceful proof that the Legislature intended the setoff prohibition must apply to workers' compensation benefits.

III. Conclusion

When an insurer seeks to reduce its obligation to pay benefits based on a third party's previous payment for the same claim, it is a setoff. Because that is the precise effect of State Farm's "Coordination" provision, section 38-77-144 prohibits the provision from reducing State Farm's obligation to pay PIP benefits to the Cothrans. We reverse the court of appeals and reinstate the summary judgment in their favor.

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[9] Here, former subsection 38-77-290(d) referred to former section 38-77-240 of the South Carolina Code (1989) (repealed by Act No. 148, 1989 S.C. Acts at 513), which is the section that required PIP coverage.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vladimir W. Pantovich, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2017-000280

ON WRIT OF CERTIORARI

Appeal from Georgetown County
George C. James, Jr., Circuit Court Judge

Opinion No. 27915
Heard March 27, 2019 – Filed August 7, 2019

AFFIRMED

Attorney General Alan McCrory Wilson and Assistant Attorney General Johnny Ellis James, Jr., both of Columbia, for Petitioner.

Appellate Defender David Alexander, of Columbia, for Respondent.

JUSTICE HEARN: In this post-conviction relief (PCR) matter, we examine South Carolina's longstanding good character charge as we determine whether the PCR court erred when it found appellate counsel for Respondent Vladimir Pantovich

ineffective for failing to raise a meritorious issue on direct appeal. The PCR court granted relief based on appellate counsel's failure to argue that the trial court erred by refusing to give such a charge, which counsel had requested at trial. While we agree that a portion of the charge Pantovich requested is improper, we nonetheless affirm because of the retrospective nature of PCR review.

FACTUAL AND PROCEDURAL BACKGROUND

Pantovich killed his former girlfriend, Sheila McPherson, with a baseball bat during an argument in his home. He hit her with the bat more than ten times, breaking ribs, damaging internal organs, and causing lacerations on her head that exposed her bare skull. Pantovich wrapped her dead body in a blanket, tied it with a rope, obscured her head with a garbage bag, and put the body and the bat in the trunk of his car. He then left his home in Georgetown County and drove toward his son's home in Taylorsville, North Carolina. On the way, he called his son to reveal what he had done. The son alerted law enforcement, and an officer stopped Pantovich as he approached Taylorsville. McPherson's body was still in the trunk in the same condition.

The State charged Pantovich with murder. At trial in 2008, he admitted he beat McPherson to death, but claimed he did so in self-defense. Pantovich explained McPherson physically abused him throughout their years-long relationship. Four days before he killed her, he and McPherson got into an argument and she left him. Two days later, Pantovich talked to her on the phone and told her he no longer wished to see her. He testified that on the evening of the killing, he came home from work around 6:00 p.m. to find McPherson in his house. She had drugs in her possession, and the toxicology report later showed she had several in her system. Pantovich told her to leave, but McPherson refused and unplugged the phone so he could not call the police. Thereafter, McPherson grabbed a fireplace poker and stabbed a hole in Pantovich's dinner tray while he sat in a reclining chair eating. McPherson then attacked him with the poker. Pantovich stated he was scared and tried to protect himself, so he backed toward the door to his garage and grabbed one of two baseball bats he kept there. He recalled blocking McPherson with one hand and using the other to hit her with the bat.

After Pantovich testified, he presented five character witnesses: Andy Seifert, a friend and former employer; Christine McCune, a friend of more than ten years; Maureen Moans, a friend of almost ten years; Debbie Crisman, Pantovich's ex-girlfriend; and Tammy Eschman, his former next-door neighbor. They generally

testified he was kind, caring, and good with children. Several also reported witnessing McPherson act violently towards Pantovich, but they never saw him react in kind.

Pantovich submitted a written request for the trial court to charge the jury as to how it may interpret and use evidence of his good character. The written charge request stated:

> An accused, when charged with a crime, has the right of proving his general good character. He may introduce evidence of his good character which is inconsistent with the crime charged against him.
>
> Evidence of the general good character of the accused is for the purpose of showing the improbability that the defendant would have committed the crime charged. The good character of the accused is like all other evidence in the case and is entitled to such effect and weight as you, the jury, may determine.
>
> Good character evidence alone may create a reasonable doubt as to the commission of the crime charged.[1] Thus, under some circumstances, a person might be entitled to a verdict of not guilty when his good reputation is taken into consideration even though a verdict of guilty might be authorized without the evidence of good character.

In response, the State requested a "more balanced" charge that would allow the jury to decide whether evidence constituted good character. After all evidence had been presented, the trial court provided a copy of its proposed jury charge, which made no mention whatsoever of good character. Pantovich reiterated his request, but the trial court denied it. The jury found him guilty of the lesser-included offense of voluntary manslaughter, and the trial court sentenced him to eighteen years in prison.

Appellate counsel filed a brief with the court of appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991). Appellate counsel did not mention the trial court's denial of Pantovich's request to charge the jury on good character. The court of appeals dismissed the appeal. *State v. Pantovich*, Op. No. 2011-UP-275 (S.C. Ct. App. filed June 8, 2011).

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[1] We refer to this portion of the instruction as the "good character alone" charge.

Pantovich subsequently filed this PCR action alleging appellate counsel was ineffective for failing to brief the trial court's refusal to give the requested jury charge. The PCR court initially found Pantovich failed to prove prejudice because he alleged no irregularity in the court of appeals' *Anders* procedure. We reversed, finding that to demonstrate prejudice "the applicant must show . . . but for appellate counsel's errors, the result of the appeal would have been different." *Pantovich v. State*, Op. No. 2015-MO-052 (S.C. Sup. Ct. filed Aug. 26, 2015).

On remand, the PCR court found appellate counsel ineffective and granted Pantovich a new trial. The court found that, because Pantovich presented evidence of his good character, controlling precedent required the trial court to give the "good character alone" charge to the jury. The PCR court determined the error prejudiced Pantovich because there was a reasonable probability the charge would have impacted the jury's consideration of whether he was without fault in bringing on the difficulty and rejected the State's arguments regarding harmless error. We granted the State's petition for a writ of certiorari.

STANDARD OF REVIEW

This Court affords deference to a PCR court's findings of fact, but reviews questions of law de novo. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). We will reverse if the PCR court's ruling is controlled by an error of law. *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

To prove appellate counsel was ineffective, a petitioner must first show counsel's performance was deficient, meaning it fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). The petitioner must then show prejudice by demonstrating that, but for counsel's deficient performance, there is a reasonable probability the result of the appeal would have been different. *Id*. at 694. A *Strickland* inquiry is retrospective, seeking to determine whether counsel was ineffective at the time of the alleged error. *Id*. at 689.

DISCUSSION

Pantovich argues the PCR court's decision should be affirmed because the trial court was and is required to give the charge he requested when a defendant presents evidence of his good character. The State argues the "good character alone" charge

is an unconstitutional comment on the facts, the charge given adequately covered the law, and any error was harmless.

The law in effect during the relevant time period—2011 and a short time thereafter—supported the PCR court's decision. In *State v. Green*, 278 S.C. 239, 294 S.E.2d 335 (1982), we stated, "[g]enerally, where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt . . . ." 278 S.C. at 240, 294 S.E.2d at 335 (citing *State v. Lyles*, 210 S.C. 87, 92, 41 S.E.2d 625, 627 (1947)). In *State v. Lee-Grigg*, 387 S.C. 310, 692 S.E.2d 895 (2010), we cited *Green* and reversed the defendant's conviction, stating "the trial court erred when it refused to give such a charge." 387 S.C. at 317, 692 S.E.2d at 898. The court of appeals had also reversed a defendant's conviction based on the trial court's refusal to charge the jury that "evidence of good character . . . may in and of itself create a doubt as to the guilt that should be considered by you . . . ." *State v. Harrison*, 343 S.C. 165, 170, 539 S.E.2d 71, 73 (Ct. App. 2000).

The modern trend, however, has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence. *See State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803 (2009) (placing significant restrictions on "the [longstanding] practice for trial courts in South Carolina . . . to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon"). Since *Belcher*, we have found error in charging the jury that "actual knowledge of the presence of drugs is strong evidence of intent to control its disposition or use" because doing so "is improper as an expression of the judge's view of the weight of certain evidence," *State v. Cheeks*, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013); we have eliminated charging the jury that a sexual assault victim's testimony need not be corroborated, *State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016); we have held "the trial court shall not provide a limiting instruction or otherwise comment to the jury" on how it should interpret and use evidence of a defendant's suicide attempt, *State v. Cartwright*, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018); and we have extended *Belcher* to eliminate from all trials any charge that the jury may infer malice from the use of a deadly weapon, *State v. Burdette*, Op. No. 27910 (S.C. Sup. Ct. filed July 31, 2019) (Shearouse Adv. Sh. No. 31 at 8).

The State asks us to hold the "good character alone" charge is similarly impermissible because it is an unconstitutional comment on the facts. While we agree that this charge is improper, we do not reverse given this case's procedural posture. Fundamentally, a collateral review proceeding is ill-suited for announcing

a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances.[2] This is especially true in a retrospective PCR analysis under *Strickland*, which seeks to determine whether counsel was ineffective *at the time of the alleged error*. Just as we do not require attorneys to be clairvoyant in anticipating changes to the law,[3] we do not hold the PCR court erred in the face of what was—at the relevant time—clear and binding authority as expressed in *Lee-Grigg* and *Green*: a jury instruction on good character was warranted when a defendant introduced evidence thereof at trial. We cannot expect our circuit courts to divine future refinements in appellate jurisdiction—only to apply the prevailing law to the facts of a case before them.

The dissent contends, however, that the real inquiry is prejudice. We agree that there has been a trend to prohibit jury charges instructing juries on how to interpret and use evidence, beginning with *Belcher* in 2009 and developing in *Cheeks*, *Stukes*, and *Cartwright*. However, the overwhelming weight of the precedent facing the appellate court on this issue in 2011 provided that failure to give the "good character alone" charge was reversible error. We do not agree with the dissent's conclusion that Pantovich fails to show prejudice because the appellate court would have extended the *Belcher* principle to good character charges at that time, especially given that this Court had upheld the precise charge just one year earlier in *Lee-Grigg*—a post-*Belcher* decision. Likewise, we are unable to presume that a hypothetically-granted petition for certiorari in 2013 would have resulted in the opinion envisioned by the dissent, as the "trend" at that time consisted of *Belcher*, a contrary decision in an on-point case in *Lee-Grigg*, and *Cheeks*.

The dissent posits that affirmance produces a strange result: we are granting Pantovich relief, yet for all intents and purposes, the "good character alone" charge is dead in South Carolina. However, this ignores that the State actually agreed to a general charge on good character. While trial counsel requested the now-problematic "good character alone" charge, the State suggested a "more balanced

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[2] *See Teague v. Lane*, 489 U.S. 288, 316 (1989) ("[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review . . . .") (emphasis in original).

[3] *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016).

charge" that would allow the jury to consider whether evidence constituted good character. Despite the State's acquiescence, the trial court did not mention good character at all in its charge, which would have made appellate counsel's chances of success on this issue even more probable. On remand, we believe Pantovich is entitled to a non-offending good character charge—for example, the first two paragraphs of the one he originally requested—if he introduces the requisite evidence. *See United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995) (holding that, instead of a requested "good character alone" charge, the trial court properly instructed the jury: "The defendant has introduced evidence of his character. More specifically, the defendant has introduced reputation and/or opinion evidence about his truthfulness, honesty and law-abidingness. You should consider character evidence with and in the same manner as all the other evidence in the case.").

Finally, we disagree with the State's contentions regarding the adequacy of the charge given and harmless error. The instruction included nothing regarding good character, despite the "good character alone" charge being warranted at the time of trial when a defendant produced such evidence. As to harmlessness, we agree with the PCR court that there was a reasonable probability of success on appeal because the jury could have considered evidence of Pantovich's peaceable character in deciding whether he brought on the difficulty of the incident. While the State argues a good character charge is inappropriate where a defendant admits to having killed a victim, if the defendant was acting in self-defense—and therefore, legally justified in his actions—we fail to see how a jury should be precluded from information that they can consider such evidence in deciding whether he did.

CONCLUSION

Viewing the propriety of the PCR court's decision based on the state of the law during the relevant timeframe—not as it has evolved today—we **AFFIRM**.

AFFIRMED

BEATTY, C.J., KITTREDGE, J., and Acting Justice Aphrodite K. Konduros, concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: I wholeheartedly agree with the majority's holding the "good character evidence alone" charge is improper and must never be given. I join the majority's directive that this charge must not be given in South Carolina courts in the future.

I disagree with the majority on two points. My disagreement would require us to reverse the PCR court, and thus I dissent. First, I would not remand for a new trial in which Pantovich will not get the good character evidence alone charge, the denial of which was the sole basis of the PCR court's decision. The majority makes a compelling argument the PCR court was correct under our precedent at the time the decision was made. However, it is my belief that if a direct appeal on the validity of the "good character evidence alone" charge had progressed to this Court on a petition for certiorari from the State, the case would have come to this Court during the timeframe in which the "trend" the majority acknowledges was in full swing. In my opinion, even if the court of appeals had reversed the conviction as the PCR court found reasonably likely, this Court would not have allowed that ruling to stand. I also believe remanding for a new trial—under the circumstance that Pantovich will not get on remand the charge for which he gets the remand—is, as the majority understates, "a strange result." For these two reasons, I would hold Pantovich suffered no prejudice.

Second, I do not believe a trial judge should give any guidance to a jury on how to use evidence of good character. Rather, I would hold that trial lawyers should be given the sole authority to suggest to the jury how the jury should use the evidence. I disagree with the majority's statement, "Pantovich is entitled to a non-offending good character charge—for example, the first two paragraphs of the one he originally requested." In my opinion, the trial judge correctly refused to give any of the charge Pantovich requested.

Pantovich received a fair trial, and even though the majority disagrees with me on the question of whether the trial court should give any guidance on how a jury should use evidence of good character, I would find Pantovich suffered no prejudice.

To the majority's explanation that the "good character evidence alone" charge is improper, I respectfully add these thoughts:

In *State v. Green*, 278 S.C. 239, 294 S.E.2d 335 (1982), we stated, "Generally, where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt . . . ." 278 S.C. at 240, 294 S.E.2d at 335 (citing *State v. Lyles*, 210 S.C. 87, 92, 41 S.E.2d 625, 627 (1947)). We affirmed the defendant's conviction, however, because we found "the error, if any," was harmless. 278 S.C. at 240, 294 S.E.2d at 335. In *State v. Lee-Grigg*, 387 S.C. 310, 692 S.E.2d 895 (2010), we quoted the statement from *Green* and reversed the defendant's conviction, stating "the trial court erred when it refused to give such a charge." 387 S.C. at 317, 692 S.E.2d at 898. The court of appeals has also reversed a defendant's conviction based on the trial court's refusal to charge the jury that "evidence of good character . . . may in and of itself create a doubt as to the guilt that should be considered by you." *State v. Harrison*, 343 S.C. 165, 170, 539 S.E.2d 71, 73 (Ct. App. 2000).

On the face of these cases, it appears the trial court erred in this case by refusing Pantovich's requested charge, and therefore, appellate counsel's failure to brief the issue was prejudicial and deficient performance. However, upon closer examination of these cases and the line of decisions upon which they are based, I would conclude our statement in *Green* was not then and is not now a correct statement of law. In light of that conclusion, I would find Pantovich failed to prove prejudice, and the PCR court erred by granting him a new trial. *See Garren v. State*, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018) (to obtain PCR, the applicant must prove counsel's performance was deficient, and the deficient performance prejudiced him) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)).

The applicable line of decisions begins in 1886 with *State v. Barth*, 25 S.C. 175 (1886). In *Barth*, the trial court charged the jury that character evidence is useful "only in doubtful cases." 25 S.C. at 177. We held "it was misleading and erroneous to charge the jury . . . 'the law . . . limit[s] the effect of good character to doubtful cases.'" 25 S.C. at 181. We stated,

> it is the privilege of the accused, in all cases where character is admissible, to put in evidence his good character without regard to the other proofs in the case, and it is for the jury to consider it in connection with the other evidence, and determine what force and effect it should have.

25 S.C. at 177. *Barth* sets forth the rule that trial courts may not charge the jury in such a way as to *limit* the jury's interpretation or use of evidence of the defendant's good character. We made no suggestion in *Barth* the trial court should charge the jury that it may use "good character evidence alone" as a basis for finding reasonable doubt.

In 1924 in *State v. Hill*, 129 S.C. 166, 123 S.E. 817 (1924), the defendant appealed his conviction on the ground the trial court improperly charged the jury to limit its use of evidence of his good character. 129 S.C. at 170, 123 S.E. at 818. We found the charge did not impose such a limit. We stated,

> Evidence of the defendant's good *reputation* for peace and good order is strongly persuasive of his good *character* in that respect, and is offered for the very purpose stated by the Circuit Judge, to show the improbability that the defendant would have committed or did commit the crime charged.

Id. (citing 30 C.J. 170). We did not hold, however, this language should be charged to the jury. There is certainly no support in *Hill* for the trial court to charge the jury "good character evidence alone" may give rise to reasonable doubt.

In 1947 in *Lyles*, relying on *Barth* and *Hill*, we addressed the defendant's claim the trial court should have explained to the jury it may consider evidence of his good character. We stated,

> There can be no doubt of the right of appellant to put in evidence his good character and it was "for the jury to consider it in connection with the other evidence,

> and determine what force and effect it should have." The good reputation of the accused, if proved, may be taken into consideration by the jury in determining whether or not he committed the crime charged.

Lyles, 210 S.C. at 92, 41 S.E.2d at 627 (first quoting *Barth*, 25 S.C. at 177; then citing *Hill*, 129 S.C. at 170, 123 S.E. at 818). Under *Lyles*—if it were not clear from *Barth* and *Hill*—it is clear a jury may consider evidence of a defendant's good character in all cases, not just "doubtful cases." However, there is nothing in *Lyles* suggesting this language should be charged to the jury. Certainly *Lyles* gives no support for a jury charge that "good character evidence alone" may give rise to reasonable doubt.

Nevertheless, in *Green* in 1982, relying on *Lyles*, this Court made the statement that "a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt." 278 S.C. at 240, 294 S.E.2d at 335. We did not reverse the conviction, however, finding "the error, if any, could not reasonably have affected the result and is properly regarded as harmless." 278 S.C. at 240, 294 S.E.2d at 335.

The first time any South Carolina court reversed a conviction on the basis of the trial court's refusal to give the "good character evidence alone" charge was the court of appeals' decision in *Harrison* in 2000. In *Harrison*, the defendant was convicted of simple possession of cocaine. 343 S.C. at 167, 539 S.E.2d at 72. Defense counsel "argu[ed] the court failed to issue a requested charge that evidence of good character and good reputation may in and of itself create a doubt as to the defendant's guilt." 343 S.C. at 169, 539 S.E.2d at 73. The court of appeals analyzed the same line of cases we discussed above—from *Barth* to *Hill* to *Lyles* to *Green*—343 S.C. at 170-73, 539 S.E.2d at 73-75, and held "[t]he trial court erred in failing to give the requested charge." 343 S.C. at 173, 539 S.E.2d at 75.

In *Lee-Grigg*, this Court also found "the trial court erred when it refused to give such a charge," and affirmed the court of appeals' decision to grant the defendant a new trial. 387 S.C. at 317, 692 S.E.2d at 898.

In this case, our prejudice analysis should focus on whether Pantovich has proven that but for appellate counsel's deficiency, "the result of [his] appeal would have been different." *Ezell v. State*, 345 S.C. 312, 314, 548 S.E.2d 852, 853 (2001). This requires us to reconsider whether the "good character evidence alone" portion of the requested charge should ever be given to the jury. *See State v. Marin*, 404 S.C. 615, 620, 745 S.E.2d 148, 151 (Ct. App. 2013) ("[T]here is no error of law in refusing to give a specific request to charge where . . . the charge requested is an incorrect statement of law . . . ."), *aff'd as modified on other grounds*, 415 S.C. 475, 783 S.E.2d 808 (2016).

To begin this reconsideration, there is no underlying constitutional or statutory principle of law that requires the "good character evidence alone" charge. Other than the decisions discussed above, there is no basis in law for charging a jury that "good character evidence alone" may form the basis for reasonable doubt. If anything, charges like this—instructing juries on how to interpret and use facts—run afoul of our constitutional prohibition against circuit courts charging juries on the facts. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. CONST. art. V, § 21.

