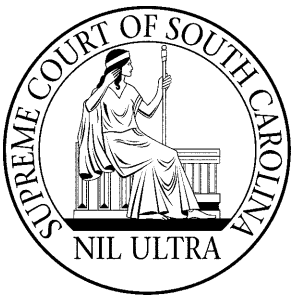

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 8, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent-Petitioner,

v.

Stephon Robinson, Petitioner-Respondent.

Appellate Case No. 2017-000990

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Barnwell County
Doyet A. Early III, Circuit Court Judge

Opinion No. 27883
Heard January 10, 2019 – Filed May 8, 2019

AFFIRMED AS MODIFIED

Appellate Defender Victor R. Seeger, of Columbia, for Petitioner-Respondent.

Attorney General Alan M. Wilson, Deputy Attorney General Donald J. Zelenka and Senior Assistant Deputy Attorney General J. Benjamin Aplin, all of Columbia; and Solicitor James Strom Thurmond Jr., of Aiken, all for Respondent-Petitioner.

JUSTICE JAMES: Stephon Robinson was convicted of first-degree burglary and possession of a weapon during the commission of a violent crime. Robinson appealed, and the court of appeals remanded the matter to the trial court to conduct an on-the-record balancing test regarding the admissibility of certain prior convictions the State used to impeach Robinson's credibility pursuant to Rule 609(a)(1) of the South Carolina Rules of Evidence. *State v. Robinson*, Op. No. 2014-UP-068 (S.C. Ct. App. filed Feb. 19, 2014). After the remand hearing, the trial court ruled Robinson's prior convictions were properly admitted; consequently, the burglary and weapon convictions remained in place.

Robinson appealed again, and the court of appeals issued an unpublished opinion holding that although the trial court erred in applying two of the five factors we set forth in *State v. Colf*,[1] any error in the admission of Robinson's prior convictions for impeachment was harmless. *State v. Robinson*, Op. No. 2017-UP-065 (S.C. Ct. App. filed Feb. 1, 2017). We granted cross-petitions for writs of certiorari to review the court of appeals' decision. We affirm the court of appeals as modified. The court of appeals reached the correct result by affirming Robinson's convictions; however, as we will discuss below, the court of appeals' analysis of the admissibility of the prior convictions was erroneous.

I. FACTUAL AND PROCEDURAL HISTORY

At around 2:00 p.m. on Sunday, February 20, 2011, Eddie Williams was relaxing in his home when he heard a car pull into his driveway. Williams testified he heard a knock at the front door, looked through a window, and saw Robinson and the white car Robinson had driven to his house on prior occasions. Williams ignored the knock at the door because he figured Robinson had come to the house to play video games with his nephew, who was not home. Williams testified Robinson got back into the car and left. Williams made his lunch and retired to his bedroom to watch a NASCAR race.

Williams testified that about ten minutes later, he again heard a car pull into his driveway and then heard his front door being kicked in. He grabbed a handgun

[1] 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000) (adopting the five-factor test used by federal courts to assist in determining whether the probative value of a prior conviction outweighs its prejudicial effect for purposes of impeachment under Rule 609, SCRE).

from his nightstand and went to investigate. Williams testified he started down the hallway and confronted Robinson face-to-face. Williams testified he also saw Robinson's brother (Reginald Felder) and another individual he did not recognize inside his home. Williams fired his handgun, and the intruders ran away. Williams testified Robinson also had a handgun and fired it in his direction while fleeing the home. Williams testified he then retrieved a shotgun and fired it into the air outside the house as the three individuals escaped in a white car. Williams called law enforcement around 2:20 p.m. and told police the intruders were driving a white four-door vehicle he thought to be a Pontiac. In two separate photo lineups, Williams identified Robinson and Robinson's brother as two of the three intruders. The third intruder was never identified.

