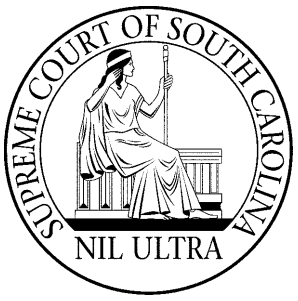

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
October 6, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richland County School District 2 and Malika Stokes, in her individual capacity and on behalf of her children "J.S., J.S., and J.C.", Petitioners,

v.

James H. "Jay" Lucas, Speaker of the South Carolina House of Representatives; Harvey S. Peeler Jr., President of the South Carolina Senate; Molly Spearman, Superintendent of Education, Respondents.

Appellate Case No. 2021-000892

ORIGINAL JURISDICTION

Opinion No. 28063
Heard August 31, 2021 – Filed September 30, 2021

JUDGMENT DECLARED

Carl L. Solomon, of Solomon Law Group, LLC, of Columbia, and Skyler B. Hutto, of Williams & Williams, of Orangeburg, for Petitioner Richland County School District 2.

W. Allen Nickles III, of Nickles Law Firm, LLC, of Columbia, for Petitioner Malika Stokes.

Susan P. McWilliams, Michael A. Parente, and Emily R. Wayne, all of Nexsen Pruet, LLC, of Columbia, for Respondent James H. "Jay" Lucas.

Kenneth M. Moffitt, Sara S. Parrish, and John P. Hazzard V, all of Columbia, for Respondent Harvey S. Peeler Jr.

Cathy L. Hazelwood and V. Henry Gunter Jr., both of Columbia, for Respondent Molly Spearman.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith Jr., all of Columbia, for Amicus Curiae the Attorney General.

PER CURIAM: We granted Petitioners' request to hear this declaratory judgment action in our original jurisdiction. Petitioners ask this Court to declare that Provisos 1.108 and 1.103 of the 2021-2022 Appropriations Act[1] are invalid. We hold the provisos are constitutional, and we reject the remaining challenges to the validity of the provisos.

I.

Proviso 1.108—enacted into law on June 22, 2021, and directed to the South Carolina Department of Education for South Carolina's kindergarten through 12th grade (K-12) public schools—provides:

> (SDE: Mask Mandate Prohibition) No school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.

Proviso 1.103 states:

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[1] H. 4100, 124th Leg., 1st Reg. Sess. (S.C. 2021), *available at* https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/tap1b.htm.

> (SDE: Public School Virtual Program Funding) For Fiscal Year 2021-22, school districts shall be permitted to offer a virtual education program for up to five percent of its student population based on the most recent 135 day ADM [(average daily membership)] count without impacting any state funding. The Department of Education shall establish guidelines for the virtual program and parameters students must meet in order to participate in the virtual program. School districts must submit their plans for the virtual program to the State Board of Education for approval.
> . . .
>
> For every student participating in the virtual program above the five percent threshold, the school district will not receive 47.22% of the State per pupil funding provided to that district as reported in the latest Revenue and Fiscal Affairs revenue per pupil report pursuant to Proviso 1.3. This amount shall be withheld from the EFA [(Educational Facilities Authority)] portion of the State Aid to Classrooms district allocation and, if necessary, the state minimum teacher salary schedule portion of State Aid to Classrooms.

II.

Although the School District has not required its students to wear masks in its education facilities, it claims Proviso 1.108 conflicts with local laws[2] regarding

[2] Both Richland County (the County) and the City of Columbia (the City) enacted emergency ordinances requiring masks in K-12 schools. The City's ordinances were declared void by this Court in *Wilson v. City of Columbia*, Op. No. 28056 (S.C. Sup. Ct. filed Sept. 2, 2021) (Howard Adv. Sh. No. 31 at 9). Based on *City of Columbia*, Richland County subsequently indicated it would not enforce its ordinance as of Sept. 2, 2021. *See Updates to the County's Face Mask Ordinance*, Richland Cnty. S.C., https://www.richlandcountysc.gov/facemasks (last visited Sept. 23, 2021). However, both the City and the County have since enacted new ordinances that require masks in K-12 schools. *See* Columbia, S.C., Ordinance 2021-078 (Sept. 8, 2021), https://www.columbiasc.net/uploads/headlines/09-08-2021/mask-ordinance-no-2021-078/Ordinance%202021-078%20enactment%20of%20certain%20ordinances%20related%20to%20COVID-19.pdf; Richland County, S.C., An Emergency Ordinance Requiring the Wearing

mask requirements in schools and places the School District in an untenable position. In addition, Petitioners claim the School District has reached the five percent cap for virtual enrollment and does not wish to risk losing state funds by exceeding the cap in Proviso 1.103. The School District asks for guidance on its options and obligations regarding facemasks and virtual education.

Petitioner Malika Stokes is the parent of three minor children who reside in Orangeburg County School District, one of whom (J.S.) is severely asthmatic. Although J.S.'s pediatrician recommended he be allowed to attend school virtually, the school district is at capacity for virtual schooling.

Petitioners contend (1) Provisos 1.108 and 1.103 violate the one-subject rule of article III, section 17 of the South Carolina Constitution; (2) the plain language of Proviso 1.108 permits the School District to implement and enforce mask mandates in its education facilities if the School District does so with funds not appropriated or authorized in the 2021-2022 Appropriations Act; (3) Provisos 1.108 and 1.103 improperly invade the authority of local school boards; and (4) Provisos 1.108 and 1.103 deny equal protection to students and violate their constitutional right to free public education. We address these argument below.

III.

In *Wilson v. City of Columbia*, we held "Proviso 1.108 manifestly sets forth the intent of the legislature to prohibit mask mandates funded by the 2021-2022 Appropriations Act in K-12 public schools." Op. No. 28056 (S.C. Sup. Ct. filed Sept. 2, 2021) (Howard Adv. Sh. No. 31 at 10). We also rejected the City's constitutional challenge to the proviso. *Id.* at 14. We held Proviso 1.108 does not violate the one-subject rule, as it "reasonably and inherently relates to the raising *and spending* of tax monies." *Id.* at 15 (quoting *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 35, 484 S.E.2d 104, 107 (1997)). We further rejected the argument that Proviso 1.108 violates the Home Rule Act[3] because Home Rule does

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of Face Masks to Help Alleviate the Spread of COVID 19, Specifically the Recent Surge in the Delta Variant (Sept. 15, 2021), https://www.richlandcountysc.gov/Portals/0/Departments/PublicInformationOffice/Docs/9_14_21%20mask%20ordinance.pdf. The validity of those ordinances is not before us.

[3] S.C. Code Ann. §§ 5-7-10 to -310 (2004 & Supp. 2020).

not grant local governments the authority to effectively overrule a legislative enactment by the General Assembly. *Id.* at 17-18. Finally, we held the proviso preempted the conflicting local ordinances. *Id.* at 18. For the reasons we set forth in *City of Columbia*, we respectfully reject Petitioners' challenges to the provisos.

IV.

Petitioners also argue both provisos deprive children of their constitutional right to a free public education and equal protection of the law. This Court will presume an act is constitutional unless its "repugnance to the constitution is clear and beyond a reasonable doubt." *Doe v. State*, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). The general presumption of validity can be overcome only by a clear showing the act violates the constitution. *Id.*

Article I, section 3 of the South Carolina Constitution prohibits the denial of equal protection of the law. Success on an equal protection claim requires "a showing that similarly situated persons received disparate treatment." *Id.* at 504, 808 S.E.2d at 814. In this case, there is no evidence that any students are receiving disparate treatment. Indeed, there cannot be any argument of disparate treatment, as the provisos apply equally to all students and all public K-12 schools. Accordingly, Petitioners' equal protection argument is without merit.

As to Petitioners' argument that the provisos violate the constitutional guarantee of a free education for all children, article XI, section 3 of the South Carolina Constitution provides: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." Petitioners contend the provisos limit the options available to school districts to ensure a free education to all children and condition the right to a free education on assuming the unnecessary risk of serious illness or even death.

Proviso 1.108 does not limit a student's right to a free education or prohibit students from wearing masks. The reduction in funding for excess virtual education set forth in Proviso 1.103 does not limit a school district's ability to provide virtual education. Instead, it reflects the reduced cost associated with providing an education virtually instead of in the physical classroom. We hold the provisos do not deprive students of their constitutional right to a free education.

The School District also asks this Court for guidance as to its options and obligations regarding facemasks and virtual education. We have no authority to do so. "It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975).

V.

Finally, the School District asks this Court to declare Proviso 1.108 does not prevent it from (1) apportioning its budget so that any mask requirement is funded by federal or local funds, (2) functionally announcing and enforcing a mask requirement without using any funding whatsoever, and (3) designating an employee or series of employees to enforce mask requirements who would be paid exclusively with federal or local funds. We repeat that Proviso 1.108 prohibits the use of funds appropriated or authorized by the 2021-2022 Appropriations Act to announce or enforce a mask mandate. As we noted in *City of Columbia*, we do not reject the possibility that funds not appropriated or authorized by that act may be used to announce or enforce a mask mandate.

VI.

As we emphasized in *City of Columbia*, our role in this dispute is limited, and "[w]e do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly." *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996). We reaffirm our holding in *City of Columbia* that Proviso 1.108 is valid and enforceable.

As we held in *City of Columbia*, Proviso 1.108 prohibits the School District from using funds appropriated or authorized under the 2021-2022 Appropriations Act to announce or enforce a mask mandate in its K-12 schools. We do not reject the possibility that other funds might be used to do so.