There are, of course, many jury charges that are valid—despite no constitutional or statutory basis—because they are based on a sound interpretation of applicable case law. However, as demonstrated in the discussion above, the "good character evidence alone" jury charge requested in this case is actually based on a misinterpretation of law. Neither *Barth*, *Hill*, nor *Lyles* say anything about giving such a charge to the jury. Nevertheless, in *Green*, this Court mistakenly relied on *Lyles*, which in turn relied on *Barth* and *Hill*, in making the statement "evidence of good character . . . may in and of itself create a doubt" must be charged. 278 S.C. at 240, 294 S.E.2d at 335. The court of appeals then misinterpreted all of the cases when it reversed the defendant's conviction in *Harrison*. 343 S.C. at 173, 539 S.E.2d at 75. By the time this Court decided *Lee-Grigg*, our misstatement in *Green* had been repeated so many times we apparently accepted it without a meaningful inquiry. *Cf. State v. Rayfield*, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006) (Pleicones, J., dissenting in part) ("Some principles of law, however, are not to be charged to a jury."), *majority opinion overruled by State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016) (holding the jury charge then Associate

Justice Pleicones objected to being given should no longer be given because "it is not within the province of the court to express an opinion to the jury on its view of the facts"); *see also State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("The impression is sometimes gained that any language from an appellate court opinion is appropriate for a charge to any jury, but this is not always true.").

The "good character evidence alone" charge has been addressed in other states and in federal courts. Many of these courts once required the charge to be given, relying on an 1896 opinion from the Supreme Court of the United States, *Edgington v. United States*, 164 U.S. 361, 17 S. Ct. 72, 41 L. Ed. 467 (1896), and other nineteenth century state cases.[4] In *Edgington*, as in *Barth*, the defendant challenged the trial court's limitation on the jury's use of evidence of the defendant's good character. 164 U.S. at 365, 17 S. Ct. at 73, 41 L. Ed. at 471. The trial court charged, "If your mind hesitates on any point as to the guilt of this defendant, then you have the right and should consider the testimony given as to his good character." 164 U.S. at 364-65, 17 S. Ct. at 73, 41 L. Ed. at 471. Counsel objected, "We except to that part of the charge in stating the effect of good character, the defendant claiming that it should not be forced only in doubtful cases." 164 U.S. at 365, 17 S. Ct. at 73, 41 L. Ed. at 471. Like this Court did in *Barth* ten years earlier, the Supreme Court of the United States found it was error to limit the jury's consideration of evidence of the defendant's good character. The Supreme Court stated,

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided

[4] *See, e.g.*, *Jupitz v. People*, 34 Ill. 516, 521 (1864) (holding that "in all criminal cases whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner"); *People v. Garbutt*, 17 Mich. 9, 24, 27 (1868) (finding the trial court's limitation on the jury's use of evidence of the defendant's good character was error because it "surround[ed] the jury with arbitrary rules as to the weight they shall allow to evidence which has properly been placed before them").

> weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt.

164 U.S. at 366, 17 S. Ct. at 73-74, 41 L. Ed. at 471. The Supreme Court was not saying, however, this should be charged to the jury. Rather, the Court was saying—as we said in *Barth*—the trial court should not restrict the jury's use of evidence of the defendant's good character to "doubtful cases." *See Barth*, 25 S.C. at 181; *see also United States v. Burke*, 781 F.2d 1234, 1240 (7th Cir. 1985) ("The [*Edgington*] Court was trying to put an end to instructions that had disfavored character evidence by telling the jury not to consider the evidence unless it first found the case close.").

To this day, some courts hold the "good character evidence alone" charge must be given if requested and supported by the evidence. *See, e.g.*, *State v. Hobbs*, 705 S.E.2d 147, 149 (Ga. 2010) (relying on a line of decisions traceable to *Jupitz*, and holding a trial court must "explain how good character evidence could generate reasonable doubt sufficient to acquit"); *People v. Lyles*, 905 N.W.2d 199, 204 (Mich. 2017) (relying on a standard jury instruction derived from *Garbutt*, and finding the trial court erred in not charging, "Evidence of good character alone may sometimes create a reasonable doubt"). Respectfully, those decisions are based on a misinterpretation of nineteenth century cases—like *Edgington* and *Barth*—that were intended to prohibit trial courts from limiting the jury's use of evidence of good character, not to enable the jury to find reasonable doubt based on "good character evidence alone."

In *Burke*, the Seventh Circuit reconsidered what it conceded was its misinterpretation of *Edgington*, and eliminated the requirement of the "good character evidence alone" jury charge, overruling *United States v. Donnelly*, 179 F.2d 227 (7th Cir. 1950). The *Burke* court's explanation of how the *Donnelly* court misinterpreted *Edgington* is particularly useful in explaining that the "good character evidence alone" charge must not be given. Referring to the *Edgington* Court's statement, "The circumstances may be such that an

established reputation for good character . . . would alone create a reasonable doubt,"[5] 781 F.2d at 1240, the *Burke* court stated,

> It is a mistake to lift language out of a passage such as this and insert it in a jury instruction. Language in judicial opinions is not meant to be given undigested to a jury. Legal terms are hard enough for lawyers to understand; ripped from their context and presented to lay deciders, passages from opinions may do nothing but confound. It is always necessary for the judge to put the thought in language that those who see the inside of a court only once in a lifetime can understand.

781 F.2d at 1240. The court continued,

> *Edgington* did not suggest that the instruction should *say* that character evidence be considered in a special way by the jury; to the contrary it quoted at length from and cited cases holding that character evidence should simply be considered with other evidence. *Edgington* told the federal courts to eliminate differences in the treatment of character and other evidence, not to create new differences.

781 F.2d at 1241. The Seventh Circuit went on to explain that every federal circuit has repudiated the "good character evidence alone" charge, stating, "Every other court of appeals that has spoken on the question has concluded that such an instruction gives undue weight to character evidence. . . . Today we join the other courts of appeals. We overrule *Donnelly* and affirm the conviction." 781 F.2d at 1237; *see also* 781 F.2d at 1241 n.3 ("collect[ing] illustrative cases [from every circuit] in a note").

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[5] *Edgington*, 164 U.S. at 366, 17 S. Ct. at 74, 41 L. Ed. at 471.

In *Barth*, *Hill*, and *Lyles*, we clarified the jury must consider evidence of a defendant's good character in all cases, not just those where the State's proof is otherwise "doubtful." The clear consequence of these holdings is that—in some cases—evidence of a defendant's good character alone may legitimately cause the jury to find reasonable doubt and acquit. It is correct under the law, therefore, that good character evidence alone may give rise to reasonable doubt. However, the mere fact a statement is correct under the law does not require it to be charged to the jury. This statement is applicable to this case because it addresses a point of fact. The applicable principle of law is simply that the jury must consider all the evidence in all cases. It is up to the trial lawyer—not the trial court—to address the point of fact: whether good character evidence alone gives rise to reasonable doubt in any given case. *See Marin*, 404 S.C. at 623, 745 S.E.2d at 153 ("The role of the trial court is to charge the jury correctly based on the evidence presented at trial. The lawyers bear the responsibility to argue how a point of law affects the jury's interpretation of the evidence." (citation omitted)).

As the majority explains, this Court began in 2009 what has become a clear trend to forbid jury charges that instruct juries on how to interpret and use evidence. I am pleased we now extend that trend to evidence of a defendant's good character, and I join the majority's prohibition that trial courts must not charge the jury that "good character evidence alone" may give rise to reasonable doubt.

The Supreme Court of South Carolina

Re: Rules of the Board of Law Examiners - Appendix A, SCACR

Appellate Case No. 2014-001607

ORDER

The Board of Law Examiners requests the Court approve its proposed amendments to the Rules of the Board of Law Examiners found at Appendix A to Part IV of the South Carolina Appellate Court Rules. Pursuant to Rule 402(k)(3), this Court approves the Board of Law Examiners' proposed amendments to the Rules of the Board of Law Examiners. Appendix A to Part IV, SCACR, shall state as follows:

RULES OF THE BOARD OF LAW EXAMINERS
(Promulgated Pursuant to Rule 402(k)(3) of the
South Carolina Appellate Court Rules (SCACR))

SPECIAL ACCOMMODATIONS FOR DISABLED APPLICANTS.

1. Policy. It is the policy of the Board of Law Examiners (the Board) of the State of South Carolina to provide reasonable accommodations for disabled applicants including persons with learning disabilities and persons with health impairments. The bar examination will be administered to all eligible applicants in a manner that does not discriminate against those applicants with disabilities.

2. Application Procedure.

(a) Persons needing special accommodations on examinations should make a written request to the Board to obtain the

necessary information, procedures and written forms. Appropriate current documentation is required by the Board.

(b) Upon written request to the Board, the manner in which the examination is administered to an applicant may be modified while maintaining the security and integrity of the examination.

(c) An applicant must submit a written request for special testing accommodations on forms prescribed by the Board no later than November 1st for the February examination and April 1st for the July examination.

(d) Applicants must submit a current medical verification prepared by a licensed professional qualified to diagnose such disability who can describe the nature and extent of the disability. Applicants must submit all medical information to be considered by the Board with their written request.

(e) The Board may require the applicant to provide additional information in support of the applicant's request. This information may include, but is not limited to, information concerning special accommodations provided during the applicant's law school education including certification from official representatives of the school where such accommodations were provided. The Board may also require the applicant to undergo a physical/psychological examination to be conducted by a licensed professional designated by the Board verifying the nature and extent of the impairment. The Board may also appoint an expert to analyze the documentation submitted by the applicant and to make a recommendation to the Board concerning appropriate accommodations.

(f) In addition, an applicant seeking special testing accommodations due to a learning disability or attention deficit/hyperactivity disorder must provide appropriate documentation provided by a licensed professional qualified to diagnose such disability including, but not limited to, a licensed physician, learning disability specialist or psychologist. Learning disability and attention deficit/hyperactivity disorder evaluations must meet all requirements

stated on the Board's written forms and should be completed or updated within the past three (3) years. An updated evaluation does not necessarily need to be a full, comprehensive diagnostic evaluation, but must provide information concerning relevant treatment, course of condition, current impairment, and rationale for current accommodation requests. The previous comprehensive diagnostic evaluation must be submitted with the updated evaluation. It is the applicant's responsibility to insure the Board is provided with a complete record fully demonstrating the existence and extent of impairment.

3. General Standards and Procedures.

(a) Depending on the nature and extent of an applicant's disability, the exam may be administered to the applicant in a separate room. Applicants assigned to a separate testing room will be monitored by a proctor approved by the Secretary of the Board.

(b) At the request of a blind or sight impaired applicant, the Board may provide the examination in braille or in large print; provided, the request is made no later than November 1st for the February exam and April 1st for the July exam.

(c) The Board may allow the applicant to use the services of a special assistant. This person may not provide substantive assistance to the applicant, but may read the Multistate Performance Examination (MPT), Multistate Essay Examination (MEE) and/or the Multistate Bar Examination (MBE) questions to the applicant. The special assistant may type or write the applicant's answers to the MPT and MEE questions and fill in the MBE answer sheet at the applicant's direction. If the applicant chooses to use a special assistant, the applicant must provide background information regarding the special assistant to the Board. The special assistant shall not have any legal related employment or education. The Secretary of the Board must approve the special assistant.

(d) The Board may allow a disabled applicant additional time to complete the MPT, MEE, and MBE portions of the

examination. The additional time on each section of the examination shall not exceed one and one half (1 1/2) times the normal time allotted for the section. In addition, longer rest and/or lunch breaks may be permitted; however, in no event shall the entire examination extend beyond two (2) additional days.

(e) The Board shall determine the measures necessary to ensure that any special accommodations approved under this policy do not compromise the security or integrity of the examination or the integrity of the applicant's answers.

(f) The Board will notify the applicant of its decision on the request for special accommodations in writing at least thirty (30) days prior to the scheduled examination.

(g) An applicant dissatisfied with the decision of the Board may appeal to the Supreme Court within ten (10) days after service of the written decision of the Board. This appeal is to be made by filing a motion with the Clerk of the Supreme Court in compliance with Rule 240, SCACR. The record in this appeal will be limited to the forms and other documents considered by the Board prior to making its decision.

(h) The Secretary of the Board shall serve as the Americans with Disabilities Act coordinator for the Board and shall ensure that the provisions of this Rule are fully implemented.

These amendments shall take effect ninety (90) days from the date of this order. *See* Rule 402(k)(3), SCACR.

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

August 1, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John Calvin Sledge, Appellant.

Appellate Case No. 2016-000641

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5672
Heard October 1, 2018 – Filed August 7, 2019

AFFIRMED IN PART AND VACATED IN PART

Laura Ruth Baer, of Collins & Lacy, PC, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Caroline M. Scrantom, all of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

HUFF, J.: John Calvin Sledge appeals from his convictions and sentences for murder, unlawful conduct toward a child, and possession of a weapon during the commission of a violent crime. On appeal, Sledge raises three issues: (1) whether

the trial court erred in admitting portions of a 911 call because they amounted to inadmissible hearsay and were more prejudicial than probative; (2) whether the trial court erred in admitting his statements to police because they were not freely and voluntarily given; and (3) whether the trial court erred in imposing a five-year sentence for possession of a weapon during the commission of a violent crime because he was given a life sentence for the murder charge and section 16-23-490 of the South Carolina Code expressly prohibits such. We affirm the convictions but vacate the sentence imposed for the weapon possession.

FACTUAL/PROCEDURAL BACKGROUND

On the night of January 29, 2014, Kimberly Sledge (Victim) was killed by a single gunshot to the back of her head. After receiving two hang-up calls at 10:15 and 10:16 p.m. that night, 911 communications received a third call from Victim's ten-year-old son, M.W., at 10:17 p.m. In the 911 call, M.W. reported that his mother had been shot and stated that his mother was married to John Sledge. When the dispatcher asked who shot Victim, M.W. replied, "John Sledge." Asked when this occurred, M.W. replied, "Just a minute ago." M.W. told the dispatcher he thought his "dad just ran off." The dispatcher asked M.W. if Victim and Sledge were arguing, and M.W. stated that they were. M.W. provided a description of Sledge's vehicle to the dispatcher. The young boy can be heard crying often and expressing shock, disbelief, and fear during the twenty-two-minute call.

Officers arrived at the incident location at 10:34 p.m. Once in the home, they found M.W. on the phone in the living room and Victim deceased in the bathroom. After a "be on the lookout" was dispatched for Sledge, Deputies Robert May and John Williams observed a car matching the description of Sledge's and activated their blue lights and stopped Sledge. Because they were responding to an incident involving a gunshot victim, the deputies drew their firearms and ordered Sledge to show his hands and get out of his car and on the ground. Deputy May acknowledged repeatedly using profane language with Sledge while instructing Sledge to put his hands out the window of his car. The deputies placed Sledge in handcuffs and escorted him to Deputy May's vehicle, placing him inside it. Though Deputy May was holding on to Sledge, he testified Sledge was "able to walk just fine." Deputy May then read Sledge his *Miranda*[1] rights. Deputy May testified Sledge appeared to be intoxicated, and he noted Sledge had a strong odor

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

of alcoholic beverage coming from his person.[2] However, he testified Sledge was not "fall-down drunk," and he appeared to understand what was being said and was able to carry on a conversation. Review of Deputy May's in-car video reveals very clear *Miranda* warnings were given and Sledge responded "Yes, sir" when asked if he understood his rights. Further, Sledge appeared to get on the ground without difficulty when instructed to do so, and he did not stumble or falter when walking to the deputy's car. When asked if he would like to speak to the deputies, Sledge said he would and asked "what's going on?" Deputy May informed Sledge he was being detained because there was a crime scene at his house. Sledge asked the deputy "why" and indicated he did not know why there would be a crime scene. Deputy May then asked Sledge what he was doing before he left the house, and Sledge described some of his activities and indicated he left the house after getting into an argument with his wife. During the drive, Sledge questioned what was happening and Deputy May responded, "Well you and your wife got in a fight, right?" Sledge asked what was wrong with his wife and what was wrong with his family. The deputy responded he was going to let someone else tell Sledge about it, but told him that his child was fine.

While Deputy May was transporting Sledge to the Law Enforcement Center (LEC), the deputy was instructed to stop and meet with a forensic officer. Deputy May stopped at a business where the forensic technician, Iona Ooten, swabbed Sledge's hands for gunshot residue. Review of the in-car video reveals as follows: During this time—at around forty-nine minutes into the video—Sledge asked to use the bathroom, but the officers told him it was too cold. Deputy May buckled Sledge back in the vehicle, and Sledge again asked to use the bathroom. Ooten again stated that it was too cold, and Deputy May told Sledge he could use the bathroom downtown once they arrived there. About a minute after he first asked, Sledge asked to use the bathroom a third time and received the same response. They arrived at the LEC at about one hour and eighteen minutes into the video, or twenty-nine minutes after Sledged first requested to use the bathroom.

Once at the LEC, Sledge encountered Sergeant Ramon Rivera before being brought into an interview room, at which time Sledge asked if he could use the restroom. Sergeant Rivera was in the process of obtaining search warrants related

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[2] Deputy Williams found a 12-pack of beer in the passenger seat of Sledge's truck and noticed a few beers were missing.

to the matter at that time and told Sledge he would be back in five minutes. When Sergeant Rivera returned and asked Sledge if he still needed to use the restroom, Sledge stated he did not. Before Sledge was interviewed, a search warrant was served on him. While Sergeant Rivera stepped away to retrieve something, Sledge was escorted into the interview room where the search warrant was served on him, and he was stripped naked, processed for DNA, and photographed by Ooten. When Sergeant Rivera returned a few minutes later he was informed Sledge may have urinated on himself, and he noticed the chair Sledge had been sitting in was wet, and there was something wet on the floor. Sergeant Rivera and Investigator Tracy King then interviewed Sledge for two and a half hours after Sledge waived his *Miranda* rights. In the interview room, Sergeant Rivera asked Sledge whether he had been drinking. Sledge stated he had. The sergeant then asked Sledge if he was under the influence of alcohol, and Sledge replied that he was not, stating he drank two beers three or four hours ago. During the interview, Sledge claimed he and Victim only bickered that night and did not fight. He denied that he left the home after shooting his gun, denied knowing what happened to Victim, denied M.W. came out of the room during their bickering to see him sitting or lying on top of Victim as described by M.W., and adamantly denied shooting or harming Victim that night.

Meanwhile, Sergeant Ragan Marling, who at that time worked in criminal investigation involving crimes against children, met with M.W. at her office. She testified M.W. was visibly upset, asking a lot of questions concerning Victim. When Sergeant Marling informed him that his mother did not survive, M.W. broke down, started crying, and kept asking over and over, "Why would he do this?" On cross-examination, the defense elicited the following from Sergeant Marling: M.W. told her he heard arguing and yelling throughout the day; M.W. went into the den to see what was happening; he said Victim's shoulder appeared to be injured; at one time when he came out of his room, Victim and Sledge were in a physical altercation—with Sledge on top of Victim on the floor in front of the fireplace—and M.W. tried unsuccessfully to push Sledge off of Victim; M.W. then went back into his bedroom; before entering his bedroom, he stood at the doorway to his bedroom talking to Victim, who was in the bathroom near his bedroom, and Sledge stated something about taking Victim to the hospital; M.W. turned around and went into his bedroom and, thereafter, heard a loud bang; when he came out of his bedroom about ten minutes after hearing the bang, he did not see Sledge in the house. Notably, defense counsel asked the sergeant if M.W. went to bed after he

tried to push Sledge off Victim, and she stated M.W. went back to his room at that time, but she did not believe he went to bed at that time.

M.W. testified at trial concerning the events of that day. He stated they did not have any visitors. He ate dinner in his room that evening and spent most of his time in his bedroom once he came back into the house. At some point, Victim entered M.W.'s room trying to get away from Sledge. Before Victim entered his room, M.W. heard Victim and Sledge arguing. Victim left M.W.'s room and, thereafter, M.W. went out of his room to check on Victim because Victim and Sledge were being loud and M.W. was trying to go to sleep. When he exited his room, he saw Sledge sitting on Victim in a squatting position as Victim was on her back. M.W. pushed Sledge off Victim and Victim told M.W. to "just go," so M.W. went to his room. Victim followed M.W. back into his room. M.W. thought Victim had a broken collarbone, and he asked her about her shoulder. Victim stated to M.W. that Sledge was really mad and might kill her, which scared M.W. Victim then left M.W.'s room. M.W. estimated the time of this incident was 8:30 or 9:00 because that was his normal bedtime, he was in his pajamas, and he was "trying to go to sleep." He was not able to relax, though, as he heard arguing while he was in his bedroom. M.W. did not emerge from his room again until after he heard a loud bang and he felt the house shake and smelled gun smoke. M.W. waited about five minutes before he came out of his room. He found his mother face down on the floor between the hall and the bathroom, and Sledge was no longer there. M.W. found a phone in the bathroom and called 911.

Law enforcement did not find evidence of a robbery or burglary. Additionally, the evidence did not support that the crime involved a home invasion. Investigation into the lives of Victim and Sledge did not reveal any other individuals who had a problem with either of them. After the 10:15 and 10:16 p.m. hang-up calls, the third 911 call from M.W. started at 10:17 p.m. Review of surveillance video from a convenience store—identified by Sledge as the place he had driven to that night to purchase beer after he left his home—showed Sledge was at the location at 10:27 p.m. The drive from Sledge's house to the store took approximately nine minutes. One of the investigators testified he found a fairly large quantity of long, blond hair consistent with Victim's in the bathroom but found no hairbrushes in the room, which indicated some type of altercation occurred there. Victim sustained a single gunshot to the back of her head, which would have resulted in a very quick demise. The cause of death was determined to be a gunshot wound to the head, and the manner of death was ruled a homicide.