On cross-examination, Robinson attacked Williams' credibility, establishing that Williams initially failed to tell law enforcement he had fired his handgun. Williams admitted that on the day of the incident, he falsely informed law enforcement that the bullet holes in his home were not from the burglary but had been there since he purchased the home. Williams testified he was not truthful with law enforcement because he thought his handgun had to be registered in order for it to be legal. The gun had been reported stolen in Beaufort County, but Williams testified he was unaware of this when he purchased the gun.

Shelly Leanna Gunnels testified she had been in an "on and off" relationship with Robinson for the last six or seven years. She testified she allowed Robinson to use her white Pontiac sedan "whenever he wanted to use it." Gunnels testified Robinson borrowed her car on February 19 and returned it on February 20 (the day of the incident) "around that afternoon."

At the close of the State's case-in-chief, the trial court informed Robinson of his right to testify in his defense and warned him the State might be permitted to impeach his credibility with his prior criminal convictions. When Robinson stated he wanted to testify, the State requested to impeach him pursuant to Rule 609(a)(1), SCRE, using 2009 convictions for second-degree burglary and attempted strong arm robbery and two 2007 Georgia convictions for breaking into an automobile. As we will discuss, Rule 609(a)(1) provides that prior convictions punishable by imprisonment for more than one year "shall be admitted" to impeach the credibility of a defendant who testifies, "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." This test

places the burden on the State to convince the trial court the evidence should be admitted.

Robinson objected, arguing "the prejudicial value outweighs the probative value." Without conducting the requisite on-the-record analysis of the *Colf* factors, the trial court ruled the strong arm robbery conviction and the two breaking and entering into an automobile convictions were admissible. The trial court ruled the second-degree burglary conviction was also admissible but ruled it had to be referred to generically as a "prior felony conviction carrying more than one year in prison." The use of the burglary conviction for impeachment is not an issue in this appeal.

Robinson testified and denied any involvement in the incident but admitted to knowing Williams and previously going to Williams' house a "good bit of times" to "get things from [him]." Robinson later clarified he knew Williams because Williams sold him marijuana. Robinson testified he was at his own house with his brother and cousin at the time of the incident. Robinson testified he borrowed Gunnels' vehicle the night before the burglary so he, his brother, and his cousin could go to a club that night. Robinson testified he took the car back to Gunnels around noon or 1:00 p.m. the next day, which would have been prior to the burglary.

On cross-examination, the State questioned Robinson about his prior convictions as follows:

> **Q:** Are you the same Stephon Robinson that was convicted of strong arm robbery in 2009?[2]
>
> **A:** Yes, sir.
>
> **Q:** And you're the same Stephon Robinson that had another felony conviction in 2009 that carried more than a year, aren't you?

[2] As noted above, the State originally informed the trial court this was an *attempted strong arm robbery* conviction but then told the jury it was a *strong arm robbery* conviction. There was no objection to this distinction by Robinson, and there is no sentencing sheet in the record to allow us to discern which offense is correct. This discrepancy does not affect our analysis. For consistency, we will refer to this prior conviction as a strong arm robbery conviction.

A: Yes, sir.

Q: And you're the same Stephon Robinson that in 2007 had two convictions for breaking and entering automobiles with the intent to commit a felony or theft?

A: Yes, sir.

Q: But you want this jury to believe that you don't know anything about this?

A: Yes, sir, because for one, I plead guilty to all of my charges and take my responsibility because I know I was guilty of those charges. And two, that was back in my past when I did stupid things to get a little money to do things because I didn't have. But my parents recently passed away and we got insurance money and all kind of money back off that, and I have no reason to kick in this man's door. Nothing.

Q: Let me ask you this, in 2007, was your brother with you whenever you broke into the cars?

A: Yes, sir.

Q: Did he plead guilty to his charges?

A: Yes, sir.

Q: And in 2009, with the strong arm robbery, was your brother with you then?

A: Yes, sir.

Q: Who else was with you?

A: No one.

Q: You and your brother?

A: Yes, sir.

Q: And that other felony charge from 2009, was your brother with you then?

A: No, sir.

Q: He wasn't?

