The Supreme Court of South Carolina

In the Matter of Lee J. Van De Carr, Jr., Petitioner

Appellate Case No. 2014-002558

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 23, 2001, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 2, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Lee J. Van De Carr, Jr., shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 19, 2014

The Supreme Court of South Carolina

In the Matter of Tara Lynn Burns, Petitioner

Appellate Case No. 2014-002549

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 1995, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated November 25, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Tara Lynn Burns shall be effective upon full compliance with this order. Her name shall removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 16, 2014

The Supreme Court of South Carolina

In the Matter of Kevin Clyde Bradley, Petitioner

Appellate Case No. 2014-002559

ORDER

The records in the office of the Clerk of the Supreme Court show that on February 5, 1990, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 2, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Kevin Clyde Bradley shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 19, 2014

The Supreme Court of South Carolina

In the Matter of Jaye Anderson Bradley, Petitioner

Appellate Case No. 2014-002566

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1991, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 3, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Jaye Anderson Bradley shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

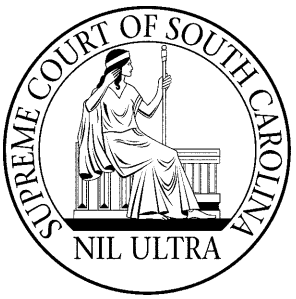
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 19, 2014



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 51
December 23, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

27396 - Town of Hilton Head Island v. Kigre, Inc. Pending

27407 - The State v. Donta Kevin Reed Pending

2010-173586 - Bayan Aleksey v. State Pending

US SUPREME COURT - EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

27408 - The State v. Anthony Nation Granted until 1/3/2015

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

27466 - Abbeville Co. School District v. State of S C Granted until12/30/2014

PETITIONS FOR REHEARING

2014-MO-045 - 1634 Main v. Shirley Hammer Denied 12/18/2014

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2014-UP-474--SCDSS v. Tiffany Lowery

2014-UP-475--State v. Samuel Dingle

2014-UP-476--State v. Jermel Rashond Daniels

2014-UP-477--John Russell Fleming, Jr. v. Kelly Dawn Fleming

2014-UP-478--State v. Erick E. Hewins

2014-UP-479--State v. Kashaun Banks

2014-UP-480--State v. Richard Sprinkle

2014-UP-481--Kenneth Ray Anderson v. S.C. Department of Motor Vehicles

2014-UP-482--State v. Wren Roberson Hinton

2014-UP-483-City of Fort Mill v. Colin Duane Fitzgerald

PETITIONS FOR REHEARING

5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc. Pending

5268-Julie Tuten v. David C. Joel Denied 12/17/14

5270-56 Leinbach Investors, LLC v. Magnolia Paradigm Pending

5272-Cindy Ella Dozier v. American Red Cross Pending

5278-State v. Daniel D'Angelo Jackson	Denied 12/17/14
5279-Stephen Brock v. Town of Mt. Pleasant	Pending
5280-State v. Donna Lynn Phillips	Pending
5281-The Greens of Rock Hill v. Rizon Commercial Contracting	Pending
5282-Joseph D. McMaster v. John H. Dewitt, M.D.	Pending
2014-UP-270-Progressive Northern Ins. v. Stanley Medlock	Pending
2014-UP-346-State v. Jason A. Bauman	Denied 12/17/14
2014-UP-366-State v. Darrell L. Birch	Denied 12/17/14
2014-UP-367-State v. Shondre Lamond Williams	Denied 12/17/14
2014-UP-379-State v. Roy Donell Moore	Denied 12/17/14
2014-UP-381-State v. Alexander L. Hunsberger	Denied 12/17/14
2014-UP-382-State v. Julio Hunsberger	Denied 12/17/14
2014-UP-385-State v. Ralph B. Hayes	Denied 12/17/14
2014-UP-387-Alan Sheppard v. William O. Higgins	Pending
2014-UP-392-City of Beaufort v. Joseph C. Sun	Denied 12/17/14
2014-UP-395-Alice Branton v. Nolan Corbitt	Denied 12/17/14
2014-UP-399-State v. Matthew B. Fullbright	Denied 12/17/14
2014-UP-400-John Doe v. City of Duncan	Denied 12/17/14
2014-UP-402-State v. Jody Lynn Ward	Pending
2014-UP-409-State v. Antonio Miller	Pending
2014-UP-410-State v. Dominique J. Shumate	Denied 12/17/14
2014-UP-411-State v. Theodore Manning	Pending

2014-UP-421-In the interest of Jameccia L., a minor under the age of 17 Denied 12/17/14

2014-UP-422-Johnson Koola v. Cambridge Two Pending

2014-UP-435-SCBT, N.A. v. Sand Dollar 31 Pending

2014-UP-438-CACH v. Toby Hoffman Pending

2014-UP-444-State v. Eric VanCleave Pending

2014-UP-447-State v. Carolyn Poe Denied 12/17/14

PETITIONS-SOUTH CAROLINA SUPREME COURT

5077-Kirby L. Bishop et al. v. City of Columbia Pending

5099-Roosevelt Simmons v. Berkeley Electric Pending

5140-Bank of America v. Todd Draper Pending

5152-Effie Turpin v. E. Lowther Pending

5175-State v. Karl Ryan Lane Pending

5176-Richard A. Hartzell v. Palmetto Collision, LLC Pending

5194-Gerald Smith v. State Granted 12/10/14

5201-Phillip Grimsley v. SLED Pending

5209-State v. Tyrone Whatley Pending

5214-State v. Alton W. Gore, Jr. Pending

5229-Coleen Mick-Skaggs v. William Skaggs Pending

5230-State v. Christopher L. Johnson Pending

5231-Centennial Casualty v. Western Surety Pending

5232-State v. Clarence W. Jenkins Pending

5241-Richard A. Fisher v. Shipyard Village Council	Pending
5242-Patricia Fore v. Griffco of Wampee, Inc	Pending
5243-Kerry Levi v. Northern Anderson County EMS	Pending
5244-Clifford Thompson v. State	Pending
5245-Allegro, Inc. v. Emmett Scully	Pending
5246-State v. Jason A. Johnson	Granted 12/10/14
5247-State v. Henry Haygood	Pending
5248-Demetrius Mack v. Leon Lott	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5257-State v. Jefferson Perry	Pending
5258-State v. Wayne S. Curry	Pending
5259-State v. Victor A. White	Pending
5261-State v. Roderick Pope	Pending
5264-Prakash Solanki v. Wal-Mart	Pending
5265-State v. Wayne McCombs	Pending
5266-State v. Anthony K. Blakney	Pending
5267-Steve Bagwell v. State	Pending
5271-Richard Stogsdill v. SCDHHS	Pending
5273-Jane Roe v. Daniel Bibby, Sr.	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-312-State v. Edward Twyman	Pending

2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-577-State v. Marcus Addison	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-297-Place on the Greene v. Eva Berry	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Denied 12/18/14
2014-UP-013-Roderick Bradley v. The State	Pending
2014-UP-087-Moshtaba Vedad v. SCDOT	Pending
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-114-Carolyn Powell v. Ashlin Potterfield	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-132-State v. Ricky S. Bowman	Pending
2014-UP-143-State v. Jeffrey Dodd Thomas	Pending
2014-UP-167-State v. David G. Johnson	Pending
2014-UP-187-State v. Mark Peters	Pending

2014-UP-203-Helena P. Tirone v. Thomas Dailey	Pending
2014-UP-206-State v. Forrest K. Samples	Denied 12/18/14
2014-UP-210-State v. Steven Kranendonk	Pending
2014-UP-215-Yossi Haina v. Beach Market, LLC	Pending
2014-UP-222-State v. James Curtis Tyner	Pending
2014-UP-224-State v. James E. Wise	Pending
2014-UP-228-State v. Taurus L. Thompson	Pending
2014-UP-234-State v. Julian Young	Denied 12/18/14
2014-UP-235-Rest Assured v. SCDEW	Pending
2014-UP-241-First Citizens Bank v. Charles T. Brooks, III	Pending
2014-UP-248-S.C. Dep't of Transp. V. RI CS5, LLC	Denied 12/18/14
2014-UP-266-Mark R. Bolte v. State	Pending
2014-UP-273-Gregory Feldman v. William Casey	Pending
2014-UP-277-Weatherford v. Weatherford	Denied 12/18/14
2014-UP-279-Jacqueline Smith v. Horry County Schools	Pending
2014-UP-282-State v. Donald M. Anderson	Granted 12/11/14
2014-UP-284-John Musick v. Thomas Dicks	Pending
2014-UP-288-Gayla Ramey v. Unihealth Post Acute	Denied 12/18/14
2014-UP-304-State v. Tawanda Allen	Pending
2014-UP-305-Tobacco Merchant v. City of Columbia Zoning	Pending
2014-UP-306-Yadkin Valley v. Oaktree Homes	Pending

2014-UP-307-Desiree Brown v. Wendell Brown (1)	Pending
2014-UP-317-Cherry Scott v. Heritage Healthcare	Pending
2014-UP-318-Linda Johnson v. Heritage Healthcare	Pending
2014-UP-332-State v. Michael Rogers	Pending
2014-UP-337-State v. Elizabeth M. Dinkins	Pending
2014-UP-343-State v. Derrick A. McIlwain	Pending
2014-UP-361-Russell W. Rice, Jr. v. State	Pending
2014-UP-362-State v. James Harris	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Demetrius Price, Petitioner.

Appellate Case No. 2012-213426

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 27470
Heard November 20, 2014 – Filed December 23, 2014

DISMISSED AS IMPROVIDENTLY GRANTED

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

Attorney General Alan McCrory Wilson, Assistant Attorney General Mark Reynolds Farthing, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in S*tate v. Price*, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012). After careful consideration of the briefs, record, and appendix, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, Acting Chief Justice, BEATTY, HEARN, JJ., Acting Justice James E. Moore and Acting Justice Paul M. Burch, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Benjamin Jackson Baldwin, Respondent.

Appellate Case No. 2014-002459

Opinion No. 27471
Submitted November 20, 2014 – Filed December 23, 2014

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Mark Weston Hardee, Esquire, of The Hardee Law Firm, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of nine (9) months to three (3) years or disbarment with conditions. Respondent requests the suspension or disbarment be imposed retroactively to October 28, 2013, the date of his interim suspension. In the Matter of Baldwin, 406 S.C. 214, 750 S.E.2d 92 (2013). We accept the Agreement and disbar respondent from the practice of law in this state with conditions as set forth hereafter in this opinion. The disbarment shall be imposed retroactively to the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

Background

In November 2009, respondent was admitted to the South Carolina Bar. In June 2011, respondent became employed with Law Firm as an associate with a salary of $24,000 per year. In August 2012, respondent's compensation structure changed to a "commission only" arrangement in which he received 50% of the fees he generated above a monthly amount for overhead.

Respondent worked alone in a satellite office and was permitted to accept cases and set fees with relative autonomy. Law Firm utilized an electronic practice management system in which respondent would create a memo for each new case that would be transmitted to a staff member who would, in turn, create an electronic client file. When respondent received fees from clients, he would physically deliver those payments to Law Firm's main office, where staff would process the deposits.

Matter I

During 2012 and 2013, respondent converted approximately $4,000.00 in client fee payments to his own use by two methods. One method involved accepting fees from new clients (in the form of cash or a money order or check payable to respondent), then using those fees for personal use rather than delivering the fees to Law Firm. Respondent covered this diversion of fees from Law Firm by handling client cases without creating an opening memo or an electronic case file. The other method involved accepting cash payment from Law Firm clients and delivering part of the funds to the firm and converting the remainder to his own use. Respondent covered this diversion of fees by altering documents to reflect a fee of an amount less than what the client actually paid. Law Firm discovered respondent's misappropriation, terminated his employment, and filed a disciplinary complaint.

Matter II

In addition to reporting this matter to the Commission on Lawyer Conduct (the Commission), Law Firm filed a police report. Respondent was arrested and charged with breach of trust with fraudulent intent over $2,000.00 but under

$10,000.00. On July 29, 2014, respondent pled guilty to breach of trust with fraudulent intent under $2,000.00. He was sentenced to time served and restitution which he has paid.

Matter III

Respondent represented Client A in defense of an action brought by Client A's mother. Client A paid respondent $1,500.00 for the representation. Respondent delivered the funds to Law Firm and opened the electronic case file in accordance with Law Firm policies.

Respondent prevailed in the action for Client A which resulted in a court order requiring Client A's mother to pay Client A $500.00 in attorney's fees and $174.26 in travel expenses. On May 30, 2013, Client A's mother delivered the $674.26 to respondent. Respondent converted those funds to his own use. On June 7, 2013, respondent delivered a personal check in the amount of $174.26 to Client A as reimbursement for his travel expenses. Respondent represents that, on August 6, 2013, he mailed a check to Client A for $500.00 for attorney's fees, but that check was never cashed. Shortly after respondent's termination, Law Firm paid Client A from its operating account. After his interim suspension, respondent delivered $500.00 to the Receiver appointed to protect his clients' interests and those funds were refunded to Law Firm.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (upon receiving funds in which client or third person has interest, lawyer shall promptly notify client or third person and shall promptly deliver to client or third person any funds client or third person is entitled to receive); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that adversely reflects upon lawyer's honesty, trustworthiness, or fitness as lawyer in other respects); Rule 8.4 (d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for

discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime); and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law) .

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to October 28, 2013, the date of his interim suspension. In the Matter of Baldwin, supra. In addition, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion. Respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School prior to filing any petition for readmission. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Diamon D. Fripp, Respondent.

Appellate Case No. 2012-212201

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 27472
Heard December 10, 2014 – Filed December 23, 2014

DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh and Senior Assistant Deputy Attorney General Salley W. Elliott, all of Columbia and Solicitor Isaac McDuffie Stone, III, of Beaufort, for Petitioner.

Jared Sullivan Newman, of Jared S. Newman, P.A., of Port Royal, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' opinion in *State v. Fripp*, 397 S.C. 455, 725 S.E.2d 136 (Ct. App. 2012). We now dismiss the writ of certiorari as improvidently granted and further direct the Court of Appeals to depublish its opinion and assign the matter an unpublished opinion number. The above opinion shall no longer have any precedential effect.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Bryant Kinloch, Respondent.

Appellate Case No. 2012-212981

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Roger M. Young, Sr, Circuit Court Judge.