After the matter was submitted to the jury, it found Sledge guilty of murder, possession of a weapon during the commission of a violent crime, and unlawful conduct toward a child. The trial court sentenced Sledge to life on the murder charge, five years for possession of a weapon during the commission of a violent crime, and ten years for unlawful conduct toward a child.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence is within the discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Winkler*, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or they are controlled by an error of law. *Id.* "Our role when reviewing a trial court's ruling concerning the admissibility of a statement upon proof of its voluntariness is not to reevaluate the facts based on our view of the preponderance of the evidence." *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008). "Rather, our standard of review is limited to determining whether the trial court's ruling is supported by any evidence." *Id.* "Thus, on appeal the trial court's findings as to the voluntariness of a statement will not be reversed unless they are so erroneous as to show an abuse of discretion." *Id.*

LAW/ANALYSIS

I. 911 Call

Sledge made a pre-trial motion to exclude portions of M.W.'s 911 call. The trial court ruled the evidence admissible and allowed the tape to be played for the jury over Sledge's objection. On appeal, Sledge contends the trial court erred in admitting the portions of the 911 call in which M.W. stated (1) Victim and Sledge were fighting earlier in the evening and (2) Sledge shot Victim. He argues the statements were inadmissible hearsay for which no exception applies, and they were more prejudicial than probative. We disagree.

Rule 803 of our evidentiary rules affords an excited utterance exception to the rule against hearsay. It provides, even though the declarant is available as a witness, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. Rule 803(2), SCRE.

> Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.

State v. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010). "In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances." *State v. Sims*, 348 S.C. 16, 20, 558 S.E.2d 518, 521 (2002). "Additionally, such a determination is left to the sound discretion of the trial court." *Id.* at 21, 558 S.E.2d at 521. "The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor." *Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573. "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." *Id.* (quoting *Sims*, 348 S.C. at 22, 558 S.E.2d at 521). "The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (quoting *State v. Dennis*, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)). The determination of whether a statement qualifies as an excited utterance exception "is left to the sound discretion of the trial court." *Sims*, 348 S.C. at 21, 558 S.E.2d at 521. The burden of establishing facts that would qualify a statement as an excited utterance is upon the proponent of the evidence. *State v. Davis*, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006).

Sledge cites *Davis* in support of his argument that, because M.W. did not witness the shooting, the excited utterance exception does not apply. We find *Davis* distinguishable and the *Sims* case more applicable to the excited utterance exception under the facts of this case.

Davis involved the admissibility of testimony from the State's key witness, Shawn Hicks, regarding statements made to him by Greg Hill. 371 S.C. at 173, 638 S.E.2d at 59. Hicks testified he heard Davis, Reggie Stevens, and the victim arguing, after which he heard a gunshot and saw three individuals running through the victim's backyard. *Id.* After hearing the gunshot, Hicks sold drugs to Stevens and Hill, and Stevens and Hill returned a short time later with Davis. Davis then bought drugs from Hicks, during which time Davis had a shotgun. *Id.* Hicks testified Davis offered to sell him the shotgun. *Id.* Over defense counsel's objection, Hicks testified Hill told him not to purchase the gun. *Id.* at 174, 638 S.E.2d at 59. Thereafter, Hicks testified Hill told him that Davis and Stevens went into the house and further advised Hicks not to get the shotgun because the victim had been shot with it. *Id.*

This court affirmed Davis' murder and armed robbery convictions, and Davis filed a petition for writ of certiorari, arguing the statement made by Hill to Hicks—that the shotgun had been used to murder the victim—was erroneously admitted hearsay. *Id.* at 177, 638 S.E.2d at 61. Our supreme court agreed with Davis, finding this court erred in determining Hill's statement was admissible under the excited utterance exception. *Id.* at 178, 638 S.E.2d at 61-62. The court noted, "statements which are not based on firsthand information, such as [when] the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule." *Id.* at 179, 638 S.E.2d at 62. It concluded there was insufficient evidence that Hill's statement was an excited utterance because (1) no evidence was elicited by the State that Hill was still under the stress or excitement of the victim's shooting when the alleged statement was made and, therefore, the State failed to meet its burden of establishing a foundation for the excited utterance and (2) there was no evidence in the record to support the conclusion that Hill witnessed the shooting. *Id.* at 180, 638 S.E.2d at 62-63.

In *Sims*, police were dispatched to a location one morning where a five-year-old boy had been found upset and crying outside the apartment of his mother. 348 S.C. at 18, 558 S.E.2d at 520. The child's mother—the victim—was found inside the apartment in a pool of blood, and she remained in a coma until her death. *Id.* at 18-19, 558 S.E.2d at 520. At trial, the child, who was then six years old, initially answered the solicitor's questions and stated someone else was in the home besides him and his mother and he saw his mother getting hurt. *Id.* at 19, 558 S.E.2d at 520. However, the child would not identify the person who was in the apartment that night. *Id.* Thereafter, the solicitor elicited testimony from the responding

officer that the child appeared withdrawn and answered questions vaguely while keeping his head down. *Id.* at 20, 558 S.E.2d at 520. Over defense counsel's hearsay objection, the officer testified the child had indicated the appellant was in the apartment the night of his mother's death. *Id.* The trial court found the statement was hearsay but ruled it was admissible under the circumstances, noting the age of the child and the fact the child made the statement after he discovered his mother under traumatic circumstances. *Id.*

Our supreme court found the trial court did not abuse its discretion in admitting the child's statement to the officer because it fell under the excited utterance exception to the hearsay rule. *Id.* at 23, 558 S.E.2d at 522. In so ruling, the court found it met the first element required for an excited utterance exception because the statement related to the startling event of the child "seeing his mother after she was attacked and possibly while she was being attacked." *Id.* at 21, 558 S.E.2d at 521. It further found, if the child was under the stress of excitement—the second element—"then that stress was caused by the startling event of seeing his mother being attacked and not being able to wake her." *Id.* The court ultimately determined the child was under the stress of the excitement. *Id.* at 21-23, 558 S.E.2d at 521-22. It acknowledged a possible time period of twelve hours between the time of the attack and the time of the child's statement but observed, "[e]ven statements after extended periods of time can be considered an excited utterance as long as they were made under continuing stress." *Id.* at 21-22, 558 S.E.2d at 521. It further noted:

> In this case, a five-year-old child possibly saw his mother being attacked and, at the very least, was left alone with his severely injured mother whom he could not wake, until he made his way outside to be found by a neighbor. Under these circumstances, we find the stress of excitement from those events lasts a longer period of time than would be likely to occur if the son had been an adult.

Id. at 22, 558 S.E.2d at 521. Finding the declarant's demeanor and age and the severity of the startling event are other factors useful in determining whether a statement qualifies as an excited utterance—and the child's age and the severity of the startling event clearly weighed in favor of finding his statement to be an excited utterance—the court then looked at the child's demeanor. *Id.* It concluded,

although the child "was not crying or acting 'excited' in the sense of being animated when he made the statement," his demeanor could be characterized as someone who was under the "stress of excitement." *Id.* at 22, 558 S.E.2d at 522. Accordingly, it held "[g]iven the totality of the circumstances, we find the [child] was under the continuing stress of excitement when he told [the officer] appellant was in the home the night of the attack." *Id.* at 23, 558 S.E.2d at 522.

Like *Sims*, we find the trial court did not abuse its discretion in admitting M.W.'s statements to the officer concerning who shot Victim and that Victim and Sledge had been arguing because these statements fall under the excited utterance exception to the hearsay rule. *See Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573 ("Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition."). First, M.W.'s statements that Sledge shot his mother and that Sledge and his mother had been arguing undoubtedly relate to a startling event. Second, the statements were made while M.W. was under the continuing stress of the excitement. M.W. testified only about five minutes passed after he heard the gunshot before he emerged from his room to find Victim and call 911. Additionally, though there is an indication that at least some of the arguing was more removed in time, we nonetheless find M.W. was under continuing stress despite the lapse in time. *See Sims*, 348 S.C. at 21-22, 558 S.E.2d at 521 ("While the passage of time between the startling event and the statement is one factor to consider, it is not the dispositive factor. Even statements after extended periods of time can be considered an excited utterance as long as they were made under continuing stress."). Although the 911 recording reflects M.W. tried to remain calm and assist the dispatcher in providing important information during the call, M.W. can be heard crying at times, and he expressed shock, disbelief, and fear during the twenty-two-minute call. Third, it is clear the stress of the excitement was caused by the startling event. Notably, M.W.'s demeanor, his age, and the severity of the startling event also weigh in favor of finding the statements complained of were excited utterances. *See id.*at 22, 558 S.E.2d at 521 ("Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event.").

Accordingly, we find the statements were properly admitted under the excited utterance exception.[3]

We acknowledge that *Davis* clearly provides that in situations in which the declarant does not have firsthand knowledge because he did not witness an event, statements made by the declarant concerning the event are not admissible under the excited utterance exception to the rule against hearsay. Nonetheless, we find this situation is distinguishable from *Davis* because, while the evidence suggests M.W. did not visually observe Sledge shoot Victim, he perceived Sledge shot her based upon his witnessing of the argument and physical altercation between Sledge and Victim prior to the shooting, his auditory and sensory perception of the shooting, and his discovery of Victim's body in a pool of blood and the fact that Sledge had left the house. Under the totality of the circumstances, in particular the sequence of events here, we find the startling event was such as to suspend M.W.'s process of reflective thought, thereby reducing the likelihood he fabricated the statements in issue. *See Ladner*, 373 S.C. at 116, 644 S.E.2d at 691 ("The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" (quoting *Dennis*, 337 S.C. at 284, 523 S.E.2d at 177)).

We also disagree with Sledge's assertion the statements should have been excluded because they were more prejudicial than probative. All relevant evidence is generally admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 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. "Unfair prejudice means an undue tendency to suggest decision

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[3] Based upon this determination, we need not reach Sledge's argument that the statements were also not admissible under the present sense impression exception to the rule against hearsay. *See* Rule 803(1), SCRE ("The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.").

on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). Rule 403, SCRE, has sometimes been misstated, incorrectly providing that for evidence to be admissible under a Rule 403 analysis the probative value of evidence must substantially outweigh the danger of unfair prejudice to the defendant, whereas "[t]he correct test is the opposite: whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *State v. King*, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018). The misstated test "incorrectly places the burden on the proponent of the evidence to establish admissibility, while the proper test places the burden on the opponent of the evidence to establish inadmissibility" under Rule 403. *Id.* An appellate court reviews a trial court's Rule 403, SCRE ruling pursuant to an abuse of discretion standard and gives great deference to the trial court's determination. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Id.* (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

Here, the statements at issue were clearly relevant as to motive, opportunity and identity. Further, while we acknowledge the prejudicial effect is great—particularly as to M.W.'s statement that Sledge shot his mother—the child's trial testimony provides additional damaging details not included in the 911 call, including that he witnessed a physical altercation between Sledge and Victim prior to the shooting and, during this time, Victim told M.W. that Sledge was really mad at her and might kill her. His trial testimony also established a scenario that explains why M.W. would have perceived Sledge was the person who shot his mother. Accordingly, we cannot say the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and we find no abuse of discretion in the trial court's determination the evidence was admissible under Rule 403.

II. Statements to Police

Sledge contends the trial court erred in admitting both his statements in the patrol car and those made during the interrogation at the LEC because, based on the totality of the circumstances, they were not freely and voluntarily made. He maintains the trial court's ruling reveals it looked at the facts and circumstances in a piecemeal fashion rather than focusing on the totality of the circumstances. He points to the following: the long duration of police custody prior to his arrest; the

circumstances surrounding him being pulled over with the officers' guns drawn, them yelling obscenities, and him being handcuffed on the pavement despite his compliance; the fact that he was intoxicated; Sledge's repeated requests for an explanation; the fact that he was driven to a parking lot where his hands were swabbed for gunshot residue and he requested to use the bathroom and was assured he would be given the opportunity when they reached the LEC; the fact that he remained handcuffed at the LEC and he was not given access to a bathroom in spite of another request; the fact that he was stripped naked in the presence of several officers—including a female officer who photographed him; and the fact that he was in an orange jumpsuit and was handcuffed to a belt, where he remained until 4:14 a.m. Sledge argues, while none of these facts alone undermined the voluntariness of his statements, they had the cumulative effect of rendering his waiver involuntary. Accordingly, he contends the State failed to meet its burden of proving either of his waivers of rights were voluntary. We disagree.

First, we agree with the State that the issue concerning admission of the LEC interview recording is not preserved for our review. Defense counsel made a pretrial motion to exclude his statements made during the interview and again sought exclusion of the entire recording during the trial. However, following redaction of the recording, and after presentation of testimony from a witness on an unrelated matter, defense counsel stated he had no objection to admission of the redacted recording. *See State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) (holding appellant's assertion that the trial court erred by refusing to suppress a custodial statement was unpreserved because trial counsel failed to make a contemporaneous objection to the statement being read into evidence); *State v. Dicapua*, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (holding the defendant's statement that he had no objection to a videotape coming into evidence "amounted to a waiver of any issue" the defendant had with the videotape); *Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."). Nonetheless, even if the issue were properly preserved, we find no error in the admission of either the statements made in the patrol car or those made during the interrogation at the LEC.

In the video from Deputy May's car, when Sledge was initially pulled over he immediately complied with the officers' instructions, appeared to get on the ground

without difficulty, and he did not stumble or falter when walking to the deputy's car. Thereafter, a very clear *Miranda* warning was given, and Sledge responded "Yes, sir" when asked if he understood his rights. Though the officers were unable to accommodate Sledge's request to use the bathroom while in the parking lot, nothing of substance to this case was discussed by Sledge until arrival at the LEC. Once at the LEC, Sledge again asked to use the bathroom, and Sergeant Rivera told him he would be back in five minutes. When Sergeant Rivera returned and asked Sledge if he still needed to use the restroom, Sledge stated he did not. While Sergeant Rivera went to retrieve something, Sledge was escorted into the interview room for processing. When Sergeant Rivera returned, he was informed Sledge may have urinated on himself. Sergeant Rivera testified he was gone for just a few minutes during this time. Sledge changed into a jumpsuit before the interview began at the LEC. During the LEC interview, the recording shows a thorough recitation and explanation of Sledge's rights. Sledge was alert, coherent and attentive, and he requested an explanation when he desired. He stated he understood his rights and wished to speak to the officers. Sledge initialed each of the rights read to him and signed below the Waiver of Rights language emphatically stating, "I have nothing to hide, sir."

Though Deputy May testified Sledge appeared intoxicated when he pulled him over, and Sledge stated in his LEC interview he had two beers to drink, we find nothing to indicate intoxication to the level that Sledge did not realize what he was saying. *See State v. Saxon*, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) ("The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying."). Additionally, though surely a source of embarrassment when he urinated on himself, the only evidence is that this occurred before the LEC interview began, Sledge was not made to remain in soiled clothes but changed into a jumpsuit after the incident, he was not denied any comfort requests during his interview, and no statements of substance were made by him between the time of his initial request to use the bathroom and him relieving himself. Further, Sledge appeared relaxed and forthcoming with details in the recording of this interview, and we detect no coercive forces or anything to indicate Sledge's will was overborne. *See State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) ("The test of

voluntariness [of a statement] is whether a defendant's will was overborne by the circumstances surrounding the giving of a confession.").

Based upon the content of the videos and the testimony presented, the trial court thoughtfully considered the fact that Sledge was *Mirandized* twice; his rights were clearly and carefully explained; Sledge paid close attention to the rights explained to him and acknowledged his waiver of rights in writing; and the atmosphere in the interview room was not hostile and there was no evidence of coercion or pressure to the extent his will was overborne. It further recognized there was evidence of Sledge's intoxication and his denied use of the bathroom but determined these circumstances did not take away his ability to understand, process information and make rational decisions nor interfere with the voluntariness of the statement or his knowing and intelligent waiver of his rights under *Miranda*. We hold the trial court's determination on this matter is supported by evidence and find no abuse of discretion in the admission of Sledge's statements. *See State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) ("The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."); *id.* ("When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence.").

III. Sentence on Weapon Charge

Finally, Sledge contends the trial court erred in sentencing him to five years of incarceration for possession of a weapon during the commission of a violent crime because he was sentenced to life for his murder conviction, and statutory law prohibits such a sentence when a life sentence without parole is imposed for a violent crime. Accordingly, he argues this sentence should be vacated. Though he acknowledges defense counsel did not raise an objection to the improper imposition of this sentence, Sledge argues this court should nonetheless review the issue in the interest of judicial economy. The State acknowledges that Sledge's weapon possession sentence should be vacated because it was issued in violation of the statute and further concedes Sledge is entitled to the proper sentence regardless of issue preservation. We agree and vacate the five-year sentence for possession of a weapon during the commission of a violent crime. *See* S.C. Code Ann. § 16-23-490(A) (2015) (providing the five-year sentence for possession of a weapon during the commission of a violent crime "does not apply in cases where

the death penalty or a life sentence without parole is imposed for the violent crime"); *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) (noting, though a challenge to sentencing must be raised at trial to be preserved for appellate review, an exception to the rule authorizes the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances); *State v. Johnston*, 333 S.C. 459, 463-64, 510 S.E.2d 423, 425 (1999) (remanding for resentencing in a case which "present[ed] the exceptional circumstance in which the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence"); *State v. Vick*, 384 S.C. 189, 202-03, 682 S.E.2d 275, 281-82 (Ct. App. 2009) (finding, under circumstances in which the State conceded it was error for the trial court to sentence a defendant for the kidnapping of a victim whom he was also convicted of murdering and that any such sentence for kidnapping should be vacated, it was appropriate to vacate the sentence for kidnapping even though the defendant failed to challenge the sentence when it was imposed).

Based on the above, we find no error in the admission of the portions of the 911 call or Sledge's statements and therefore confirm Sledge's convictions. However, we find the trial court erred in imposing the five-year sentence on the weapon charge and, accordingly, vacate that sentence.

AFFIRMED IN PART AND VACATED IN PART.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cricket Store 17, LLC d/b/a Taboo, Appellant,

v.

City of Columbia Board of Zoning Appeals, Respondent.

And

City of Columbia Zoning Administrator,
Counterclaimant,

v.

Cricket Store 17, LLC d/b/a Taboo, Counterdefendant.

Appellate Case No. 2017-000561

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5673
Heard May 16, 2019 – Filed August 7, 2019

AFFIRMED

Thomas R. Goldstein, of Belk Cobb Infinger &
Goldstein, PA, of Charleston, for Appellant.

Peter M. Balthazor, of Riley Pope & Laney, LLC, of Columbia, and Scott D. Bergthold, of Chattanooga, Tennessee, for Respondent.

KONDUROS, J.: Cricket Store 17 d/b/a Taboo (Taboo) appeals the order of the circuit court affirming the decision of the City of Columbia Board of Zoning Appeals (the Board) in denying Taboo the right to request a special exception from a city ordinance limiting the operation of sexually-oriented shops within the limits of the City of Columbia (the City). We affirm.

FACTS/PROCEDURAL BACKGROUND

In 2011, Taboo applied for a license to operate the City's only licensed adult business. The City issued the license on December 5, 2011. On December 19, 2011, the City hired Scott Bergthold, a Tennessee attorney who specializes in handling adult businesses regulation/zoning. The City passed a licensing ordinance to regulate adult businesses. Subsequently, Bergthold drafted a zoning ordinance to regulate adult business locations for the City. This ordinance, sections 17-371 to -376 of the City of Columbia Code of Ordinances, (the ordinance) was enacted in November of 2012.

Section 17-374(a) of the ordinance provides: "No variance from any of the provisions of this section may be granted by the zoning board of adjustment. No special exception regarding any of the requirements of this section may be granted by the zoning board of adjustments." Taboo brought constitutional challenges against the ordinance in federal court and lost. *See Cricket Store 17, LLC v. City of Columbia*, 97 F. Supp. 3d 737 (D.S.C. 2015) (granting the City's motion for summary judgment), *aff'd*, 676 Fed. Appx. 162 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 116 (2017).

After Taboo's federal claims failed, Taboo applied to the Board for a special exception. However, the Zoning Administrator rejected and returned Taboo's application for special exception by letter dated February 26, 2016, stating the ordinance prohibited Taboo from filing an application for special exception. Meanwhile, the City threatened criminal prosecution against Taboo for violating the ordinance. On January 28, 2016, the Zoning Administrator delivered a written notice of violation letter to Taboo. Taboo then filed two appeals with the Board—

one appealing the Zoning Administrator's decision to issue citations and a second one appealing the Board's refusal to accept its application for special exception. The Board accepted both appeals.

The City scheduled both administrative hearings for April 12, 2016. After the hearings were conducted, the Board affirmed the Zoning Administrator's decision on both counts. Taboo appealed these rulings to the circuit court which affirmed. This appeal followed.