A: No, sir. You talking about the burglary, right?

Q: The charge that you pled guilty to in 2009, the felony charge that carried more than a year.

A: Yes, sir, yes, sir.

Q: Was your brother with you on that?

A: No, sir.

Q: Okay. So in three out of the four times when you committed a crime, your brother was with you?

A: Yes, sir.

Arthur Wallace, Robinson's cousin, testified he, Robinson, and Reginald Felder went to the club together the night before the incident in Gunnels' vehicle and that Robinson returned Gunnels' vehicle to her around noon or 1:00 p.m., which would have been before the burglary. Wallace denied their involvement in the burglary and testified that he, Robinson, and Felder all hung out together at Robinson's house that day. The State impeached Wallace's credibility with a 2008 second-degree burglary conviction. Robinson does not challenge Wallace's impeachment in this appeal.

Reginald Felder (Robinson's brother) similarly recounted the three going to the club the previous night and hanging out together at Robinson's house on the day of the incident. Felder testified Robinson returned Gunnels' vehicle around 1:00 p.m. the day of the burglary. The State impeached Felder's credibility with the same 2007 Georgia convictions for breaking into an automobile and the same 2009 conviction for strong arm robbery that were used to impeach Robinson. Robinson does not challenge Felder's impeachment in this appeal.

During Robinson's closing argument, Robinson attacked Williams' credibility. During the State's closing argument, the State acknowledged the importance of credibility in the case and commented on the credibility of each of the witnesses. The trial court gave the following limiting instruction on Robinson's prior convictions in its charge to the jury:

> You also heard in this case evidence that the defendant had been, in the past, convicted of crimes other than the one for which he is now on trial. This evidence may be considered by you if you conclude it's true only in deciding whether the defendant's testimony is believable or credible and for no other purpose. You must not consider the defendant's prior record as any evidence of the defendant's guilt of the charge we are trying here today.

Robinson appealed his convictions. The court of appeals found the trial court erred by failing to conduct a meaningful on-the-record balancing test when deciding whether to admit Robinson's prior convictions and remanded the matter to the trial court for the sole purpose of conducting the balancing test.[3] *State v. Robinson*, Op. No. 2014-UP-068 (S.C. Ct. App. filed Feb. 19, 2014). On remand, the trial court conducted a hearing and heard arguments as to whether Robinson's prior convictions were admissible under Rule 609(a)(1) and *State v. Colf*. After the hearing, the trial court issued an order addressing each of the *Colf* factors and concluded "the probative value of the introduction of [Robinson's] prior record outweighed any prejudice to him under Rule 609(a)(1), SCRE." The trial court denied Robinson's motion for a new trial.

Robinson again appealed. The court of appeals addressed only two of the five *Colf* factors, held the trial court erred in its application of those two factors, but affirmed Robinson's convictions because "any error in the admission of Robinson's prior convictions was harmless." *State v. Robinson*, Op. No. 2017-UP-065 (S.C. Ct. App. filed Feb. 1, 2017). The court of appeals did not address the remaining three *Colf* factors and thus did not determine whether the prior convictions were properly

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[3] *See State v. Scriven*, 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000) (providing a trial court *must* conduct "a meaningful analysis to balance the impeachment value of [a defendant's] prior convictions, if any, against the prejudicial impact, as clearly required under Rule 609(a)(1)").

admitted after an analysis of all five *Colf* factors. We granted both Robinson's and the State's petitions for writs of certiorari.

II. STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law." *State v. Dunlap*, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

III. DISCUSSION

Both Robinson's and the State's arguments revolve around their perception of a correct application of the *Colf* factors in determining whether Robinson's prior convictions were ultimately admissible at trial pursuant to Rule 609(a)(1), SCRE. Robinson argues the court of appeals correctly applied the two factors it discussed but erred by not addressing the remaining factors and not ruling on the ultimate admissibility of his prior convictions. Robinson also argues the error in admitting the prior convictions was not harmless beyond a reasonable doubt. The State argues the court of appeals erred in its application of the two factors it did discuss.