Opinion No. 27473
Heard October 8, 2014 – Filed December 23, 2014

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Petitioner.

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

JUSTICE PLEICONES: Bryant Kinloch was charged with trafficking cocaine, trafficking heroin, and possession with intent to distribute heroin within proximity of a park after law enforcement obtained a search warrant and discovered cocaine and heroin at 609 A Pleasant Grove Lane in Charleston. Before trial, Kinloch moved to suppress the drugs, raising the following grounds to support his motion to suppress: (1) the search warrant affidavit was not sufficient to establish probable cause to search 609 A; (2) the good faith exception to the exclusionary rule did not apply; and (3) even if the affidavit were sufficient, law enforcement intentionally omitted exculpatory information, which, if included, would defeat probable cause. The trial judge suppressed the drugs, finding the search warrant affidavit was insufficient to establish probable cause. The Court of Appeals affirmed. *State v. Kinloch*, Op. No. 2012-UP-432 (S.C. Ct. App. filed July 18, 2012). The State petitioned for a writ of certiorari, and we granted the petition.

Factual/Procedural Background

Law enforcement prepared an affidavit, setting forth the following facts in support of obtaining a search warrant for 609 A.

> On January 2, 2008, law enforcement conducted surveillance of 609 A after receiving "numerous complaints about heroin and cocaine transactions" at 609 A "over the past several months."[1] During its surveillance, law enforcement observed two white males meet with a black male wearing a red shirt, red pants and red hat.[2] The parties entered the residence for about "one minute," and the white males exited the residence, walking in the direction of Highway 17. On three or four other occasions, law enforcement observed the black male in a red shirt exit the residence and meet unknown parties, with

[1] At the time of law enforcement's surveillance and the complaints regarding drug activity, it was not clear whether 609 A was Kinloch's residence. There has been no challenge to whether Kinloch maintained a "legitimate expectation of privacy" in 609 A. *See State v. Missouri*, 361 S.C. 107, 111, 603 S.E.2d 594, 594 n.2 (2004) (noting whether a party may challenge a search under the Fourth Amendment depends on whether there is a "legitimate expectation of privacy in the . . . the premises searched").

[2] When law enforcement executed the search warrant, it identified Kinloch as the man in the red shirt, red pants, and red hat.

> whom the black male in a red shirt engaged in quick "hand-to-hand" transactions. Law enforcement observed the black male in a red shirt counting money after the transactions as he returned to 609 A. During each transaction, the black male in a red shirt was accompanied by another male wearing a black puffy jacket. Law enforcement observed the black male in a red shirt walking into and out of the residence on several occasions. At around 5:00 p.m. that same day, law enforcement observed the male in the black puffy jacket exit the residence and walk towards a gas station on Highway 17. The subject handed an unknown black male, later identified as Redondo Burns, a clear plastic wrapping in exchange for money. Law enforcement approached Burns, at which point he dropped a clear plastic baggy containing a white powdery substance, which tested positive for heroin. Law enforcement observed the male in the black puffy jacket return to 609 A.

Based on the above information, the magistrate issued a warrant to search 609 A for drugs and items related to the purchase and distribution of drugs. No supplemental testimony was taken

Upon executing the search warrant, law enforcement recovered the following from 609 A: (1) twenty grams of heroin from Kinloch's pocket; (2) two baggies each containing ten grams of white powder; (3) a one dollar bill containing a brown powder substance on the kitchen counter; (4) cocaine base on the kitchen counter; (5) a brown wrapper containing a green leafy substance on the kitchen counter; and (6) items suggesting Kinloch manufactured or distributed narcotics.

Kinloch moved to suppress the drugs, arguing the search warrant affidavit did not set forth sufficient facts to establish probable cause to search 609 A and thus, the search violated the Fourth Amendment.[3] Specifically, Kinloch contended the suspicious foot traffic outside 609 A, coupled with finding drugs on Burns, a person who was never connected to the residence, was not sufficient to establish probable cause to search 609 A. Thus, Kinloch argued the search warrant affidavit was insufficient because there was not a sufficient nexus to connect the drugs that were recovered from Burns to 609 A

[3] Kinloch also raised a state constitutional argument and an argument as to the purported infirmity of the search warrant pursuant to S.C. Code Ann. § 17-13-140 (2014). Neither impacts our analysis or decision today.

The trial judge granted Kinloch's suppression motion, finding the affidavit was insufficient because the affidavit failed to link the drugs recovered from Burns to 609 A. The trial judge relied on *State v. Gentile*, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007), and stated that while there was a lot of suspicious activity outside 609 A, law enforcement only recovered drugs "some distance from 609 A" and that was not sufficient to establish probable cause to search the residence.

The State appealed, arguing the trial judge erred in finding the affidavit was insufficient to establish probable cause because in doing so, the trial judge improperly required the affidavit to establish with "near certainty" that drugs would be found at 609 A, rather than the proper "fair probability" standard. The State further argued the tips of drug activity outside 609 A, and law enforcement's observance of "hand-to-hand" transactions outside the residence collectively were sufficient to establish probable cause to search 609 A. Thus, the State contended the trial judge's suppression ruling should be reversed since the trial judge utilized an improper standard of review, and since a sufficient nexus was established between 609 A and Kinloch's drug activity.

The Court of Appeals affirmed. The Court of Appeals cited "clear error" as the standard of review for determining whether the trial judge erred in finding the search warrant was not supported by probable cause. *Kinloch*, Op. No. 2012-UP-432 (S.C. Ct. App. filed July 18, 2012). However, the Court of Appeals then cited *Gentile* and parenthetically noted the magistrate in *Gentile* did not have a "substantial basis" for his probable cause determination because the search warrant affidavit failed to connect the evidence of drug activity to Gentile's residence. *Id.*

Issue

Did the Court of Appeals err in finding the search warrant affidavit was insufficient to establish probable cause?

Law/Application

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A search or seizure does not violate the Fourth Amendment if it is authorized by a warrant that is supported by probable cause.[4] *Id.*; *see State v.*

[4] Section 17-13-140 also states that a search warrant shall be issued "only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a

Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), *cert. denied*, 555 U.S. 1074 (2008). A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221 (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

In reviewing a magistrate's probable cause determination, circuit court judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221; *see also State v. Bellamy*, 336 S.C. 140, 143–45, 519 S.E.2d 347, 348–49 (1999) (applying the fair probability standard and stating the duty of a reviewing court is to ensure the magistrate had a substantial basis for its probable cause determination). As the Supreme Court in *Gates* noted, reviewing a magistrate's probable cause determination based on the "substantial basis" standard encourages law enforcement to seek a warrant, rather than conduct warrantless searches with the hope of relying on some other exception to the warrant clause. *See Gates*, 462 U.S. at 237. If no supplemental testimony is taken, a magistrate's probable cause determination is limited to the four corners of the search warrant affidavit. *See, e.g.*, *State v. Herring*, 387 S.C. 201, 214, 692 S.E.2d 490, 497 (2009)

In finding the search warrant affidavit insufficient to establish probable cause, both the trial judge and the Court of Appeals relied on *State v. Gentile*, a case in which the following facts were insufficient to support the magistrate's probable cause finding: (1) anonymous tips indicating a high volume of traffic frequented outside Gentile's residence; (2) a citizen complaint regarding the smell of marijuana near the residence; and (3) the arrest of a visitor to Gentile's residence, during which law enforcement recovered marijuana from the visitor. 373 S.C. 506, 514–18, 646 S.E.2d 171, 175–77 (Ct. App. 2007).

Although *Gentile* is factually similar, it is not dispositive. Rather, here, unlike *Gentile*, the facts set forth in the affidavit establish that law enforcement received numerous complaints over the course of several months regarding drug activity at 609 A. After receiving those complaints, but prior to seeking a search warrant, law enforcement observed activity consistent with drug activity when they observed parties conducting "hand-to-hand" transactions outside 609 A and saw a man counting money as he returned to the residence. Based, in part, on this

---

court of record establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (2014).

observation, law enforcement followed the man they had seen outside 609 A to a nearby gas station, where they saw this man hand another unknown man, later identified as Burns, a clear plastic wrapping in exchange for money. When law enforcement approached Burns, he dropped the clear plastic baggy, the contents of which tested positive for heroin.

We find based on these facts that the Court of Appeals erred in affirming the circuit court's suppression ruling as the magistrate had a substantial basis for reaching his probable cause determination. *See Baccus*, 367 S.C. at 50, 625 S.E.2d at 221 (reviewing a magistrate's finding of probable cause under the "substantial basis" standard of review). We reach this conclusion after acknowledging that independently each fact set forth in the search warrant affidavit is merely suspicious, but the totality of the circumstances—namely, the numerous tips indicating drug activity was probably present at 609 A and the subsequent surveillance of 609 A during which seemingly drug-related behavior was observed—distinguishes this case from *Gentile*. Likewise, we note that our decision today is based, in part, on the uncertainty as to the standard applied to review the magistrate's probable cause determination. *See Kinloch*, Op. No. 2012-UP-432 (S.C. Ct. App. filed July 18, 2012) (reciting, erroneously, "clear error" as the standard by which it was reviewing the trial judge's decision).

Accordingly, we reverse and remand with instructions that the circuit court proceed in a manner consistent with this opinion.[5]

---

[5] We do so reminding the parties that they are free to litigate the issues not addressed in this opinion. For example, in Kinloch's suppression motion, he also argued that the drugs should be suppressed because he was entitled to a *Franks* hearing based on exculpatory information that law enforcement intentionally omitted. *See, e.g.*, *State v. Missouri*, 337 S.C. 548, 557, 524 S.E.2d 394, 398 (1999) (applying *Franks v. Deleware*, 438 U.S. 154 (1978), and finding, *inter alia*, that evidence should be suppressed when it was obtained on the basis of a search warrant affidavit that excluded exculpatory information). The circuit court did not reach Kinloch's argument as its determination as to the existence of probable cause was dispositive. The merits of that issue have yet to be decided.

Further, we decline to reach the State's remaining argument regarding the applicability of the good faith exception set forth in *United States v. Leon*, 468 U.S. 897 (1984), for we find our resolution of the issue regarding the sufficiency of

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

---

the search warrant affidavit is dispositive. *See State v. Henson*, 407 S.C. 154, 167, 754 S.E.2d 508, 515 n.4 (2014) (declining to reach an additional argument where the resolution of the first issue was dispositive).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carmax Auto Superstores West Coast, Inc.,
Respondent/Petitioner,

v.

South Carolina Department of Revenue,
Petitioner/Respondent.

Appellate Case No. 2012-212203

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From The Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 27474
Heard March 19, 2014 – Filed December 23, 2014

AFFIRMED AS MODIFIED

Adam N.. Marinelli, Milton G. Kimpson, and Roxanna M. Tinsley, all of South Carolina Department of Revenue, of Columbia, for Petitioner/Respondent.

John C. von Lehe, Jr. and Bryson M. Geer, both of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Respondent/Petitioner.

Robert L. Widener and Erik P. Doerring, both of McNair

Law Firm, PA, of Columbia, for Amicus Curiae, South Carolina State Chamber of Commerce.

Burnet R. Maybank, III, of Nexsen Pruet, LLC, of Columbia and Alexandra E. Sampson, of Reed Smith, LLP, of Washington, DC, for Amicus Curiae, Council on State Taxation.

CHIEF JUSTICE TOAL: Both CarMax Auto Superstores West Coast, Inc., (CarMax West) and the South Carolina Department of Revenue (the Department) appeal the court of appeals' decision, reversing and remanding the decision of the Administrative Law Court (ALC) upholding the Department's use of an alternative apportionment formula to calculate CarMax West's income tax for tax years 2002-2007. We affirm as modified in an opinion which resolves all matters with finality and decline to remand at both parties' request.

FACTS/PROCEDURAL BACKGROUND

CarMax, Inc., (CarMax) was formed in 1993 as a subsidiary of Circuit City Stores, Inc., and is the nation's largest retailer of used automobiles. In 2002, CarMax became a separate, publicly-traded holding company of CarMax Auto Superstores, Inc., (CarMax East) and CarMax West, two wholly owned subsidiaries, which primarily performed retail automobile sales. CarMax East owned and operated the used car superstores on the East Coast and in the Midwest, including South Carolina, and managed all of the financial operations and corporate overhead of CarMax. CarMax West owned and operated the used car superstores on the West Coast and owned all of the intellectual property. From 2002-2004, CarMax East paid royalties to CarMax West for the use of this intellectual property in accordance with a licensing agreement.

In 2004, CarMax reorganized its corporate structure, and created CarMax Business Services, LLC (CBS), a multi-member limited liability company with two members: CarMax East and CarMax West. CarMax East contributed the financing operations and corporate overhead management to the partnership, and CarMax West contributed the intellectual property. Ownership percentages of CBS were based on the value of the assets contributed, and the members' income

derives from their respective percentages of ownership.[1]

After the restructuring, CarMax East and CarMax West became vehicle retailers only, and CBS began to provide all of the corporate overhead services, house financing operations through its financing arm (CAF), and manage the intellectual property for its members. Both CarMax East and CarMax West pay CBS a management fee for these services.[2]

CarMax West claims that it has no financial connection to South Carolina outside of royalty payments from CarMax East. From 2002-2004, CarMax East made direct payments to CarMax West for use of the intellectual property; and since 2004, CarMax East has made management fee payments to CBS on a per-vehicle-sold basis, and CAF has generated further financing revenue in South Carolina. Because of its status as an LLC, CBS is taxed as a partnership; therefore, both sources of revenue "flow through" CBS to its members, and thus indirectly, to CarMax West.[3]

At issue is how an allocated portion of this income should be taxed in South Carolina. CarMax West initially filed timely corporate income tax returns for tax years 2002-2007.[4] In 2008, the Department audited CarMax West, and issued a proposed assessment, adjusting CarMax West's apportionment formula and imposing penalties. CarMax West filed a protest, and in early 2009, the

---

[1] CarMax West owns 93.5% of CBS, and CarMax East owns 6.5% of CBS.

[2] The management fee is assessed on a per-vehicle-sold basis. CBS further generates revenue from providing financing to CarMax East's and CarMax West's customers through CAF.

[3] By virtue of its status as a "pass-through" entity for taxation purposes, CBS pays no taxes in South Carolina.