We also hold Proviso 1.103 is constitutional. We decline to give the School District advisory guidance as to its options and obligations regarding virtual education.

JUDGMENT DECLARED.

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

The Supreme Court of South Carolina

In the Matter of Jeffrey Thomas Watson, Respondent.

Appellate Case Nos. 2021-001099 and 2021-001100

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of Receiver to protect the interests of Respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the issuance of an order of interim suspension and the appointment of the Receiver.

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

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Mr. Lumpkin may make disbursements from Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s), and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina
October 1, 2021

The Supreme Court of South Carolina

Re: Amendment to Section 2(d)(3), South Carolina Electronic Filing Policies and Guidelines

Appellate Case No. 2021-000971

ORDER

Pursuant to Article V, Section 4 of the South Carolina Constitution, Section 2(d)(3) of the South Carolina Electronic Filing Policies and Guidelines is amended to read:

> **(d) Excluded Documents.** The following documents may not be E-Filed, regardless of whether the filer is an attorney, and must be Traditionally filed together with a Certificate of Technical Difficulty:
>
> . . .
>
> **(3)** Settlements filed as new cases, including Minor Settlement and Death Settlement Proceedings, if initiated and filed by the defendant, rather than the plaintiff. However, in cases where the plaintiff is represented by a member in good standing of the South Carolina Bar, a settlement filed as a new case may be E-Filed by the defendant.

This amendment, which allows defendants to file certain settlements as new cases,[1] is effective immediately.

[1] Instructions for the initiation of a settlement case by a defense attorney are available on the E-Filing Portal Page at https://www.sccourts.org/efiling/ARGs/ARG-26%20Initiating%20A%20Case%20By%20Defense%20Attorney.pdf.

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
October 6, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Travis Latrell Lawrence, Appellant.

Appellate Case No. 2018-000989

Appeal From Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 5863
Submitted May 3, 2021 – Filed October 6, 2021

AFFIRMED

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

Attorney General Alan McCrory Wilson, Assistant Attorney General William Frederick Schumacher, IV, both of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, all for Respondent.

HILL, J.: A jury convicted Travis Latrell Lawrence of attempted murder. He now appeals, raising two grounds. The first is that the trial court erred in ruling his co-defendant who was awaiting trial, Terrell Bennett, was protected by the right against self-incrimination from being forced to testify at Lawrence's trial. The second error Lawrence alleges is the admission of evidence that Bennett was the

subject of a traffic stop three months before the attempted murder occurred. We see no error in the trial court's handling of the self-incrimination issue, but it was error, albeit harmless, to admit the traffic stop evidence. We therefore affirm.

I. FACTS

The victim, Clayton Baxter, testified he was at home when Bennett called asking to borrow money. Baxter told Bennett to come over. Baxter considered Bennett—who called him "Unc"—to be his nephew. They had known each other over twenty years, as Baxter's sister raised Bennett. When Bennett arrived outside Baxter's house, he called Baxter and asked if anyone else was inside (Baxter's pregnant friend was asleep upstairs). When Baxter opened the door to let Bennett in, he noticed someone walking behind Bennett and asked, "Who's that behind you?" The answer was Lawrence, who emerged pointing a .38 revolver at Baxter. Baxter testified he knew Lawrence, having met him through Bennett some six or seven times. Lawrence told Baxter to "give me the money," Bennett closed the door, and the three moved towards the dining room table. Baxter, who is six foot seven inches tall and weighs three hundred pounds, noticed Lawrence lower the revolver. Baxter grabbed Lawrence and slammed him on the table. The fracas soon involved all three men, and at some point, the gun fired, sending a bullet towards the upstairs bedroom, fortunately not striking anyone. Lawrence then went to the kitchen and found a knife, which he used to slice Baxter across the face and stab him in the head, back, and shoulder. Lawrence and Bennett then departed, taking the knife, gun, and seventy dollars cash. Baxter called 911.

Baxter testified he told the responding officers Lawrence and Bennett had attacked him. While cross-examining Baxter, Lawrence tried to establish that Baxter initially identified Bennett as the stabber. Lawrence also insinuated that—due to Baxter's previous drug conviction and the presence of marijuana, scales, and cash in his home—the entire episode had erupted over a botched drug deal. Baxter denied naming Bennett as the stabber, contradicting some evidence from the officers' body cameras, including a clip played to the jury where Baxter stated, "'Rell [Terrell] did it" and "Trav" was with him and that Bennett drove a gold Cadillac. The semantic quibbling on cross continued over what the definition of "it" is, with Baxter clarifying that Lawrence was the one who stabbed him, Bennett had also held the gun on him at one point during the melee, and both Lawrence and Bennett were involved in the attack and robbery. Baxter also picked Lawrence out from a photo array police showed him shortly after the crime.

Over Lawrence's relevance objection, the trial court allowed the State to call a patrolman who testified he had pulled Bennett over for a "simple traffic stop" three months before the attack on Baxter, and Bennett was driving a gold Cadillac Deville.

In his case, Lawrence called one of the responding officers to testify his incident report reflected Baxter stated he was stabbed by "'Rell." Lawrence also subpoenaed Bennett to testify, but Bennett invoked his right against self-incrimination. After hearing *in camera* testimony *ex parte*, the trial court upheld Bennett's right, finding his proposed testimony incriminating. The jury found Lawrence guilty of attempted murder but not guilty of armed robbery and possession of a firearm by a person convicted of a crime of violence.

II. STANDARD OF REVIEW

As to the trial court's ruling on the self-incrimination issue, we have been unable to find any previous South Carolina case establishing a specific standard of review. Our default is the benchmark for criminal cases: we review only errors of law and are bound by the factual findings of the trial court unless they are clearly erroneous. *See State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 200 (2006). We may only reverse the trial court's evidentiary ruling admitting the traffic stop if it amounts to an abuse of discretion, meaning it is unsupported by the law or the record. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

III. DISCUSSION

A. Co-defendant Bennett's Right Against Self-incrimination

Lawrence claims the trial court erred in finding Bennett demonstrated an objectively reasonable fear of incrimination. We disagree, as the trial court's ruling was well supported by the record and correctly applied the law.

Lawrence subpoenaed Bennett to testify because he believed Bennett could help him prove Baxter initiated the fight and, therefore, Lawrence had acted in self-defense. At the second day of trial, after the State had presented Baxter and other witnesses, Bennett appeared and invoked his right against self-incrimination. The trial court conducted a hearing on the record *in camera* with only Bennett, his lawyer, and essential court personnel present. The trial court also took *in camera* testimony from a police investigator who was present on several occasions when Bennett was

interviewed. The trial court ruled Bennett would face a "hazard of incrimination" if compelled to testify and, therefore, had the right not to testify.

The right against self-incrimination is enshrined in both the South Carolina and the United States Constitutions. *See* U.S. Const. amend. V; S.C. Const. Art I, §12. Our Supreme Court has assumed the analysis of our state constitutional right is in lockstep with federal precedent. *Grosshuesch v. Cramer*, 377 S.C. 12, 23 n.2, 659 S.E.2d 112, 118 n.2 (2008). The right, which is also ensured by statute, S.C. Code Ann. § 19-11-80 (2014), "protects the innocent as well as the guilty." *Ohio v. Reiner*, 532 U.S. 17, 18 (2001). It protects the innocent because an innocent witness' truthful answers may, in ambiguous circumstances and when combined with other evidence, furnish the government with incriminating proof "from the speaker's own mouth." *Id*. at 21; *see* Akhil Amar, *The Bill of Rights* 116 (1998) (Fifth Amendment protects "the innocent but inarticulate defendant, who might be made to look guilty if subject to crafty questions from a trained inquisitor"). It protects a person from being forced to testify against himself, a basic liberty that embodies many of our country's values and aspirations and is a monument to man's struggle to greater dignity and freedom. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); *see also State v. Thrift*, 312 S.C. 282, 296, 440 S.E.2d 341, 349 (1994). The framers placed the guarantee in the federal bill of rights, constitutionalizing a common law right that had developed in England over the centuries and was designed to shield citizens from the debasing horrors of forced confessions obtained by such infamous tyrannies as the Star Chamber and the Spanish Inquisition (which no one expected). *See generally Tucker*, 417 U.S. at 440; Leonard Levy, *Origins of the Fifth Amendment* (1968).

"[N]o rule, on the subject of evidence, is better established then that a witness shall not be bound to criminate himself. The only difficulty arises in the application of the rule." *State v. Edwards*, 2 Nott & McC. 13, 14, 11 S.C.L. 13, 14 (Const. Ct. App. S.C. 1819). When a criminal defendant calls a witness who invokes the right against self-incrimination, competing interests of justice collide. A criminal defendant's right to present evidence "has constitutional dimensions," drawing from the Sixth Amendment rights to confrontation and compulsory process. *United States v. Nixon*, 418 U.S. 683, 711 (1974); *Washington v. Texas*, 388 U.S. 14, 19 (1967). Layered upon this is the common law command that, in general, parties have a right to "every man's evidence." *See Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). When a witness stakes his constitutional right not to testify against these weighty interests, the trial court must strike the balance, at times a tricky task. The trial court must be mindful that the

right against self-incrimination is to be broadly drawn, *see Hoffman v. United States*, 341 U.S. 479, 486 (1951), and the defendant's right to confrontation and to present evidence must yield to the opposing Fifth Amendment right as long as the witness has a legitimate fear of possible incrimination. *See, e.g.*, *United States v. Khan*, 728 F.2d 676, 678 (5th Cir. 1984).