STANDARD OF REVIEW

This court reviews appeals from a local zoning board pursuant to the standards proscribed in section 6-29-840 of the South Carolina Code (Supp. 2018). *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004). Findings of fact will not be disturbed unless the record contains no evidence to reasonably support them. *Id*. However, "[i]ssues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Eagle Container Co. v. Cty. of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008).

LAW/ANALYSIS

I. Res Judicata

As an initial matter, the City argues res judicata bars Taboo's claims in this case, and therefore, the circuit court's order should be affirmed. The City maintains it defeated Taboo's challenges to the ordinance in federal court and those decisions prohibit relitigation of any issues that were, or could have been, raised therein. We disagree.

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.

Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (alteration in original) (quotation marks omitted)).

In this case, the circuit court held "the federal court rejected Taboo's challenges to the City's application of its ordinance to Taboo, and the Fourth Circuit has recently affirmed that ruling. That final judgement in federal court is *res judicata* to Taboo's claims against the City's enforcement of the ordinance against its sexual device shop." The circuit court went on to affirm the rejection of Taboo's application for special exception and the issuance of citations in January 2016 on the merits.

We conclude res judicata does not apply to the matters on appeal in the present case. The federal litigation affirmed the constitutionality of the ordinance generally and as applied to Taboo. While Taboo is still attempting to postpone its demise in its current location, it is not alleging the ordinance is unconstitutional or cannot be applied to it on a substantive basis. Therefore, the issues raised in this appeal were not litigated in the federal action nor could they have been. First, the citations were issued in 2016, after the district court's opinion. Likewise, Taboo did not apply for a special exception until 2016. Both issues involve the interpretation and procedural implementation of the ordinance as opposed to its constitutional validity or general application to Taboo. Because we conclude res judicata does not bar Taboo's arguments, we will address them in turn.

II. Statutory Construction

Section 17-374(a) of the ordinance provides: "No variance from any of the provisions of this section may be granted by the [Board]. No special exception regarding any of the requirements of this section may be granted by the [Board]." Taboo contends use of the word "may" means the Board had the discretion to grant its request for a special exception. Consequently, the circuit court's conclusion the Board could not at least consider its application is erroneous. We disagree.

"The primary rule of statutory construction is that the [c]ourt must ascertain the intention of the legislature." *Kerr v. State*, 345 S.C. 183, 188, 547 S.E.2d 494, 496 (2001). "In interpreting a statute, 'the court must give the words their plain and ordinary meaning without resorting to a tortured construction which limits or expands the statute's operation.'" *State v. Bull*, 350 S.C. 58, 61, 564 S.E.2d 351,

353 (Ct. App. 2002) (quoting *State v. Dickerson*, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000)). "Furthermore, 'a statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.'" *Id*. (quoting *State v. Baker*, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993)). "As with statutes, the lawmakers' intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 466, 602 S.E.2d 76, 79 (Ct. App. 2004) (quoting *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)).

"The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning . . . ." *Kennedy v. S.C. Ret. Sys*., 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001). "[W]hen the question arises whether 'may' is to be interpreted as mandatory or permissive in a particular statute, legislative intent is controlling." *Robertson v. State*, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981). "'[W]here other words are used in connection with "shall," "must," "may[,]" or "might," which clearly indicate mandatory or directory construction, as the case may be, we have never ignored the force of the descriptive or qualifying language.' . . . Courts that have construed legislative use of the phrase 'may not' have consistently held that the phrase is mandatory and not permissive or discretionary." *Stringer v. Realty Unlimited, Inc.*, 97 S.W.3d 446, 448 (Ky. 2002) (quoting *Clark v. Riehl*, 230 S.W.2d 626, 627 (Ky. 1950)); *see also In re Denial of Application for Issuance of One Original (New) On-Premises Consumption Beer/Wine License*, 883 P.2d 833, 836 (Mont. 1994) (holding the phrase "may not consider" precludes consideration).

In the ordinance at issue, use of the term "no" at the beginning reveals the intent that variances or special exceptions to the ordinance not be allowed. South Carolina case law has recognized the term "may" does not exclusively connote discretionary conduct when construing it so would violate legislative intent. Furthermore, the rules of construction indicate the court is not to give words a tortured meaning. To construe this ordinance as discretionary requires one to read out the word "no" in a way that contorts its plain meaning and renders it superfluous. Consequently, we affirm the circuit court's finding the ordinance did not permit the Board discretion to grant Taboo's request for special exception.

III. Conflict with Statute

Next, Taboo argues the circuit court erred in not finding section 17-374(a) of the ordinance conflicts with the enabling legislation that creates local zoning boards of appeal, section 6-29-800 of the South Carolina Code (Supp. 2018). We disagree.

Subsection (B) of the enabling statute states, "Appeals to the [B]oard may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county." Taboo maintains it is an aggrieved person and must therefore be permitted to make its appeal for a special exception. The City argues the ordinance prohibits the granting of a variance in this case and the "any aggrieved person" language in subsection (B) of the enabling statute is proscribed by the subject matter limitations set forth in subsection (A). Section 6-29-800(A)(2) provides the Board has the power "to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship." Further, "[a] local governing body by ordinance may permit or preclude the granting of a variance for a use of land, a building, or a structure that is prohibited in a given district . . . ." § 6-29-800(A)(2)(d)(i).

Under a prior version of this enabling legislation, our supreme court found an ordinance flatly prohibiting variances conflicted with the enabling legislation at issue. The disputed ordinance in *Bostic v. City of W. Columbia*, 268 S.C. 386, 389, 234 S.E.2d 224, 225 (1977), provided "under no circumstances shall the Board of Adjustment grant a variance to permit a use not generally or by specific exception permitted in the district involved." The court found the challenged ordinance conflicted with the enabling statute which permitted zoning boards to grant variances. *Id*. at 389-90, 234 S.E.2d at 226. In contrast, the current enabling legislation specifically authorizes local governing bodies to "preclude the granting of a variance for a use of land, a building, or a structure that is prohibited in a given district." 6-29-800(A)(2)(d)(i). Furthermore, section 6-29-800(A)(3) enables governing bodies "to permit uses by special exception *subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance*." *Id.* (emphasis added). Because local governing bodies are now permitted to pass a prohibitory ordinance like 17-374(a), we conclude the current statute and challenged ordinance do not conflict even in light of the "any aggrieved person" language in subsection (B). As the City maintains, the designation of *who* may

appeal for a variance is circumscribed by the parameters set forth in subsection (A). Therefore, we affirm as to this issue.

IV. Remaining Issues

Additionally, Taboo asserts (1) it was not afforded the opportunity for a presubmission meeting with the City, (2) its claims should have been referred for mediation, and (3) the circuit court erred in admitting Bergthold pro hac vice. We conclude these issues are either unpreserved for appellate review or have been abandoned based on a lack of citation to supporting law. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal).

CONCLUSION

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

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brandon Rashad Marshall, Jr., Appellant.

Appellate Case No. 2016-000870

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

Opinion No. 5674
Submitted November 1, 2018 – Filed August 7, 2019

AFFIRMED

Appellate Defender Susan B. Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

WILLIAMS, J.: In this criminal appeal, Brandon Rashad Marshall, Jr. appeals his convictions for murder and possession of a firearm during the commission of a violent crime. On appeal, Marshall argues the circuit court erred in denying him

immunity under the Protection of Persons and Property Act (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2015). We affirm.

FACTS/PROCEDURAL HISTORY

Marshall was indicted for murder and possession of a weapon during the commission of a violent crime after he shot and killed Anthony Williams (Victim) on May 22, 2014. Prior to trial, Marshall sought immunity from prosecution pursuant to the Act, and on April 4, 2016, the circuit court conducted an immunity hearing pursuant to *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). At the immunity hearing, the circuit court admitted the video recording of Detective Burckhardt interviewing Marshall on the night of the incident (the recorded interview).

During the immunity hearing, Marshall testified he met Victim approximately three months prior to the shooting, and the two began a sexual relationship about one month later. At the time of the incident, Victim was also in a relationship with Ashley Butler. Victim and Butler resided together, but Victim was not on Butler's lease and was on trespass notice for Butler's apartment (the apartment). On the night of the shooting, Marshall was invited to visit Butler and Victim at the apartment. Marshall stated he took his gun into the apartment because he argued with Butler's neighbor before, and he previously witnessed the neighbor severely assault another man. Marshall testified that while he was at the apartment, Victim and Butler got into an argument, so he left the room. Marshall stated he returned to the room when he heard Butler yelling, "Get off of me, you are always putting your hands on me." He also indicated he heard Butler say she could not breathe. Marshall stated he saw Victim on top of Butler with one hand around her neck and the other hand positioned to strike her face. Marshall testified he grabbed his gun off the table, inserted the clip, and told Victim he needed to stop and needed to leave. Victim left the apartment, and Marshall followed him.

Marshall stated he returned to the back door to gather his belongings, but Butler did not want to open the back door, so she put his bag on the front porch. Marshall testified that after he put his bag, but not his gun, in his car, he saw Victim go back to the apartment, and he thought Victim was trying to kick in the door. Marshall stated he approached Victim in an attempt to calm Victim down and encourage him to leave because he feared Victim would get in trouble for violating the trespass notice. Marshall also testified he was afraid Victim would attempt to kill

Butler if Victim was successful in kicking in the door. Marshall stated Victim shoved him to the ground, and Marshall was fairly certain his glasses fell off. Marshall testified he approached Victim again and tried to grab Victim's wrist, but Victim pulled away and resumed kicking and punching the door. When Marshall attempted to grab Victim's hand, Victim turned around and shoved him twice, knocking him into a tree. Marshall indicated he had a hard time getting up, and when he finally got up, Victim pushed him against the tree again, causing Marshall to fall. Marshall indicated Victim got on top of him and hit his face at least once while Marshall repeatedly told Victim to get off of him. According to Marshall, he was not physically able to get Victim off of him because he was overweight and suffered from prior injuries stemming from automobile accidents. Marshall testified he was pretty sure he was on the ground when he turned over, threw back his hand, and fired the gun until it stopped firing. Marshall then ran to his car and drove away, but he quickly returned to the scene after police arrived. Marshall testified he believed Victim was trying to kill him and Butler and that Victim would have killed him had he not defended himself. According to Marshall, he did not make a definite decision to shoot Victim.

Marshall acknowledged his testimony during the immunity hearing differed from what he told Detective Burckhardt in the recorded interview, but he indicated his memory was much better at the immunity hearing than it was "immediately after the traumatizing incident." The recorded interview differed from the immunity hearing testimony as to the distance between Marshall and Victim when Marshall fired the gun and as to whether Marshall (1) had his glasses on when he shot Victim, (2) was standing or lying on the ground when he shot Victim, (3) put the clip in the gun during Victim and Butler's argument or after Victim shoved him, and (4) fired the gun continuously or stopped firing but resumed firing after Victim tried to get back up.

At the immunity hearing, Butler's testimony differed from Marshall's account of the events. Butler testified that on the night of the incident, an argument ensued between her and Victim. Butler stated she spit at Victim, and Victim grabbed her and held her down on the couch. Butler testified that although she could not breathe when Victim held her down on the couch, she believed it was because of the position she was in not because Victim was choking her. Butler averred Victim did not choke her. She further testified Victim did not hit her, she never told Victim to stop hitting her, and she never believed Victim was going to kill her or

seriously hurt her. She stated that throughout their relationship, Victim never hit or assaulted her.

According to Butler, Victim left when Marshall grabbed Victim while he was on top of her on the couch and told Victim to leave. After Marshall and Victim left, Butler locked the back door. She testified Marshall knocked on the back door to get his things, she put them on the front porch, and she asked him to leave. Butler indicated Victim then knocked on the back door to get some clothes. Butler testified Victim knocked louder than Marshall, but she did not think he was trying to kick in the door, and she did not fear he was going to hurt her. Butler stated she did not let Victim in, but she yelled through the door that she would get Victim's clothes from upstairs. Butler testified she did not let Victim in because she feared she would get kicked out of her apartment as a result of the trespass notice, not because she was afraid. As she was coming down the stairs with Victim's clothes, Butler stated she heard gunshots. A photograph admitted into evidence by the State showed that the police found Victim's clothes near the front door.

Butler's neighbor also testified at the immunity hearing. She stated she awoke to the sound of gunshots, and then she heard a male voice yell "you are messing with the wrong [person]." She testified she heard no pause in the gunshots.

Dr. Nicholas Batalis conducted Victim's autopsy, which showed four bullet wounds. He testified he did not observe any stippling or soot on Victim's injuries. Dr. Batalis explained soot will not travel further than six to twelve inches from the location where the gun was shot, and stippling will not travel more than two to four feet. This indicated Marshall was not within close range when he shot Victim.

At the close of the immunity hearing, the circuit court denied Marshall's request for immunity under the Act, finding Marshall failed to show the elements of self-defense by a preponderance of the evidence. Specifically, the court noted the inconsistencies (1) within Marshall's testimony at the hearing, (2) between the recorded statement and Marshall's testimony, (3) between Marshall's testimony and Butler's testimony, and (4) between the scientific evidence and Marshall's theory of the case. The case proceeded to a jury trial, and Marshall was convicted of murder and possession of a weapon during the commission of a violent crime. The circuit court sentenced Marshall to concurrent sentences of forty years' imprisonment for

murder and five years' imprisonment for the possession of a weapon during the commission of a violent crime. This appeal followed.[1]

ISSUE ON APPEAL

Did the circuit court err by denying Marshall immunity from prosecution pursuant to the Act?

STANDARD OF REVIEW

Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Act, employing a preponderance of the evidence standard. *State v. Manning*, 418 S.C. 38, 43, 791 S.E.2d 148, 150 (2016). Appellate courts review an immunity determination for abuse of discretion. *Id*. at 45, 791 S.E.2d at 151. A circuit court abuses its discretion when its ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

LAW/ANALYSIS

Marshall argues the circuit court erred in denying him immunity from prosecution under the Act. Specifically, Marshall contends he established by a preponderance of the evidence the elements required for immunity under the Act and the requisite elements of self-defense because (1) he was without fault in bringing on the difficulty because Victim was the initial aggressor, (2) he believed he was in imminent danger and a reasonably prudent person would have held the same belief, (3) he was not engaged in unlawful activity at the time of the fatal altercation with Victim, and (4) he had no duty to retreat because the altercation occurred in a public area of Butler's apartment complex. We disagree.

Subsection 16-11-450(A) of the South Carolina Code (2015) provides, "A person who uses deadly force as permitted by the provisions of this article or another

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[1] Marshall's counsel initially filed a motion to be relieved and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), which raised another issue on appeal. By order filed November 13, 2017, this court denied the motion to be relieved as counsel and ordered the parties to fully brief the issue of whether Marshall was entitled to immunity from prosecution pursuant to the Act.

applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force . . . ." Subsection 16-11-440(C) provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C) (2015).

To warrant immunity under the Act, there must be a pretrial determination where the accused must demonstrate the elements of self-defense, save the duty to retreat, to the satisfaction of the circuit court by a preponderance of the evidence. *State v. Curry*, 406 S.C. 364, 370–71, 752 S.E.2d 263, 266 (2013). The accused must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; and (3) if his defense was based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have held the same belief, or if he actually was in imminent danger, the circumstances "would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life." *Id*. at 371 n.4, 752 S.E.2d at 266 n.4.

We find the circuit court did not abuse its discretion in holding Marshall was not entitled to immunity because he failed to prove the elements of self-defense by a preponderance of the evidence due to inconsistencies in the record. In recent precedent, our supreme court has clarified when inconsistent evidence warrants a denial of immunity from prosecution under the Act. *See State v. Cervantes-Pavon*, 426 S.C. 442, 448–451, 827 S.E.2d 564, 567–69 (2019); *State v. Andrews*, Op. 27894 (S.C. Sup. Ct. filed June 19, 2019) (Shearouse Adv. Sh. No. 25 at 9–12). "[J]ust 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 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. "Thus, the relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." *Andrews*, Op. 27894 at 11–12.

Marshall points to *State v. Douglas* to support his contention that immunity should have been granted. 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). In *Douglas*, this court held the accused proved he acted in self-defense by a preponderance of the evidence when he shot the victim after the victim assaulted him and refused to leave the accused's house. *Id*. at 314, 319, 768 S.E.2d at 236, 240. However, this case differs from *Douglas* because the physical evidence presented in *Douglas* was consistent with the accused's testimony. *Id.* at 319–20, 768 S.E.2d at 239–40. In the instant case, the circuit court found numerous inconsistencies called Marshall's credibility into question and resulted in Marshall failing to establish entitlement to immunity by the preponderance of the evidence. Such inconsistencies included the sequence of events leading up to the shooting, whether Marshall was standing and whether he was wearing his glasses when he fired the shots towards Victim, whether the shots were continuous, when Marshall put the clip in the gun, and the distance between Marshall and Victim when Marshall fired the gun. The court also noted inconsistencies between Marshall's testimony and Butler's testimony, including what led to the initial argument between Butler and Victim, whether Victim was choking and hitting Butler, and the intensity with which Victim was knocking on the back door. Based on these inconsistencies, the circuit court found Marshall's testimony was unreliable and prevented the court from finding he established the relevant elements of self-defense by a preponderance of the evidence.

The circuit court specifically noted Marshall did not establish by a preponderance of the evidence that he was without fault in bringing about the difficulty. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (explaining to establish self-defense, the accused must show he was without fault in bringing on the difficulty); *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955) ("[O]ne cannot through his own fault bring on a difficulty and then claim the right of self-defense . . . ."); *State v. Wigington*, 375 S.C. 25, 32, 649 S.E.2d 185, 188 (Ct. App. 2007) ("[O]ne who provokes or initiates an assault cannot escape criminal liability by invoking self[-]defense . . . ." (first alteration in original) (quoting *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999))). In *State v. Slater*, our supreme

court noted it could be reasonably calculated that the accused brought on the difficulty when he approached an altercation that was already underway with a loaded weapon by his side. 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). In the instant case, following the argument between Victim and Butler, the parties separated before Marshall, who was aware Victim was angry, approached Victim at the back door of the apartment and inserted himself—and his gun—into Victim's interactions with Butler. Marshall repeatedly grabbed Victim's wrist and hand, causing Victim to become aggravated and shove Marshall. Based on Marshall's actions, the circuit court found Marshall did not establish by a preponderance of the evidence that he was without fault in bringing about the difficulty.

Based upon our review of the record, we find the circuit court properly weighed the evidence presented and did not abuse its discretion in denying immunity under the Act.

CONCLUSION

Thus, the circuit court's denial of immunity is

AFFIRMED.[2]

HUFF and SHORT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jessica Orzech Thompson n/k/a Jessica Orzech Pares, Appellant,

v.

Robert Guignard Thompson, Respondent.

Appellate Case No. 2016-001770

Appeal From Charleston County
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 5675
Heard December 4, 2018 – Filed August 7, 2019

REVERSED AND REMANDED

Gregory Samuel Forman, of Gregory S. Forman, PC, of Charleston, for Appellant.

Megan Catherine Hunt Dell, of Dell Family Law, P.C., of Charleston; and Theresa Marie Wozniak Jenkins, of Theresa Wozniak Jenkins, Attorney at Law, LLC, of Flint, Michigan, both for Respondent.

WILLIAMS, J.: In this domestic relations matter, Jessica Pares (Wife) appeals the family court's Order from Rule to Show Cause/Motion, arguing the family court erred in (1) granting Robert Thompson's (Husband) Rule 60(b)(5), SCRCP motion; (2) refusing to give Wife another opportunity to refinance the former

marital home (the Home); (3) failing to make Husband solely responsible for the lien with Palmetto Coastal Investments, LLC (the Palmetto Lien); and (4) awarding attorney's fees to Husband and not awarding attorney's fees to Wife. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on October 13, 2002. During the marriage, the parties owned and operated Palmetto Tree Service, LLC (Palmetto Tree). Wife managed the accounting and clerical tasks, and Husband worked at various job sites planting, removing, and fertilizing trees.

Husband and Wife separated around April 15, 2010, and they were divorced on July 26, 2011. After the parties separated, but prior to their divorce, Husband and Wife entered into a written final settlement agreement (the Agreement) resolving all issues arising out of their marriage except for the matter of divorce. On October 8, 2010, the family court issued a final order (the Final Order), which approved the Agreement, incorporated the Agreement, and indicated the Agreement was issued as the enforceable order of the court.[1]

The Final Order provided "[a]s soon as she is able, Wife shall assume or re-finance all loans on [the Home] in her own name. . . . Wife must place [the Home] on the market for sale on or before June 1, 2025." The Final Order also provided Husband and Wife would each be responsible for their own debts, indemnify each other against liability for those debts, and pay all accounts and obligations in a timely manner so as to not harm the other party's credit. The Final Order made Husband responsible for all debts associated with Palmetto Tree and indemnified Wife from Palmetto Tree's debts. Finally, the Final Order provided:

> It is the intent of the parties that the provisions of [the Final Order] shall govern all rights and obligations of the parties as well as all rights of modification; and, further, that the terms and conditions of [the Final Order] . . . shall not be modifiable by the parties or any court without the written consent of Husband and Wife . . . .