[4] In its initial filing, CarMax West utilized a "three-factor" or "three-factor double weighted sales" formula, which calculates a taxpayer's taxable income in South Carolina by computing a ratio of the taxpayer's total property, payroll, and sales. *See* S.C. Code Ann. § 12-6-2250 (Supp. 2009), *repealed by* Act No. 110, 2007 S.C. Acts 557, 595, *and* Act No. 116, 2007 S.C. Acts 688, 741 (repealing with respect to tax years after 2010).

Department issued a Determination upholding the Department's assessment.

Six months later, CarMax West filed the amended tax returns in question, using the statutory apportionment method found in section 12-6-2290 of the South Carolina Code. *See* S.C. Code Ann. § 12-6-2290 (2000 & Supp. 2009). This method, commonly referred to as the "gross receipts method," calculates a multistate taxpayer's taxes due by creating an apportionment ratio that divides the taxpayer's receipts from financing and intangibles in South Carolina by the taxpayer's receipts from financing, intangibles, and retail sales everywhere else the taxpayer does business.[5] CarMax West then multiplied its net income by the apportionment ratio, and multiplied that number by South Carolina's income tax rate to arrive at its South Carolina income tax.

The Department rejected CarMax West's use of the gross receipts method, claiming it did not fairly represent the extent of CarMax West's business dealings in South Carolina. Rather, the Department proposed an alternate apportionment method pursuant to section 12-6-2320(A)(4) of the South Carolina Code. *See* S.C Code Ann. §12-6-2320 (2000 & Supp. 2009).

The Department's proposed alternative formula employed an apportionment ratio of CarMax West's South Carolina income from intangibles and financing divided by CarMax West's intangibles and financing income from everywhere else that it does business. According to the Department, this alternative formula focused on CarMax West's actual business activity in South Carolina. The Department sought to prevent CarMax West from diluting its income by inflating the denominator of its apportionment ratio with sales from its Western retail operations. Furthermore, the Department sought to include the income from the sale of securitized consumer lending contracts in CarMax West's South Carolina income. The Department still sought penalties.

After the Department issued a Final Agency Determination upholding the Department's use of the alternate formula, CarMax West filed a contested case in

---

[5] Prior to reorganization, CarMax West classified gross receipts from South Carolina as the royalties, and after the reorganization, CarMax West attributed the royalty portion of CBS as South Carolina receipts, but CarMax West did not include the financing revenue within the numerator of the apportionment factor.

the ALC. The ALC affirmed the Department's use of an alternative apportionment formula, but dismissed the penalties assessed against CarMax West. The ALC found that (1) the Department demonstrated that the gross receipts formula failed to fairly represent CarMax West's business in South Carolina; (2) the Department's alternate apportionment formula was reasonable with respect to the extent of CarMax West's business activity in South Carolina; (3) the financing receipts were appropriately sourced to South Carolina; and (4) the alternative apportionment formula did not violate the Commerce Clause.

CarMax West appealed the ALC's decision to the court of appeals. *See CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Revenue*, 397 S.C. 604, 725 S.E.2d 711 (Ct. App. 2012). On appeal, CarMax West argued the ALC erred in: (1) applying the wrong burden and standard of proof; (2) failing to consider that CarMax West operates a unitary business and permitting the Department to use separate accounting procedures when calculating tax liability of a unitary business; (3) finding that CarMax West's South Carolina business activities were not accurately calculated using the gross receipts method; (4) using the wrong test in deciding that CarMax West's financing receipts should be sourced to South Carolina; and (6) finding that the Department did not violate CarMax West's constitutional rights by applying a separate accounting to a unitary business and by sourcing financing receipts to South Carolina. *Id.* at 606, 725 S.E.2d at 712. The court of appeals reversed and remanded the case to the ALC for application of the proper burden of proof, without considering the remaining issues. *Id.* at 611, 725 S.E.2d at 714.

Both parties filed petitions for a writ of certiorari. This Court granted review and accepted amici curiae briefs from the Council on State Taxation and the South Carolina State Chamber of Commerce.

STANDARD OF REVIEW

The Administrative Procedures Act[6] (the APA) "governs appellate review of a final decision from an administrative agency." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007) (citation omitted). In appeals taken pursuant to the APA,

[6] S.C. Code Ann. §§1-23-310 to -400 (Supp. 2013).

> [t]he court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5)(a)–(f) (Supp. 2013). However, the Court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5); *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008).

ANALYSIS

In South Carolina, corporate income tax "is imposed annually at the rate of five percent on the South Carolina taxable income of every corporation . . . transacting, conducting, or doing business within this State or having income within this State, regardless of whether these activities are carried on in intrastate, interstate, or foreign commerce." S.C. Code Ann. § 12-6-530 (2014). "A corporation's taxable income in South Carolina is computed using the Internal Revenue Code with modifications as provided by South Carolina law, and this amount is 'subject to allocation and apportionment as provided in Article 17 of this chapter.'" *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 145, 694 S.E.2d 525, 528 (2010) (quoting S.C. Code Ann § 12-6-580 (2000)). When "a taxpayer is transacting or conducting business partly within and partly without this

State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State." S.C. Code Ann. § 12-6-2210(B) (2014).

"Article 17, entitled 'Allocation and Apportionment,' provides certain income that is not related to business activity in South Carolina must be directly allocated to a taxpayer and is not subject to apportionment." *Media Gen.*, 388 S.C. at 145, 694 S.E.2d at 528 (citing S.C. Code Ann. §§12-6-2220, -2230 (2000 & Supp. 2009)). Any income "remaining after allocation is apportioned in accordance with the general apportionment statute, section 12-6-2250, or one of the special apportionment formulas" provided in Sections 12-6-2290 through 12-6-2310. *Id.* at 145 (citing S.C. Code Ann. § 12-6-2240 (Supp. 2009)).

In this case, CarMax West utilized the statutory formula found in section 12-6-2290 of the South Carolina Code, which requires a taxpayer to "apportion its . . . net income using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year." *See* S.C. Code Ann. 12-6-2290. However, the Department sought to use an alternative method of apportionment pursuant to section 12-6-2320(A) of the South Carolina Code, which provides:

> If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> (1) separate accounting;
>
> (2) the exclusion of one or more of the factors;
>
> (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State; or
>
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Burden of Proof

On appeal, the Department takes issue with the burden of proof adopted by the court of appeals. Specifically, the Department contends the court of appeals erred in applying *Media General*.[7]

In its Order, the ALC properly applied a preponderance of the evidence standard of proof, but also found that because the burden of proof "is generally upon the party asserting the affirmative in an adjudicatory administrative proceeding" and CarMax West requested the contested case hearing to challenge the Department's proposed assessment, then CarMax West bore the burden of proof.

The court of appeals reversed the ALC, finding it applied an incorrect burden of proof under section 12-6-2320(A). *CarMax*, 397 S.C. at 611, 725 S.E.2d at 714. The court of appeals reasoned:

> There are two burdens of proof which must be met in this case. First, we note both the Department and CarMax West agree the Department bears the burden of proving the gross receipts formula does not fairly represent CarMax West's business activity in South Carolina. Second, the Department bears the burden of proving its alternative accounting method is reasonable and more fairly represents CarMax West's business activity in South Carolina.

Id. at 611, 725 S.E.2d at 714–15. Moreover, the court of appeals stated that "based on *Media General*, the Department, as the proponent of the alternative apportionment method, must establish that its alternative method is not only appropriate, but more appropriate than any competing methods." *Id.* at 611, 725 S.E.2d at 714. Finding the ALC erred in requiring CarMax West satisfy the second prong of the analysis, the court of appeals reversed the ALC and remanded for a

[7] CarMax West does not contest these findings; rather, CarMax West argues that the court of appeals erred in refusing to consider the issues posed to it concerning CarMax's status as a unitary business, the sourcing of the financing receipts to South Carolina, and the constitutionality of the Department's application of South Carolina's taxation scheme to it.

proper application of the burden. *Id.* at 612, 725 S.E.2d at 715.[8]

We find the statutory language of section 12-6-2320(A) clearly evinces a two-part analysis, and we affirm the court of appeals in that respect. However, the second prong of the analysis is met by a showing that the deviation from a statutory apportionment formula is reasonable, and no further showing is required at that stage. Thus, we find the court of appeals erred in requiring a showing that the Department prove its alternate formula "more fairly represents CarMax West's business activity in South Carolina," and further, we agree with the Department that the court of appeals misapplied *Media General* in holding the Department must prove that its alternate formula is "more reasonable than any competing method."[9]

Accordingly, when a party seeks to deviate from a statutory formula under section 12-6-2320(A), the proponent of the alternate formula bears the burden of proving by a preponderance of the evidence that: (1) the statutory formula does not fairly represent the taxpayer's business activity in South Carolina and (2) its

---

[8] The court of appeals rejected CarMax West's contention below that the standard of proof was clear and convincing evidence, and CarMax West has not appealed that ruling. *CarMax*, 397 S.C. at 611–12, 725 S.E.2d at 714–15.

[9] In *Media General*, it was undisputed that the gross receipts formula did not fairly represent the income of the multi-state taxpayer, and the alternative formula proposed by the taxpayer did in fact fairly measure the taxpayer's business activity in South Carolina. *Media Gen.*, 338 S.C. at 146, 694 S.E.2d at 529. In upholding the application of the alternative formula suggested by the taxpayer, we stated:

> Although the Department has the discretion to select an alternative method, the ALC has ordered in this case that the method be applied and we affirm this determination as the Department has not established that another method would be more appropriate.

Id. at 152, 152, 694 S.E.2d at 532. In contrast to the situation that arose in *Media General*—where both parties agreed that the statutory formula did not fairly represent the taxpayer's business in South Carolina—here, there was not the potential for competing alternatives. Therefore, the proponent's showing that the alternative formula is reasonable necessarily ends the inquiry.

alternative accounting method is reasonable.

In so holding, we reject the Department's argument that the court of appeals erred in failing to shift the burden to prove reasonableness to CarMax West. The Department suggests that because it was the proponent of the statutory formula to which the taxpayer raised an alternative formula in *Media General*, it was required to supply another more appropriate formula in the face of the taxpayer's proposed alternative. Consequently, in this case, where the roles are reversed, the Department argues CarMax West must now prove its formula is more appropriate than the Department's proposed alternative.

This argument is unavailing because it ignores the clear distinction between this case and *Media General*. There, both the Department and the taxpayer agreed that the statutory formula did not fairly represent the taxpayer's business in South Carolina. The taxpayer supplied an alternative formula, but the Department fell back on the statutory formula. Thus, in the context of that case, affirmation was appropriate on the basis that the Department failed to select an alternative method, but also failed to establish that another method would be more appropriate. Here, however—where the Department alone is arguing that the statutory formula does not fairly represent the taxpayer's business in South Carolina—the Department bears the burden to prove (1) that the statutory formula does not fairly represent CarMax West's business activity in South Carolina and (2) that the proposed alternative formula is reasonable. *Cf. St. Johnsbury Trucking Co. v. State*, 385 A.2d 215, 217 (N.H. 1978) (holding "an alternative formula is the exception, and the party who wants to use an alternative formula accordingly has the burden of showing that the alternative is appropriate"); *Donald M. Drake Co. v. Dep't of Revenue*, 500 P.2d 1041, 1044 (Or. 1972) (holding "the use of any method other than apportionment should be exceptional" and the party seeking to use an alternative method bears the burden of proof).

Therefore, we affirm the court of appeals finding that the ALC erred in placing the burden of proof on CarMax West.

Application of the Burden

The Department contends that because it has proved that the statutory formula did not fairly represent a taxpayer's business activity within the state, the only issue on appeal is what burden of proof to apply to the question of whether

the Department's formula was reasonable. This formulation of the issue assumes that the Department made a sufficient showing regarding the first prong of the analysis. We find that it did not as a matter of law.[10]

While there is substantial evidence in the record to support the ALC's finding that the Department's alternative accounting method was reasonable, the Department failed to prove the threshold issue that the statutory formula does not fairly represent CarMax West's business activity within South Carolina.

As noted by the South Carolina State Chamber of Commerce in its amicus brief, to satisfy its burden with respect to this first prong, the Department merely "describe[d] what it did rather than cite any evidence justifying what it did." Rather, at trial, the Department relied on CarMax West to refute its use of an alternate formula, and it was in this context that CarMax West raised its unitary business, sourcing, and constitutional arguments.

In its order, the ALC relied on testimony from an auditor that the business structure of CarMax West and CBS is often "linked with tax minimization strategies." Furthermore, the ALC relied on evidence regarding the sourcing of income, and the fact that CarMax West's apportionment ratio yielded a significantly lower tax than that of CarMax East, to support its determination that CarMax West's income was diluted. This was the extent of the evidence offered by the Department to prove the contention that the statutory formula did not fairly represent CarMax West's business activity in South Carolina, other than bald assertions by its witnesses that it satisfied this threshold question.

Even if these findings accurately characterize CarMax West's motives, they do not provide a sound evidentiary basis to support the conclusion that the statutory formula did not fairly represent CarMax West's business in South Carolina. *See St. Johnsbury Trucking Co.*, 385 A.2d at 217 ("Merely because the use of an alternative form of computation produces a higher business activity attributable to New Hampshire, is not in and of itself a sufficient reason for deviating from the legislatively mandated formula." (citations omitted)).

---

[10] At oral arguments, upon questioning by Justice Pleicones, both parties agreed that this case should be resolved on this Record as a matter of judicial economy, and that remand was unnecessary.

Therefore, we find that the Department failed to satisfy its burden of proof as a matter of law.[11]

CONCLUSION

For the foregoing reasons, the opinion of the court of appeals is

AFFIRMED AS MODIFIED.

BEATTY, HEARN, JJ., and Acting Justice James E. Moore concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

[11] We need not reach the CarMax West's remaining issues on appeal, as they were all raised as defenses to the Department's use of an alternative apportionment method, and the proper allocation of the burden of proof resolves this appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority that the Court of Appeals was correct in reading S.C. Code Ann. § 12-6-2320(A) (2014) to place a two-part burden on the party seeking to deviate from the standard allocation formula. First, the proponent of the deviation must show that the gross receipts formula does not fairly represent the taxpayer's in-state business activity. Second, the proponent of change must demonstrate that its proposal is reasonable, but not that its alternative is fairer than any other formula. I therefore agree with the majority's modification of the test used by the Court of Appeals, but disagree with the majority's application of these principles here.