The task is made more difficult by the lack of guidance as to the procedure the trial court should use. *See United States v. Dalton*, 918 F.3d 1117, 1130 (10th Cir. 2019) (noting no standard procedure exists). While a trial court cannot, except in exceptional circumstances, uphold a witness' blanket assertion of a self-incrimination claim, it likewise cannot interrogate the witness to an extent that would expose the very incriminating evidence the right is designed to safeguard. The proceeding, which the trial court here held on the record, *in camera*, and *ex parte*, should be designed to permit the witness or his lawyer to explain in general terms his legitimate fear of incrimination, after which the trial court may probe further, by examination if necessary, to determine if the witness' fear of prosecution is genuine, objectively reasonable, and meets the low threshold of *Hoffman* and *Grosshuesch*. We are not presented with a challenge to the procedure the trial court used but note *in camera* and *ex parte* self-incrimination hearings present many pros and cons. *See United States v. Melchor Moreno*, 536 F.2d 1042, 1047 n.7 (5th Cir. 1976) (cataloging advantages and disadvantages of *in camera, ex parte* inquiry of a witness' Fifth Amendment claim).

A witness' claim to his right against self-incrimination must be upheld unless it is "perfectly clear" the testimony sought has no possible tendency to incriminate. *Malloy v. Hogan*, 378 U.S. 1, 12 (1964). But a "witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman*, 341 U.S. at 486. Instead, the court makes the call, and it must uphold the privilege as long as it is "evident from the implications of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id*. at 486–87. In making this assessment, the trial court considers the facts and peculiarities of the case and uses its wisdom and practical experience to imagine how the witness' own words might ensnare him in the teeth of a criminal law.

The right protects answers that are incriminating on their face, as well as any that might form a "link in the chain" needed to prosecute the witness for a crime. *Id*. at

486. Accordingly, the privilege "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972). The hazard of prosecution need not be certain, nor even likely; the possibility of prosecution is enough. *First Union Nat'l Bank v. First Citizens Bank & Trust Co. of S.C.*, 346 S.C. 462, 467, 551 S.E.2d 301, 303 (Ct. App. 2001); *United States v. Johnson*, 488 F.2d 1206, 1209–10 (1st Cir. 1973). Because of the fundamental importance of the right, a trial court may not be unduly skeptical of the witness' fear, for it may be the witness cannot explain his need for the right without surrendering it. *Hoffman*, 341 U.S. at 486–87. At the same time, the court is not bound to uphold the right if the witness' danger of incrimination is "imaginary and unsubstantial." *Reiner*, 532 U.S. at 21 (quoting *Mason v. United States*, 244 U.S. 362, 366 (1917)). In the past, many courts required assertion of the privilege on a "question by question" basis, but a more enlightened view is that when the hazard is openly apparent, the witness "need not be tested by the rote recitation of questions that have obvious answers of which the judge is already aware." *United States v. Stewart*, 907 F.3d 677, 685 (2d. Cir. 2018).

Though the trial court's examination of Bennett may have been too specific (and involved unnecessary inquiry of the police witness), we affirm the upholding of Bennett's right to not testify. The hazard of incrimination was openly apparent. Bennett was not facing just a risk of prosecution; he was already being prosecuted as Lawrence's indicted co-defendant. Almost anything Bennett could utter about the incident would likely be used against him at his upcoming trial. The trial court well understood the situation and also knew Bennett's proposed testimony was at odds with what the State was contending was the truth. *See United States v. Mares*, 402 F.3d 511, 514–15 (5th Cir. 2005) (affirming trial court's refusal to allow defendant to examine co-perpetrator outside presence of jury and rule on co-perpetrator's Fifth Amendment right on a question by question basis; by the time issue surfaced at trial, trial court had heard enough evidence of co-perpetrator's actions exposing him to robbery and other charges to understand the implications of the proposed testimony and the corresponding scope of co-perpetrator's Fifth Amendment privilege).

B. Admission of the Pre-trial Traffic Stop of Co-defendant Bennett

At trial, the State argued the traffic stop evidence was relevant because it corroborated Baxter's identification of Bennett. The trial court agreed, a decision we review for abuse of discretion. 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.

To be sure, Baxter testified Bennett drove a gold Cadillac to his house that day, and he told the responding officers Bennett drove a gold Cadillac. But Bennett's identity was not an issue at Lawrence's trial. Nor was the ownership of the gold Cadillac. The only identity of consequence was who stabbed Baxter, a fact the gold Cadillac evidence could not illuminate.

The State maintains the evidence was relevant because it bolstered Baxter's credibility. We must, however, take a rational approach to the impact of this evidence. To call its probative value weak would be a monstrous understatement.

No one disputes Baxter knew Bennett well. They had enjoyed a close relationship for over twenty years and considered each other family. Corroborating Baxter's knowledge of Bennett was not relevant or probative. On the other hand, testimony that Bennett was stopped by police shortly before the attack was at best a waste of time and, at worst, a deliberate attempt by the prosecution to paint Lawrence as someone who consorted with law breakers. We therefore conclude the traffic stop evidence should not have been admitted as its probative value was dwarfed by the dangers of unfair prejudice to Lawrence, confusion of the issues, misleading the jury, and waste of time. Rule 403, SCRE. Although we have little doubt the State presented the traffic stop simply for its spillover prejudicial effect, the evidence was so feckless it is an easy call for us to deem it harmless. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (error is harmless when it appears beyond a reasonable doubt that it did not contribute to the verdict).

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

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Treva C. Flowers, Tristan Flowers, and Ashley F., an infant under the age of fourteen (14) years, by and through her next friends, Treva C. Flowers and Tristan Flowers, Appellants,

v.

Bang N. Giep, M.D., and Spartanburg & Pelham OB-GYN, P.A. (formerly Spartanburg OB-GYN. P.A.), Respondents.

Appellate Case No. 2017-002299

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5864
Heard June 23, 2020 – Filed October 6, 2021

AFFIRMED

Charles L. Henshaw, Jr., of Furr & Henshaw, of Myrtle Beach, for Appellants.

C. Mitchell Brown and Brian Patrick Crotty, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Dennis Gary Lovell, Jr., of Copeland, Stair, Kingma & Lovell, LLP, of Charleston, all for Respondents.

WILLIAMS, J.: Treva C. Flowers, Tristan Flowers, and their daughter Ashley F. (collectively, Appellants) brought a cause of action against Dr. Bang N. Giep and Spartanburg & Pelham OB-GYN (Doctor and OB-GYN respectively, Respondents collectively) for injuries suffered by Ashley during birth. Appellants assert the trial court erred in denying their motion to strike Respondents' affirmative defense of emergency medical care. We affirm.

FACTS/PROCEDURAL HISTORY

At issue in this case is the interpretation of section 15-32-230 of the South Carolina Code (Supp. 2020), which provides physicians immunity from simple negligence in certain medical malpractice suits. The statute provides:

> (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.
>
> (B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.
>
> (C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:
>
> (1) in immediate threat of death; or
>
> (2) in immediate threat of serious bodily injury.

> Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

Id.

Appellants brought this medical malpractice action against Respondents, alleging Doctor breached the standard of care during Treva's delivery on October 8, 2008. During delivery, a complication known as shoulder dystocia occurred.[1] Appellants alleged that Doctor failed to properly manage the shoulder dystocia, which caused Ashley to suffer an injury to her brachial plexus nerves.

After unsuccessful mediation, Appellants filed a complaint alleging Doctor was negligent and grossly negligent and OB-GYN was liable as his employer. The case was tried before a jury, and after both parties rested, Respondents moved for a directed verdict on the issue of gross negligence. Appellants subsequently withdrew their allegation of gross negligence, and the court granted the motion. Respondents also moved to amend their answer to assert the affirmative defense of emergency medical care found in subsection 15-32-230(A). Appellants consented to the amendment because the issue had been litigated, and the trial court granted the motion. Appellants immediately moved to strike the defense, arguing it was inapplicable because Treva had received prenatal care and she had a prior doctor/patient relationship with Doctor and members of his practice. Appellants argued that, when section 15-32-230 is read as a whole, subsection (B) limits the immunity provided in subsection (A) if the physician provided obstetrical care. The trial court held the statute describes "two separate and distinct situations" in which a physician cannot be liable for simple negligence and denied Appellants' motion to strike the affirmative defense. The court included subsections (A) and (C) in its jury instructions.

After deliberating, the jury returned a verdict in favor of Respondents. The jury found that although Respondents negligently harmed Ashley, the negligence occurred while Doctor rendered care in a genuine emergency situation in which Ashley was medically unstable and in an immediate threat of death or serious bodily harm. Appellants moved for a new trial, asserting the court should have

[1] During childbirth, shoulder dystocia occurs when the baby's shoulder catches against the mother's pubic bone and fails to enter the pelvis, stalling the delivery.

struck the affirmative defense. The trial court denied the motion, and this appeal followed.

ISSUE ON APPEAL

Did the trial court err in interpreting subsections 15-32-230(A) and (B) as distinct and separate defenses from ordinary negligence and in denying Appellants' motion to strike the affirmative defense?

STANDARD OF REVIEW

Statutory interpretation is a question of law, and this court may interpret a statute without any deference to the trial court. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 300, 814 S.E.2d 513, 516 (2018). A ruling on a motion to strike is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979). A trial court abuses its discretion when it commits an error of law, makes a factual finding that lacks evidentiary support, or fails to exercise any of its vested discretion. *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

LAW/ANALYSIS

Appellants do not argue on appeal that the shoulder dystocia was not a genuine emergency situation in which Ashley was medically unstable and under an imminent risk of death or serious bodily injury. Accordingly, it is the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (stating an unappealed ruling is the law of the case). Because this constitutes evidentiary support for the affirmative defense and grounds for denying the motion to strike, the trial court's denial amounts to an abuse of discretion only if the court erred in interpreting section 15-32-230. *Totaro*, 273 S.C. at 135, 254 S.E.2d at 801 (stating a motion to strike is reviewed for an abuse of discretion). Appellants argue the court erred in interpreting the statute as providing "separate and distinct" defenses rather than one defense.