[1] Hereinafter, the Agreement is referred to as the Final Order because the Agreement was incorporated into the Final Order.

> Neither the Family Courts of the State of South Carolina nor any other court shall have jurisdiction to modify, supplement, terminate, or amend [the Final Order] or the rights and responsibilities of the parties hereunder.

In August 2011, Wife, on the advice of her counsel—individually and on behalf of Palmetto Tree—consented to the entry of the Palmetto Lien in the amount of $42,500. The Palmetto lien resolved a lawsuit initiated by Palmetto Coastal Investments, LLC, on December 29, 2009, after payments were not made pursuant to a January 31, 2008 commercial lease that was signed by Wife personally and on behalf of Palmetto Tree.[2]

After entry of the Final Order, Wife paid the mortgages on the Home from accounts held by Palmetto Tree. Husband resided in the Home without Wife from October 2012 until November 2013. During that time, Wife continued to pay the mortgages through June 2013,[3] but no further mortgage payments were made following the June 2013 payment until February 2015. Wife testified she believed Husband would pay the mortgages while he resided in the Home. She stated she presented Husband with a lease that required Husband to pay rent, but Husband refused to sign the lease. Husband testified Wife did not provide him with a proposed lease, and there was no agreement for him to pay the mortgages because Wife paid all of the bills out of the Palmetto Tree account. Husband also noted the court did not order him to pay the mortgages. Husband testified that at some point, he became aware he would have to start paying the mortgages after he and Wife argued about the payments. However, Husband indicated he could not pay the mortgages because Wife interfered with his business by withholding checks and insurance information, opening a competing business, and disconnecting his business phone. Husband and Wife each included the Home's mortgage payments on their individual financial declarations in 2013.

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[2] Wife indicated she and Husband agreed to consent to the Palmetto Lien. Husband stated he was personally served with notice of the lawsuit, but he lacked knowledge of any further proceedings and of the Palmetto Lien.

[3] The June 2013 payment was a partial payment.

Wife testified she attempted to make partial payments on the mortgages after Husband vacated the Home in November 2013. However, Wife indicated the bank would only allow her to make the payments in full. Wife said she utilized the Home as a rental property and received approximately $70,000 in rental income. She stated she did not attempt to make further payments on the mortgages because she had to utilize the money to fix damage Husband caused to the Home[4] and the bank would not accept partial payments.

In October 2014, Wells Fargo Bank filed an action to foreclose on the Home because the first mortgage was not paid.[5] Wells Fargo's complaint indicated that as of June 1, 2013, the principal sum of $269,135.73, with an interest rate of 5.875%, advances, late charges, and costs and disbursements of the action, including attorney's fees, were due. On January 2, 2015, Wife e-mailed Husband to inform him of the scheduled foreclosure. She indicated she did not intend to lose the Home but stated it "is in my best interest to prolong the process as long as possible." Wife indicated that although her credit was damaged, her new husband had good credit, so she would not be affected if the Home went into foreclosure. Wife wrote, "I'm assuming you are trying to repair your credit so that you can purchase a home for yourself and do not want a foreclosure on your credit history." Wife gave Husband four options for the Home: (1) do nothing and have the Home go into foreclosure; (2) sign a quit claim deed; (3) allow Wife to sell the Home to her new husband's parents; or (4) sign a quit claim deed so Wife's father could buy Husband's right to the equity in the Home for $60,000. Wife's e-mail provided, "These are the only options available. There is no negotiating. You can either have good credit and be able to buy a new home for yourself now or have bad credit indefinitely. Either way I'm in the [Home] until 2025." In February 2015, Wife paid around $67,000 to prevent foreclosure.

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[4] Wife testified there were plumbing and flooring issues and that the appliances were broken. However, a woman who rented the home in November 2013, shortly after Husband moved out, indicated the home was in fine condition, but it needed cleaning and upkeep.

[5] While the record indicates neither of the mortgages were paid from June 2013 to February 2015, there is no indication that the second mortgage was foreclosed on.

Wife indicated she made multiple attempts to refinance the Home, but those attempts were frustrated by liens on the Home[6] and the foreclosure action, for which she blamed Husband. Wife executed a deed giving her new husband an interest in the Home. She testified Nationstar Mortgage indicated if she made six months of payments, used her new husband's credit and ownership interest in the Home, and had her new husband co-sign for her, she would likely qualify to refinance the Home.

On March 10, 2015, Husband filed a rule to show cause and motion for relief pursuant to Rule 60(b)(5), SCRCP. Husband argued Wife was in contempt for failing to pay the mortgages and for failing to refinance the Home. In the alternative, Husband argued under Rule 60(b)(5), it was inequitable for the Final Order to have prospective application concerning the ownership rights and obligations associated with the Home due to Wife's unilateral destruction of Husband's credit and Wife's failure to abide by the family court's order to resolve the matter in an equitable fashion. Husband asserted ownership and possession of the Home should be transferred to him and Wife should be responsible for all of the lien judgments attached to the Home, including the Palmetto Lien. Alternatively, Husband contended the family court should immediately list the Home for sale and have the proceeds divided pursuant to the Final Order.

The family court held hearings on the Rule 60(b)(5) motion on January 13, 2016, and April 6, 2016.

In response to Husband's rule to show cause, the family court did not find Wife in contempt of court for her failure to pay or timely pay the mortgages or her failure to refinance the Home. However, the family court granted Husband's Rule 60(b)(5) motion, ordering that the Home be immediately listed for sale because the family court found "it is no longer equitable for [the Final Order], as applied to [the

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[6] Wife hired someone to determine if there were any liens with joint liability between the parties, joint liability between Wife and Palmetto Tree, or liability exclusively related to Husband or Palmetto Tree. This search found multiple liens against Husband, a judgment filed by the parties' neighborhood against Husband and Wife jointly, and the Palmetto Lien. Testimony indicated Ford Motor Company had a lien against Wife, and Wife's attorney indicated there may be other judgments against Wife.

Home], [to] have prospective application . . . the circumstances have changed so materially and significantly between these parties that maintaining a financial entanglement between them creates a clearly onerous, unforeseen, and oppressive hardship on both parties." The family court ordered Husband and Wife to each pay 50% of the Palmetto Lien from the proceeds of the sale of the Home. The family court ordered Wife to pay all of Husband's attorney's fees and costs.

Wife filed a motion to reconsider on July 21, 2016. The family court denied Wife's motion on July 27, 2016. This appeal followed.

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). De novo review allows the appellate court to make its own findings of fact, but the appellate court is not required to ignore the family court's superior position to make credibility determinations. *Lewis v. Lewis*, 392 S.C. 381, 384–85, 709 S.E.2d 650, 651–52 (2011). "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017).

LAW/ANALYSIS

I. Rule 60(b)(5), SCRCP

Wife first argues the family court erred by granting Husband's Rule 60(b)(5), SCRCP motion. We agree because we find the family court did not have jurisdiction to modify the Final Order to require Wife to immediately sell the Home.[7]

[7] Although Wife does not specifically contest the family court's subject matter jurisdiction to modify the Final Order, we address this issue on appeal because "[l]ack of subject matter jurisdiction cannot be waived and should be taken notice of by [the appellate court] on its own motion." *Eichor v. Eichor*, 290 S.C. 484, 487, 351 S.E.2d 353, 355 (Ct. App. 1986).

Rule 60(b)(5), SCRCP, provides, "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding . . . [if] it is no longer equitable that the judgment should have prospective application."

Generally, the family court has the authority to modify any order issued by the family court. S.C. Code Ann. § 63-3-530(A)(25) (2010) (stating the family court has exclusive jurisdiction to modify or vacate any order issued by the family court). However, subsection 20-3-620(C) of the South Carolina Code (2014) provides, "The [family] court's order as it affects distribution of marital property shall be a final order not subject to modification except by appeal or remand following proper appeal." This court has found "the law in South Carolina is exceedingly clear that the family court *does not* have the authority to modify court[-]ordered property divisions." *Simpson v. Simpson*, 404 S.C. 563, 571, 746 S.E.2d 54, 58–59 (Ct. App. 2013) (quoting *Green v. Green*, 327 S.C. 577, 581, 491 S.E.2d 260, 262 (Ct. App. 1997)); *see also* Roy T. Stuckey, *Marital Litigation in South Carolina* 375–77 (4th ed. 2010) (discussing exceptions to the family court's exclusive jurisdiction to modify an order issued by it). This court has specified "it is beyond the equitable powers of the family court to reopen and modify court[-] ordered property divisions." *Simpson*, 404 S.C. at 573, 746 S.E.2d at 59; *see also Green*, 327 S.C. at 581, 491 S.E.2d at 262 (holding the family court erred by concluding it was within its equitable powers to reopen and modify portions of a property settlement agreement incorporated into a divorce decree). However, an order of the family court *may* be modified if "jurisdiction was specifically reserved in the decree or if allowed by statute." *Hayes v. Hayes*, 312 S.C. 141, 144, 439 S.E.2d 305, 307 (Ct. App. 1993). Thus, "[e]xcept for those matters over which a court retains continuing jurisdiction, terms of a final property settlement agreement, once approved, are binding on the parties and the court." *Clark v. Clark*, 423 SC 596, 610, 815 S.E.2d 772, 779 (Ct. App. 2018) (quoting *Price v. Price*, 325 S.C. 379, 382, 480 S.E.2d 92, 93 (Ct. App. 1996)).

This court has found the family court has jurisdiction to reconsider an otherwise un-modifiable property division in order to correct clerical errors and in exceptional circumstances. *See Clark*, 423 S.C. at 608–10, 815 S.E.2d at 779–80; *Simmons v. Simmons*, 392 S.C. 412, 414–15, 709 S.E.2d 666, 667 (2011); *Johnson v. Johnson*, 310 S.C. 44, 47, 425 S.E.2d 46, 48 (Ct. App. 1992).

In *Clark*, this court allowed for the modification of a court-ordered property division using Rule 60(a), SCRCP,[8] to correct a clerical error that accounted for the same trailer twice in the court order approving the parties' settlement agreement regarding the equitable division of property. *Clark*, 423 S.C. at 608–10, 815 S.E.2d at 779–80. However, this court emphasized "[t]he family court's correction of clerical errors may not extend to 'chang[ing] the scope of the judgment.'" *Id.* at 610, 815 S.E.2d at 779 (second alteration in original) (quoting *Brown v. Brown*, 392 S.C. 615, 622, 709 S.E.2d 679, 683 (Ct. App. 2011)). No such clerical errors are present in this case to establish subject matter jurisdiction to modify the Final Order.

In *Simmon*s, our supreme court found the family court had subject matter jurisdiction to revisit a court-approved divorce settlement agreement when the alimony portion of the agreement was declared void on appeal. 392 S.C. at 414–15, 709 S.E.2d at 667. The court recognized the parties' intended agreement regarding alimony was "inextricably connected to the agreed upon division of marital property, and vice versa" and noted in that context, "and in view of Rule 60(b)(5), SCRCP, basic principles of equity suggest that all issues should be revisited by the family court." *Id*. at 415–16, 709 S.E.2d at 668. Such exceptional circumstances are not found in the instant case, as none of the provisions of the Final Order have been voided. Thus, we do not believe the court's use of Rule 60(b)(5) in *Simmons* may be applied to the instant case.

Husband cites *Johnson*[9] in support of his argument that Rule 60(b)(5) may be used to modify an otherwise un-modifiable agreement. However, we find the facts in that case are distinguishable as *Johnson* involved exceptional circumstances. In *Johnson*, this Court used Rule 60(b)(5) to find that if justice so requires, the court may relieve a party of a final consent order if it was based on a vacated final consent order in a related case. *Id*. at 47, 425 S.E.2d at 48. The Final Order in this case was the result of a single agreement that was incorporated into the Final Order, and it was not based on a separate order that was subsequently vacated.

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[8] "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Rule 60(a), SCRCP.

[9] 310 S.C. 44, 425 S.E.2d 46.

Thus, we do not believe the court's use of Rule 60(b)(5) in *Johnson* may be applied to the instant case.

Furthermore, since *Johnson*, this Court has indicated "[a] family court order can be modified only when jurisdiction was specifically reserved in the decree or if allowed by statute." *Hayes*, 312 S.C. at 144, 439 S.E.2d at 307. When this Court decided *Hayes*, Rule 60(b)(5) was already in effect. *See Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 47 (Ct. App. 1988) (finding Rule 60(b)(5) is based on the historical power of a court of equity to modify its decree in light of subsequent conditions). Despite the existence of Rule 60(b)(5), this court indicated "[t]here is no statutory authority for modifying an order of equitable distribution." *Hayes*, 312 S.C. at 144, 439 S.E.2d at 307.

Such exceptional circumstances were not found in *Green*. 327 S.C. 577, 491 S.E.2d 260. In that case, the husband and his expert fraudulently concealed and withheld evidence that a building that was divided in the parties' court-approved property agreement needed approximately $36,500 in repairs. *Id.* at 578–79, 491 S.E.2d at 261. The family court ordered the husband to pay the wife for repairs to the building, finding it was within its equitable powers to adjust the value of the building. *Id.* at 579–80, 491 S.E.2d at 261–62. This court reversed the family court's modification, finding the family court erred in concluding it had equitable powers to reopen and modify the parties' agreement because "the law in South Carolina is exceedingly clear that the family court does not have the authority to modify court[-]ordered property divisions." *Id*. at 581, 491 S.E.2d at 262.

In this case, there were no clerical errors to be corrected, and we find there were no exceptional circumstances to warrant modification of the property agreement. Accordingly, we reverse the family court's decision to grant Husband's 60(b)(5), SCRCP motion because the family court lacked subject matter jurisdiction to modify the Final Order.[10]

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[10] We decline to address the family court's refusal to grant Wife another opportunity to refinance the home or the family court's requirement that Husband and Wife each pay fifty percent of the Palmetto Lien from the proceeds of the marital home because our decision on the foregoing issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues on appeal when the disposition of a prior issue is dispositive).

II. Attorney's Fees

Wife argues the family court erred in awarding attorney's fees to Husband and not awarding attorney's fees to Wife. Because we find the family court lacked subject matter jurisdiction to grant Husband's Rule 60(b)(5), SCRCP motion and we reverse on that issue, we remand the issue of attorney's fees for reconsideration by the family court. *See Rogers v. Rogers*, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001) (holding that because "the beneficial result obtained by counsel is a factor in awarding attorney's fees, when that result is reversed on appeal, the attorney's fee award must also be reconsidered").

CONCLUSION

Based on the foregoing, the family court's order is

REVERSED and REMANDED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

H. Marshall Hoyler, Appellant,

v.

The State of South Carolina, Merry Land Properties, LLC, Sherbert Living Trust, Supan Living Trust, Elizabeth R. Levin, Edward McCray Wise Revoc. Living Trust, Carol Ann DeVries Wise Revoc. Living Trust, Amelie Cromer, Philip Cromer, Robert Chiavello, Tocharoen Living Trust, Helen M. Olesak, Lesley Anne Glick a/k/a Lesley Ann Glick, Shirley G. Lackey, Patricia Banfield, Bertrand Cooper, Jr., NHP SH South Carolina I, LLC n/k/a CCP Bayview 7176 LLC, Oyster Cove Homeowners Ass., Shirley Anne Moyer, Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus, Rita Brown, Houston Family Partnership, Joan Taylor Trustee, Michael Bull, Nancy Bull, Marny H. VonHarten, Dianne M. Donaldson, Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti, Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh Janet E. Walsh, Defendants,

Of which The State of South Carolina and Merry Land Properties, LLC are the Respondents.

Appellate Case No. 2016-001277

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

Opinion No. 5676
Heard March 4, 2019 – Filed August 7, 2019

AFFIRMED

Jefferson D. Griffith, III, and Richard Lee Whitt, both of Austin & Rogers, P.A., of Columbia, for Appellant.

Mary Duncan Shahid and Angelica M. Colwell, both of Nexsen Pruet, LLC, and Stephen Peterson Groves, Sr., of Butler Snow, LLP, all of Charleston, for Respondent Merry Land Properties, LLC.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith, Jr., all of Columbia, for Respondent The State of South Carolina.

GEATHERS, J.: Appellant H. Marshall Hoyler challenges an order of the Master-in-Equity denying his request pursuant to S.C. Code Ann. § 48-39-220 (2008) to declare that Hoyler holds title to 95.27 acres of tidelands along the Beaufort River and abutting the Town of Port Royal.[1] Hoyler argues that this property is readily identifiable from the plat incorporated into the deed to his predecessor in title and, therefore, the master improperly considered extrinsic evidence. Hoyler also argues the master erred by (1) allowing adjacent property owners to intervene in the action; (2) concluding the adjacent property owners had standing; (3) keeping the

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[1] Section 48-39-220(A) provides,

> *Any person claiming an interest in tidelands*[,] which, for the purpose of this section, means all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, *may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands* as against the State.

(emphases added). The statute was amended in 2014, after Hoyler filed this action in November 2007, to reflect a change in the entity to receive service of process.

record open to allow Respondent Merry Land Properties, LLC (Merry Land) to submit additional testimony; and (4) declining to hear post-trial motions in a timely manner. We affirm.[2]

FACTS/PROCEDURAL HISTORY

In 2006, Merry Land purchased two tracts of land in the Town of Port Royal for the purpose of constructing a mixed-use development, including condominiums, with deep water access to the Beaufort River. One of the tracts consists of eight acres with access to the Beaufort River via tidelands within which Hoyler claims ownership of 95.27 acres (the disputed marsh).[3] Merry Land paid $4.5 million for

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[2] We decline to address Merry Land's additional sustaining ground. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

[3] The statute authorizing this action, section 48-39-220, is a part of the Coastal Zone Management Act, Title 48, Chapter 39 of the South Carolina Code (2008 & Supp. 2018). We interpret the provisions of the Act to mean that "marshes" are a subset of "tidelands," which are generally defined in the Act at S.C. Code Ann. § 48-39-10(G) (Supp. 2018) but are also given a distinct definition for purposes of section 48-39-220. The general definition of tidelands in § 48-39-10(G) is, in pertinent part:

> all areas which are at or below mean high tide and *coastal wetlands*, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. *Coastal wetlands include marshes*, mudflats, and shallows *and means those areas periodically inundated by saline waters* whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction. Provided, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system.

(emphases added). The distinct definition of tidelands for purposes of section 48-39-220 is: "all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters *without regard to the degree of salinity of such waters*." (emphasis added).

this tract. The other tract, for which Merry Land paid $1.5 million, consists of 10 acres and borders Johnny Morrall Circle and Ribaut Road. Prior to closing on the purchase of these tracts, Merry Land obtained state and federal permits authorizing construction of a community marina.

After Merry Land closed on the purchase of these tracts, it refinanced the loan secured by the property. During the refinancing process, the appraiser employed by Merry Land's lender discovered a notation in the Beaufort County GIS System indicating a tax parcel in the marsh where Merry Land planned to launch the marina.[4] As a result, Merry Land sent a letter to Hoyler, a Rhode Island resident, offering to purchase this property. Rather than accepting the offer, Hoyler filed this action on November 8, 2007, against Respondent State of South Carolina to obtain a declaration that he owned the disputed marsh.

In his complaint, Hoyler asserted the existence of an 1891 deed to his predecessor in title, J.M. Crofut, from former Governor Benjamin R. Tillman for 95.27 acres of marshland located on the Beaufort River. The complaint also asserted that the deed was accompanied by a plat depicting a tract "bounded on the South by lands of Moss, on the West by miscellaneous individuals, on the North by Seal Island Chemical Works[,] and on the East by the Beaufort River." An heir of Crofut, Elizabeth Waterhouse, devised a share of her putative interest in the property to Hoyler in 1968, and in 1979, the remaining heirs conveyed their respective putative interests to Hoyler for $10.

In its answer to the complaint, the State asserted that it held prima facie title to the disputed marsh in trust for the public and Hoyler lacked the power to exclude the public from the marsh. Merry Land filed a motion to intervene in this action as well as an "Answer and Counterclaim" asserting that Hoyler was barred from preventing construction of the planned marina by the doctrines of estoppel and laches. On February 22, 2008, the master, with the consent of counsel for all parties, executed an order granting Merry Land's motion to intervene.[5]

The master conducted a hearing on January 31, 2011, in which he denied Hoyler's subsequent and contrarian motion to dismiss Merry Land from this action and ruled, *sua sponte*, that several additional owners of property adjacent to the

[4] Beaufort County assigned a market value of $1,000 to this parcel.