In discussing the issues pertinent to this appeal, we will attempt to clarify the approach that must be undertaken by a trial court when determining whether to admit or exclude evidence of prior convictions of a witness for impeachment purposes.

A. Rule 609, SCRE

Rule 609 of the South Carolina Rules of Evidence governs the admissibility of a witness's prior convictions for purposes of impeachment. Rule 609 prescribes varying standards for admissibility of evidence of prior convictions. In pertinent part, Rule 609 provides:

> **(a) General Rule.** For the purpose of attacking the credibility of a witness,

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
>
> . . . .
>
> **(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 609(a) invokes three impeachment scenarios. First, under Rule 609(a)(1), evidence that a witness other than an accused has been convicted of a crime punishable by death or imprisonment for more than one year (in the jurisdiction where the conviction occurred) is admissible, subject to Rule 403, SCRE. Under Rule 403, evidence of such a conviction "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Rule 403 test

places the burden upon the opponent of the evidence to establish inadmissibility pursuant to Rule 403. Second, under Rule 609(a)(1), when the accused chooses to testify during his trial, if the State seeks to introduce impeachment evidence that the accused has been convicted of a crime punishable by imprisonment for more than one year, the evidence is admissible if the State establishes the probative value of admitting the evidence outweighs its prejudicial effect upon the accused. Third, under Rule 609(a)(2), if a witness, even an accused, has been convicted of a crime involving dishonesty or false statement, evidence of such a conviction shall be admitted regardless of the maximum punishment and regardless of the probative value or prejudicial effect of the evidence. *See State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006).

Rule 609(b) invokes one impeachment scenario. Evidence of a conviction of any kind is not admissible if more than ten years has elapsed from the date of conviction or the release of the witness from confinement for that conviction, whichever is the later date, unless the proponent of the evidence establishes that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. Rule 609(b) includes notice requirements and establishes a presumption against the admissibility of these "remote" convictions, and the State bears the burden of substantially overcoming the presumption.

Rule 609(a)(2) requires no balancing test for admissibility of a prior conviction for a crime involving dishonesty or false statement. However, Rule 609(a)(1) and Rule 609(b) require the trial court to balance—in three varying degrees—the probative value of evidence of a prior conviction and the degree of prejudice to the opponent of the evidence (as noted, the Rule 403 test also requires the trial court to consider confusion of the issues, misleading the jury, etc.). Even though these three Rule 609 admissibility tests differ from one another, we have, through *State v. Colf*, provided a uniform set of factors for the trial court to consider when applying each test.

In *State v. Colf*, we considered the admissibility of a criminal defendant's convictions under Rule 609(b), as the defendant's trial took place more than ten years from the defendant's release from confinement for the prior convictions. 337 S.C. 622, 625-26, 525 S.E.2d 246, 247-48 (2000). In *Colf*, we adopted the five-factor analysis employed by federal courts when weighing the probative value of prior

convictions against the prejudicial effect to the accused. *Id.* at 627, 525 S.E.2d at 248. These factors include:

> 1) The impeachment value of the prior crime.
>
> 2) The point in time of the conviction and the witness's subsequent history.
>
> 3) The similarity between the past crime and the charged crime.
>
> 4) The importance of the defendant's testimony.
>
> 5) The centrality of the credibility issue.

Id. "These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case." *Id.* Although *Colf* focused on the admission of prior convictions more than ten years old under Rule 609(b), our courts have also consistently applied these factors for purposes of a Rule 609(a)(1) analysis. *See, e.g.*, *Bryant*, 369 S.C. at 517 n.1, 633 S.E.2d at 155 n.1.