Appellants assert the General Assembly intended for subsections (A) and (B) to apply together, rather than separately, to provide immunity for care rendered in

certain locations while imposing additional requirements for obstetrical care. Stated another way, Appellants contend subsection (A) provides a defense for a physician rendering care in a genuine emergency situation in, among other places, an obstetrical suite. However, if the care provided is obstetrical care, Appellants argue subsection (B) then limits subsection (A), precluding the defense if the physician or a member of his or her practice has a prior doctor/patient relationship with the patient or if the patient received prenatal care. Appellants submit that because Doctor provided obstetrical care and had a prior doctor/patient relationship with Treva and she previously received prenatal care, Doctor could not invoke the affirmative defense and the court erred in denying their motion to strike. We disagree.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 70, 804 S.E.2d 633, 638 (Ct. App. 2017) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). "What the General Assembly says in the text of the statute is the best evidence of its intent, and this [c]ourt is bound to give effect to the legislature's expressed intent." *Aiken v. S.C. Dep't of Revenue*, 429 S.C. 414, 419, 839 S.E.2d 96, 99 (2020). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014) (quoting *Sloan*, 371 S.C. at 498, 640 S.E.2d at 459). "Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 608, 670 S.E.2d 674, 678 (Ct. App. 2008). "The legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense." *Id.* (quoting *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 380 S.C. 349, 367, 669 S.E.2d 899, 908 (Ct. App. 2008), *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246 (2010)).

Section 15-32-230 has been interpreted to be in derogation of the common law. *See Byrd as Next Friend of Julia B. v. McLeod Physician Assocs. II*, 427 S.C. 407, 414, 831 S.E.2d 152, 155 (Ct. App. 2019). Therefore, it must be strictly construed. *See id.* ("Statutes in derogation of the common law are to be strictly construed." (quoting *Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 201,

810 S.E.2d 848, 850 (2018))). "Under this rule, a statute restricting the common law will not be extended beyond the clear intent of the legislature." *Id.* (quoting *Eades*, 422 S.C. at 201, 810 S.E.2d at 850).

From a plain reading of the text, we find subsection (A) describes a physician that encounters an emergency while providing care whereas subsection (B) describes a physician treating a patient previously unassociated with the physician or his or her practice or lacking prior prenatal care. Because subsections (A) and (B) describe different factual scenarios in which a physician might provide negligent care, we find the legislature intended subsection (B) to apply separately from subsection (A) rather than as a limitation to (A). Moreover, the language within subsection (B) neither indicates that it is a limitation on the defense provided in subsection (A) nor does it state that subsection (A) only provides a defense for obstetrical care if the requirements within subsection (B) are satisfied. *See Hardee v. McDowell*, 372 S.C. 413, 419, 642 S.E.2d 632, 636 (Ct. App. 2007) ("If the state legislature had intended for a [particular result], it could have drafted the statute to reflect that intent."), *aff'd as modified on other grounds*, 381 S.C. 445, 673 S.E.2d 813 (2009). To adopt Appellants' interpretation and read subsection (B) as a limitation to subsection (A) would be a "forced construction" of the text's plain language. *See Original Blue Ribbon*, 380 S.C. at 608, 670 S.E.2d at 678 ("Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction.").

Accordingly, we find section 15-32-230 provides a defense against simple negligence in two separate and distinct scenarios. Thus, we hold the trial court did not err in its interpretation of section 15-32-230 and in denying Appellants' motion to strike the defense. *See DomainsNewMedia.com*, 423 S.C. at 300, 814 S.E.2d at 516 (stating statutory interpretation is a question of law that is reviewed de novo); *Totaro*, 273 S.C. at 135, 254 S.E.2d at 801 (stating motions to strike are reviewed for an abuse of discretion); *Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating a trial court abuses its discretion when it commits an error of law or makes a factual finding unsupported by the evidence).

CONCLUSION

Based on the foregoing, the trial court is

AFFIRMED.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Richland County, Respondent,

And Central Midlands Regional Transit Authority, Intervenor/Respondent.

Appellate Case No. 2018-000794

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

Opinion No. 5865
Heard April 21, 2021 – Filed October 6, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James G. Carpenter, of Carpenter Law Firm, PC, of Greenville, for Appellants.

Elizabeth Van Doren Gray, Robert E. Tyson, Jr., and Benjamin Rogers Gooding, of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Intervenor/Respondent Central Midlands Regional Transit Authority.

Andrew F. Lindemann, of Lindemann & Davis, P.A., of Columbia, for Respondent Richland County.

HEWITT, J.: This case is about the "penny tax" Richland County enacted in 2012. The tax was authorized by the Optional Methods for Financing Transportation Facilities Act, currently codified at S.C. Code Ann. §§ 4-37-10 to -50 (2021).

There are two main issues. The first is whether it is lawful to use penny tax revenue to fund the continued operation of the bus system commonly known as "the Comet." The circuit court held this spending was indeed lawful and granted a summary judgment to the entity operating the Comet—the Central Midlands Regional Transportation Authority.

We affirm that judgment and hold it is proper under the statute to use tax revenue for the continued operation of a mass transit system. That use also meets the guidance our supreme court gave when it considered a prior dispute about this penny tax. The court held proper expenditures "must be tethered to a specific transportation-related capital project *or* the administration of a specific transportation project." *Richland County v. S.C. Dep't of Revenue*, 422 S.C. 292, 312, 811 S.E.2d 758, 768 (2018) (emphasis added). Put simply, we believe running a mass transit system falls under "the administration of a specific transportation project."

The second issue is whether the circuit court erred in dismissing various claims against Richland County for an alleged failure to prosecute those claims. As far as we can discover, no case upholds a dismissal with prejudice for this sort of pre-trial failure to prosecute. Thus, we reverse the judgment dismissing the claims against the County and remand for further proceedings.

FACTS

In July 2012, Richland County Council passed an ordinance setting a referendum for that November. The referendum sought voter approval of a one percent sales and use tax to fund three transportation projects. The first project was $656 million for improvements to highways, roads, streets, intersections, bridges, and related drainage system improvements. The third project was roughly $80 million for improvements to sidewalks, bike paths, intersections and greenways.

The second project—the main issue here—called for spending $301 million for "[c]ontinued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements." The November referendum passed. The penny tax became effective in May 2013.

Appellants are a non-profit organization and two individuals. They sued the County in May 2016, about three and a half years after voters approved the referendum. The circuit court granted the Comet's motion to intervene.

The case was designated complex. The circuit court issued a consent scheduling order with a discovery deadline in July 2017 and a dispositive motions deadline in September 2017. None of the parties requested any extensions, engaged in any formal discovery, or scheduled any depositions.

The County served its motion to dismiss at the dispositive motions deadline. The County alternatively sought summary judgment. The Comet served a motion for summary judgment as well. The circuit court heard the motions in a single hearing in October 2017, about a month after the motions were filed.

The circuit court ultimately issued a written order granting the County's motion to dismiss, ruling Appellants had "taken no action to prosecute their claims in the eighteen or so months since the complaint was filed." The court held dismissal was warranted under Rule 41(b), SCRCP, and the court's inherent authority. The court specified the dismissal was with prejudice. Appellants' motion to reconsider was denied.

The circuit court granted summary judgment to the Comet around the same time the court dismissed Appellants' claims against the County. The court held the enabling statutes did not prohibit using penny tax funds to operate the Comet because the statute listed "mass transit systems" as an allowable transportation-related project. The court rejected Appellants' argument that tax revenues could only be used for the Comet's "capital costs"—not for operating or administrative expenses—as inconsistent with the statute's preamble and plain language.

ISSUES

1. Whether the circuit court erred in ruling penny tax revenue could be used to fund the Comet's operation.

2. Whether the circuit court erred in dismissing Appellants' claims against the County for failure to prosecute.

PROPER USE OF PENNY TAX FUNDS

The legislature enacted the Optional Methods for Financing Transportation Facilities Act in 1995. *See* Act No. 52, 1995 S.C. Acts 321-334. The first section of the Act contained "findings" that each county would be "authorized to establish transportation authorities and to finance . . . the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects . . . ." *Id*. at 321. The original Act explained a county's governing body could impose this tax by enacting an ordinance, subject to a referendum, and mandated that the ordinance specify and describe "the project for which the proceeds of the tax are to be used." S.C. Code Ann. § 4-37-30(A)(1)(a) (Supp. 1995). It also set out a list of allowable projects. § 4-37-30(A)(1)(a)(i) (Supp. 1995).

The legislature amended the Act five years later. *See* Act. No. 368, 2000 S.C. Acts 2486-2494. There were no changes to the requirements for an ordinance or a referendum; however, the amendment added "mass transit systems" and "greenbelts" to the list of acceptable projects. *See* S.C. Code Ann. § 4-37-30(A)(1)(i) (2011).

Appellants argue that funds from the penny tax may only be used for the Comet's "capital expenditures" and may not be used for its continued operation. They appear to define "capital costs" as generally constituting one-time costs incurred for the creation or improvement of property such as buildings, infrastructure, or equipment.