Since we are holding that the burden of proof is on the Department, I agree with the Court of Appeals that we should remand this matter to the ALC for reconsideration. Whether the Department can meet its burdens are questions of fact which, in my opinion, should not be decided on certiorari despite the parties' agreement that we do so. The ALC placed the burden of proof on CarMax West, and accordingly its findings of fact and conclusions of law are premised on that error of law. It is therefore not surprising that as the majority states, "the Department relied on CarMax West to refute [the Department's] use of an alternate formula," or that the Department, lacking any burden of proof, largely offered evidence of **what** it did rather than **why** it did it.

In light of our clarification of the burden of proof, I would remand to the ALC with instructions to reconsider this matter and to hold an evidentiary hearing if requested by either party. I would also permit the parties to reargue the points of law raised in their petitions of certiorari but not decided by the Court today.

For the reasons given above, I concur in part, dissent in part, and would remand for reconsideration.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Bailey Taylor, Respondent.

Appellate Case No. 2012-213018

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Published Opinion No. 5285
Heard November 3, 2014 – Filed December 23, 2014

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson, and Assistant Attorney General William M. Blitch, Jr., for Appellant, both of Columbia.

Travis Ashley Newton, of The Newton Law Firm, P.A., of Anderson, for Respondent.

KONDUROS, J.: The magistrate court dismissed Bailey Taylor's charge for driving under the influence (DUI) because the required video recording of the incident site omitted Taylor from view for a period of time while the arresting officer repositioned his vehicle. The State appealed the circuit court's upholding of this dismissal. We reverse and remand.

FACTS

On July 22, 2011, South Carolina Highway Patrol Trooper E.S. Tolley charged Taylor with driving with unlawful alcohol concentration under section 56-5-2933 of the South Carolina Code (Supp. 2013).[1] During the stop, as Tolley repositioned his patrol vehicle, the camera omitted Taylor from view for a period of time.

Taylor moved pretrial to dismiss the charge against her, arguing Tolley failed to comply with section 56-5-2953 of the South Carolina Code (Supp. 2013)[2] because the video omitted her from view for several seconds and Tolley failed to submit an affidavit explaining why her actions were not recorded during that time. The State argued the officer was not required to capture all of the defendant's actions to satisfy the statute's requirements. The magistrate court dismissed Taylor's charge for driving with unlawful alcohol concentration. The magistrate court concluded the statute required the arresting officer to record all of Taylor's conduct at the incident site and required the submission of an affidavit explaining why all of her conduct was not video recorded. The magistrate court concluded dismissal of Taylor's charge was an appropriate remedy when the State did not comply with the statute because Taylor's actions while outside the view of the video constituted "conduct," and Tolley failed to submit an affidavit. The magistrate's return does not contain any findings of fact other than stating Taylor's actions are omitted from view on the video for a period of time.[3]

The State appealed to the circuit court, arguing the magistrate court erred because the video recording captured all of the requirements of section 56-5-2953, even though the video omitted Taylor's actions at the incident site for several seconds. The State asserted the statute only specifically requires certain aspects of the

---

[1] The statute became effective February 10, 2009.
[2] This statute also became effective February 10, 2009.
[3] The magistrate's return is unclear whether the magistrate court reviewed the video. The return states "both parties agree that there is a gap on the video recording where the defendant is not on camera and her conduct is not being recorded," but does not state that the court watched the video. Additionally, neither the State nor Taylor offered any items into evidence before the magistrate court.

defendant's conduct at the incident site be recorded and the word "conduct" in the statute is not meant to encompass every action of the defendant. The State also contended its production of a video recording that met the requirements of the statute rendered the submission of an affidavit unnecessary. The circuit court affirmed the magistrate court, concluding the omission of Taylor's actions from view for several seconds violated the statute and Tolley failed to submit an affidavit but, finding the video began upon activation of blue lights, continuously recorded the entire time, captured all of the field sobriety tests administered, included Taylor's arrest, and showed Tolley advising Taylor of her *Miranda*[4] rights.[5] This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

"In criminal appeals from magistrate . . . court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); S.C. Code Ann. § 18-3-70 (Supp. 2013) ("The appeal [from a magistrate in a criminal case] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law."). This court will review the decision of the magistrate court for errors of law only. *City of Rock Hill v. Suchenski*, 374 S.C.

---

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

[5] It is also unclear whether the circuit court reviewed the video or made its findings based on statements by counsel during the hearing. Again, neither the State nor Taylor offered any items into evidence before the magistrate court. Nonetheless, Taylor has not challenged that the other requirements of the statute were met. Taylor only argued her omission from the camera's view for a period of time violated the statute because her conduct was not recorded.

12, 15, 646 S.E.2d 879, 880 (2007); *Henderson*, 347 S.C. at 457, 556 S.E.2d at 692.

In criminal appeals from the magistrate court, the circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. *See City of Greer v. Humble*, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013). "Moreover, [q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *Id.* (alteration by court).

LAW/ANALYSIS

The State contends the magistrate court and circuit court erred in dismissing the DUI charge under section 56-5-2953(A) of the South Carolina Code (Supp. 2013) when the video recording briefly omitted Taylor from its view at the incident site but otherwise complied with the statute's requirements and when Tolley did not submit an affidavit explaining Taylor's omission from view. We agree.

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (internal quotation marks omitted); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). "However, penal statutes will be strictly construed against the [S]tate." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806.

"If the statute is ambiguous, however, courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its

subject matter and accords with its general purpose." *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.* at 342-43, 713 S.E.2d at 283.

A person who commits a DUI offense "must have his conduct at the incident site . . . video recorded." § 56-5-2953(A). "The video recording at the incident site must: (i) not begin later than the activation of the officer's blue lights; (ii) include any field sobriety tests administered; and (iii) include the arrest of a person for a violation of . . . [s]ection 56-5-2933[6] [of the South Carolina Code (Supp. 2013)], . . . and show the person being advised of his [*Miranda*] rights." § 56-5-2953(A)(1)(a)(i-iii). A violation of this section may result in dismissal of the DUI charges. S.C. Code Ann. § 56-5-2953(B) (Supp. 2013); *see also City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding dismissal of DUI charge is an appropriate remedy if the officer fails to produce a satisfactory video recording unless an exception applies).

In *Suchenski*, our supreme court affirmed the reversal of the defendant's DUI conviction when the video stopped recording before the officer administered a third field sobriety test and before the defendant was arrested. 374 S.C. at 14, 646 S.E.2d at 879. The City conceded the officer did not comply with the video recording requirement but asserted it was excused under section 56-5-2953(B). *Id.* at 14-15, 646 S.E.2d at 879-880. The court found the applicability of the exceptions unpreserved because the City failed to seek a post-judgment ruling after the circuit court did not address section 56-5-2953(B) in its order. *Id.* at 15-16, 646 S.E.2d at 880. In applying the prior version of the statute, which required video recording to begin upon activation of blue lights and conclude after the defendant's arrest but did not specifically require video recording of field sobriety tests, the court held the City's failure to comply with the statute required dismissal of the charges. *Id.* at 14, 17, 646 S.E.2d at 879, 881; *see also* S.C. Code Ann. § 56-5-2953(A)(1) (2006).

---

[6] Tolley charged Taylor with violating section 56-5-2933.

In *Murphy v. State*, which the State asserts is controlling in this case, this court affirmed the defendant's DUI conviction under the prior version of the statute even though she conducted the horizontal gaze nystagmus (HGN)[7] test with her back to the vehicle camera and even though the video only recorded the defendant from the knees up as she performed the walk and turn test[8], occasionally only displaying half of her body. 392 S.C. 626, 628-29, 709 S.E.2d 685, 686-87 (Ct. App. 2011). The defendant argued "the videotape of the incident [s]ite d[id] not comply with the statute because it fail[ed] to 'record most of the field sobriety tests.'" *Id.* at 631, 709 S.E.2d at 688. The court found "the plain language of the statute does not require that the recording capture a continuous full view of the accused, or capture *all* field sobriety tests. Rather, provided all other requirements are met, the video need only record the accused's conduct." *Id.* at 632, 709 S.E.2d at 688. Further, the court concluded "an unbroken recording of the tests is not necessary to capture conduct." *Id.* However, unlike the current statute, the statute applicable in *Murphy* did not include the explicit requirement that it "include any field sobriety tests

---

[7] "Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system." *State v. Sullivan*, 310 S.C. 311, 315 n.2, 426 S.E.2d 766, 769 n.2 (1993). "The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking." *Id.*

[8] "In the walk and turn test, the subject is directed to take nine steps, heel-to-toe, along a straight line. After taking the steps, the suspect must turn on one foot and return in the same manner in the opposite direction. The examiner looks for eight indicators of impairment: if the suspect cannot keep balance while listening to the instructions, begins before the instructions are finished, stops while walking to regain balance, does not touch heel-to-toe, steps off the line, uses arms to balance, makes an improper turn, or takes an incorrect number of steps." *Appendix A: Standardized Field Sobriety Testing*, National Highway Traffic Safety Administration, at http://www.nhtsa.gov/people/injury/alcohol/sfst/appendix_a.htm (last visited Oct. 24, 2014).

administered."[9] § 56-5-2953(A)(1)(a)(ii). Instead, the statute only required the video recording to "include the person being advised of his *Miranda* rights before any field sobriety tests are administered, if the tests are administered." § 56-5-2953(A)(1)(b) (2006).

In *State v. Gordon*, the court of appeals affirmed the circuit court's determination that the statute required the HGN field sobriety test to be on video and specifically for the HGN test, the defendant's head must be on video. 408 S.C. 536, 543, 759 S.E.2d 755, 758 (Ct. App. 2014), *cert. granted*. In *Gordon*, the defendant moved to dismiss the charge in magistrate court, arguing the State violated the statute because the video recording did not show his head during the administration of the HGN test. *Id.* at 539, 759 S.E.2d at 756. The magistrate court denied the motion under *Murphy*, finding the statute only required the defendant's conduct to be recorded, and the defendant was convicted in a jury trial. *Id.* The circuit court reversed his conviction on appeal, finding the defendant's head was not on video, which violated the statute. *Id.* at 539-40, 759 S.E.2d at 756-57. This court agreed the HGN test, specifically the defendant's head during the HGN test, must be recorded to comply with the statute. *Id.* at 543-44, 759 S.E.2d at 758-59. The court distinguished *Murphy* because, unlike the amended statute applicable in *Gordon* and in the present case, it was based on the prior statute, which did not specifically require video of the field sobriety tests. *Id.* at 543, 759 S.E.2d at 758; *see also* § 56-5-2953(A)(1)(a)(ii) (Supp. 2013); § 56-5-2953(A)(1)(b) (2006). However, the court vacated the circuit court's factual finding that the defendant's head could not be seen on video because the circuit court may not make factual findings when sitting in an appellate capacity. *Gordon*, 408 S.C. at 543, 759 S.E.2d at 759. This court then remanded to the magistrate court to determine whether the defendant's head was on the video recording because the magistrate court had never made any findings due to its misconstruction of the statute. *Id.* at 543-44, 759 S.E.2d at 759.

---

[9] Moreover, the *Murphy* court noted the legislature's amendment to the statute in 2009 bolstered its conclusion the previous statute was not violated when the video did not capture the defendant's performance on all of the field sobriety tests administered. 392 S.C. at 632 n.4, 709 S.E.2d 685 at 688 n.4.

Dismissal of a DUI "charge is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." *Suchenski*, 374 S.C. at 17, 646 S.E.2d at 881. "[T]he Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." *Town of Mt. Pleasant*, 393 S.C. at 348, 713 S.E.2d at 286. "By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance." *Id.* at 349, 713 S.E.2d at 286.

However, noncompliance with the recording requirement is excusable and is not alone a ground for dismissal (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable and stating which reasonable efforts were made to maintain it; (2) if the arresting officer submits a sworn affidavit that it was physically impossible to produce the videotape because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) when an arrest is made and the camera has not been activated if video recording begins and conforms with the requirements as soon as practicable in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests; or (4) for any other valid reason for the failure to produce the video tape based upon the totality of the circumstances. § 56-5-2953(B).

Both the circuit court and the magistrate court committed errors of law by holding the statute required dismissal unless the video recorded all of Taylor's actions. The statute's language is plain, unambiguous, and conveys a clear meaning, and consequently, the rules of statutory interpretation are unnecessary. Furthermore, the circuit court erred in making factual findings because it was sitting in an appellate capacity. *Rogers v. State*, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004).

Suchenski, *Murphy*, and *Gordon* demonstrate the plain language of the statute does not require the video to encompass every action of the defendant, but requires video of each event listed in the statute. Significantly, in each of these cases, the propriety of dismissal of the charges depended on whether the officer complied with the mandatory provisions of the statute. In *Suchenski*, although the court did not discuss the nature of the City's violation of the statute because the City conceded its noncompliance, the video stopped recording *before* the defendant was

arrested. 374 S.C. at 14-15, 646 S.E.2d at 879-80; *see also* § 56-5-2953(A)(1)(a) (2006) (requiring video to "conclude *after* the arrest of the person for a violation of" a DUI offense (emphasis added)). In *Murphy*, the court found the officer complied with the statute even though the camera only recorded portions of the defendant's body during the sobriety tests because the prior statute did not specifically require video of sobriety tests. 392 S.C. at 628, 631-32, 709 S.E.2d at 686, 688. Additionally, the court noted the defendant did not allege the video did not record the officer giving *Miranda* warnings, which was required by the statute. *Id.* at 631, 709 S.E.2d at 688. Finally, in *Gordon*, after affirming the circuit court's determination that the statute required video recording of the HGN sobriety test, this court remanded to the magistrate court to determine whether the video captured the defendant's head during administration of the HGN test. 408 S.C. at 543-44, 759 S.E.2d at 758-59. This court noted the statutory provision requiring video recording of field sobriety tests administered is pointless "if the actual tests cannot be seen on the recording." *Id.* at 543, 759 S.E.2d at 758; *see also State v. Henkel*, 404 S.C. 626, 632, 746 S.E.2d 347, 351 (Ct. App. 2013) (*cert. granted*) (finding trial court erred in not dismissing the charge when officer failed to videotape the issuing of *Miranda* warnings and no exception applied).