To summarize, Rule 609(a)(2) contemplates one impeachment scenario, that being for convictions of crimes involving dishonesty or false statement, with automatic admissibility regardless of who the witness is and regardless of punishment or resulting prejudice. Rule 609(a)(1) and Rule 609(b) contemplate three impeachment scenarios with three different admissibility standards: (1) under Rule 609(a)(1), if the witness is someone other than the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the *Colf* factors and determine whether, under Rule 403, the probative value of the conviction is substantially outweighed by the danger of unfair prejudice and/or other relevant considerations set forth in Rule 403. The burden of establishing inadmissibility of the conviction is upon the opponent of the evidence; (2) under Rule 609(a)(1), if the witness is the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the *Colf* factors and determine whether the probative value of the conviction outweighs its prejudicial effect to the accused. The burden of establishing admissibility is upon the State, the proponent of the evidence; (3) under Rule 609(b), if the conviction is a "remote" conviction (even a conviction of a crime involving dishonesty or false statement under Rule 609(a)(2)), the trial court must balance the *Colf* factors and determine whether the probative value of the

conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. Rule 609(b) establishes a presumption against the admissibility of a remote conviction and places the burden of establishing admissibility of the conviction upon the proponent of the evidence.

While the same *Colf* factors are to be considered in determining admissibility under all three of the 609(a)(1) and 609(b) impeachment scenarios, the practitioner and the trial bench should be mindful of the different admissibility standards in the three scenarios. We also note that these rules apply in civil cases, except of course the portion of Rule 609(a)(1) prescribing the standard to be applied when the witness is the accused in a criminal case. This Court and the court of appeals have encountered various circumstances under which a Rule 609/*Colf* analysis was required. In the instant case, we have the opportunity to clarify some of the issues faced by both trial courts and appellate courts when Rule 609(a)(1) is in play.

In *Bryant*, the defendant was on trial for murder and unlawful possession of a weapon by a convicted felon; he testified at trial and was impeached with two prior firearms convictions. 369 S.C. at 514-15, 633 S.E.2d at 154-55. When considering whether those convictions were automatically admissible under Rule 609(a)(2) as crimes of dishonesty or false statement, we stated: "Violations of narcotics laws are generally not probative of truthfulness. Furthermore, a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness. Likewise, firearms violations also are not generally probative of truthfulness." *Id.* at 517, 633 S.E.2d at 155-56 (internal citations omitted). Finding the defendant's prior firearm convictions did not involve dishonesty or false statement, we explained the probative value of the convictions should have been weighed against their prejudicial effect prior to their admission under Rule 609(a)(1). *Id.* at 517, 633 S.E.2d at 156. We ultimately held it was error for the trial court to admit the defendant's prior firearm convictions. *Id.* at 518, 633 S.E.2d at 156. We reasoned the defendant's prior firearms convictions "had nothing to do with [the defendant's] credibility and, their admission was more prejudicial than probative, especially in light of the offenses for which he was on trial."[4] *Id.*

[4] Perhaps a clearer statement in *Bryant* would have been that the prior firearms convictions "had little" to do with the defendant's credibility, as we did not intend to hold prior firearms convictions are per se inadmissible under Rule 609(a)(1) and Rule 609(b). We can envision circumstances in which such prior convictions may

In *State v. Broadnax*, the defendant was on trial for armed robbery and kidnapping; he testified at trial and was impeached with his prior armed robbery convictions. 414 S.C. 468, 471-72, 779 S.E.2d 789, 790-91 (2015). The trial court admitted the defendant's armed robbery convictions pursuant to Rule 609(a)(2) and the court of appeals' prior decision in *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003). *Broadnax*, 414 S.C. at 471, 779 S.E.2d at 790. Overruling *Al-Amin* and reaffirming the rule articulated in *Bryant*, we held armed robbery is not a crime of dishonesty or false statement and, therefore, the defendant's prior convictions were not admissible under Rule 609(a)(2). *Broadnax*, 414 S.C. at 476, 779 S.E.2d at 793. We explained that "for impeachment purposes, crimes of 'dishonesty or false statement' are crimes in the nature of *crimen falsi* 'that bear upon a witness's propensity to testify truthfully.'" *Id.* (quoting *Adams v. State*, 644 S.E.2d 426, 432 (Ga. Ct. App. 2007)). We emphasized our holding did "not preclude the admission of prior convictions for armed robbery; rather, it merely enables a trial judge to conduct a balancing test pursuant to Rule 609(a)(1) when the State seeks prior convictions for armed robbery to impeach a criminal defendant's testimony." *Id.* at 478, 779 S.E.2d at 794.