We respectfully disagree. We begin with the statute's language. There is some textual support for Appellants' argument that the Act favors expenses tied to things like infrastructure and equipment. The Act's title refers to financing transportation "facilities." Still, the Act begins with legislative findings that the Act allows counties to finance the cost of "acquiring, designing, constructing, equipping and operating highways, roads . . . and other *transportation-related projects*." Act. No. 52, 1995 S.C. Acts 321 (emphasis added). And, those same findings are not limited to financing the cost of designing and building a project. They directly refer to "operating" the project. These legislative findings have never been changed. The 2000 amendment added "mass transit systems" and "greenbelts" to the list of

allowable projects in section 4-37-30(A)(1)(a)(i). For these reasons, we agree with the circuit court that the statute's language authorizes spending penny tax funds on operating transportation-related projects, including mass transit systems.

We must mention two other parts of the statutory language. The first is the Act's use of the words "capital costs," which is not a defined term. The Act uses this term once—in mandating that the ordinance include the "estimated capital cost" of each project to be funded by the penny tax and the principal amount of bonds to be supported by the tax. *See* § 4-37-30(A)(1)(c).

We do not agree with Appellants' argument that this sole reference to capital costs outweighs the Act's expressly articulated purpose of allowing counties to use penny tax revenue to finance the operation of transportation-related projects. Appellants' argument is also difficult to square with the fact that a mass transit system is specifically identified in the statute as an acceptable transportation-related project. The statute explains that penny tax revenue may only be used "for the purpose stated in the imposition ordinance." § 4-37-30(A)(15). The ordinance must, of course, be consistent with the Act's purpose. But as we noted above, operating a mass transit system is consistent with that purpose.

The last bit of statutory language we must address is an awkward phrase in the list of allowable projects. The statute says projects funded by the tax may include:

> highways, roads, streets, bridges, mass transit systems, greenbelts, and other *transportation-related projects facilities* including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation-related projects.

Section 4-37-30(A)(1)(a)(i) (emphasis added).

We do not know what to make of the word sequence "projects facilities." Perhaps either "projects" or "facilities" was included by mistake. Another explanation may be that there was supposed to be an "and" or "or" between them. The title of the statute says the statute is about "transportation facilities," but the Act's legislative findings refer to "transportation-related projects," and a later provision of the very same statute repeatedly uses the same term—"transportation-related projects." *See* § 4-37-30(B)(1)(a). Overall, we agree the best reading is the one the circuit court applied: the statute authorizes spending funds on operating transportation-related projects, not just transportation-related facilities.

RICHLAND COUNTY V. DEPARTMENT OF REVENUE

We noted at the beginning that our interpretation of the statute was consistent with that of our supreme court when it considered a prior dispute about this penny tax. Around the same time Appellants brought this lawsuit against the County, the County filed its own suit against the South Carolina Department of Revenue (DOR). DOR was refusing to remit penny tax funds to the County and claimed the County was spending tax funds on unlawful purposes. Chief among these alleged unlawful purposes were public relations fees and a mentor-mentee program.

Our supreme court recognized that DOR had a duty to ensure "the County's expenditures of Penny Tax revenues comply with the revenue laws DOR is charged with enforcing." *Richland County*, 422 S.C. at 306, 811 S.E.2d at 765. The court also issued an injunction prohibiting the County from violating the Act. *Id*. at 311-12, 811 S.E.2d at 768-69.

Appellants claim our supreme court's opinion endorsed capitalization standards from the Internal Revenue Code as the standard for determining whether expenditures are lawful under the enabling statutes for this penny tax. We do not agree. The court decreed that the County would be "subject to guidelines for determining whether expenses are properly allocable to a specific transportation project, or the direct administration of a specific transportation project," but it did not adopt the argument that the Internal Revenue Code controlled. *Id*. at 312, 811 S.E.2d at 768. The court held penny tax funds "must be tethered to a specific transportation-related capital project *or* the administration of a specific transportation project." *Id*. (emphasis added). As with our reading of the statutory language, we believe the best reading of the court's opinion is that it requires penny tax funds be tethered to building or operating a "transportation-related project."

FAILURE TO PROSECUTE

Appellants' amended complaint against the County purported to state seven causes of action. The first was Appellants' claim that the County violated the statutes by using penny tax funds to operate the Comet. In the remaining claims, Appellants insisted the County was violating procurement statutes and parts of the ordinance related to audits and a budget.

The circuit court dismissed Appellants' claims against the County pursuant to Rule 41(b), SCRCP and the court's inherent authority based on its view that Appellants

had not actively prosecuted the case. The court noted Appellants had not served any discovery even though the complex case order at the beginning of the litigation said "[i]t is expected there will be significant discovery sought in this case because of the issues." The court also noted Appellants did not file any dispositive motions.

Here, as below, Appellants argue they opted to use requests under the Freedom of Information Act in lieu of formal discovery. They also point out that they defeated an early effort to have the case dismissed or decided on the pleadings.

Appellants additionally argue the progress of this case was stalled by the DOR case. Our supreme court heard oral arguments in that case three months before the discovery and dispositive motions deadlines passed in this case. Indeed, at the circuit court stage, Appellants told the court that this case "overlapped significantly" with the DOR case and that the court should consider waiting for our supreme court's decision before joining the two cases together.

We share the circuit court's concern about the lack of action in prosecuting this case. Appellants did not serve any discovery requests until after the County and the Comet filed dispositive motions. This was over a year after the case began, and two months past the discovery deadline set forth in the consent scheduling order. In an effort to evade dismissal, Appellants pointed the circuit court to their late discovery request, to their recently-filed FOIA request, and told the court they wanted to conduct depositions if the opposing parties identified any witnesses. But a scheduling order "is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987) (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)) (addressing Rule 16 of the Federal Rules of Civil Procedure). As the circuit court observed, courts must have the authority to dismiss a case in the event a plaintiff unreasonably neglects to prosecute if courts are to maintain control of their dockets. *See Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983) (making this same observation).

Still, and even when reviewed for abuse of discretion, we cannot affirm. Consider *Don Shevey & Spires*, where the plaintiff served a summons, served a complaint, but delayed fifteen months in filing the summons with the court even though a statute required its filing within ten days of service. 279 S.C. at 59, 301 S.E.2d at 758. Even there (a situation of complete inaction), the suit was dismissed without prejudice—not "with prejudice," as was done here. Consider also *Small v. Mungo*, where our supreme court affirmed a dismissal based on counsel's failure to appear for trial but

modified the dismissal from "with prejudice" to "without prejudice." 254 S.C. 438, 443-44, 175 S.E.2d 802, 804 (1970). In *McComas v. Ross*, this court surveyed precedent and said dismissals for failure to prosecute typically involved things like repeated warnings to the offending party, multiple opportunities to proceed with trial, unreasonable neglect, or deliberate indifference to the defendant's rights. 368 S.C. 59, 62-63, 626 S.E.2d 902, 904 (Ct. App. 2006). We cannot say anything like that occurred here.

As far as we can discover, no South Carolina case upholds a dismissal with prejudice for this sort of pre-trial failure to prosecute. There can be no question Appellants should have served discovery sooner, requested an extension of the scheduling order before it expired, and formally requested a stay if they thought it made sense for the circuit court to wait for our supreme court's ruling in the DOR case. Possible consequences for failing to do these things would certainly include barring Appellants from filing late discovery requests, disallowing any late dispositive motions, and ordering the case to proceed per the scheduling order. The proper action remains up to the circuit court in the first instance. We hold only that it was an abuse of discretion to dismiss Appellants' case with prejudice.

ALTERNATIVE ARGUMENTS

Two arguments are offered as different avenues for affirming the dismissal of Appellants' claims against the County. First, the County contends we should dismiss this case as duplicative in light of the County's litigation against DOR.

As we noted in the section describing the DOR litigation, our supreme court recognized DOR's authority to certify the County was spending penny tax funds appropriately. After that case was remanded, the circuit court issued a preliminary injunction adopting guidelines for the appropriate use of penny tax revenue. We were informed during the oral argument in this case that DOR has been conducting an audit of the County's use of penny tax funds and that the audit has concluded.

Dismissing this litigation as duplicative of the DOR case has some appeal. The fact that DOR was recognized as the authority to police this area points away from the need for this litigation. Still, we cannot square dismissal on this ground with precedent that reads the procedural rule on duplicate cases narrowly. In *Capital City Insurance Co. v. BP Staff, Inc.*, this court said "the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate." 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009)

(interpreting Rule 12(b)(8), SCRCP). Similarly, in *Freemantle v. Preston*, our supreme court explained that although two cases sought the same relief (both looked to invalidate Anderson County's severance agreement with a former employee), the parties and claims were not substantially similar to warrant dismissal. 398 S.C. 186, 196 n.4, 728 S.E.2d 40, 45 n.4 (2012). The same is true here. There is no denying some of Appellants' claims are different from the claims in the DOR litigation.

The second alternative argument is standing. The circuit court ruled at the beginning stage of this case that Appellants possessed both taxpayer standing and public importance standing. The court found taxpayer standing has a long history in South Carolina and noted that all three Appellants had paid the penny tax.

We will not rule on this argument. The County did not argue lack of standing on appeal. The argument was brought to us by an amicus. Our supreme court has declined to rule on standing when it was raised by an amicus. *See James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010); *see also* Rule 213, SCACR ("The [amicus] brief shall be limited to argument of the issues on appeal as presented by the parties . . . ."). We believe the prudent course is to follow that lead.