The purpose of the video requirement in the statute "is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant*, 393 S.C. at 347, 713 S.E.2d at 285. In enacting the provision, the legislature indicated this purpose and intent by specifically requiring the video to "include any field sobriety tests administered," as they determine whether a driver is impaired and therefore create direct evidence of the DUI arrest. § 56-5-2953(A)(1)(a)(ii). In addition, unlike requiring the video to encompass every action of the defendant, requiring video recording of the person's arrest and of the officer issuing *Miranda* warnings serves to protect important rights of the defendant. However, this does not mean the legislature intended only those events enumerated in the statute to be recorded. The plain language of the statute demonstrates the legislature intended video recording of the majority of an officer's encounter with a potential DUI suspect. Nonetheless, interpreting the statute to require dismissal of the charges when the defendant is off camera for a short period of time and the gap does not occur during any of those events that either create direct evidence of a DUI or serve important rights of the defendant would result in an absurdity that could not possibly have been intended by the legislature. Indeed, interpreting the statute in that way would require dismissal of a DUI charge when a suspect stumbles out of view of the camera or when the officer is placing a suspect into his vehicle. Accordingly, section 56-5-

2953 does not require dismissal of a DUI charge when the video recording of the incident briefly omits the suspect but that omission does not occur during any of those events that either create direct evidence of a DUI or serve important rights of the defendant.

Because the statute was not violated in this situation, submitting an affidavit was unnecessary. Moreover, affidavits are required only when the camera was inoperable or it was physically impossible to record because the defendant required emergency medical treatment or exigent circumstances existed. § 56-5-2953(B). The record contains no evidence those situations were present here. As a result, the State did not need to submit an affidavit.

Although the video omitted Taylor from its view during the repositioning of Tolley's patrol vehicle, none of the field sobriety tests administered and none of the other statutory requirements occurred while she was out of the camera's view. Because both the magistrate court and circuit court erred in interpreting the statute to require dismissal here, we reverse and remand to the magistrate court for trial.

REVERSED AND REMANDED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Graham Franklin Douglas, Respondent.

Appellate Case No. 2013-000148

Appeal From Chesterfield County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5286
Heard September 10, 2014 – Filed December 23, 2014

AFFIRMED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon Jr., all of Columbia; and Solicitor Ernest Adolphus Finney III, of Sumter, for Appellant.

S. Jahue Moore, Michael Brooks Biediger, and Margaret Amelia Hazel, all of Moore Taylor Law Firm, P.A., of West Columbia, for Respondent.

GEATHERS, J.: The State seeks review of a circuit court order granting Respondent Graham Franklin Douglas immunity from prosecution for murder and

possession of a weapon during the commission of a violent crime pursuant to the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 to -450 (Supp. 2013). We affirm.

FACTS/PROCEDURAL HISTORY

At the hearing on Respondent's motion to dismiss the indictment, Respondent testified concerning the events leading up to the shooting of his longtime friend Charles Eden Smith. According to Respondent, on May 31, 2011, Smith and Respondent went to play golf at Green River Country Club near Chesterfield. They arrived at the golf course between nine and ten o'clock in the morning and left between three o'clock and four-thirty in the afternoon. During this time, the two men shared a medium-sized bottle of vodka, and they purchased another medium-sized bottle of vodka on their way back to Respondent's house from the golf course. When they arrived at the small house, the two men began drinking the second bottle of vodka while sitting in lawn chairs in Respondent's backyard.

At approximately five o'clock that evening, Respondent and Smith went inside Respondent's house, where the two men continued drinking vodka. Smith then went to the bathroom inside Respondent's bedroom suite and locked the bedroom door because the bathroom did not have a door.

When Smith came out of the bedroom, he was holding a bottle of Respondent's anti-anxiety medication, which Respondent kept in a dresser drawer next to his bed.[1] Smith stated, "Look what I found," to which Respondent replied, "No, no, no, no, I need those. Give them to me." As Respondent attempted to grab the bottle, Smith moved the bottle between his left hand and right hand. Smith then placed the bottle on the bar in the kitchen. As Respondent reached for the bottle, Smith slid the bottle back and forth on the bar, continuing to taunt Respondent. Respondent finally exclaimed "G** d*** it, give me my medicine," and Smith then "snapped" and "went crazy." Smith grabbed Respondent by his upper arms

[1] Respondent testified he suffered from panic attacks and chronic insomnia, in addition to attention deficit disorder and dyslexia. The medication prescribed for Respondent for his anxiety and insomnia was Clonazepam.

and threw him up against the refrigerator, causing Respondent to hit his head.[2] Smith held him there, and Respondent felt his knees buckle underneath him.[3] When Smith released Respondent, Respondent fell on the floor and hit his head again. Smith got on top of Respondent and struck Respondent in the eye. Respondent told Smith several times to leave him alone and to leave his house, but Smith refused to do so. Smith bit Respondent on his leg, then backed off, went into the dining room, and started laughing. Unable to walk at that moment, Respondent crawled into his bedroom, which was adjacent to the kitchen.

Respondent then crawled up onto his bed and again told Smith to leave the house. As Respondent sat on the bed, Smith lingered, so Respondent retrieved a pistol from the dresser drawer next to his bed and set the pistol next to himself on the bed. Smith continued to laugh and refused to leave. Respondent then stood up and went to the kitchen's threshold, with the pistol by his side, and once more told Smith to leave. However, Smith, whose eyes "looked like a man possessed," began advancing toward Respondent.

When Respondent realized Smith was not going out the front door, Respondent lifted the pistol in an attempt to scare Smith away. Respondent was "terrified" because Smith "had already [attacked Respondent] once." When Smith was approximately two feet away from Respondent, Respondent fired the pistol. The bullet hit Smith in the chest, piercing his heart. He fell to the floor, struggling to breathe, and died within minutes.

Respondent ran to his parents' house next door to call 911. Before the 911 dispatcher could answer, Respondent blurted out: "Hey, I just shot [Smith]." When the dispatcher answered, Respondent stated: "Yeah, I need an ambulance out here." After the dispatcher asked for more detailed information, Respondent gave the phone to his father. Respondent's father told the dispatcher he believed someone had been shot and gave the dispatcher a street address. Respondent returned to his house and took some Clonazepam before the police arrived.

---

[2] Respondent actually testified that Smith grabbed him by his shoulders. However, photographs of Respondent's injuries show severe bruising on Respondent's upper arms.

[3] The evidence shows that Respondent likely sustained a concussion when his head hit the refrigerator.

Because Respondent's father was employed by the Chesterfield County Sheriff's Office, that office asked the South Carolina Law Enforcement Division (SLED) to investigate the case and instructed its deputies to secure the scene until SLED arrived. When Deputy Dana Wallace arrived, he asked Respondent "What is going on?" Respondent stated, "He come [sic] at me with a gun and I shot him." Both Deputy Wallace and Sergeant Wayne Jordan testified that Respondent appeared "highly intoxicated." Deputy Wallace instructed two other deputies to detain Respondent. During the next several hours, Respondent spontaneously uttered the following: "I shot [Smith.]"; "[Smith] is dead."; "I'm a murderer."; and "I had to shoot him before he shot me."

Respondent was indicted for murder and possession of a weapon during the commission of a violent crime.[4] Subsequently, Respondent filed a motion to dismiss the charges against him pursuant to the Protection of Persons and Property Act, § 16-11-410 to -450 (the Act). On October 2 and 3, 2012, the circuit court conducted a hearing on the motion. After receiving all of the evidence, the circuit court took the motion under advisement. The circuit court later sent a letter to the Solicitor and Respondent's counsel, advising them of the court's decision to grant the motion to dismiss and explaining the grounds for granting the motion.

On November 19, 2012, the Solicitor filed a written request for reconsideration. However, on January 4, 2013, the circuit court issued a formal order granting Respondent immunity from prosecution and dismissing the charges against him. The circuit court found Respondent showed by a preponderance of the evidence that, when he shot Smith, he was acting in self-defense because he reasonably believed it was necessary to use deadly force to prevent death or great bodily harm to himself. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court abuse its discretion in finding Respondent reasonably believed shooting Smith was necessary to prevent great bodily injury to himself?

[4] There is no indictment in the record. However, the circuit court referenced an indictment at the conclusion of its order granting immunity.

2. Did the circuit court err in admitting into evidence the testimony of two police officers concerning Smith's prior bad acts?

3. Did the circuit court abuse its discretion in assessing the evidence of Smith's intoxication and failing to properly assess Respondent's intoxication?

4. Did the circuit court err in granting Respondent immunity from prosecution pursuant to S.C. Code Ann. § 16-11-440(C)?

STANDARD OF REVIEW

This court reviews the trial court's pretrial determination of immunity for an abuse of discretion. *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). The admission or exclusion of evidence is also subject to an abuse of discretion standard of review. *See State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion . . . ."). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007). In other words, the abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility. *Cf. State v. Mitchell*, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009) (equating the "any evidence" standard of review in criminal cases to the abuse of discretion standard of review and emphasizing that, under this standard, the appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence").

LAW/ANALYSIS

I. Reasonable Belief

The State argues the circuit court abused its discretion in finding Respondent reasonably believed shooting Smith was necessary to prevent great bodily injury to himself. We disagree.

Section 16-11-450(A) of the South Carolina Code provides immunity from criminal prosecution to a person using deadly force as permitted by the Act or

another applicable provision of law.[5] Further, section 16-11-440 sets forth the circumstances under which the Act allows deadly force. The statute provides, in pertinent part:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a *dwelling, residence, or occupied vehicle,* or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> . . .
>
> (C) A person who is not engaged in an unlawful activity and who is attacked in *another place* where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(A), (C) (emphases added). Section 16-11-430(2) defines "great bodily injury" as "bodily injury which creates a substantial risk of

[5] An exception exists if the person against whom deadly force was used is a law enforcement officer. *Id.*

death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ." In the present case, Respondent sought, and was granted, immunity under subsection (C) rather than subsection (A), as Smith was initially a social guest in Respondent's home.

Our supreme court has recently emphasized that immunity under the Act "is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence," save the duty to retreat. *Curry*, 406 S.C. at 371-72, 752 S.E.2d at 266-67. "[A] valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." *Id.* at 371, 752 S.E.2d at 266.

> There are four elements required by law to establish a case of self-defense:
>
> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Id. at 371 n.4, 752 S.E.2d at 266 n.4 (citation omitted). Again, the last element, i.e., the duty to retreat, need not be shown when seeking immunity under the Act. *Id.* at 371, 752 S.E.2d at 266.

In *Curry*, our supreme court affirmed the circuit court's denial of the accused's motion to dismiss pursuant to section 16-11-440(C). *Id.* at 370, 752 S.E.2d at 266. The court noted that the testimony of the accused and the State's witnesses varied "substantially." *Id.* at 369, 752 S.E.2d at 265. After reciting the facts of the case, the court stated "Appellant's claim of self-defense presents a quintessential jury question." *Id.* at 372, 752 S.E.2d at 267.

Likewise, in *State v. Butler*, our supreme court affirmed the circuit court's denial of the accused's motion for a directed verdict on self-defense, concluding that the evidence created a jury issue on the question of self-defense. 407 S.C. 376, 382, 755 S.E.2d 457, 460-61 (2014). The court noted that the accused presented various inconsistent accounts of how her stabbing of the victim occurred. *Id.* at 382, 755 S.E.2d at 460. The court also noted that the accused's injuries were not consistent with her testimony that the victim struck her in the head with a DVD/VCR player, punched and kicked her, and choked her into unconsciousness. *Id.*

Unlike *Curry* and *Butler*, here, the circuit court found by a preponderance of the evidence that (1) Respondent reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and (2) Respondent acted in self-defense. The evidence supports these findings. Respondent presented several photographs showing severe bruising on Respondent's upper arms, a black eye, a scraped knee, and several marks on his legs and chest.

Additionally, several of the State's witnesses presented forensic evidence in the form of blood spatters from the scene, gunshot residue, Smith's autopsy, and Smith's blood-alcohol level.[6] All of this objective evidence was consistent with Respondent's testimony concerning the events leading up to the shooting. Specifically, gunshot residue was found on Smith's left palm, indicating that Smith was within close proximity of the pistol when it was fired. There was stippling around Smith's gunshot wound. According to the State's expert in trace evidence, the presence of stippling indicated that Smith was within two feet of the pistol's muzzle. Blood spattering was found five to seven feet from Smith's head on the kitchen floor, and blood transfer stains were found on the island separating the kitchen from the dining room, also five to seven feet from Smith. This evidence is consistent with Respondent's testimony that Smith was in the kitchen when Respondent shot him.

[6] Law enforcement did not obtain a blood-alcohol level for Respondent.

Further, Smith's autopsy revealed that the bullet pierced the left side of Smith's chest, traveling through the heart and backward and downward to the right side of his back. As observed by the circuit court, this information established that Smith was facing Respondent when the pistol fired. Moreover, the post-mortem report showed that Smith's blood-alcohol level was 0.216 and the level of alcohol found in Smith's ocular fluid was 0.24. The toxicologist who prepared the report testified that a level of 0.216 can cause "severe aggression, emotional instability, [and] violence" for an experienced drinker. Deputy Wallace testified that he knew Smith was a heavy drinker.[7]

In its order granting immunity, the circuit court stated it discounted the portions of Respondent's testimony that were either self-serving or subjective and instead relied on the objective evidence and testimony of other witnesses. The court also noted that it looked to the evidence at the scene to objectively assess Respondent's testimony. The court ultimately found Respondent's testimony credible because it was consistent with the forensic evidence at the scene and other evidence in the case. As to the evidence of injuries to Respondent and Smith, the court found:

> [Respondent] fared much worse in the altercation prior to the fatal shot, and because Smith had no incapacitating wounds prior to that shot, [Respondent's] claimed belief that serious additional injury was about to be inflicted upon him if he did not act to protect himself was reasonable, and is supported by the evidence in this case.

---

[7] The circuit court addressed the State's concern that Respondent's intoxication was not taken into consideration by noting that law enforcement failed to measure Respondent's blood-alcohol level. *See infra* Issue III. While Respondent's intoxication was generally relevant to the case, we note the standard for evaluating whether an accused had a reasonable belief that deadly force was necessary to prevent great bodily harm to himself is objective, rather than subjective. The circuit court implicitly found that a reasonable, sober person facing the circumstances Respondent faced would have believed shooting Smith was necessary to prevent great bodily harm to himself and, thus, Respondent's belief that deadly force was necessary was reasonable.