B. Application of the *Colf* Factors and Rule 609(a)(1) in this Case

Robinson's prior convictions include a 2009 conviction for second-degree burglary, a 2009 conviction for strong arm robbery, and two 2007 Georgia convictions for breaking and entering into an automobile with the intent to commit a felony or theft. As previously noted, the 2009 second-degree burglary conviction was "sanitized" when the trial court allowed the State to elicit testimony that Robinson had a prior felony conviction carrying more than one year in prison. The introduction of this conviction is not an issue in this appeal.

The parties obviously disagree as to the admissibility of the strong arm robbery conviction and the two breaking and entering into an automobile convictions. Robinson's strong arm robbery conviction and his two breaking into an automobile convictions are not automatically admissible as crimes of dishonesty or false statement under Rule 609(a)(2); therefore, the trial court was required to conduct an analysis under Rule 609(a)(1) and *State v. Colf* to determine whether the probative value of admitting these prior convictions outweighed the prejudicial

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well be admissible, provided the trial court conducts the requisite balancing test and rules accordingly.

effect to Robinson. As we noted above, on remand, the trial court considered all five *Colf* factors and determined the convictions were admissible under Rule 609(a)(1); however, the court of appeals reviewed only two of the five factors.

1. The impeachment value of the prior crime.

"The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness's propensity for truthfulness, or credibility." *State v. Black*, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012). "The tendency to impact credibility . . . determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness." *Id.* at 21-22, 732 S.E.2d at 887. The purpose of the impeachment is not to show the witness is a bad person but rather to show background facts which impact the witness's credibility. *Id.* at 22, 732 S.E.2d at 887.

The trial court provided the following analysis regarding the impeachment value of Robinson's prior crimes:

> This Court finds the admission of the four prior convictions has value for impeachment purposes and that the prejudicial effect of the admission of the prior convictions, if any, is not outweighed by their admission. While no specific details of the prior convictions were provided to this Court or the jury in this case, the mere fact that the Defendant had twice been convicted of serious crimes within a few years of the alleged offense would tend to impact the Defendant's credibility. Simply put, convictions for breaking into motor vehicles and strong-arm robbery don't imply that the accused was an armed burglar, as was alleged in this case, but they do imply that the accused is not someone to be trusted - that he might not be credible.

Citing *Black*, 400 S.C. at 21-22, 732 S.E.2d at 887, and *Bryant*, 369 S.C. at 517, 633 S.E.2d at 155, the court of appeals concluded the trial court erred in finding Robinson's prior convictions had impeachment value, reasoning South Carolina courts have found prior convictions for robbery, burglary, and theft are not probative of truthfulness. This was error.

In *Black*, the defendant's only corroborating witness was impeached using two manslaughter convictions that were more than ten years old. 400 S.C. at 15, 732 S.E.2d at 883. Because of the remoteness of the prior convictions, under Rule 609(b), the convictions were only admissible if the probative value "substantially" outweighed the prejudicial effect. *Id.* at 18, 732 S.E.2d at 885. This is a more strenuous admissibility test than the one called for under Rule 609(a)(1). When employing a *Colf* analysis and addressing the impeachment value factor, we stated, "A rule of thumb is that convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not." *Id.* at 22, 732 S.E.2d at 887. We noted that although the prior convictions arguably raised concerns regarding the witness's general character, it is more narrowly the witness's propensity for telling the truth that is properly placed at issue under Rule 609. *Id.* at 23, 732 S.E.2d at 887. We held, "The manslaughter convictions, while crimes of violence, are not particularly probative of the specific trait of truthfulness; consequently, their impeachment value is limited. . . . In this case, the trial court did not relate any specific facts or circumstances, other than the mere existence of the convictions, that made them particularly probative of [the witness's] credibility." *Id.* at 23-24, 732 S.E.2d at 887-88.