[5] Curiously, the order referring this action to the master was not executed until September 13, 2010.

disputed marsh would be joined as defendants.[6] In his written order, the master concluded the adjacent property owners were being joined pursuant to Rule 20(a), SCRCP,[7] because they could lose their right of access to the Beaufort River upon a declaration that Hoyler held title to the disputed marsh. Hoyler filed a motion for reconsideration and a Notice of Appeal. The motion for reconsideration remained unresolved until after this court dismissed the appeal as interlocutory and our supreme court denied certiorari. On remand, the master denied Hoyler's motion for reconsideration and granted a motion to intervene filed by Nancy Deering Carey. Hoyler appealed these rulings, and this court also dismissed the appeal as interlocutory.

Subsequently, Hoyler served all of the adjoining property owners with notice of this action, and the master conducted a hearing on November 19, 2015. The master allowed the record to stay open for 45 days after the hearing to allow Merry Land to obtain the deposition testimony of a surveyor who had worked with Merry Land's civil engineering expert. After the master reviewed this deposition testimony, he sent an e-mail to counsel for the parties requesting a proposed order from counsel for Respondents. In response, Hoyler filed a motion challenging the findings in the master's e-mail pursuant to Rule 59(e), SCRCP. The master denied this motion in a Form 4 order.

On May 27, 2016, the master issued a written order concluding that the conveyance to Crofut was a valid exercise of the State's authority under the law as it

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[6] The disputed marsh is contiguous to the Spanish Point subdivision in Port Royal.

[7] Rule 20(a) states, in pertinent part,

> All persons *may* be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(emphasis added).

existed at the time of the conveyance but the property could not be accurately located and, therefore, Hoyler was not entitled to a declaration that he held title to the disputed marsh. On June 19, 2016, Hoyler filed a second Rule 59(e) motion in response to the written order, and the master denied this motion. This appeal followed.

ISSUES ON APPEAL

1. Did the master err by concluding Hoyler was not entitled to a declaration that he held title to 95.27 acres of marshland as against the State?

2. Did the master err by allowing adjacent property owners to intervene in this action?

3. Did the master err by concluding the adjacent property owners had standing?

4. Did the master abuse his discretion by keeping the record open to allow Merry Land to submit additional testimony?

5. Did the master err by declining to hear post-trial motions in a timely manner?

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006) (quoting *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "To make this determination [the appellate court] look[s] to the main purpose of the action as determined by the complaint." *Id.* (quoting *Estate of Revis v. Revis*, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997)). When the complaint's main purpose "concerns the determination of title to real property, it is an action at law." *Id.*

"In an action at law, '[the appellate court] will affirm the master's factual findings if there is any evidence in the record [that] reasonably supports them.'" *Id.* (quoting *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 101–02, 552 S.E.2d 778, 781 (Ct. App. 2001)). Further, "[the appellate c]ourt reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("Questions of law may be decided with no particular deference to the trial

court." (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008))).

LAW/ANALYSIS

I. Determination of Title

Hoyler argues that the 95.27 acres is readily identifiable from the plat incorporated into the deed to Crofut and, therefore, the master improperly considered extrinsic evidence. On the other hand, Merry Land contends the intent underlying the deed's incorporation of the plat was to show the boundaries, metes, courses, and distances of the property conveyed but the plat's information was insufficient to identify those features.[8] Likewise, the State maintains the plat provided insufficient guidance. We agree with Merry Land and the State.

We begin our analysis with the foundation on which the determination of property rights in tidelands rests, South Carolina's public trust doctrine. The public trust doctrine provides that lands below the high water mark are presumptively owned by the State and held in trust for the benefit of the public, and it has been a vital part of the jurisprudence of South Carolina and many other states for centuries, even pre-dating the beginning of our republic.[9] The doctrine rightfully forbids the

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[8] *See Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) ("In construing a deed, 'the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy.'" (quoting *Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977))); *id.* at 201, 672 S.E.2d at 583 ("In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." (quoting *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391–92 (1987))).

[9] *See McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149–50, 580 S.E.2d 116, 119–20 (2003); *Grant*, 395 S.C. at 230–31, 717 S.E.2d at 99–100; *Query*, 371 S.C. at 410–11, 639 S.E.2d at 456; *see also State v. Pac. Guano Co.*, 22 S.C. 50, 55–56 (1884); *Commonwealth v. City of Roxbury*, 75 Mass. 451, 478–79 (1857); Melissa K. Scanlan, *Shifting Sands: A Meta-Theory for Public Access and Private Property Along the Coast*, 65 S.C. L. Rev. 295, 307–13 (2013); William A. Clineburg and John E. Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C. L. Rev. 7, 10–24 (1971).

State from permitting activity substantially impairing the public interest in marine life, water quality, or public access.[10]

> The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.

Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995) (quoting Greg L. Spyridon and Sam A. LeBlanc, III, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 Tul. Envtl. L.J. 287, 291 (1993)). In more recent years, our supreme court captured the essence of the doctrine as it applies to tidelands: "Our State's tidelands are a precious public resource held in trust for the people of South Carolina."[11]

It is through this lens that we examine the claim of a private individual to an ownership interest in tidelands, an interest that would allow him to exclude the public. Because the law, as a zealous guardian of the public interest, bestows presumptive ownership of tidelands on the State for the benefit of the public, any deed from the State purporting to convey tidelands to a private individual must be strictly construed against the grantee and in favor of the public.[12] In *State v. Pacific Guano Company*, our supreme court explained,

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[10] *McQueen*, 354 S.C. at 149–50, 580 S.E.2d at 119–20.

[11] *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 22, 766 S.E.2d 707, 710 (2014).

[12] *Query*, 371 S.C. at 411, 639 S.E.2d at 456–57; *accord Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011) ("In areas subject to the public trust doctrine, presumption of State ownership 'may be overcome only by showing a specific grant from the sovereign[,] which is strictly construed against the grantee.'" (quoting *McQueen*, 354 S.C. at 149 n.6, 580 S.E.2d at 119 n.6)); *Grant v. State*, 395 S.C. 225, 229, 717 S.E.2d 96, 98 (Ct. App. 2011).

> In all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor, reversing the rule as between individuals, on the ground that the grant is supposed to be made at the solicitation of the grantee, and the form and terms of the particular instrument of grant proposed by him and submitted to the government for its allowance. But this rule applies *a fortiori* to a case where such grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land[] but also a portion of that public domain [that] the government held in a fiduciary relation[] for general and public use.

22 S.C. 50, 86 (1884).

For this reason, "the party asserting a transfer of title bears the burden of proving its own good title,"[13] and one claiming an interest in tidelands pursuant to section 48-39-220(A) must convince the court that the State intended to include the tidelands within the boundaries expressed in the deed.[14] Necessarily, the claimant must show that the language of the conveyance is specific enough to determine a reasonably precise location of its boundaries so that members of the public will not be excluded from property rightfully belonging to them.[15]

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[13] *Lowcountry*, 347 S.C. at 103, 552 S.E.2d at 782; *see also State v. Fain*, 273 S.C. 748, 752, 259 S.E.2d 606, 608 (1979) ("[I]t is well settled that the State comes into court with a presumption of title, and, if an individual is to prevail, *he must recover upon the strength of his own title, of which he must make proof*." (emphasis added)).

[14] *See Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 398, 252 S.E.2d 133, 136–37 (1979); *Query*, 371 S.C. at 411, 639 S.E.2d at 456 ("To establish ownership of tidelands or marshlands, a claimant must show (1) the claimant's predecessors in title possessed a valid grant, and (2) the grant's language was sufficient to convey title to land below the high water mark.").

[15] *See Hobonny Club,* 272 S.C. at 398, 252 S.E.2d at 136–37; *Grant*, 395 S.C. at 235–36, 717 S.E.2d at 102 (contrasting the plat to the disputed property with the precise plats in *Hobonny Club* and highlighting expert testimony stating that the plat was "poorly drawn and not capable of being relocated on the ground"); *Query*, 371 S.C. at 411–12, 639 S.E.2d at 456–57.

In *Query v. Burgess*, this court affirmed the master's finding that the plat accompanying a 1786 deed to the disputed property near the Folly River was "not sufficiently detailed to rebut the State's presumption of title to land below the high water mark." 371 S.C. at 412, 639 S.E.2d at 457. The court noted that the plat "contain[ed] the bare bones of a survey and [was] neither precise nor detailed." *Id.* The court also concluded that the master "reasonably determined the 1786 grant and accompanying plat did not demonstrate the State's intent to grant title to the marshlands" based on "the absence of terms consonant with granting property below the high water mark, such as 'marsh,' 'marshland,' 'high-water mark,' or 'low-water mark.'" *Id.*

In contrast, in *Hobonny Club, Inc. v. McEachern*, our supreme court upheld the circuit court's conclusion that the plaintiff had valid title to certain tidelands "embraced within the boundaries of the plats attached to the royal grants . . . ." 272 S.C. at 398, 252 S.E.2d at 137. The court observed, "the failure of the grantor to use 'low water line' in describing the property conveyed was not significant in that the attached plats precisely showed the boundaries of the land granted without the necessity of resorting to words." *Id.* at 398, 252 S.E.2d at 136. The court added,

> [T]he plats in question speak with a precision not usually attainable by mere words, and they compel the conclusion that the grantor intended to include the tidelands encompassed within the perimeters of the plats. *It is difficult to imagine how more precisely to express intent as to the location of boundaries than to incorporate an accurate plat in the description*. The plats incorporated in the two grants to [the plaintiff's predecessor in title] are exceptional. They are not mere maps on which boundary waterways are drawn in free-hand to represent directions and conformations of boundaries. These plats are carefully scaled and platted so as to delineate the boundaries of the tracts granted with mathematical precision. It is undisputed that the boundaries are *accurately relocatable on the ground by contemporary engineering methods*. *The specificity of the attached plats outweigh, in our judgment, the general terms of the descriptions in the grants in determining the intent of the grantor*. We conclude that it was the clear intent of the grants in question to convey title to all tidelands lying

> *within the perimeter lines of the plats* accompanying the grants to [the plaintiff's] predecessor in title[].

Id. at 398, 252 S.E.2d at 136–37 (emphases added); *see also Brownlee v. Miller*, 208 S.C. 252, 261, 37 S.E.2d 658, 662 (1946) (affirming the trial court's order dismissing a petition to set aside a judicial sale and adopting the language of the order, which relied, in part, on the sufficiency of the property description "to enable a person of ordinary prudence acting in good faith and making inquiries suggested by the description to enable him to identify the land"); *id.* at 260, 37 S.E.2d at 661 ("[B]oundaries govern acreage and inaccuracies relating to the area of a tract are generally immaterial.").

In *Grant v. State*, this court once again addressed the plat examined in *Query* and specifically noted that "in contrast to the plats in *Hobonny Club*, Grant's expert land surveyor . . . testified the 1786 plat is poorly drawn and *not capable of being relocated on the ground*." 395 S.C. at 236, 717 S.E.2d at 102 (emphasis added). The court concluded that the claimant failed to rebut the State's presumptive title, implicitly acknowledging the claimant's obligation to show the language of the conveyance is specific enough to determine a reasonably precise location of its boundaries. *Id.* at 236, 717 S.E.2d at 102.

While a property description need not be perfect, it must allow one examining it to identify the property conveyed; otherwise, the conveyance is void. *See Blake v. Doherty*, 18 U.S. 359, 362 (1820) ("It is undoubtedly *essential to the validity of a grant*, that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind." (emphasis added)).

> "A deed is not void for uncertainty, because there may be errors or an inconsistency, in some of the particulars. . . . Generally the rule may be stated to be, that the deed will be sustained, *if it is possible from the whole description, to ascertain and identify the land intended to be conveyed*." In a note to that section it is said: "As that is certain which can be made certain, the description, if it will enable a person of ordinary prudence acting in good faith and making inquiries, *which the description would suggest to him to identify the land*, is sufficient."

Brownlee, 208 S.C. at 261, 37 S.E.2d at 662 (emphases added) (alteration in original) (quoting *McNair v. Johnson*, 95 S.C. 176, 179, 178 S.E. 892 (1913)); *see also Lord v. Holland*, 655 S.E.2d 602, 603–04 (Ga. 2008) ("One essential of a deed is that the description of the premises sought to be thereby conveyed must be sufficiently full and definite to afford means of identification." (quoting *Crawford v. Verner*, 50 S.E. 958, 959 (Ga. 1905)); *Katz v. Daughtrey*, 151 S.E. 879, 880 (N.C. 1930) ("If the land intended to be conveyed cannot be identified from the description contained in the deed, it follows as a necessary corollary that as the deed is, for this reason, inoperative, it is equally inoperative as color of title.").

In identifying the land intended to be conveyed, it is permissible to rely on extrinsic evidence if it is necessary to clarify a property description. *See Blake*, 18 U.S. at 362 ("[I]t is not necessary that the grant itself should contain such a description as, *without the aid of extrinsic testimony*, to ascertain precisely what is conveyed." (emphasis added)); *Lord*, 655 S.E.2d at 604 ("While it is not necessary that the instrument should embody a minute or perfectly accurate description of the land, yet it must furnish the key to the identification of the land intended to be conveyed by the grantor." (quoting *Crawford*, 50 S.E. at 959)). However, if it is impossible to locate a key identifier referenced in the deed, the grant is void. *Blake*, 18 U.S. at 362–63. In *Blake*, the plaintiff, who claimed title to certain land through a grant from the State of Tennessee, filed an ejectment action against the defendants, who claimed the land under a patent from the State of North Carolina. *Id.* at 360. The property description in the North Carolina patent designated a hickory tree as the beginning of a survey. *Id.* Using the hickory to illustrate the degree of certainty required in a property description, the Court explained,

> Almost all grants of land call for natural objects which must be proved by testimony consistent with the grant, but not found in it. Cane Creek, and its wes[t] fork, are to be proved by witnesses. So the hiccory which is to constitute the beginning of a survey of a tract of land to lie on the west fork of Cane Creek. *If, in the nature of things, it be impossible to find this hiccory, all will admit the grant must be void*. But if it is not impossible, if we can imagine testimony which will show any particular hiccory to be that which is called for in the grant, then it is not absolutely void for uncertainty, whatever difficulty may attend the location of it.

Id. at 362–63 (emphasis added).

Here, the Governor's deed to Hoyler's predecessor in title, J.M. Crofut, employed the terms high water mark and low water mark, but it also incorporated the 1891 plat in conveying "A Plantation or Tract of Vacant Land, situate in Beaufort [illegible] of Beaufort County and State aforesaid containing ninety-five [and] 27/100 (95 27/100) acres, more or less, [b]eing a parcel or tract of land on the Beaufort River in County and State aforesaid and lying between high and low water mark[s] on [the] river above mentioned[,] *having such shape, form*[,] *and marks as are represented by a Plat of said land on file in the office of the Secretary of State in Book 2 of Public Land Plats, Page 16*." (emphasis added).[16] *See Hobonny Club*, 272 S.C. at 397, 252 S.E.2d at 136 ("Where a deed describes land as it is shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses[,] and distances of the property conveyed."). The incorporated plat designates specific bearings and distances, some of which are illegible, for the boundary lines.

The plat's illegibility effectively made the deed ambiguous as to the precise location of the 95.27 acres in dispute. Therefore, the master properly considered extrinsic evidence. *See Santoro v. Schulthess*, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009) ("If this [c]ourt decides that the language in a deed is ambiguous, the determination of the grantor's intent then becomes a question of fact."); *see also S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (applying rules of contract construction to a restrictive covenant in a deed); *id.* at 623, 302–03 ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. It is a question of law for the court whether the language of a contract is ambiguous. *Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties*. The determination of the parties' intent is then a question of fact." (emphasis added) (citations omitted)); *Williams v. Gov't Employees Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) ("If the court decides [a contract's] language is ambiguous, . . . evidence may be admitted to show the intent of the parties, and the determination of the parties' intent becomes a question of fact for the fact-finder.").

This extrinsic evidence consisted of expert testimony presented at the final merits hearing. First, Hoyler presented the testimony of his expert in land surveying, Lorick Fanning, who provided his opinion regarding identification of the area referenced in the deed to Crofut. Fanning recreated the boundaries of the parcel,

[16] The State reserved mineral and phosphate rights to itself.

relying on field work as well as an 1882 plat that purportedly encompassed the parcel conveyed to Crofut. He established the eastern and western boundaries of the parcel by using the current location of the mean high water and mean low water marks.

Merry Land's land surveying expert, Donald Cook, testified that he examined the 1882 plat and the 1891 plat and noticed the absence of a "scale" and a "point of beginning" or "point of commencement." *Cf. Lord*, 655 S.E.2d at 604 ("The description set forth in plaintiff's deed did not include a beginning point or other specifications enabling one to definitively locate the property to be conveyed. It follows that plaintiff's deed was invalid . . . ." (citations omitted)); *Katz*, 151 S.E. at 880 (holding that a deed purporting to convey twenty-five acres of a fifty-acre tract "without fixing the beginning point or any of the boundaries of the twenty-five acres" was void for vagueness and uncertainty of description because it failed to describe with certainty the property sought to be conveyed, and it contained no reference to "anything extrinsic, which by recourse thereto [wa]s capable of making the description certain"). Cook explained, "without a point of beginning[,] you have . . . no point to start to locate the parcel on the ground. Without a scale[,] you can't . . . tell . . . what measurement of units they were using. So, therefore, scaling it, you don't know really how big the parcel is or potentially how big it is." *See Brownlee*, 208 S.C. at 260, 37 S.E.2d at 661 ("[B]oundaries govern acreage and inaccuracies relating to the area of a tract are generally immaterial."); *cf. Hobonny Club*, 272 S.C. at 394, 252 S.E.2d at 134 (noting the plat annexed to the deed was drawn to a scale of one inch to twenty chains); *State v. Holston Land Co.*, 272 S.C. 65, 67, 248 S.E.2d 922, 924 (1978) (same).

Merry Land also presented the deposition testimony of a second surveyor, Jim Gardner. Gardner analyzed the 1882 and 1891 plats with the assistance of a computer assisted drafting (CAD) technician in entering the plats' bearings and distances into the CAD program. He concluded the bearings and distances that they *could* discern had shortcomings creating a degree of uncertainty exceeding the allowed tolerance for error, and there were certain bearings and distances that were illegible. In particular, Gardner explained one of the standards for professional surveyors that requires "mathematical closure of surveys," i.e., making the boundary lines "come back together," and described the tolerance for error in the following manner: "anything less than a 1-to-10,000 closure should be dismissed."

Gardner also explained, "if you have a break in the survey, it's not going to close mathematically to any effect, which means . . . it's kind of floating out there." He continued,

> the plat not closing, not coming back together, in other words, if you started at a point, you're supposed to come around and end at the starting point. This survey, if it didn't do that, then everything could be shifted one way or the other. And you wouldn't know where these corners were, truly, without . . . other surveys specifying adjoining corners or adjacent boundaries.

Cook's testimony concerning the failure to close was consistent with Gardner's testimony: "It means that the points are just kind of hanging out there in space." As to the intent of the surveyor who created the 1882 and 1891 plats, Gardner stated that the absence of the terms "mean high water" or "mean low water" indicated that the surveyor's intent was to designate the acreage by bearings and distances on the plat.

In reaching his determination that the property could not be accurately located, the master concluded that Hoyler's "efforts to recreate the 1882 plat and the conveyance to Crofut [were] unreliable." Whereas Hoyler relied on natural monuments "utilizing mean high and mean low water to reflect high and low water as stated in the [deed]," the plats did not "rely on natural monuments and instead articulate[d] specific directions in express bearings and distances." The master found that the deed's "express reference to the 1891 plat" and the plat's specificity overrode the use of mean high water and mean low water to fix the location of Hoyler's property.

The master also concluded, "Since the plat references a surveyed boundary, replication of the plat should, in the first instance, be based on the surveyed boundary instead of a natural boundary." The master noted that Fanning erred in replicating the 1891 plat "by relying on 'Mean High Water' and 'Mean Low Water' when the [deed] only refer[red] to 'high' and 'low' water" and did not identify high and low water as the parcel's boundaries. We agree with the master's assessment of Fanning's testimony as having negligible probative value because he did not use the plat's bearings and distances for all of the boundary lines—rather, he "relied on [the] mean high and mean low water mark[s] for the eastern and western boundaries[] and extrapolated the north-westerly property corner." *See Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 463, 702 S.E.2d 372, 374 (Ct. App. 2010) ("The probative value of expert testimony stands or falls upon an evidentiary showing of the facts upon which the opinion is, or must logically be, predicated." (quoting *Ward v. Epting*, 290 S.C. 547, 563, 351 S.E.2d 867, 876 (Ct. App. 1986))); *see also Blake*, 18 U.S. at 364, 367 (reversing a judgment for the defendants on the ground that the trial court improperly

instructed the jurors they could use a private survey "made by direction of a party interested under the grant" for the purpose of "ascertaining the land contained in the grant under which the defendants claimed").