The court also took into account Smith's previous attack of Respondent in the summer of 2006. This attack occurred in Smith's home—Respondent "uttered the expletive 'G** d***,' upon which Smith 'snapped' and became violent, slamming [Respondent] against the pantry door" while choking him. Smith's mother and sister had to pull Smith off of Respondent. The circuit court noted that Respondent's testimony regarding this attack was not disputed by Smith's mother or sister, who were present in the courtroom during the hearing but not called by the State to testify. Curiously, the State argues there was "no indication based upon the prior interaction between Respondent and Smith that Smith would inflict great bodily injury." Smith's choking of Respondent and the need for Smith's mother and sister to pull Smith off of Respondent refute this argument.

We note the circuit court did not directly address the first element of self-defense, i.e., whether the accused was without fault in bringing on the difficulty. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4; *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense." (quoting *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999))). The circuit court merely stated that Respondent was not engaged in any unlawful activity at the time of the incident. Nonetheless, the evidence supports the circuit court's implicit finding that Respondent was without fault in bringing on the difficulty.[8]

Respondent's testimony indicates that Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return Respondent's medicine. Further, after Smith attacked Respondent and Respondent retreated to his bedroom, Respondent's reappearance at the kitchen's threshold with a loaded

---

[8] Given Respondent's previous violent experience with Smith in the summer of 2006, perhaps Respondent should have known that sharing almost two full bottles of vodka with Smith was a bad idea. However, Respondent's condonation of, and participation in, this drinking binge did not amount to "bringing on the difficulty." "One who merely does an action [that] affords an opportunity for conflict is not thereby precluded from claiming self-defense. Fault implies misconduct, not lack of judgment." 40 Am. Jur. 2d *Homicide* § 146 n.6 (2008) (citing *State v. Jackson*, 382 P.2d 229, 232 (Ariz. 1963)); *Jackson*, 382 P.2d at 232 ("Before an act may cause forfeiture of the fundamental right of self-defense it must be willingly and knowingly *calculated to lead to conflict*." (emphasis added)).

pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave. *See State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("As the defense of habitation provides, defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection." (citing *State v. Bradley*, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923))); *Bradley*, 126 S.C. at 533, 120 S.E. at 242 ("A man who attempts to force himself into another's dwelling, or who, *being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser* . . . ." (emphasis added)); *cf. State v. Dickey*, 394 S.C. 491, 499-501, 716 S.E.2d 97, 101-02 (2011) (concluding that the accused, an armed security guard for an apartment complex, was without fault in bringing about the difficulty as a matter of law because he was exercising his right to eject trespassers in good faith).

In sum, the evidence supports the circuit court's finding that Respondent reasonably believed shooting Smith was necessary to prevent great bodily harm to himself as well as the finding that Respondent acted in self-defense. Therefore, the circuit court did not abuse its discretion in making these findings.

II. Admission of Police Officers' Testimony

The State contends the circuit court abused its discretion in admitting the testimony of Officer William Stair, of the Myrtle Beach Police Department, and Sergeant Roy Drake, of the Cheraw Police Department, involving specific instances of Smith's violent conduct in 2007 and 2010, respectively. The State argues that neither incident was directed at Respondent or closely connected with Respondent's shooting of Smith and, therefore, this testimony was inadmissible character evidence.

Preservation

Respondent argues the State failed to preserve this issue for review because (1) the State did not object to the disputed testimony after the circuit court conditionally heard it; and (2) at trial, the State objected to the testimony on the ground of relevance only. We disagree.

We do not view the circuit court's rulings as conditional. Further, the circuit court was sufficiently apprised of the Solicitor's continuing objections such that it had an opportunity to consider and rule on them before issuing its order granting

immunity. *See Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939) ("[A]ll that this [c]ourt has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower [c]ourt and passed upon by that [c]ourt."). Moreover, the State's objections at trial adequately covered both relevance and improper character evidence to the extent the evidence went beyond what Respondent had already referenced in his own testimony.[9] "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). Therefore, the State sufficiently preserved the issue of improper character evidence to the extent it went beyond Respondent's testimony.

Merits

Rule 404(a)(2), SCRE, provides, in pertinent part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character of the *victim* of the crime offered by an accused, or by the prosecution to rebut the same . . . .

(emphasis added).

Further, Rule 404(b), SCRE, states:

> Evidence of other crimes, wrongs, or acts is not admissible *to prove the character of a person in order to show action in conformity therewith*. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

[9] During his colloquy with the circuit court, the Solicitor stated, "I have no objection to [Respondent] testifying to what his understanding of the history of Mr. Smith was. I do object to this officer now telling the [c]ourt something that he did not tell [Respondent]."

(emphasis added). Moreover, Rule 405, SCRE, addresses the following methods of proving character:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an *essential element of a* charge, claim, or *defense*, proof may also be made of specific instances of that person's conduct.

(emphases added). However,

> [i]n the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other *specific instances of violence* on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate *the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm*.

State v. Day, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000) (emphases added) (citations omitted). "Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial [court's] discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused." *Id.* at 420, 535 S.E.2d at 436. In *Day*, our supreme court held evidence of a specific instance of the victim's violent behavior that occurred only four months prior to the victim's death was admissible to prove the accused had a reasonable apprehension of violence from the victim. *Id.* at 421, 535 S.E.2d at 437.

Here, the testimony to which the State objected showed that, in 2007, Officer Stair and another officer arrested Smith for public intoxication, disorderly conduct and resisting arrest. After being placed in a jail cell, Smith tried to damage the cell's lights. When Officer Stair and three other officers tried to move Smith to a different location, Smith refused to walk where officers directed him to go, requiring the officers to drag him. In preparing to remove Smith's handcuffs, the officers asked him to kneel down. However, Smith refused to do so and locked his knees. As the officers placed him on the ground to remove his handcuffs, Smith started struggling and attempted to bite Officer Stair on his leg. Consequently, officers charged Smith with assaulting a police officer, to which he later pled guilty.

Later in the trial, Sergeant Drake testified that Smith was arrested in 2010 for assault after he bit a woman on her shoulder. When he arrived at the jailhouse, Smith was "highly intoxicated" and "sobbing about his deceased sister." As police officers processed Smith, they removed his sister's bracelet from his arm. Smith became distraught and angry, requiring the officers to forcibly place him in his jail cell. Smith then "charged back at" the officers.

The circuit court admitted Officer Stair's and Sergeant Drake's testimony into evidence on the grounds that it was relevant to Smith's state of mind and Respondent's state of mind at the time of the shooting and it was cumulative to Respondent's previous testimony referencing the two incidents. Respondent previously testified that, prior to the shooting, he was aware of these incidents as well as other, more serious instances of Smith's violence:

> Q. Did you have on the day this happened, and I believe this was May 31, 2011. Did you have any knowledge in regard to [Smith's] propensity for violence?
>
> A. Oh, yes, sir.
>
> Q. Would you tell the [j]udge the knowledge that you had in regard to his propensity for violence?
>
> A. *I knew that he had a history of violence in the past, and that he could be unpredictable, and violent, and aggressive.*

Q. Did you know that he had a criminal history of violent acts?

A. Oh, yes, sir.

Q. Can you describe the criminal history that you knew he had in regard to violent activity?

A. *Burglary, armed robbery, assaulting a woman, assaulting two police officers, and I know that he had a[n] upcoming charge against him for some sort of criminal sexual misconduct.*

Q. That was pending in the [c]ourt at the time he passed away?

A. Yes, sir.

. . .

Q. All right. At any time in the past, had [Smith] ever assaulted you?

A. Yes, sir.

Q. How many years ago was it that [Smith] actually assaulted you?

A. It would have been somewhere around the summer of 2006.

Q. Where did that assault take place?

A. In the home of his parents.

Q. Would you tell the [j]udge what he had done when he assaulted you approximately [five years] before this happened?

A. *He had thrown me up against, as I remember, the pantry door, and strangled me, started choking me*. He stopped because his sister and mother[,] crying[,] pulled him off.

Q. What had provoked that attack?

A. I . . . said, [G]** d***.

Q. And when you said that, what did he do?

A. He snapped.

(emphases added).

Therefore, the fact that Smith had a history of violent behavior was well-established—without objection from the State—prior to the admission of Sergeant Drake's and Officer Stair's testimony. Any error in admitting details of the 2007 and 2010 incidents beyond what Respondent already knew was harmless. *See State v. Williams*, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996) (holding improperly admitted testimony was cumulative to the other, properly admitted evidence and was therefore harmless).

III. Assessment of Intoxication Evidence

The State asserts the circuit court erred in assessing the evidence of Smith's intoxication and Respondent's intoxication, arguing that these errors require this court to vacate the corresponding findings and the order granting immunity. We disagree.

Specifically, the State maintains that the circuit court's reliance on the testimony of the toxicologist, Shana Sorrells, was misplaced. The State argues that Sorrells testified she did not know how Smith would behave with a 0.216 blood-alcohol level, and the circuit court attributed to her testimony the statement that such a

level "would *most probably* lead to aggressive and violent behavior." (emphasis added). The circuit court actually stated: "According to the testimony of toxicologist Shanna B. Sorrells of SLED, such a level of intoxication would most probably lead to aggressive and violent behavior, emotional instability, and mood swings." The circuit court then stated: "This behavioral evidence bears directly upon the issue of [Respondent's] claimed belief of being in imminent fear of serious bodily harm requiring the use of deadly force for his protection."

On direct examination, Sorrells stated that a blood-alcohol level of 0.216 can cause "severe aggression, emotional instability, [and] violence" for an experienced drinker. She also stated, "[Y]ou would definitely see some severe mood swings" in an experienced drinker with a 0.216 blood-alcohol level. On cross-examination, Sorrells stated, "[I]t has been shown that usually at that level you do see increased agitation and mood swings." Sorrells then admitted "that does not occur in everybody, that is just *on average*." (emphasis added). Sorrells also admitted she did not know how much experience Smith had with drinking.

We recognize that Sorrells' indication of "on average" does not equate with the circuit court's indication of "most probably." But while the circuit court may have overlooked or slightly misstated Sorrells' testimony under cross-examination, her actual testimony that a blood-alcohol level of 0.216 *can* cause severe aggression, emotional instability, and violence for an experienced drinker still provided support for the circuit court's recognition of this testimony as relevant to Smith's aggressive behavior prior to the shooting. Further, there was ample additional evidence of Smith's tendency toward aggression. In addition to the choking incident in 2006, Respondent recounted his knowledge of Smith's history of "[b]urglary, armed robbery, assaulting a woman," and "assaulting two police officers." Therefore, any inaccuracy in the circuit court's characterization of Sorrells' testimony did not prejudice the State.

The State further maintains the circuit court erred in not considering Respondent's intoxication, arguing Respondent's behavior before and during the shooting indicates his judgment was impaired by the alcohol he consumed that day. However, the standard for evaluating whether an accused had a reasonable belief that deadly force was necessary is an objective standard. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (setting forth the elements of self-defense and stating "if his defense is based upon his belief of imminent danger, a *reasonably prudent man* of ordinary firmness and courage would have entertained the same

belief" (emphasis added)). Further, the circuit court implicitly found that a reasonable, sober person facing Respondent's circumstances would have believed shooting Smith was necessary to prevent great bodily harm to himself and, thus, Respondent's same belief was reasonable.

The circuit court also noted that law enforcement did not obtain a specific blood-alcohol level for Respondent, despite the fact that Respondent was in police custody. Therefore, the circuit court appropriately declined to attribute any aggressive behavior to Respondent at the time of the shooting.

Based on the foregoing, the circuit court did not commit reversible error in assessing the evidence of Smith's and Respondent's intoxication.

IV. Location of Homicide

The State argues that a finding of immunity may not be made pursuant to section 16-11-440(C) unless the location of the homicide was a place other than the accused's residence or vehicle. We disagree.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000) (citation omitted). On the other hand, "[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Id.* "If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." *Id.* Stated another way, "[a] statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers," and "the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citation and quotation marks omitted).

Section 16-11-440 provides, in pertinent part:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a *dwelling, residence, or occupied vehicle*, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> . . .
>
> (C) A person who is not engaged in an unlawful activity and who is attacked in *another* place where he has a right to be, including, *but not limited to*, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

§ 16-11-440(A), (C) (emphases added).

The State places emphasis on the word "another" in the phrase "another place where [the accused] has a right to be" in subsection (C) of section 16-11-440. The primary definition of "another" is "different or distinct from the one first considered." *Merriam Webster's Collegiate Dictionary* 51 (11th ed. 2003). This definition would arguably modify "place," as used in section 16-11-440(C), in such a way as to make "dwelling, residence, or occupied vehicle" and "another place" mutually exclusive. This is the interpretation the State proposes. On the other

hand, the second and third definitions of "another" are "some other" and "being one more in addition to one or more of the same kind," respectively. *Id.* The third definition is more inclusive and arguably would *not* eliminate "dwelling, residence, or occupied vehicle" as a possible "place" where the person using deadly force has a right to be pursuant to section 16-11-440(C).

"Words in a statute must be construed in context." *Sparks*, 406 S.C. at 128, 750 S.E.2d at 63 (citation and quotation marks omitted). "Thus, the [c]ourt may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance [that] would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." *Id.* at 129, 750 S.E.2d at 63 (citation and quotation marks omitted). Notably, the General Assembly expressly set forth its intent for the Act in section 16-11-420 as follows:

> (A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle *and to extend the doctrine to include* an occupied vehicle and *the person's place of business*.
>
> (B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders *and attackers* without fear of prosecution or civil action for acting in defense of themselves and others.
>
> (C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.
>
> (D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested *and safe within their homes, businesses, and vehicles*.

> (E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion *or attack*.

(emphases added).

The General Assembly's use of this language in section 16-11-420 clearly indicates its intent to provide the protections of the Act to persons within their own home facing not only unwelcome intruders but also "attackers," including those who are initially invited into the home and later place the homeowner in reasonable fear of death or great bodily injury. Further, the language of section 16-11-440(C) itself indicates that its application is not limited to businesses. Therefore, the more inclusive definition of "another" is the proper definition to employ in interpreting section 16-11-440(C). *See Sparks*, 406 S.C. at 128, 750 S.E.2d at 63 ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." (citation and quotation marks omitted)); *Broadhurst*, 342 S.C. at 380, 537 S.E.2d at 546 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." (citation omitted)).

Based on the foregoing, the circuit court correctly interpreted section 16-11-440(C) to apply to Respondent.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's order granting Respondent immunity from prosecution.