As mentioned above, in *Bryant*, when we discussed the possibility of a prior conviction's automatic admissibility under Rule 609(a)(2), we stated, "[A] conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." 369 S.C. at 517, 633 S.E.2d at 155. Here, the court of appeals applied our statement out of context in finding Robinson's prior convictions were not probative of credibility for purposes of a Rule 609(a)(1) analysis. Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1). If the court of appeals' conclusion regarding this factor is carried to its logical extreme, no convictions would ever have impeachment value under Rule 609 unless they were crimes of dishonesty or false statement admitted under Rule 609(a)(2). Rule 609(a)(2) would inevitably swallow Rule 609(a)(1).

Even though Robinson's convictions for strong arm robbery and breaking and entering automobiles are not crimes involving dishonesty or false statement within the meaning of Rule 609(a)(2), that does not rule out the existence of impeachment value in each one of these prior offenses. The trial court observed, "Simply put,

convictions for breaking into motor vehicles and strong-arm robbery don't imply that the accused was an armed burglar, as was alleged in this case, but they do imply that the accused is not someone to be trusted - that he might not be credible." It was within the trial court's discretion to conclude that because Robinson has prior convictions for such offenses, he legitimately might not be considered credible. *See Black*, 400 S.C. at 21-22, 732 S.E.2d at 887 ("Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness."). The trial court did not abuse its discretion in finding Robinson's prior convictions had impeachment value.

2. The point in time of the conviction and the witness's subsequent history.

Robinson's prior convictions were in 2007 and 2009. He was tried for the burglary of Williams' residence in 2011. The trial court found Robinson's prior convictions revealed a continuing pattern of criminal behavior that could legitimately impact his credibility in the eyes of the jury. The court of appeals did not address this factor.

Robinson acknowledges the temporal proximity of his prior convictions to his current charges. However, Robinson contends the trial court erred by mentioning in its remand order what the sentences were for his convictions, arguing that while there was temporal proximity, "the jury did not and should not have known what the sentences were for each of Robinson's prior convictions." This argument has no merit, as the jury heard no evidence of the length of the sentences for the prior convictions. The trial court simply addressed the "subsequent history" portion of this *Colf* factor by comparing Robinson's prior releases from confinement to the timing of the instant crime. An analysis of the sentences illustrates closeness in time between the prior offenses and the offense for which Robinson was on trial, revealing a pattern of behavior that legitimately evoked questions of Robinson's credibility. The trial court did not abuse its discretion in weighing this factor as it did.

3. The similarity between the past crime and the charged crime.

"[E]vidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions." *Colf*, 337 S.C. at 628, 525 S.E.2d at 249. "[W]hen the prior offense is similar to the offense for which the defendant is on trial, the danger

of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." *Bryant*, 369 S.C. at 517-18, 633 S.E.2d at 156.

Robinson dwells heavily on this point and claims the trial court erred in its application of this factor. The trial court found there was very little similarity between the past crimes and the charged crimes. The trial court reasoned:

> [T]he State was prohibited from mentioning the Defendant's 2009 burglary conviction during the trial. Instead, the State was required to simply refer to the conviction as "a felony conviction that carries more than a year." There is nothing about that characterization of the prior conviction to make it similar to the offense that the Defendant faced. As to the strong-arm robbery and breaking into motor vehicles charges, there is no indication that any of those charges involved the use of a deadly weapon (a crucial element of the burglary charge), or that they involved entering someone's home (also an element of the burglary charge). Despite defense counsel's claim, there is no similarity between the prior convictions and the offenses for which the Defendant was on trial in this case.

The court of appeals did not address this factor.