We consider all of this evidence within the confines of a narrow scope of review, an obligation to defer to the fact finder's assessment of witness credibility, and longstanding precedent requiring construction of the State's purported conveyance of tidelands against the grantee. *Query*, 371 S.C. at 411, 639 S.E.2d at 456–57 ("A deed or grant by [the State] is construed strictly in favor of the State and general public and against the grantee." (alteration in original) (quoting *State v. Hardee*, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972))); *see also Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017) ("[T]he credibility of testimony is a matter for the finder of fact to judge." (quoting *S.C. Dep't of Soc. Servs. v. Forrester*, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984)); *id.* ("In a bench trial, the judge, as the finder of fact, may believe all, some, or none of the testimony, even when it is not contradicted."); *id.* ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to [circuit] court findings where matters of credibility are involved." (alteration in original) (quoting *Forrester*, 282 S.C. at 516, 320 S.E.2d at 42)).

We cannot ignore the testimony of Donald Cook and Jim Gardner supporting the master's finding that the deed to Crofut and the 1891 plat it incorporated were insufficient to convey title to a defined location of marsh bordering the Beaufort River. *See Blake,* 18 U.S. at 362 ("It is undoubtedly *essential to the validity of a grant*, that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind." (emphasis added)); *Brownlee*, 208 S.C. at 261, 37 S.E.2d at 662 (holding a deed will be sustained if "it is possible from the whole description, to ascertain and identify the land intended to be conveyed"); *cf. id.* (noting that the surveyors in that case had no trouble in locating the land).

Therefore, we are compelled to affirm the master's finding. *See Query*, 371 S.C. at 410, 639 S.E.2d at 456 ("In an action at law, '[the appellate court] will affirm the master's factual findings if there is any evidence in the record [that] reasonably supports them.'" (quoting *Lowcountry*, 347 S.C. at 101–02, 552 S.E.2d at 781)).

II. Intervention and Joinder

Hoyler also argues the master erred by allowing Merry Land and the other adjacent property owners to "intervene in the action" because they did not claim an

interest in tidelands, their boundary lines would not change as a result of the action, and therefore, they had no interest in the outcome. Hoyler maintains that section 48-39-220 allows the participation of only those parties "claiming a 'right, title[,] or interest' below the high-water mark." We disagree with this reasoning.

Rule 24, SCRCP, states, in pertinent part,

> **(a) Intervention of Right.** Upon timely application anyone *shall* be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction [that] is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone *may* be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion[,] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(emphases added).

Here, the master executed a consent order allowing Merry Land to intervene in this action. The consent order does not reference Rule 24, and the motion to intervene, which was served with Merry Land's answer and counterclaim, is not in the record. The order states, in pertinent part, "this [c]ourt was advised that [Hoyler] . . . [does] not object to intervention but reserve[s] any claims and defenses that [he] may have as to [Merry Land]." Subsequently, Hoyler sought to dismiss Merry Land from the action on the ground that it did not have standing. The master denied this motion.

As to the other adjacent property owners, the master, *sua sponte*, invoked Rule 20(a) to join them as defendants because they could lose their right of access to the Beaufort River upon a declaration that Hoyler held title to the disputed marsh. As

we previously stated, Rule 20(a), entitled "Permissive Joinder," provides, in pertinent part,

> All persons *may* be joined in one action as defendants *if there is asserted against them* jointly, severally, or in the alternative, *any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action*. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(emphases added).

Here, Hoyler's complaint references the dock construction permit obtained by one of the adjacent property owners. The complaint seeks not only a declaration that Hoyler owns the disputed marsh but also a declaration that he "possesses all rights of a fee simple property owner[,] *including the right to exclude dock construction*." (emphasis added). This language asserts a right to relief arising out of the then-existing and possible future dock construction by adjacent property owners. Further, the legal question of ownership of the disputed marsh was a question that was common to all of the defendants. Hoyler's complaint called into question not only the State's competing claim of ownership but also the rights of adjacent property owners to use the marsh to access the Beaufort River and their eligibility to build docks originating from their respective lots and extending into the disputed marsh.[17] If the master had granted Hoyler's request for a declaration that he had the right to exclude dock construction, the rights of the joined parties to access the river or to build in the disputed marsh would have been extinguished. Therefore, the master properly joined the adjacent property owners as defendants in this action.

[17] Included in the master's list of thirty-two adjacent property owners is one owner who was ineligible to build a dock due to insufficient frontage. Eight neighboring owners were listed as eligible for a community dock, and the remaining adjacent owners had sufficient frontage for singular docks.

Turning back to Merry Land's participation in this action, the master was authorized to allow intervention under Rule 24(b),[18] which states,

> anyone *may* be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when *an applicant's claim or defense and the main action have a question of law or fact in common*. . . . In exercising its discretion[,] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(emphases added). This standard is similar to the standard for permissive joinder under Rule 20(a), and Merry Land is similarly situated to the other adjacent property owners. Merry Land has already obtained a permit to build a community marina in the disputed marsh. Because the permit depends on the State's ownership of the disputed marsh, a declaration favoring Hoyler's ownership would extinguish Merry Land's right to build the marina or otherwise access the Beaufort River. As a result, Merry Land asserted that the doctrines of estoppel and laches barred Hoyler from excluding marina construction in the marsh. Therefore, the legal question of ownership of the disputed marsh was common to both Hoyler's action and Merry Land's assertions.

Further, Merry Land's intervention has not caused any undue delay or unfairly prejudiced the master's determination of the merits of Hoyler's claim to ownership. Hoyler himself unnecessarily delayed the case by seeking review of two unappealable interlocutory orders. Moreover, the master's decision to hold the record open for 45 days to allow Merry Land to obtain deposition testimony caused only minimal delay. Additionally, the inadequacy of the information in the deed and plat provided to Hoyler's predecessor in title would have defeated Hoyler's ownership claim even if Merry Land had not intervened in the action.

Based on the foregoing, the master properly denied Hoyler's motion to dismiss Merry Land from the action.

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[18] Hoyler argues none of the adjacent property owners could intervene under Rule 24(a), which governs mandatory intervention. However, there is nothing in the record indicating the master or Merry Land invoked Rule 24(a) in support of intervention. Because the master was authorized to allow permissive intervention under Rule 24(b), we need not consider Hoyler's arguments concerning Rule 24(a).

III. Standing

Hoyler further argues the master erred by allowing the joined parties to continue to participate in the trial because they lacked standing. We disagree.

"Standing refers to [] '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (second alteration in original) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." *Id.* (quoting 1A C.J.S. *Actions* § 101 (2005)). "It concerns an individual's 'sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court.'" *Id.* (alteration in original) (quoting 1A C.J.S. *Actions* § 101 (2005)).

Standing consists of the following elements:

> First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (alterations in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *accord Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014).

Here, Merry Land's asserted injury-in-fact is its inability to move forward with its development plans despite its considerable investment of time and money to (1) ensure the property it ultimately purchased could support a mixed-use development and marina; (2) obtain government approvals for construction of the development; and (3) obtain federal and state permits for marina construction. In

fact, Merry Land delayed closing its purchase of the property until it obtained the permits authorizing marina construction due to its cognizance of the value the real estate market places on deep water access. This injury is clearly "concrete and particularized" and "actual," rather than "conjectural" or "hypothetical." *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (setting forth the first element of standing).

With title to the disputed marsh brought into doubt by Hoyler's filing of this action, Merry Land's development project has remained in limbo, preventing Merry Land from realizing any return on its investment. *See id.* (describing the second element of standing as a "causal connection between the injury and the conduct complained of"). A decision favoring Hoyler would effectively void the marina permit and result in Merry Land's loss of access over the disputed marsh to the river. The State would no longer have the authority to manage these tidelands for public use or to permit adjacent property owners to build docks in these tidelands. Further, there is no realistic expectation that Hoyler would give Merry Land permission to build in the disputed tidelands given his request for a declaration that he can exclude dock construction. *See* S.C. Code Ann. Regs. 30-2(I)(4) (2011) (providing that if a decision in an action under section 48-39-220 determines that the plaintiff owns the disputed tidelands and has a right to exclude others, a critical area permit will not be issued unless "the applicant presents the Department with a copy of a deed, lease, or other instrument from the adjudicated critical area landowner that would allow construction of the proposed project[] or written permission from such owner to carry out the proposal").

On the other hand, a decision favoring the State redresses Merry Land's injury-in-fact by validating not only the State's title to the disputed marsh but also the federal and state permits allowing Merry Land to move forward with its development plans. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (setting forth the third element of standing: "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'").

Similarly, the other adjacent upland property owners were injured by Hoyler's action. Those who had not yet built docks were unable to begin that process without the risk of losing their financial investment upon having to remove them later. Further, those who had already built docks would have had to remove them upon a ruling favorable to Hoyler. Moreover, all of the adjacent owners would have lost access to the Beaufort River upon a ruling favorable to Hoyler. These injuries were clearly "concrete and particularized" and "actual or imminent," rather than "conjectural" or "hypothetical," and they resulted from Hoyler's filing of this action. *See id.* (setting forth the first element of standing and describing the second element

of standing as a "causal connection between the injury and the conduct complained of"); *cf. Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 565, 505 S.E.2d 598, 605 (Ct. App. 1998), *overruled on other grounds by Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002) (holding the appellant's claim of an individual injury in the adverse effect of a certificate of consistency on her use and enjoyment of a wetland adjacent to her residence was sufficient to provide standing); *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988) (holding several environmental groups' allegations of an individualized injury in the adverse effect of a Coastal Council decision on their members' use and enjoyment of wetlands' fish and wildlife were sufficient to show standing).

In other words, the State would no longer have the authority to manage the disputed marsh for public use or to permit adjacent property owners to build in the marsh, and Hoyler has explicitly indicated an intent to exclude dock construction upon a ruling in his favor. On the other hand, a decision favoring the State redresses the adjacent owners' injuries by validating the existing dock permits and the State's authority to grant future dock permits. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (setting forth the third element of standing: "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'").

Based on the foregoing, Merry Land and the other adjacent property owners had a "sufficient interest in the outcome of the litigation to warrant consideration of [their] position by a court." *Powell*, 379 S.C. at 444, 665 S.E.2d at 241 (quoting 1A C.J.S. *Actions* § 101 (2005)). Therefore, the master properly allowed these defendants to participate in this action.

IV. Additional Testimony

Hoyler maintains the master erred by granting Merry Land's request to keep the record open to allow it to submit the testimony of its surveyor. Hoyler argues the master effectively granted a continuance that was not authorized by Rule 40(i)(2), SCRCP. We disagree.

Rule 40(i), SCRCP, governs continuances and states,

> **(1) <u>For Cause.</u>** As actions are called, counsel may request that *the action* be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court. Ordinarily such continuances shall be only

> until the next term of court. Each scheduled calendar week of circuit court shall constitute a separate term of court.
>
> **(2) <u>For Absence of Witness.</u>** No motion *for continuance of trial* shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is not intended for delay. . . . A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts he believes the witness if present would testify to, and the grounds for such belief.

(emphases added).

However, once a trial begins, "[t]he conduct of trial, including the admission and rejection of testimony, is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of legal error that results in prejudice for the appellant." *S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 85, 431 S.E.2d 625, 628 (Ct. App. 1993). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Further, "[t]o warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice." *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct. App. 2005).

At the November 2015 hearing, Merry Land presented the testimony of Gregory Baisch, a civil engineer employed with Ward Edwards Engineering. Baisch testified that he asked the Ward Edwards survey staff to attempt to close the boundaries of the 1882 and 1891 plats. However, the master sustained Hoyler's objections to Baisch attempting to recount the surveyors' investigation and determinations. At the conclusion of Baisch's testimony, Merry Land moved to keep

the record open after the hearing to allow it to locate the surveyor who worked with Baisch, Jim Gardner, and obtain his deposition testimony. The master granted the motion, allowing the record to stay open for 45 days and requiring subsequent post-trial briefs.

The master's ruling did not constitute a continuance as contemplated by the language of Rule 40. With the exception of Gardner's deposition testimony, the master conducted a full bench trial upon remand from Hoyler's unsuccessful, years-long, interlocutory appeals. Hoyler has not shown that he was unfairly prejudiced by the record staying open for a mere 45 days after trial. Hoyler participated in the deposition and had the opportunity to submit a post-trial brief after the deposition. Further, he does not allege in his appellate brief that the slight post-trial delay unfairly prejudiced him.

Based on the foregoing, the master acted within his discretion in allowing the record to remain open to allow Merry Land to submit Gardner's testimony. *See Galbreath*, 315 S.C. at 85, 431 S.E.2d at 628 ("The conduct of trial, including the admission and rejection of testimony, is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of legal error that results in prejudice for the appellant."); *Conway*, 363 S.C. at 307, 609 S.E.2d at 842 ("To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice.").

V. Post-trial Motions

Hoyler's final argument is that the master erred by "refusing to hear post-trial motions in a timely manner." This issue is unpreserved because Hoyler's supporting discussion is conclusory and cites no authority. *See S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (noting an issue was abandoned because the appellant made a conclusory argument without citation of any authority to support her claim).

In any event, the record does not support Hoyler's assertion that the master refused to hear any "post-trial motions." The master gave all parties the opportunity to submit post-trial briefs, and they took advantage of this opportunity. *See supra* section IV. Further, to the extent Hoyler is arguing that the master did not properly consider his Rule 59(e) motions, neither Hoyler's e-mail request to "make [his] post trial motions for the record" nor his request for "guidance as to Post-Trial Motions" communicated a request for a hearing on a motion for reconsideration, especially

given the fact that the requests pre-dated the master's announcement of his decision. Therefore, we reject Hoyler's argument that the master refused to timely consider his post-trial motions.

CONCLUSION

Based on the foregoing, we affirm the master's order.

AFFIRMED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joseph Bowers, Appellant.

Appellate Case No. 2014-002176

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

Opinion No. 5677
Heard October 10, 2018 – Filed August 7, 2019

REVERSED AND REMANDED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

GEATHERS, J.: Late night verbal altercations at a local club escalated to a shootout, resulting in the death of two people, Dante Bailey and Michael Morgan, and the injury of two others, Robert Goodwine and Richard Green. Appellant Joseph Bowers was convicted for the (1) voluntary manslaughter of Michael Morgan, (2) assault and battery of a high and aggravated nature of Richard Green, and (3) possession of a weapon during the commission of a violent crime. Bowers argues the circuit court erred by instructing the jury on mutual combat and voluntary

manslaughter because there is no evidence to support either charge. We reverse and remand for a new trial.

FACTS/PROCEDURAL HISTORY

On June 21, 2012, Stanley Humphries and Dante Bailey were playing pool at the Sand Dollar in St. Helena. After the Sand Dollar closed for the night, the two left and went to Bailey's house to pick up some cigarettes before heading to a local club, Midnight Soul Patrol. Appellant met Humphries and Bailey at Bailey's house, and the group rode in Humphries' car to the club. The group went inside the club but was inside for only a few minutes before walking outside to smoke. Arthur Chaplin and a group of men approached Bailey, and Bailey and Chaplin started arguing.

Humphries testified the argument was only verbal and ended soon after it started. Other witnesses testified similarly. Mangum Smalls stated he saw Bailey and Chaplin arguing and guns were flashed, then Derrick Grant got between the two and defused the situation. Joe Pope testified he saw the argument between Bailey and a group of men and it was defused quickly. Alvin Wilson, the DJ at the club, noticed the crowd was moving outside and when he followed, he saw the altercation. As a result, Wilson declared the party over and walked back inside.

After the altercation was abated, someone suggested leaving, and Humphries, Bailey, and Appellant walked back to Humphries' car, attempting to leave. Meanwhile, Pope turned to walk into the club and saw a separate altercation between **Lucas** Morgan and Irvin Smalls, unrelated to Bailey and Chaplin's altercation. According to Pope, Irvin was trying "to get to Lucas," but Lucas had a gun. At that time, Humphries, Appellant, and Bailey had returned to Humphries' car, but Bailey was standing outside of the car directing Humphries out of the parking spot to avoid hitting nearby obstacles.

Then the gunshots began, precipitated by **Michael** Morgan inexplicably firing a flare gun.[1] Bailey was shot. Humphries and Appellant exited the car and Bailey was on the ground, having been hit by a bullet that perforated his heart and a lung. Mangum Smalls testified that he saw Appellant trying to help put Bailey inside of a

[1] There was testimony that Lucas Morgan, Michael Morgan, Richard Green and Alvin Wilson were all related.

car and noticed Appellant was holding Bailey's gun.[2] Richard Green, who had his back to the club and was outside of the club owner's nearby house, heard the first shot and attempted to flee. He was shot in the back and paralyzed from the waist down. Robert Goodwine walked outside of the club as the gunshots began and saw Green lying on the ground. Goodwine saw Lucas and Bailey shooting and attempted to flee towards the main road when Lucas "came around the corner shooting," hitting Goodwine in his left calf. Pope testified that shortly after the shots began, a group of four or five men ran towards Michael Morgan shooting while Michael was standing over Green with a flare gun. Michael was then hit by a bullet, but no one saw who shot Michael. The bullet struck Michael in his hip, perforated his iliac vein, and he died hours later. All of the injuries were the result of "through and through" shots, meaning a projectile passed completely through the body.

Once the shooting stopped, Pope called 911. Paul Adam, a deputy with the Beaufort County Sheriff's Office, was dispatched to the club and arrived thirteen minutes later. Deputy Adam collected evidence—including spent shell casings, a Glock handgun, and a flare gun—and turned the evidence over to the lead investigator, Adam Zsamar. Deputy Adam also told Investigator Zsamar that three people had guns—Bailey, Lucas Morgan, and Lewis Johnson. Investigator Zsamar processed the scene and located two sets of different brand nine–millimeter shell casings, one set clustered near where Lucas Morgan was seen firing and the other set clustered near where Appellant and Bailey were placed. The day after the shooting, Investigator Zsamar executed a search warrant at Lucas Morgan's residence and found the same brand of ammunition that was clustered near where witnesses placed Lucas Morgan. Further investigation also revealed that the Glock recovered from the scene was registered to Bailey.

Jeremiah Fraser, an investigator with the Beaufort County Sheriff's Office, interviewed Appellant on the day after the shooting. Appellant's version of events was similar to Humphries' version. Appellant told investigators that he was at the club with Bailey and Bailey got into an argument with someone. Appellant said he pulled Bailey away from the argument and towards the car so they could leave but then "shots started ringing out towards them," and that's when Bailey pulled out his gun, stepped out from behind the car, and was shot. Appellant denied shooting a

[2] Mangum Smalls initially testified that he witnessed Appellant with a gun prior to when Appellant was trying to help put Bailey inside of the car. However, once presented with his previous deposition testimony, Smalls corrected himself and testified he did not see Appellant firing a gun and only witnessed Appellant holding Bailey's gun after Bailey had been shot.

gun, and his clothes were collected for gunshot residue testing. Also, Appellant's hands were swabbed for gunshot residue, but the swabs were never tested because they were collected outside of the six-hour window in which gunshot residue can be expected to be found on living tissue, according to expert testimony. Appellant was jailed after the interview, and his shirt and shorts later tested positive only for lead particles.[3] According to one of the South Carolina Law Enforcement Division (SLED) agents, authorities did not test Michael Morgan or Dante Bailey for gunshot residue because they were classified as victims. After being jailed, Appellant chose to speak with investigators again and said that someone else was shooting. While awaiting trial, Appellant had a conversation with his girlfriend on a prison telephone that recorded him saying "I ain't killed the boy, I only shot the boy."

Appellant was tried for the murders of his friend Dante Bailey and Michael Morgan, the attempted murders of Robert Goodwine and Richard Green, and possession of a weapon during the commission of a violent crime. However, after trial but before jury deliberations began, the State withdrew the murder indictment for Bailey and proceeded on the remaining indictments.[4] Over Appellant's objection, the circuit court instructed the jury on mutual combat and told the jury the doctrine applied only to Michael Morgan's murder. The circuit court also instructed the jury on the lesser-included offenses of voluntary manslaughter and assault and battery of a high and aggravated nature. Appellant objected to the voluntary manslaughter jury instruction. Additionally, Appellant requested a self-defense instruction that was also given.

Ultimately, the jury found Appellant guilty of the voluntary manslaughter of Michael Morgan, the assault and battery of a high and aggravated nature of Richard Green, and possession of a weapon during commission of a violent crime. This appeal followed.

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[3] An expert testified that lead is one of three main components of gunshot residue, the others being barium and antimony. Unless the test returns positive results for all three components, the components found cannot be called gunshot residue.

[4] The court allowed the jury to deliberate on Appellant's indictment for the attempted murder of Robert Goodwine, despite Goodwine's testimony that Lucas Morgan shot him and the circuit court's instruction that the theory of mutual combat did not apply to Goodwine.

ISSUES ON APPEAL

1. Did the circuit court err by instructing the jury on mutual combat?

2. Did the circuit court err by instructing the jury on voluntary manslaughter?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "In general, the trial judge is required to charge only the current and correct law of South Carolina . . . and the law to be charged to the jury is determined by the evidence at trial." *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003) (citation omitted). Unless justified by the evidence, an instruction should not be given because it can confuse the jury. *State v. Commander*, 384 S.C. 66, 75, 681 S.E.2d 31, 36 (Ct. App. 2009), *aff'd as modified*, 396 S.C. 254, 721 S.E.2d 413 (2011). But an instruction must be erroneous and prejudicial to warrant reversal. *Taylor*, 356 S.C. at 231, 598 S.E.2d at 3.