CONCLUSION

For the foregoing reasons, we affirm the grant of summary judgment to the Comet and reverse the circuit court's dismissal of the claims against County.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Betty Herrington, Respondent,

v.

SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center; SavaSeniorCare, LLC; SSC Equity Holdings, LLC; SavaSeniorCare Administrative Services, LLC; SavaSeniorCare Consulting Services, LLC; Defendants,

Of which SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center; SavaSeniorCare Administrative Services, LLC; SavaSeniorCare Consulting Services, LLC; are the Appellants.

Appellate Case No. 2018-002088

Appeal From Oconee County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5866
Submitted May 3, 2021 – Filed October 6, 2021

REVERSED AND REMANDED

Stephen L. Brown, D. Jay Davis, Jr., and Russell G. Hines, all of Clement Rivers, LLP, of Charleston, for Appellants.

Raymond T. Wooten, of Smith Jordan, P.A., of Easley, for Respondent.

HEWITT, J.: The appellants in this case are a number of related organizations operating a nationwide chain of senior care facilities. We will refer to them as "the Sava Group." They appeal a circuit court order declining to compel arbitration and argue the stated basis for avoiding arbitration—that the parties only agreed to arbitrate disputes involving precisely $50,000—is erroneous. We agree and reverse.

FACTS

Betty Herrington injured her foot and went to the hospital. She was admitted to one of the Sava Group's facilities later for further care. After about a month, Herrington was transferred back to the hospital for the foot to be amputated. In this lawsuit, she claims the amputation was the result of malpractice and neglect she experienced at the Sava Group's facility.

One of the many documents Herrington signed when she was admitted to the Sava Group's facility was a "Dispute Resolution Program," sometimes referred to as a "DRP." The opening paragraphs state:

> The purpose of DRP is to enhance the quality of care that is provided to our residents, and to resolve any disagreements about care and other services that we provide and that may arise.
>
> DRP is valuable to all parties because it offers a streamlined process to settle disagreements. DRP increases the likelihood that disagreements can be resolved more quickly and less expensively than by litigation and that residents themselves will actually benefit from faster resolution of disagreements. Participation in DRP also helps to reduce the cost of healthcare for everyone.

After the introduction, the agreement provides (in bold, underlined, and uppercase type) that "[b]y agreeing to have all disagreements resolved through the dispute resolution program, the parties agree to waive the right to a judge or a jury trial and

to have the dispute resolved through various steps, culminating in a decision by an arbitrator."

The centerpiece of this case is the agreement's definition of "dispute." The agreement says a "dispute" is "any claim . . . totaling $50,000 individually or in the aggregate . . . ." The definition specifies that the agreement does not cover smaller claims; it says "any such claim or dispute involving solely a monetary claim in an amount less than $50,000" shall "not be deemed a dispute under this agreement."

At the end—right before the signature block—the agreement provides (in bold and uppercase type) that:

> by agreeing to have all disagreements resolved through the dispute resolution program, the parties agree to waive the rights to a judge or a jury trial. The Arbitrator's decision is final and binding, and cannot be appealed to any state, or federal court, unless provided for [in] state or federal law.

The Sava Group moved to compel arbitration based on the agreement. The circuit court conducted a hearing and took the case under advisement before entering a written order finding:

> The [agreement] applies to disputes and defines a dispute as "any claim or dispute totaling *$50,000 individually or in the aggregate* that would constitute a cause of action that either party could bring in a court of law[.]" (*emphasis added*). Claims for less than $50,000 are excluded from the definition of a dispute. Therefore, by its own unambiguous terms, the [agreement] only applies to claims or disputes of exactly $50,000.

The circuit court did not address Herrington's other arguments questioning whether the agreement was a valid binding contract. The Sava Group's motions to reconsider, alter, or amend were denied.

ISSUE

Whether the circuit court erred in interpreting the arbitration agreement as only applying to claims for exactly $50,000.

STANDARD OF REVIEW

"The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise." *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). Our standard of review is de novo. *Id*. Still, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id*.

LAW/ANALYSIS

This case presents the odd but familiar situation where opposing parties pitch different interpretations of a writing while also arguing the writing is unambiguous. The Sava Group argues the agreement as a whole is capable of only one reasonable interpretation—that the parties agreed to arbitrate any claim or dispute totaling $50,000 *or more*. Herrington maintains the circuit court was correct in finding the agreement only requires arbitration for claims of exactly $50,000 pursuant to the plain and literal language in the agreement's definition of "dispute."

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001).

The circuit court rejected the Sava Group's argument that the parties intended the arbitration clause to apply to all claims for $50,000 or more by reasoning the court would have to add language to the agreement in order to read the agreement this way. The court went on to cite *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994), for the rule that "[w]hen the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." The court explained its duty was to enforce the contract (not to rewrite it), the agreement was drafted by "sophisticated entities," and the agreement did not require arbitration because Herrington was not claiming "exactly $50,000 in damages."

This ruling makes sense if one isolates his or her focus to the literal reading of the agreement's "dispute" definition. Even so, and critically, we are convinced that

interpretation does not hold up when viewing the agreement as a whole. We are bound to interpret the agreement by looking at the entire agreement from beginning to end: precedent explains that when construing a contract, "all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). We do this because "[p]resumably, all portions of a contract are inserted for a purpose and the contract must be read as a whole, giving appropriate weight to all provisions." *Id*. We assume the parties intended a meaningful agreement, not a nonsensical or absurd one, so we read agreements in a way that "will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." *Id*. at 593, 225 S.E.2d at 349.

The agreement begins by stating the parties' desire to "have all disagreements resolved through the dispute resolution program." In similar fashion, the agreement closes with a reference to the parties "agreeing to have all disagreements resolved through the dispute resolution program." The obvious intention is that most disputes will go through arbitration—claims of lesser value are defined to not even be "disputes"—and one cannot come away from the agreement without the idea that the parties intended for the agreement to comprehensively describe how they would handle all of their disputes and disagreements. Yet, Herrington argues, and the circuit court found, that the parties only agreed on how they would handle two classes of claims: claims worth less than $50,000 and claims for exactly $50,000.

We cannot agree. That interpretation results in an idiosyncratic agreement that does not remotely accomplish its stated purpose. Putting aside the practical question of how one would enforce a contract binding someone to arbitrate claims with precisely $50,000 in controversy—could a plaintiff simply plead damages of one cent more or less and completely avoid arbitration?—the agreement's purpose was directly advertised as covering all disagreements, not discussing some and ignoring others. We are convinced the right approach is to read the agreement as comprehensive. We do not think it is sensible to read it as an agreement that is all donut-hole and no donut.

We acknowledge *Ellis*, which states:

> When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The court's duty is to enforce the contract made by the parties regardless of its

> wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.

316 S.C. at 248, 449 S.E.2d at 488 (citation omitted). Still, we have recognized that one cannot interpret text without also considering context. *See State v. Miles*, 421 S.C. 154, 161, 805 S.E.2d 204, 208 (Ct. App. 2017) (quoting *Avis Rent A Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986)). And sometimes "[t]here is no surer way to misread any document than to read it literally." *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring). We respect Herrington's argument that it is not for this court to question why the Sava Group would create a dispute resolution regime that exempts more than it covers. But in the end, we cannot adopt a construction that pits the agreement against itself and results in a dispute resolution scheme that is essentially void of any practical effect. *See Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 416–20, 756 S.E.2d 148, 152–54 (2014) (instructing that courts should assume the parties intended to form a binding contract and an interpretation saving the contract will be favored over another that voids it or renders terms superfluous).

CONCLUSION

We reverse the circuit court's order and remand for the circuit court to consider Herrington's remaining arguments opposing arbitration.

REVERSED AND REMANDED.[1]

LOCKEMY, C.J., and HUFF, J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Victor McCoy Weldon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002000

ON WRIT OF CERTIORARI

Appeal From Clarendon County
Jocelyn Newman, Circuit Court Judge

Opinion No. 5867
Heard March 1, 2021 – Filed October 6, 2021

REVERSED AND REMANDED

Appellate Defender Taylor Davis Gilliam, of Columbia, for Petitioner.

Attorney General Alan McCroy Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, and Assistant Attorney General Brianna Lynn Schill, all of Columbia, for Respondent.

MCDONALD, J.: Victor M. Weldon (Petitioner) argues the post-conviction relief (PCR) court erred in finding he received effective assistance of counsel despite trial counsel's failure to call Petitioner or either of his alibi witnesses to testify at Petitioner's trial. As to the alibi witnesses, we agree; thus, we reverse and remand to the court of general sessions for a new trial.

Facts and Procedural History

Following a May 2012 trial, a jury found Petitioner guilty of first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime in connection with the robbery of Edward Gibbons (Victim) on May 15, 2010. The trial court sentenced Petitioner to consecutive thirty-year sentences for first-degree burglary and armed robbery, and concurrent five, twenty, and five-year sentences for grand larceny, kidnapping, and the weapons charge. Petitioner appealed his conviction, and this court affirmed, finding the trial court did not err in denying Petitioner's directed verdict motion. *See State v. Weldon*, Op. No. 2014-UP-463 (S.C. Ct. App. filed Dec. 17, 2014). Thereafter, Petitioner filed an application for PCR, which the PCR court denied by order dated July 28, 2017. Following our supreme court's transfer of the matter, the court of appeals granted the petition for a writ of certiorari and ordered briefing.