AFFIRMED.

WILLIAMS and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Srivastava, Appellant,

v.

Ravindra Srivastava, Respondent.

Appellate Case No. 2013-000344

Appeal From Beaufort County
Peter L. Fuge, Family Court Judge

Opinion No. 5287
Heard September 10, 2014 – Filed December 23, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jane Srivastava, of Hilton Head Island, Pro Se.

H. Fred Kuhn Jr., of Moss Kuhn & Fleming, LLC, of Beaufort, for Respondent.

GEATHERS, J.: In this divorce action, Jane Srivastava (Wife) appeals the family court's final order. Wife argues the family court erred by (1) failing to either impute income to Ravindra Srivastava (Husband) or deviate from the Child Support Guidelines in its child support award, (2) giving credit to Husband for excess child support payments, (3) awarding Husband attorney's fees, (4) not awarding Wife attorney's fees, (5) dividing the marital property in an inequitable manner, (6) finding Husband did not condone Wife's adultery, (7) denying Wife

alimony, and (8) rendering a partial and biased decision. We affirm in part, reverse in part, and remand.

ISSUES ON APPEAL

I. Did the family court err in failing to either impute income to Husband or deviate from the Child Support Guidelines in its child support award?

II. Did the family court err in giving credit to Husband for excess child support payments?

III. Did the family court err in awarding Husband attorney's fees and not awarding Wife attorney's fees?

IV. Did the family court err in finding Husband did not condone Wife's adultery and, thus, err in denying Wife alimony?

V. Did the family court err in dividing the marital property in an inequitable manner?

VI. Did the family court fail to render an impartial and nonbiased decision?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In appeals from the family court, the appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011) (citations omitted). "*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court's findings." *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654–55. However, this broad scope of review does not require the appellate court to disregard the factual findings of the family court or ignore the fact that the family court was in the better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of convincing this court that the family court erred in its findings. *Id.* at 387–88, 544 S.E.2d at 623. Accordingly, we will affirm the decision of the family court unless its decision is controlled by some error of law or the appellant satisfies the burden of showing that the preponderance of the

evidence actually supports contrary factual findings by this court. *See Lewis*, 392 S.C. at 390–91, 709 S.E.2d at 654–55.

LAW/ANALYSIS

Wife argues the family court erred in its final order for several reasons. We address each issue in turn.

I. Did the family court err in failing to either impute income to Husband or deviate from the Child Support Guidelines in its child support award?

Wife argues the family court erred in its child support determination by failing to (a) impute income to Husband, or (b) deviate from the Child Support Guidelines to award a larger sum of child support. Husband asserts these arguments are not preserved. We agree with Husband.

"To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [family] court." *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006). "Therefore, when an appellant neither raises an issue at trial nor [files] a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review." *Id.* at 212, 634 S.E.2d at 54–55.

In *Marchant v. Marchant*, the wife alluded to the fact that the husband was capable of earning more in the final hearing, but she did not request a finding that the husband was voluntarily underemployed for the purpose of imputing income. 390 S.C. 1, 7, 699 S.E.2d 708, 711 (Ct. App. 2010). Furthermore, the family court did not rule on the issue of income imputation. *Id.* This court determined that the wife was required to file a Rule 59(e) motion to seek a ruling on that point, and she failed to do so. *Id.* Because income imputation was not raised to and ruled upon by the family court, this court found the issue was unpreserved. *Id.* at 7, 699 S.E.2d at 711–12.

Likewise, here, Wife failed to raise the issues of income imputation and deviation from the Child Support Guidelines to the family court, and she never filed a Rule 59(e) motion for the family court to consider these issues. Because Wife failed to

do so, these arguments are not preserved for appellate review. *See id.*; *Doe*, 370 S.C. at 212, 634 S.E.2d at 54–55.

II. Did the family court err in giving credit to Husband for excess child support payments?

Wife argues the family court erred in giving credit to Husband for overpayment of child support. Husband argues this issue is unpreserved. We agree with Husband.

Similar to the first issue, Wife did not file a Rule 59(e) motion to reconsider this ruling after the family court issued its final order. Therefore, we find this issue is also unpreserved. *See, e.g.*, *Bennett v. Rector*, 389 S.C. 274, 284, 697 S.E.2d 715, 720 (Ct. App. 2010) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." (quoting *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998))); *id.* (finding that when the family court made the child support award retroactive in its order, the mother needed to raise the issue in a Rule 59(e) motion to preserve her argument on appeal); *Doe*, 370 S.C. at 212, 634 S.E.2d at 54–55 (finding issues not raised to and ruled upon by the family court are not preserved for appellate review).

III. Did the family court err in awarding Husband attorney's fees and not awarding Wife attorney's fees?

Wife argues the family court erred in awarding Husband attorney's fees in the amount of $50,000 because Husband earns a substantially higher income than Wife. Wife maintains that she should have been awarded attorney's fees instead. We find the family court erred, as the evidence does not support the attorney's fees awarded to Husband.

Section 20-3-130(H) of the South Carolina Code (2014) authorizes the family court to order payment of litigation expenses to either party in a divorce action. "An award of attorney's fees rests within the sound discretion of the trial [court] and should not be disturbed on appeal absent an abuse of discretion." *Doe v. Doe*, 319 S.C. 151, 157, 459 S.E.2d 892, 896 (Ct. App. 1995) (citation omitted).

In deciding *whether* to award attorney's fees and costs, a family court should first consider the following factors as set forth in *E.D.M. v. T.A.M.*: "(1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the fee on each party's standard of living." *Farmer v. Farmer*, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010) (citing *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992)). Then, if the family court decides to award attorney's fees to a particular party, the family court should weigh the following factors as set forth in *Glasscock v. Glasscock* in considering *how much* to award in attorney's fees and costs: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Id.* (citing *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991)).

In *Rogers v. Rogers*, our supreme court found the family court's award of attorney's fees to the husband was excessive, in part, because the award represented approximately 16% of the wife's annual income. 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001). In remanding the issue of attorney's fees to the family court, the supreme court emphasized, "A party's ability to pay is an essential factor in determining whether an attorney's fee should be awarded, as are the parties' respective financial conditions and the effect of the award on each party's standard of living." *Id.* (citing *Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993)).

Here, the family court generally acknowledged in its final order that it considered the four factors in *E.D.M. v. T.A.M.* in deciding whether to award attorney's fees. The family court then referenced its application of the *Glasscock* factors in determining how much to award in attorney's fees. While the family court's decision to award attorney's fees is generally within its discretion, *Doe*, 319 S.C. at 157, 459 S.E.2d at 896, we find the award of $50,000 in attorney's fees to Husband is excessive and an abuse of discretion.

As in *Rogers*, we have compared the award of attorney's fees to Wife's annual income. According to the family court's order, Wife has a gross annual income of

$55,260.[1] Applying this number to the award of attorney's fees, the $50,000 award here represents approximately 90% of Wife's gross annual income.[2] And, although the family court generally referenced the *E.D.M.* factors, the income-to-attorney's fees ratio makes it apparent that the family court did not sufficiently consider each party's ability to pay, their respective financial conditions, and the effect of the award on each party's standard of living. *See Rogers*, 343 S.C. at 334, 540 S.E.2d at 842; *Sexton*, 310 S.C. at 503, 427 S.E.2d at 666 (noting a party's ability to pay is an "essential" factor in determining an award of attorney's fees); *Spreeuw v. Barker*, 385 S.C. 45, 72, 682 S.E.2d 843, 857 (Ct. App. 2009) (stating this court "would be very concerned by an award of attorney's fees representing approximately 40% of [a party's] annual income"). Moreover, Husband earns a substantially higher annual income than Wife, which further illustrates the family court's failure to adequately address these factors. *Cf. Bodkin v. Bodkin*, 388 S.C. 203, 224–25, 694 S.E.2d 230, 241–42 (Ct. App. 2010) (affirming the family court's attorney's fees award, in part, because the husband was in a far better financial condition to pay the wife's attorney's fees based upon their respective incomes and the effect of the award on their standard of living). Accordingly, we remand to the family court to address each of the *E.D.M.* factors with specificity to make an appropriate determination of whether to award attorney's fees in light of the conclusions of this opinion. If the family court determines that attorney's fees should be awarded to a particular party, it should then specifically address each of the *Glasscock* factors in determining the amount of attorney's fees.

IV. Did the family court err in finding Husband did not condone Wife's adultery, and, thus, err in finding Wife was barred from receiving alimony?

Wife argues the family court erred in finding Husband did not condone Wife's adultery. In turn, Wife contends that she should have been awarded alimony. Husband maintains that he never forgave Wife for her actions, and the family court properly found Wife's claim of condonation was not credible. We disagree with

---

[1] The family court's order states that Wife earns a gross monthly income of $4,605. We used this number to extrapolate her annual earnings of $55,260.

[2] According to the numbers proffered by Husband in his appellate brief, Wife's average annual income between 2008 and 2011 was $73,690. Even if we used this number instead of the court's calculations, the award of attorney's fees would still constitute 67.8% of Wife's annual income.

Husband. The evidence does not support the family court's finding of the absence of condonation, and, therefore, Wife is not barred from receiving alimony.

A. Condonation

As a defense to adultery in a divorce action, "condonation means 'forgiveness, express or implied, by one spouse for a breach of marital duty by the other. More specifically, it is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated, and that the offender shall thereafter treat the forgiving party with conjugal kindness.'" *Nemeth v. Nemeth*, 325 S.C. 480, 488, 481 S.E.2d 181, 185 (Ct. App. 1997) (quoting *McLaughlin v. McLaughlin*, 244 S.C. 265, 272, 136 S.E.2d 537, 540 (1964)). "To establish condonation, there generally must be proof of reconciliation, 'which implies normal cohabitation of the husband and wife in the family home.'" *Id.* (quoting *Langston v. Langston*, 250 S.C. 363, 373, 157 S.E.2d 858, 863 (1967)). "A full resumption or continuance of marital cohabitation after the conduct complained of and with knowledge thereof, *for any considerable period of time*, quite conclusively shows an intention to forgive or condone such conduct." *McLaughlin*, 244 S.C. at 274, 136 S.E.2d at 541 (emphasis added) (internal quotation marks and citation omitted).

Once an act of adultery is condoned, a spouse cannot later revive the marital offense as a bar to paying alimony unless the other spouse repeats the offense. *See RGM v. DEM*, 306 S.C. 145, 150, 410 S.E.2d 564, 567 (1991) (stating condonation may be revoked by subsequent illicit conduct); *McLaughlin*, 244 S.C. at 275, 136 S.E.2d at 542 (same); *see also Murray v. Murray*, 271 S.C. 62, 64, 244 S.E.2d 538, 539 (1978) (finding that even if the husband's initial decision to stay in the home constituted condonation, the condonation was nullified by the wife's subsequent acts of misconduct). Moreover, a condoned act of adultery cannot be employed as a bar to paying one spouse alimony as a matter of law. *Doe v. Doe*, 286 S.C. 507, 512, 334 S.E.2d 829, 832 (Ct. App. 1995).

In *McLaughlin*, after the husband committed marital misconduct (physical cruelty), our supreme court found that the wife continued living with her husband for approximately five months before the couple separated. 244 S.C. at 274, 136 S.E.2d at 541. The supreme court noted that although the relationship between the couple appeared to have been strained, the parties nevertheless continued living together under the same roof for five months. *Id.* at 274–75, 136 S.E.2d at 541–42. Therefore, the evidence of five months' continued cohabitation convinced the court

that the wife condoned the husband's misconduct. *Id.*; *see also Doe*, 286 S.C. at 510, 334 S.E.2d at 831 (finding the marital misconduct was condoned by the husband when the couple continued to cohabitate and voluntarily engage in sexual relations for approximately five months). *But see Nemeth*, 325 S.C. at 488, 481 S.E.2d at 185 (finding the evidence was insufficient to prove the husband condoned the wife's adultery by spending two nights in the home after the wife confessed her adultery when the husband testified they did not sleep together and there was no agreement to reconcile); *Murray*, 271 S.C. at 63–64, 244 S.E.2d at 539 (holding it was not condonation for the husband to remain in the marital home on advice of counsel and for the sake of the parties' young son after the wife committed marital misconduct).

Notwithstanding continued cohabitation, our supreme court has found that the presence or lack of sexual access is also a pertinent factor in determining the existence of condonation. *See, e.g.*, *Wilson v. Wilson*, 274 S.C. 236, 238–40, 262 S.E.2d 732, 733–34 (1980) (holding that even though the couple continued living together for three months after the husband last physically abused the wife, the family court erred in not allowing the wife to testify about the lack of sexual access for condonation purposes). Nevertheless, in finding condonation, our courts have primarily focused on whether the evidence shows the injured spouse forgave the offending spouse. *See McLaughlin*, 244 S.C. at 272, 136 S.E.2d at 540 ("Condonation . . . means forgiveness, express or implied, *by one spouse* for a breach of marital duty *by the other*." (emphases added)); Roy T. Stuckey, *Marital Litigation in South Carolina* 132 (4th ed. 2010) (evaluating the elements of condonation and stating "[t]he primary evidentiary issue is the fact or act of forgiveness *on the part of the injured spouse*" (emphasis added)).

Here, Wife's testimony indicates that she and Husband resumed "normal cohabitation" after Wife admitted to the affair. Wife testified that after her admission, she ended the relationship with her paramour and never engaged in another extramarital relationship. She also stressed that the parties continued living together in the marital home from the time Husband learned of the affair in January 2010 until Wife moved out over a year later in March 2011—a fact that Husband does not dispute. As Wife testified—and Husband admitted—even before Wife's admission of adultery, the couple regularly slept in separate bedrooms because Husband snored and was "on call a lot" with his practice. Despite continuing to maintain separate bedrooms after Wife's admission of adultery, Wife contends the parties engaged in conjugal conveniences at least once

per month from January 2010 until October 2010. As additional evidence of condonation, Wife cites an e-mail Husband sent in July 2010—*seven months* after her admission of adultery—which she claims is a clear indication of his intent to forgive Wife and a plea to continue their marital relationship in full.[3]

Although fourteen months of cohabitation elapsed after Wife's admission of adultery, Husband insists that no "normal cohabitation" occurred because the couple never slept in the same bedroom and Wife frequently traveled away from the marital home during much of the alleged period of reconciliation. Specifically, during oral argument, Husband's counsel stressed that Wife traveled and was gone "most of the time," and, therefore, she was not "seeking condonation." Moreover, despite living together for fourteen months, Husband cites an e-mail Wife sent to Husband in August 2010—halfway through the fourteen-month cohabitation period—notifying Husband of Wife's intent to separate and file for divorce. Finally, as to intimacy between the two, Husband contradicted Wife and maintained that they only "attempted" to engage in sexual relations on one occasion after Husband learned of Wife's affair.