LAW/ANALYSIS

I. Issue Preservation

As a threshold matter, the State contends the jury instruction issue is not preserved for appellate review and Appellant waived his objection by failing to raise specific grounds. Specifically, the State argues that after the off-the-record charge conference, Appellant "generally objected" to the jury instruction but "did not provide any grounds in support of those objections" during the on-the-record charge conference. We disagree.

Issue preservation rules are "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). But issue preservation is not a "gotcha" game. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Instead of being hyper-technical, we approach preservation with a practical eye. *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). Once a party objects to a jury charge and, after opportunity for discussion, is denied on the record, no further action is necessary in order to preserve the issue for appeal. *State v. Johnson*, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998). The failure to raise specific grounds for an

objection will not prevent the appellate court from addressing an issue when the record indicates that the trial court and the State understood the basis for the objection. *State v. Hendricks*, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (citing *State v. Kromah*, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013)).

In *Hendricks*, the court found the appellant's hearsay objection to a recording preserved despite appellant's failure to state specific grounds, i.e., saying "hearsay," because the basis for the objection was apparent from the context. *Id.* The court based its ruling on Rule 103(a)(1), SCRE, which requires timely objection to the admission of evidence to support a claim of error and specificity in making the objection *if the ground for the objection is not apparent from the context*. *Id.* After the appellant objected, the State responded with hearsay exceptions, arguing the recording was admissible as an excited utterance or present sense impression. *Id.* This court held the issue was preserved because "the State and trial court immediately understood [the appellant's] objection was based on hearsay." *Id.*

Although the *Hendricks* court's ruling was based on Rule 103(a)(1), SCRE, our supreme court in *State v. Cain* relied, in part, on *Hendricks* when it found preserved an appellant's argument challenging the sufficiency of the State's evidence of the quantity of a drug because it was clear from the record that the State and trial court understood the basis for the appellant's argument. 419 S.C. 24, 35, 795 S.E.2d 846, 852 (2017). In *Cain*, during pre-trial motions, the appellant argued the State could not rely on "theoretical yield" to elevate a charge of manufacturing drugs to trafficking drugs under section 44-53-375 of the South Carolina Code. *Id.* at 34, 795 S.E.2d at 851. Our supreme court found this argument necessarily focused on the State's evidence of the quantity of the drug. *Id.* The court noted the State "clearly understood the argument to relate to quantity." *Id.* The trial court took the motion to dismiss under advisement, and when the appellant later moved for a directed verdict based on quantity, the trial court referred back to the previous discussion about theoretical yield to deny the motion. *Id.* at 34–35, 795 S.E.2d at 852. Because the trial court's reference to the previous discussion indicated it understood the directed verdict motion was based on "the sufficiency of the State's evidence on the element of quantity," the argument was preserved. *Id.* at 35, 795 S.E.2d at 852 (citing *Hendricks*, 408 S.C. at 531, 759 S.E.2d at 437).

Following *Cain*'s guidance, we find Appellant's argument challenging the sufficiency of the evidence of mutual combat is preserved because it is clear from the record that the circuit court and the State understood the basis for Appellant's objection. At the directed verdict stage, the circuit court was cognizant of the issue with instructing mutual combat when it is unsupported by the evidence. The court

stated, "But there's one case that I read this morning, I know you all have read it too, and it's Judge Hayes' reversal for submitting a mutual combat. And that -- I need to look at that from the standpoint of everybody's protection." The court was referring to *State v. Taylor*, the case Appellant relies on in his appellate brief.

Later, after an off-the-record charge conference, the circuit court stated:

> All right. We've had a charge conference, informally, and we've gone through some certain things, and as -- first of all, as I understand, the State is requesting that I charge the mutual combat. I will include that in my charge, and I understand the Defendant objects to that inclusion. Only because I think that there is -- in view of the evidence that could suggest mutual combat construed based on the testimony. While that testimony was somewhat contradictory, it still would be evidence, if the jury believes, whatever the jury chooses to believe, would support the theory.

In other words, the trial judge decided to charge the jury on mutual combat over Appellant's objection, reasoning there was evidence to support the charge. Although the specific ground for Appellant's objection is not expressed on-the-record after the off-the-record charge conference, the record indicates that the trial judge and the State understood Appellant was objecting because he thought there was no evidence to support the charge. *See Kromah*, 401 S.C. at 353, 737 S.E.2d at 497 (holding the issue was preserved when the trial court immediately appeared to understand the objection was a renewal of a previous argument); *Hendricks*, 408 S.C. at 531, 759 S.E.2d at 437 (holding an issue was preserved because the trial court immediately understood the basis of the objection). Thus, we find that the basis of Appellant's objection is apparent from the context of the trial judge's brief synopsis of the parties' respective positions following the off-the-record charge conference. *See Hendricks*, 408 S.C. at 531, 759 S.E.2d at 437 ("We find . . . the hearsay basis for Hendricks' objection is apparent from the context . . . . Therefore, the objection preserved the issue because it is clear from the record that both the State and trial court immediately understood Hendricks' objection was based on hearsay."); *see also* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 203 (3rd ed. 2016) ("[W]here a contested issue of law has been argued during the course of the trial and ruled upon by the trial court, an objection need not be made to that portion of the charge dealing with the same issue previously ruled upon by the trial court."); *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("A review of the colloquy

between the judge and counsel convinces us that the position of each was made well known prior to the commencement of the charge. We do not think that any further objection was required under these facts in order to preserve the rights of the defendant."); *Johnson*, 333 S.C. at 64 n.1, 508 S.E.2d at 30 n.1 (clarifying the long-standing rule that "where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at the conclusion of the court's instruction"). Accordingly, we find the issue is preserved and we will address the merits.

II. History of Mutual Combat

"The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years." *Taylor*, 356 S.C. at 231, 589 S.E.2d at 3. "The doctrine [of mutual combat] has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs." *Id*. at 232, 589 S.E.2d at 4. Mutual combat occurs when there is a mutual intent and willingness to fight. *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." *Id.* (citing 40 C.J.S. *Homicide* § 123). The antiquated doctrine was limited in its application by our supreme court in *State v. Taylor.* In *Taylor*, our supreme court required that the fight arise out of a pre-existing dispute and that the combatants be armed with deadly weapons. 356 S.C. at 233–34, 589 S.E.2d at 4. Additionally, each party must know the other is armed with a deadly weapon. *Id.* at 234, 589 S.E.2d at 5. Moreover, it is essential that the agreement to fight be "entered into prior to the beginning of combat," also described as an antecedent agreement to fight. 40 C.J.S. *Homicide* § 206; *accord Taylor*, 356 S.C. at 233, 589 S.E.2d at 4.

State v. Graham provides the quintessential example of mutual combat in South Carolina. In *Graham*, Graham and the decedent threatened each other and quarreled the day before the shooting. 260 S.C. at 451, 196 S.E.2d at 496. Graham armed himself and the two met in town the next day. *Id.* They became engaged in an altercation, which continued until Graham waived his pistol in the face of the decedent, who then left town only to return shortly thereafter with his own pistol. *Id.* The decedent parked outside of the barber shop where Graham was waiting, and the decedent stepped out of his vehicle, pistol in hand. *Id.* Graham, seeing the decedent armed, left the barber shop and walked into the street, positioning himself for an encounter. *Id.* As Graham entered the street, both parties fired, and Graham fatally wounded the decedent. *Id.*

Our supreme court determined "[t]here was ill-will between the parties" and it was "inferable that they had armed themselves to settle their differences at gun point." *Id.* at 452, 196 S.E.2d at 496. Accordingly, the question of mutual combat was for the jury to decide. *Id.*; *see State v. Mathis*, 174 S.C. 344, 348, 177 S.E. 318, 319 (1934) (finding the law of mutual combat was appropriately instructed to the jury because "[t]here was testimony that the appellant and the [decedent] were on the lookout for each other; . . . were armed in anticipation of a combat; [and] that each drew his pistol and fired upon the other").

Similarly, other jurisdictions have found a charge on the law of mutual combat appropriate when there is evidence of an antecedent agreement to fight and when both parties are armed with dangerous weapons. *See Hughes v. State*, 274 S.W. 146, 147 (Tex. Crim. App. 1925) (emphasizing the importance of there being evidence of an antecedent agreement to fight before there can be an issue of mutual combat); *Lujan v. State*, 430 S.W.2d 513, 514 (Tex. Crim. App. 1968); *Green v. State*, 809 S.E.2d 738, 741 (Ga. 2018); *State v. Johnson*, 733 A.2d 852, 855 (Conn. App. Ct. 1999).

On the other hand, *State v. Taylor* is an example of circumstances that do not justify a jury instruction on mutual combat. In *Taylor*, the petitioner and the decedent got into a physical altercation after the petitioner attempted to stop a fight between the decedent and another person. 356 S.C. at 229, 589 S.E.2d at 2. At the suggestion of someone in the house, the petitioner and decedent moved their fight outside and, shortly thereafter, the petitioner drew a knife and stabbed the decedent fifteen times. *Id.* at 230, 589 S.E.2d at 2. Our supreme court determined there was no pre-existing ill-will between the parties and no evidence the decedent knew the petitioner was armed with a knife. *Id.* at 234, 589 S.E.2d at 5. Accordingly, there was "insufficient evidence of mutual willingness to fight to submit the issue of mutual combat to the jury." *Id.*

Although we have a limited number of cases in our jurisprudence on the law of mutual combat, that case law unequivocally indicates that it is essential there is evidence of a pre-existing ill-will between the parties and that both parties are armed with deadly weapons and have knowledge that the other is armed. *See id.* at 234, 589 S.E.2d at 4–5 (finding a charge on the law of mutual combat unwarranted when there was "no indication that [the victim] knew Petitioner was armed with a knife[] and there was no pre-existing ill-will between the parties"); *Mathis*, 174 S.C. at 348–49, 177 S.E. at 319 (finding mutual combat charge proper where appellant and deceased were on the lookout for each other and both parties were armed in

anticipation of meeting the other); *Graham*, 260 S.C. at 451, 196 S.E.2d at 496 (finding mutual combat charge proper where appellant and deceased had "quarreled" prior to the killing and each knew the other was armed with a pistol).

A. Mutual Combat Jury Instruction

In the instant case, Appellant argues the circuit court erred in charging mutual combat because there is no evidence to support the charge. We agree and find that this case is more similar to the circumstances in *Taylor* where evidence of one or more elements of mutual combat is entirely lacking. Therefore, a charge on mutual combat was improper.

First, there was no evidence of an antecedent agreement to fight or pre-existing ill-will between Appellant and Michael Morgan. *See Taylor*, 356 S.C. at 233–34, 589 S.E.2d at 4–5. No witness testified that either Appellant or Michael Morgan harbored ill-will toward the other. Moreover, no one testified to seeing Appellant argue with Michael Morgan or anyone else on the night of the shooting. *See Graham*, 260 S.C. at 451, 196 S.E.2d at 496 (finding mutual combat charge proper where, amongst other factors, appellant and deceased had quarreled prior to the killing); *Mathis*, 174 S.C. at 348–49, 177 S.E. at 319 (finding mutual combat charge proper where, amongst other factors, there was testimony that appellant and deceased were on the lookout for each other); *State v. Young*, 424 S.C. 424, 436–37, 818 S.E.2d 486, 492 (Ct. App. 2018) (finding there was sufficient evidence to charge mutual combat).

Significantly, several witnesses testified neither argument that occurred that night involved Appellant. Instead, the first argument involved Bailey and Chaplin, which was immediately defused. There was testimony that Bailey and his friends began to walk away in an effort to leave. The second unrelated argument was between Lucas and Irvin—individuals who were not associated with Appellant and his friends. Additionally, there was testimony that Appellant was pulling Bailey towards Humphries' vehicle so that they could leave. Furthermore, Humphries testified that Appellant was inside of Humphries' vehicle when the shooting began. *See Graham*, 260 S.C. at 450, 196 S.E.2d at 495 ("[Mutual] intent may be manifested by the acts and conduct of the parties and the circumstances attending and leading up to combat." (citing 40 C.J.S. *Homicide* § 124)); *see also Green*, 809 S.E.2d at 741 (holding a jury instruction on mutual combat was not warranted where there was no evidence that victim had an intention to fight Green and, instead, the evidence showed victim was feuding with Green's friend).

Notably, during oral argument, the State maintained that the flashing of guns between Bailey and Chaplin was "the assent for mutual combat" as it related to Appellant. However, we disagree, and as our supreme court stated in *Taylor*, "[I]t is only logical that the evidence of agreement to fight be plain . . . ." 356 S.C. at 234, 589 S.E.2d at 4. To maintain that an argument that did not involve Appellant manifested his assent to engage in mutual combat with Michael Morgan is illogical. *See id.* at 235, 589 S.E.2d at 5 ("The mutual combat doctrine is triggered when both parties contribute to the resulting fight."); *see also Green*, 809 S.E.2d at 741 (holding charge on mutual combat was not warranted when there was no evidence that the victim had an intention to fight the defendant). Thus, there is no evidence that Appellant and Michael Morgan had an antecedent agreement to fight. *See Taylor*, 356 S.C. at 234, 589 S.E.2d at 5 (finding the circuit court erred in charging the law on mutual combat when there was no evidence of pre-existing ill-will or a dispute between victim and petitioner); *see also Lujan*, 430 S.W.2d at 514 (holding charge on mutual combat was unwarranted when there was no evidence of an antecedent agreement); *Hughes*, 274 S.W. at 147 (finding insufficient evidence of antecedent agreement to fight); *id*. ("In our opinion[,] the evidence in this case did not raise the issue of mutual combat. The evidence is utterly lacking in anything indicating any prearrangement between the appellant and the deceased to engage in combat. There is nothing to suggest any ill feeling between [the defendant and victim] until the very moment they began to fight.").

Finally, there was no evidence that Michael Morgan had reason to believe Appellant was armed with a deadly weapon before the shooting started. *See Taylor*, 356 S.C. at 234, 589 S.E.2d at 5. Witnesses testified that they did not see Appellant with a gun prior to the shooting. No one testified to seeing Appellant flash a gun. In fact, the basis for the State's theory of mutual combat was that Appellant picked up Bailey's gun after Bailey was shot. Smalls testified that after Bailey was fatally wounded, he saw Appellant trying to help put Bailey inside of Humphries' car. Smalls indicated that was when he saw Appellant holding Bailey's gun and he did not see Appellant trying to shoot anyone with Bailey's gun. Smalls further stated that he did not see Appellant with a gun prior to the shooting. Additionally, there was no conclusive evidence of gun shot residue found on Appellant.[5] Moreover, Appellant's recorded statement, "I ain't killed the boy, I only shot the boy," is insufficient to support a theory of mutual combat when evidence for one or more elements of the doctrine is lacking. Therefore, we find there is "insufficient evidence

[5] The evidence presented indicated that there were lead particles found on Appellant; however, the other two main components of gunshot residue, barium and antimony, were not found.

of a mutual willingness to fight" with deadly weapons and the issue of mutual combat should not have been submitted to the jury. *See id.* at 234, 589 S.E.2d at 5 (holding there was insufficient evidence of mutual willingness to fight to submit the issue of mutual combat to the jury); *id*. (noting that prior South Carolina cases "emphasize[d] that each party knew the other was armed"); *see also Stewart v. State*, 356 S.E.2d 515, 517 (Ga. 1987) (holding there was insufficient evidence to warrant a charge on mutual combat where "there was no evidence that the victim was armed with a deadly weapon at the time of the fight, nor [] was there any evidence that [defendant] and the victim mutually agreed to fight with deadly weapons"); *Hughes*, 274 S.W. at 147 ("[T]he issue of mutual combat . . . does not arise alone from the fact that the parties to the affray are mutually engaged in it, but that the issue arises out of an antecedent agreement to fight . . . [and] before there can be the issue of mutual combat, the testimony must show that the agreement exists.").

B. Prejudice

However, our inquiry does not end because the erroneous charge must also be prejudicial to be reversible. *Taylor*, 356 S.C. at 231, 598 S.E.2d at 3. We find the erroneous charge on mutual combat was prejudicial because the charge effectively negated Appellant's self-defense plea.

The commingling of mutual combat and self-defense jury instructions is problematic. *See id.* at 233, 589 S.E.2d at 4 (noting that, in Georgia, commingling charges on mutual combat and self-defense is per se harmful because it places a heavier burden on the defendant than is required for self-defense (citing *Grant v. State*, 170 S.E.2d 55, 56 (Ga. Ct. App. 1969))). Essentially, the no-fault element of self-defense requires that the defendant is "without fault in bringing on the difficulty," and the State has the burden of disproving self-defense beyond a reasonable doubt. *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Yet mutual combat negates the no-fault element of self-defense because mutual combat requires an intent and willingness to fight. *Taylor*, 356 S.C. at 232, 589 S.E.2d at 3; *see id.* at 234, 589 S.E.2d at 4 ("[M]utual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection."). Stated differently, if a person has an intent and willingness to fight, manifested by conduct, that person cannot be without fault in bringing on the difficulty, and, as a matter of law, the plea of self-defense is unavailable. *See State v. Porter*, 269 S.C. 618, 622, 239 S.E.2d 641, 643 (1977) ("As a general rule, the plea of self-defense is not available to one who kills another while engaged in mutual combat.").

To complicate matters further, a defendant may still claim self-defense after having engaged in mutual combat if, before the killing, the defendant withdraws and "endeavors in good faith to decline further conflict, and[,] either by word or act, makes that fact known to his [or her] adversary." *Taylor*, 356 S.C. at 232 n.2, 589 S.E.2d at 3 n.2 (quoting *Graham*, 260 S.C. at 451, 196 S.E.2d at 496). This heightened standard directly conflicts with the no-fault element of self-defense and, when there is no evidence of mutual combat, has the effect of placing the burden on the defendant to prove self-defense. This is true even when self-defense is properly charged, i.e., the jury is instructed that the State must disprove self-defense beyond a reasonable doubt. *Id.* at 235, 589 S.E.2d at 5 (noting the trial court charged self-defense properly but "that charge was negated by the court's unwarranted charge on mutual combat," which limited the petitioner's "ability to claim self-defense" and prejudiced the petitioner by requiring him to prove self-defense).

Here, the court instructed the jury on mutual combat and self-defense as follows:

> Now, I want to discuss with you a part of the theory that you'll have to consider, and it's known as mutual combat. And this law provides that if a [d]efendant voluntarily participated in mutual combat for the purpose other than protection, the killing of a victim would not be self-defense. This is true even if during the combat[,] the Defendant feared death or serious bodily injury.
>
> However, if before the killing is committed the [d]efendant withdraws and tried in good faith to avoid further conflict, and either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty.
>
> For mutual combat there must be a mutual intent and a willingness to fight. This intent may be shown by the acts and conduct of the parties and circumstances surrounding the combat. In addition, it must . . . be shown that both parties were armed with a deadly weapon.
>
> The Defendant has raised the defense of self-defense. And self-defense would be a complete defense if it is established, and you must find the Defendant not

> guilty. The State has the burden of disproving self-defense by -- beyond a reasonable doubt. If you have a reasonable doubt of the Defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the Defendant not guilty.

The jury was then instructed on the four elements of self-defense. Additionally, the jury was instructed on the interplay between mutual combat and self-defense: "[A]s you know the mutual combat says if he's mutually engaged, then self-defense goes out the window, so to speak. It's not available. But if [the State] failed to prove that then you would consider the self-defense aspect, or again, the State had to prove or disprove that self-defense."

Although the court instructed self-defense properly, we find the self-defense instruction was negated by the court's unwarranted instruction on mutual combat, which effectively relieved the State of its burden to disprove self-defense and imposed on Appellant the burden to prove self-defense. *See Taylor*, 356 S.C. at 235, 589 S.E.2d at 5 (noting the trial court charged self-defense properly but "that charge was negated by the court's unwarranted charge on mutual combat," which limited the petitioner's "ability to claim self-defense" and prejudiced the petitioner by requiring him to prove self-defense). Therefore, we find that Appellant was prejudiced by having to prove self-defense, contradicting our state's well-established jurisprudence that the State has the burden of disproving self-defense.

Accordingly, we reverse Appellant's convictions and remand for a new trial.[6] Because we reverse based on the unwarranted mutual combat jury instruction, we need not address Appellant's related argument that the circuit court erred by instructing the jury on voluntary manslaughter. *Edwards v. State*, 372 S.C. 493, 496–97, 642 S.E.2d 738, 740 (2007) (holding the appellate court need not address remaining issues when resolution of a prior issue is dispositive).

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[6] At oral argument, counsel for Appellant maintained that all of Appellant's charges were intertwined and a reversal would apply to all of Appellant's convictions. We agree—especially, under these circumstances, where Appellant's self-defense plea was negated by the unwarranted jury instruction. *See State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) ("If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury.").

REVERSED AND REMANDED.

LOCKEMY, C.J., and THOMAS, J., concur.