At trial, Victim testified he was preparing to leave his home between 6:00 and 6:30 a.m. on May 15, 2010, when three masked men emerged from a storage room in his garage and jumped him. The men threw Victim to the ground, and one assailant sat across Victim's chest and hit him in the face while another sat on his legs. The three men restrained Victim by wrapping duct tape around his head; they then took his personal property, including money, and left together in his vehicle. An acquaintance of Victim found the stolen vehicle abandoned on the side of the road at approximately 6:40 a.m.

Days after the robbery, Investigator Kenneth Clark of the Clarendon County Sheriff's Department received reports of three individuals spending a lot of money. In connection with these reports, Investigator Clark interviewed Michael Pearson. Shortly thereafter, Investigator Clark learned Pearson's fingerprint positively matched a fingerprint taken from Victim's stolen vehicle. A subsequent "positive [DNA hit] came off the black duct tape that was wrapped around Victim's head," and the DNA matched Petitioner. Investigator Clark testified Petitioner was not a

person of interest in the case until law enforcement received the DNA hit. Four pieces of duct tape were collected from the crime scene, but Petitioner's DNA was found on only one piece recovered from Victim's head. Investigator Clark admitted that none of the people he interviewed implicated Petitioner in the robbery.

Although Petitioner denied knowing Pearson, Investigator Clark discovered Petitioner and Pearson had both attended the South Carolina Vocational Rehabilitation Center (Vocational Rehabilitation) for a four-day period in December 2008; their time cards indicated both men worked in the wood shop on three of those days. A Vocational Rehabilitation area supervisor, John Hornsby, testified that approximately twenty-five people worked in the 250-square-foot wood shop on a daily basis. He confirmed everyone working in the wood shop worked six hours a day on the same shift, ate in the same area, and shared a restroom.

Catherine Leisy, a forensic scientist at the South Carolina Law Enforcement Division (SLED), testified she tested a swab from duct tape taken from Victim's head, and this swab contained a mixture of DNA from at least two individuals. Petitioner was the major DNA contributor on the swab taken from this part of the duct tape. She explained, "The probability of randomly selecting an unrelated individual having a profile matching the major contributor to this mixture is approximately 1 in 670 billion." Petitioner's DNA did not match the DNA on any of the other items she received for testing, including the swabs from other pieces of duct tape recovered from Victim. When asked on cross-examination whether she had "any information as to whether the pertinent sample came from the inside or the outside of the duct tape," Leisy responded, "The description that I received was a swab from outside and inside area [sic] of the black duct tape from the victim's head." Trial counsel then asked, "So the swab was taken on both sides of the duct tape?" Leisy answered, "Based on the information I received, yes sir." Leisy did not receive the duct tape itself, only the swabs taken from the tape.

The trial court advised Petitioner of his Fifth Amendment right not to testify, and Petitioner confirmed he had been afforded sufficient time to discuss his decision with trial counsel. The trial court then stated,

> And only you can talk to your lawyers, you can get advice from your lawyers as to what they think you

> should or should not do or whatever trial strategy they plan to implement. But ultimately it is your decision and not theirs as to whether you testify or not.

Petitioner indicated he understood and chose not to testify.

In its closing argument, the State argued,

> You don't think the DNA is enough? What about that story? Mr. Weldon? I don't know anything about this case. His DNA is on the tape. Not the tape on the floor. Not the tape that somebody found in the storage room. His DNA is on the tape that [was] wrapped around [Victim's] head . . . .

In his closing, trial counsel emphasized that the only evidentiary item implicating Petitioner was one swab from the duct tape. He argued,

> My first point is you will notice on that report that they took a swab from the outside of the duct tape and the inside of the duct tape, but they didn't test them separately. They jumbled them up and tested them together.
>
> Certainly if they were able to show that Victor Weldon's DNA was on the dead center middle sticky side of the duct tape five feet into the roll, we'd have a much more difficult case today. That evidence is not there. There is evidence that there may be his DNA on the duct tape; possibly from the outside and possibly from the inside.

Trial counsel also noted duct tape is not "some Samurai sword or a hunting knife" or otherwise unusual item. He stated, "I've got duct tape in my truck, in my boat, in my kitchen drawer, in my tool box; I don't know if that duct tape in my boat is

my duct tape or if it's my buddy's duct tape from the last time we went fishing." Both Petitioner and Pearson were convicted.[1]

At the PCR hearing, Petitioner claimed he wanted to testify at trial but did not because "[trial counsel] said he wanted the closing argument." Petitioner testified he told trial counsel he was at his house with his mother on the morning of the armed robbery. At that time, Petitioner lived with his mother and his sister; Petitioner's girlfriend and his little brother stayed with them occasionally. Petitioner testified that between 6:00 and 6:30 a.m., when the crimes occurred, he and his girlfriend were "just getting up with my sister, waiting for my mother to come home." His mother normally came home from work between 7:00 and 7:15 a.m. Petitioner believed that on the night of May 14, he would have been home

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[1] Petitioner and Pearson were tried together. After the State rested in the joint trial, each moved for a directed verdict:

> Pearson argued that even though his fingerprint was found on the outside of Gibbons'[s] car, the fingerprint was insufficient to place him at the crime scene. In reply, the State argued the fingerprint was found on the rear of the vehicle, where Gibbons testified one of the men who robbed him had been seated as they fled his house.

State v. Pearson, 410 S.C. 392, 397, 764 S.E.2d 706, 709 (Ct. App. 2014), *rev'd*, 415 S.C. 463, 783 S.E.2d 802 (2016). This court reversed Pearson's conviction, finding the single recovered fingerprint

> merely raised a suspicion of Pearson's guilt because there was no additional evidence showing when the fingerprint was placed on the vehicle. Moreover, none of the other evidence presented by the State placed Pearson at the crime scene or established a relationship between Pearson and Weldon. For this reason, the jury could only have guessed Pearson was involved in the crimes.

Id. at 402, 764 S.E.2d at 712. Our supreme court reversed this court and affirmed Pearson's convictions, finding sufficient substantial circumstantial evidence of Pearson's guilt existed to withstand the directed verdict motion. *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016).

and he had probably gone to bed around 11:00 p.m. He testified his sister was home when he went to bed that night and he believed he woke up the morning of the 15th around 6:40 or 6:45 a.m. Petitioner saw his sister when he woke up, and he saw his mother when she arrived home between 7:00 and 7:15 a.m. Petitioner claimed he told all of this to trial counsel, and he believed his mother and sister could have testified they were with Petitioner at their home when the armed robbery occurred. He explained his mother and sister were present at the trial and he was concerned when they did not testify. Although he did not understand this, he did not ask trial counsel about it at trial because he was nervous.

Petitioner's mother, Deborah Weldon (Mother), testified she was present at Petitioner's trial, and although trial counsel had asked her to testify, he never called her as an alibi witness. Petitioner lived with her at her Sumter home on May 15, 2010, and Mother saw Petitioner on the night of May 15 when he woke her up around midnight to tell her to move from the couch to her bed. Mother testified Petitioner was home when she woke up at 8:00 a.m. on May 15. To Mother's knowledge, Petitioner did not leave the house during the evening of May 14 or the morning of May 15. Mother did not work overnight on May 15, 2010, because at that time, she was working on an "as needed" schedule at Tuomey Hospital.

Petitioner's sister, Jessica Weldon (Sister), testified she was present at Petitioner's trial and trial counsel told her she would testify, but he never called her to the stand. Sister recalled when she went to bed around midnight on May 14, Petitioner was at home in his room with his girlfriend. Petitioner's room was "very close" to hers and "[she could] see everything coming out his room, [and] going in." Sister testified she woke up around 5:00 a.m. the next morning when a friend called, and she saw Petitioner asleep in his bed when she went into Petitioner's room "to sneak a cigarette from his girlfriend at the time." While Sister was outside smoking, she saw Petitioner "peek out the window." Sister testified she was at home between 6:00 and 7:00 a.m., and Petitioner was in his room with his girlfriend. The next time she saw Petitioner leave his room was around 9:00 a.m. that morning, when Petitioner let his two cats outside to play.

Trial counsel explained his trial strategy was to attack the DNA evidence, and he believed the weakness of the DNA evidence was that it could not be determined whether the DNA sample had been taken from the outside or the inside sticky side of the duct tape. If the DNA was found on the sticky side, trial counsel believed it was much more likely that Petitioner was present during the crime. Trial counsel

confirmed he spoke with Mother and Sister about Petitioner's whereabouts on May 15, and the substance of those conversations would have been very similar to their testimonies at the PCR hearing. Trial counsel had filed a notice of an alibi defense but confirmed he did not call any witnesses at trial on Petitioner's behalf. He did not know why he failed to call the witnesses, but he admitted there was a notation in his trial notebook indicating he had prepared to question Mother regarding Petitioner's alibi. Trial counsel conceded that in hindsight, he should have called Mother and Sister as witnesses, and he thought presenting their testimony could have changed the outcome of Petitioner's trial. Trial counsel testified he may have considered having the last argument versus presenting witnesses, but he was not sure whether that was the reason he failed to call them. Trial counsel explained,

> With, with hindsight, you know, reading the PCR application, I'm scratching my head wondering why we would not have called our alibi witnesses, and that's the only thing I can come up with, but I don't see that in my notes that were taken at the time of trial.

Trial counsel agreed with PCR counsel's statement that even if he had made an actual decision on this point in order to retain the final closing argument, "calling alibi witnesses would have been a much more favorable strategic decision versus not calling alibi witnesses and trying to get the last argument."