In the final hearing, the family court found Wife not credible and Husband credible, and in turn, it determined Husband's testimony revealed he did not condone Wife's adultery. While matters of credibility are generally left to the discretion of the family court, *see Reiss v. Reiss*, 392 S.C. 198, 204, 708 S.E.2d 799, 802 (Ct. App. 2011), the evidence here does not support the family court's determination.

---

[3] Husband's e-mail states, in pertinent part,

> We are going through the worst conflict in our life but as awful as it feels, it is an opportunity to revive the connection, values, love and dreams that we had together. *At no point in this turmoil . . . have* [*I*] *stopped loving you or dreaming of our future together.* . . . I want our relationship to survive and thrive not because of kids or geography or shame of a failed marriage but because of our love and commitment to be better for each other.

(emphasis added).

As our supreme court noted in *McLaughlin*, continued cohabitation for a considerable amount of time "quite conclusively" shows condonation. 244 S.C. at 274, 136 S.E.2d at 541 (citation omitted). Here, after Wife's admission of adultery, Husband and Wife continued normal cohabitation for at least seven months until Wife expressed her desire to separate in her August 2010 e-mail to Husband. Furthermore, after this email, the couple continued living together under the same roof for an additional seven months. Although the relationship between Husband and Wife appears to have been strained, their continued marital cohabitation for a "considerable period of time[] *quite conclusively shows an intention to forgive or condone such conduct*." *Id.* (emphasis added) (citation omitted). Moreover, Husband admitted that after he learned of Wife's affair in January 2010, he and Wife attempted marriage counseling twice to work on the marriage. Wife also testified—and Husband has not offered clear and positive proof otherwise—that she has not repeated an adulterous act after admitting to the affair.[4]

Despite Husband's testimony concerning minimal marital intimacy, the evidence of fourteen months of continued cohabitation and two counseling sessions, coupled with Husband's July 2010 e-mail, strongly evinces Husband's condonation of

---

[4] After the parties separated, Wife admitted joining "JDate," a Jewish dating website, in late September or October of 2011. Wife revealed that she went on four different dates while the parties were separated, but insists that she only had "coffee dates" with these four men and was simply "looking for company." Husband has not offered proof that anything more than an informal "coffee meeting" occurred during these "dates." *See McLaurin v. McLaurin*, 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct. App. 1987) (stating proof of adultery must be clear and positive, and the infidelity must be established by a clear preponderance of the evidence) (citation omitted). In *McElveen v. McElveen*, this court declined to find the wife committed adultery because there was "virtually no evidence of a romantic or sexual relationship" between the wife and the alleged paramour. 332 S.C. 583, 598–99, 506 S.E.2d 1, 8–9 (Ct. App. 1998), *disapproved of on other grounds by Wooten v. Wooten*, 364 S.C. 532, 615 S.E.2d 98 (2005). "[W]ithout evidence to support a romantic relationship, including love letters, romantic cards, hand-holding, hugging, kissing, or any other romantic demonstrations or actions between the wife and [the alleged] paramour, adultery [is] not adequately established." *Brown v. Brown*, 379 S.C. 271, 279, 665 S.E.2d 174, 179 (Ct. App. 2008).

Wife's adultery. As noted, the law of condonation focuses on forgiveness from the standpoint of the injured party. *See, e.g.*, *McLaughlin*, 244 S.C. at 272, 136 S.E.2d at 540 ("Condonation in the law of divorce means forgiveness, express or implied, *by one spouse* for a breach of marital duty *by the other*." (emphases added) (internal quotation marks and citation omitted)); Roy T. Stuckey, *Marital Litigation in South Carolina* 132 (4th ed. 2010) ("The primary evidentiary issue [when evaluating condonation] is the fact or act of forgiveness on the part of the injured spouse."). Furthermore, we reject Husband's contention that *Wife's* conduct and travels negated evidence of *Husband's* condonation under these circumstances. Wife's travels in 2010 included brief trips to Paris and Italy, and two months with the children during the summer in New York; however, Wife always returned home after these trips.

Therefore, under our view of the preponderance of the evidence, it is apparent that Husband condoned Wife's adultery, and he cannot now revive the marital offense. *See McLaughlin*, 244 S.C. at 275, 136 S.E.2d at 542 (finding one spouse may not later revoke condonation unless a subsequent and similar act of marital fault is repeated by the offending spouse). Accordingly, we proceed to the discussion of alimony.

B. Alimony

Because the family court erred in finding Husband did not condone Wife's adultery, Wife is not barred from receiving alimony. Therefore, the family court should reconsider the issue of alimony on remand.[5] *See Doe*, 286 S.C. at 512, 334 S.E.2d at 832 (holding a condoned act of adultery cannot be employed as a bar to paying one spouse alimony as a matter of law).

"Alimony is a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage." *Reiss*, 392 S.C. at 208, 708 S.E.2d at 804. "If an award of alimony is warranted[,] the family court has a duty to make an award that is fit, equitable, and just." *Id.* The family court

[5] Because the family court found Husband did not condone Wife's adultery, it ordered Wife to repay all amounts of temporary alimony paid by Husband before the final hearing. In light of our holding, we reverse the family court as to this issue as well.

"may grant alimony in such amounts and for such term as the [court] considers appropriate under the circumstances." *Davis v. Davis*, 372 S.C. 64, 79, 641 S.E.2d 446, 454 (Ct. App. 2006).

In determining an award of alimony, the family court must consider the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital property of the parties; (9) custody of the children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) any other factors the family court considers relevant. S.C. Code Ann. § 20-3-130(C) (2014). However, "[t]he family court is only required to consider relevant factors." *King v. King*, 384 S.C. 134, 142, 681 S.E.2d 609, 613 (Ct. App. 2009).

After consideration of the appropriate factors, if the family court determines Wife is entitled to alimony, it "must determine what type of alimony is most likely to do justice in this case and, based upon [its] findings of fact and upon consideration of the factors in making such [an] award[], decree either periodic alimony, lump sum alimony or rehabilitative alimony." *Carroll v. Carroll*, 309 S.C. 22, 25, 419 S.E.2d 801, 802–03 (Ct. App. 1992) (footnote omitted).

V. Did the family court err in dividing the marital property in an inequitable manner?

Wife argues the family court erred in its equitable distribution award, particularly because the court's calculations gave excessive weight to (1) her "indiscretion," (2) the $45,360 "gift" Wife gave to her mother, and (3) the unauthorized $16,626 withdrawal from a marital account while the divorce action was pending. We address Wife's arguments in turn.

First, we do not find the family court placed excessive weight on her indiscretion. There is simply no evidence in the record to support this allegation. *See Pinckney*, 344 S.C. at 387–88, 544 S.E.2d at 623 (finding the appellant in an equitable action has the burden of convincing the appellate court that the trial court committed error).

Second, the evidence supports the family court's determination that Wife's $45,360 transfer to her mother was fraudulent and made in anticipation of divorce. The family court may alter the equitable distribution of marital property based on economic misconduct if the allegedly at-fault party engaged in "willful misconduct, bad faith, intentional dissipation of marital assets, or the like." *McDavid v. McDavid*, 333 S.C. 490, 496, 511 S.E.2d 365, 368 (1999); *cf. Panhorst v. Panhorst*, 301 S.C. 100, 104–06, 390 S.E.2d 376, 378–79 (Ct. App. 1990) (finding no fraudulent intent on the husband's part in giving his mother a total of $25,000 to $30,000 *over the course of twenty years*, even without the wife's knowledge, because there was no evidence to show that the husband made the gifts with the intent to deprive the wife of her share of the marital estate).

Here, the facts show Wife transferred this money from the marital estate to her mother without Husband's knowledge while she had an ongoing affair. Furthermore, the family court noted Wife met with a few divorce lawyers during this time, and Wife, herself, is an attorney and knowledgeable of the law. The family court found this was evidence that she fraudulently and purposely reduced the marital estate to her advantage in contemplation of divorce. The family court's finding of economic misconduct is supported by the evidence and, accordingly, the deduction of the amount Wife transferred to her mother from Wife's portion of the marital estate was warranted.

As to Wife's third argument, we find Wife's unauthorized $16,626 withdrawal was also properly deducted from her award. In the family court's temporary order, it authorized each party to withdraw up to $15,000 from any marital account for payment of attorney's fees and litigation costs before the final hearing. Because Wife withdrew $16,626 in excess of the authorized $15,000 limit from a marital account, the amount of the unauthorized withdrawal was properly charged against Wife's portion of the marital estate. *See* S.C. Code Ann. § 20-3-620(B)(3) (2014) (stating the court shall give weight in apportioning marital property, among other factors, to the *depreciation* of the marital estate by one party).

Nevertheless, the court failed to properly consider the other equitable apportionment factors listed under section 20-3-620(B), which requires the family court to consider, among other factors, the income of each spouse, the earning potential of each spouse, whether alimony has been awarded, and the tax consequences to either party as a result of any particular form of equitable apportionment.

Here, Wife's portion of the marital estate was substantially tied up in illiquid retirement accounts. As Wife maintained at oral argument, a brief review of the division of assets reveals that Wife is unable to reach the funds in her portion of the retirement accounts without incurring substantial penalties and tax consequences. On the other hand, Husband was awarded and has access to all of the equity in the marital home, while also having a significantly greater income. Although the court properly deducted certain amounts from Wife's share of the marital estate, the division of assets reveals the court did not properly consider the tax consequences or the earning potential of each spouse in the equitable distribution award. *See Ellerbe v. Ellerbe*, 323 S.C. 283, 289, 473 S.E.2d 881, 884 (Ct. App. 1996) (finding the equitable apportionment statute requires the family court consider the tax consequences to each party resulting from the award); *cf. Wooten*, 364 S.C. at 543, 615 S.E.2d at 103 (stating it is an abuse of discretion for the family court to consider the tax consequences from a speculative liquidation or sale if the apportionment order does not contemplate the liquidation or sale of the asset); *Ellerbe*, 323 S.C. at 289, 473 S.E.2d at 884 (same). *See also Reiss*, 392 S.C. at 212, 708 S.E.2d at 806 (finding the family court appropriately considered the disparity in the parties' incomes in the equitable distribution award); *Morris v. Morris*, 335 S.C. 525, 534, 517 S.E.2d 720, 725 (Ct. App. 1999) (affirming the family court's equitable distribution award requiring the wife to purchase the husband's equity in the marital home, in part, because the husband had no liquid assets with which to establish his new life, apart from the income he earned); *Wood v. Wood*, 298 S.C. 30, 33, 378 S.E.2d 59, 61 (Ct. App. 1989) (factoring the husband's greater future earning capacity into the equitable distribution award).

Here, the family court's order did not take into consideration the inherent fiscal burden resulting from Wife's lack of liquid assets. Because Wife's only significant assets are tied up in illiquid retirement accounts, it is apparent she will need to liquidate these accounts, at least partially, for anticipated living expenses as the award currently stands. Therefore, on remand, the family court should specifically reconsider, among the other apportionment factors, Husband's earning capacity, Wife's need to liquidate her portion of the retirement accounts for anticipated living expenses, the tax consequences of liquidating these accounts, and the amount of alimony awarded, if any.[6]

---

[6] Because we have also remanded for an alimony determination, we note that the equitable distribution award may affect alimony, and vice versa. *See Johnson v.*

VI. Did the family court fail to render an impartial and nonbiased decision?

Wife argues the family court's final order is biased and partial to Husband. In particular, Wife alleges (1) the family court's order is contrary to the evidence, (2) the court found for Husband on all issues, (3) the court had ex-parte communications with Husband's counsel, and (4) the court had previously referred litigants in need of a psychiatric or addiction evaluation to Husband's practice.

Wife cites *Patel v. Patel* for the proposition that a family court's impartiality might reasonably be questioned when its factual findings are not supported by the record. 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). While this is true, the family court's factual findings are not so deficient as to question the judge's impartiality in this action. "The fact [that] a [family court] ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) (citing *Reading v. Ball*, 291 S.C. 492, 354 S.E.2d 397 (Ct. App. 1987)). Although we have assigned error to certain issues in this appeal, we find Wife's allegations of judicial bias are without merit, and, accordingly, we have no reason to question the family court's impartiality.

CONCLUSION

In conclusion, we hold Wife did not preserve her arguments that the family court erred by failing to either impute income to Husband or deviate from the Child

---

Johnson, 288 S.C. 270, 277, 341 S.E.2d 811, 815 (Ct. App. 1986) ("The amount of property awarded in an equitable distribution may be an important factor in determining alimony."); *id.* at 277, 341 S.E.2d at 815–16 ("Since we are remanding the equitable distribution award for reconsideration, the alimony award should be reconsidered in light of [the wife's] portion of the property distribution determined on remand."). Moreover, the determination of attorney's fees on remand must contemplate the reversal of these substantive results achieved at trial by Husband's counsel. *Sexton*, 310 S.C. at 503, 427 S.E.2d at 666 (finding beneficial results obtained by counsel is an essential factor in determining whether attorney's fees should be awarded and acknowledging that the supreme court has previously reversed the award of attorney's fees where the substantive results achieved by counsel were reversed on appeal) (citations omitted).

Support Guidelines in its child support award. We also find unpreserved Wife's argument regarding the family court's alleged error in giving credit to Husband for excess child support payments. As to the award of attorney's fees, we find the family court erred in awarding $50,000 to Husband, and, thus, we remand for reconsideration. As to condonation and alimony, we reverse the family court's finding that Husband did not condone Wife's adultery and, therefore, remand for reconsideration of alimony.

As to the equitable distribution award, we hold the family court appropriately deducted Wife's fraudulent transfers from her portion of the estate. However, the court should reconsider certain equitable distribution factors in light of Wife's need to liquidate her portion of the retirement accounts and our holding that Wife is not barred from receiving alimony. Finally, we find Wife's allegations of bias on the part of the family court are without merit.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and McDONALD, JJ., concur.