On cross-examination, the State asked trial counsel whether he was concerned with whether the witnesses' stories at the PCR hearing "didn't quite match up." Although trial counsel did not recall the alibi witnesses' stories "not matching up," he responded that Petitioner's case would have been better if he had called only one alibi witness. However, trial counsel reiterated, "With hindsight, I have no idea why I did not call the alibi witnesses." In response to various scenarios presented by the State, trial counsel agreed it was possible the State could have called witnesses to rebut the alibi testimony. Trial counsel recalled speaking with Petitioner's girlfriend prior to trial, and although he did not remember the details of their conversation, he did "recall in general the people in the household being part of an alibi." Trial counsel acknowledged that if he had presented the alibi witnesses, he would not have had the final argument. When asked whether he had ever participated in a joint trial such as this one, trial counsel responded, "I'm a real estate attorney, so I don’t do criminal trials. I, I—well, in twenty-something years,

I may have done one or two but generally I don't . . . try criminal cases." There was no redirect.

In its order of dismissal, the PCR court held trial counsel was not ineffective for failing to call the alibi witnesses. Specifically, the court found,

> Trial counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.
>
> The decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel's strategy. . . .
>
> . . . .
>
> . . . . Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses, his trial strategy can be inferred from the basis of his overall strategy, which he testified was to attack the State's DNA evidence against [Petitioner].

The PCR court further found the testimony at the PCR hearing reflected trial counsel's intention to have the final closing argument, stating:

> Trial Counsel's decisions at the trial were clearly made with a tactical strategy in mind and his actions were carefully chosen, even if he disagreed with them looking back in hindsight. Trial Counsel was at least reasonably competent in his decisions at the time of trial, and thus his representation was not ineffective.
>
> Because Trial Counsel articulated, both at the PCR hearing and at the time of trial, a strategic reasoning for choosing not to call alibi witnesses, his performance cannot be found ineffective, and this allegation is denied and dismissed with prejudice.

The PCR court deemed meritless Petitioner's argument that trial counsel was ineffective in failing to call Petitioner to testify. The PCR court found Petitioner did not present any evidence that proved trial counsel would not allow him to testify, and trial counsel could not recall why Petitioner chose not to take the stand. The court further found that if trial counsel had advised Petitioner not to testify, it would have fit into trial counsel's trial strategy to have the final closing argument by not putting up a defense; the PCR court held this was "a reasonable strategy that should not be questioned in hindsight."

Additionally, the PCR court found Petitioner failed to meet his burden of showing he was prejudiced by any alleged deficiencies because there was "overwhelming evidence of his guilt." The court specifically noted Petitioner's DNA was found on the duct tape recovered from the victim, and although this was "essentially" the only direct evidence linking Petitioner to the crime, an exact DNA match could not be easily rebutted. Thus, the court determined it was "unlikely that any other actions by Trial Counsel could have prevented a jury from convicting [Petitioner] based on this DNA evidence."

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We review questions of law de novo, with no deference to trial courts." *Id.* at 180–81, 810 S.E.2d at 839.

Law and Analysis

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). "This court gives great deference to the PCR court's findings on matters of credibility." *Putnam v. State*, 417 S.C. 252, 260, 789 S.E.2d 594, 598 (Ct. App. 2016).

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*,

404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514. Deficiency "is measured by an objective standard of reasonableness." *Taylor*, 404 S.C. at 359, 745 S.E.2d at 102. To establish prejudice, an applicant must show that "but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "In other words, he must show that 'the factfinder would have had a reasonable doubt respecting guilt.'" *Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (quoting *Strickland*, 466 U.S. at 695). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "[W]here trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance." *Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998).

"In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error." *Smalls*, 422 S.C. at 190, 810 S.E.2d at 844.

> [F]or the evidence to be "overwhelming" such that it categorically precludes a finding of prejudice . . . the evidence 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 of "a reasonable probability . . . the factfinder would have had a reasonable doubt" cannot possibly be met.

Id. at 191, 810 S.E.2d at 845 (quoting *Strickland*, 466 U.S. at 695). "Additionally, the strength of the State's evidence should be viewed in light of trial counsel's errors such that there 'is no reasonable possibility [counsel's errors] contributed in any way to [the applicant's] convictions.'" *Martin v. State*, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019) (alterations in original) (quoting *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845).

Initially, we find Petitioner has failed to show trial counsel was ineffective in failing to call Petitioner to testify at trial. *See Speaks*, 377 S.C. at 399, 660 S.E.2d at 514 ("In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application."). At the PCR hearing, Petitioner claimed he wanted to testify but did not because trial counsel told him he wanted the final closing argument. Petitioner did not testify that trial counsel prevented him from testifying at trial, and he did not elicit testimony from trial counsel at the PCR hearing addressing this issue. The trial court advised Petitioner of his Fifth Amendment right and emphasized it was his decision, not trial counsel's, whether or not to testify. Accordingly, we find evidence supports the PCR court's denial of post-conviction relief on this ground.

However, we find no evidence supports the PCR court's findings that trial counsel provided effective assistance or implemented—much less articulated—any valid trial strategy with respect to the alibi witnesses. *See Martin*, 427 S.C. at 456, 832 S.E.2d at 280) (finding "as a matter of law that Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother" where "[l]ead counsel candidly admitted his file contained the mother's statement" as to the time she took Petitioner to the bus stop in Atlanta and the drop-off time coincided with that of the armed robbery). Mother's and Sister's timeline testimonies are comparable to that in *Martin*, and the PCR court's finding that trial counsel's "decision not to use contradictory alibi witnesses at trial was very likely part of [his] trial strategy" is unsupported by the record.

Trial counsel admitted at the PCR hearing that he did not know why he failed to elicit Petitioner's alibi from at least one of the available alibi witnesses. Although trial counsel hypothesized he did not call the witnesses so that Petitioner could

have final argument, he agreed "that calling alibi witnesses would have been a much more favorable strategic decision versus not calling alibi witnesses and trying to get the last argument." On cross-examination, trial counsel reiterated he did not know why he did not call the witnesses. But he thought that if it had been an issue, he "would have had a discussion with [himself] and made a conscious choice" not to present their testimony.

We recognize trial counsel agreed with the State's suggestion that he may have declined to call the witnesses because the State might have then called rebuttal witnesses to challenge the alibi testimony and because he wanted to have the last closing argument. Still, trial counsel repeatedly testified he did not know why he chose not to call the witnesses. Thus, we can find no support in the record for the PCR court's finding that because trial counsel "articulated, both at the PCR hearing and at the time of trial, a strategic reason for choosing not to call alibi witnesses, his performance cannot be found ineffective."

And while there are minor discrepancies among the witnesses' testimonies regarding exactly what time Petitioner woke up on May 15 and whether Mother worked the night of May 14, these discrepancies did not involve credibility issues nor were they necessarily contradictory. *Cf. Edwards*, 392 S.C. at 458, 710 S.E.2d at 65 ("A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with *serious* credibility questions, even if that witness is a co-defendant." (emphasis added)). Sister's testimony could have provided Petitioner with an alibi because she testified she saw him at their Sumter home around 5:00 a.m., he was at the house between 6:00 a.m. and 7:00 a.m., and she did not see him leave his room until 9:00 a.m. when he let his cats outside. *See Walker v. State*, 407 S.C. 400, 406–07, 756 S.E.2d 144, 147 (2014) (finding a witness's testimony that she spent every weekend with the petitioner provided sufficient testimony to support the PCR court's conclusion that the witness would have offered alibi testimony "that reasonably could have resulted in a different outcome at trial" because, if true, the testimony showed it was impossible for petitioner to have committed the crime that occurred on a Saturday). Thus, we can conceive of no *valid* trial strategy supporting trial counsel's failure to call at least one of the alibi witnesses.[2]

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[2] Of additional concern is the PCR court's finding that "[t]rial counsel's decisions were *clearly made* with a tactical strategy in mind and his actions were *carefully*

Further, we find the presence of Petitioner's DNA on a single piece of duct tape recovered from Victim does not constitute "overwhelming evidence" such that it precludes a finding of prejudice. *See Smalls*, 422 S.C. at 190, 810 S.E.2d at 844 ("In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error."). Other than his possible acquaintance with Pearson, the DNA match from the duct tape was the only evidence presented at trial linking Petitioner to the crime, and there could be other reasonable explanations for its presence. Petitioner was not a person of interest in the investigation until the DNA hit. Petitioner challenged the strength of the DNA evidence, and the testimony he elicited from Leisy may have been sufficient to raise a reasonable doubt regarding his guilt had he also presented evidence of an alibi. *See id*. at 191, 810 S.E.2d at 845 ("[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence 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 of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." (quoting *Strickland*, 466 U.S. at 695)). Had even one of Petitioner's alibi witnesses testified, there is a reasonable probability the result at trial would have been different. *See Taylor*, 404 S.C. at 359, 745 S.E.2d at 102 (recognizing that to obtain relief, a PCR applicant must "demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different").

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chosen, even if he disagreed with them looking back in hindsight." (Emphasis added). In discussing prejudice and overwhelming evidence, the PCR court further noted trial counsel "testified that his trial strategy was to attack the State's DNA evidence against Applicant, which he did fully," yet the court also found "Applicant did not dispute the evidence against him. This is clearly overwhelming evidence of Applicant's guilt." Finally, it appears the court conflated the fingerprint evidence against Pearson with Petitioner's DNA match from the duct tape, as the order denying relief states "Applicant's fingerprints were found on the duct tape that was placed on the victim by his attackers during the robbery."

Conclusion

Based on the foregoing, we find the evidence does not support the PCR court's dismissal of Petitioner's application for post-conviction relief. We reverse and remand for a new trial.

REVERSED AND REMANDED.

KONDUROS and GEATHERS, JJ., concur.