First-degree burglary is defined, as applied to this case, as entering "a dwelling without consent and with intent to commit a crime in the dwelling" and "when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime . . . is armed with a deadly weapon." S.C. Code Ann. § 16-11-311(A)(1)(a) (2015). "Strong armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." *State v. Rosemond*, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003). The Georgia breaking and entering into an automobile convictions are violations of section 16-8-18 of the Georgia Code (2018), which provides: "If any person shall enter any automobile or other motor vehicle with the intent to commit a theft or a felony, he shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, or, in the discretion of the trial judge, as for a misdemeanor."

Robinson argues the similarity of his prior convictions to the instant burglary charge weighs against admissibility. He contends the common thread between the burglary charge and the prior convictions is the taking of the property of another. Robinson asserts the jury became aware of his prior stealing habits and his pattern of escalating conduct.

Robinson also points to another similarity between his prior convictions and the charged offense that he contends requires exclusion of the prior convictions—his brother being with him during his commission of the prior crimes and the charged crime. The State cross-examined Robinson on this point, but Robinson did not object to that line of questioning; therefore, this narrow argument is not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court in order to be preserved for appeal).

The trial court did not abuse its discretion in analyzing the similarity factor as it did. Robbery and breaking and entering into automobiles involve different conduct than burglary and possession of a weapon during the commission of a violent crime, and neither the robbery nor the breaking into automobiles involved being armed with a deadly weapon or entering a dwelling. The fact that breaking and entering automobiles and first-degree burglary both involve entering into someone's property without consent was not, in the trial court's judgment, a determinative factor. Neither was the fact that robbery and burglary are overly similar just because, according to Robinson, most burglaries are undertaken with an eye towards stealing something. In this case, the trial court's limiting instruction sufficiently addressed Robinson's fear that the evidence would be inappropriately used as propensity evidence. The trial court acted within its discretion in weighing this factor as it did.

4. The importance of the defendant's testimony.

Robinson's defense at trial was an alibi defense. When analyzing the importance of Robinson's testimony, the trial court reasoned:

> Given the fact that the Defendant's testimony was entirely cumulative to the testimony of the other two defense witnesses, it was not necessary for the Defendant to take the stand in his defense. In fact, the only thing the

> Defendant testified to that his other witnesses did not confirm was that he [Robinson] had bought marijuana from Mr. Williams at the home prior to the date of the burglary.

The court of appeals did not address this factor.

Robinson argues the trial court's evaluation of the importance of his testimony ignored the constitutional significance of his right to testify in his own defense and the State's efforts to undermine his alibi defense. He contends there is often a no more powerful witness for the defense than the defendant himself. Robinson argues, "To characterize [his] testimony as cumulative because he presented other alibi witnesses is far too simplistic." Robinson contends the "most compelling portion" of his testimony was his explanation that he had taken responsibility for his past crimes, as well as noting his lack of motive to steal. He maintains the importance of his testimony increased the potential prejudice of admitting his prior convictions and should have weighed against their admission.

The trial court acted within its discretion in analyzing this factor. Robinson's direct examination was brief; his testimony largely echoed the testimony of his brother and cousin, who were both able to communicate the alibi upon which Robinson's defense relied. Though Robinson communicated a couple of additional points, his testimony was largely cumulative to that of other witnesses. *See Brooke v. United States*, 385 F.2d 279, 285 (D.C. Cir. 1967) (finding there was no abuse of discretion in ruling a defendant's prior convictions could be used for impeachment in the event he testified because defendant would have given a version that was substantially the same as the version given by another defense witness).

Additionally, Robinson's testimony was not necessary to explain his mindset at the time of the alleged crime. *Cf. United States v. Smith*, 181 F. Supp. 2d 904, 910 (N.D. Ill. 2002) (finding the importance of a defendant's testimony was enhanced when the State was required to prove his intent to defraud, thus, this factor cut against the admission of the defendant's prior convictions). With or without Robinson's testimony, the jury had to resolve the issue of Williams' credibility, since his testimony was the only direct evidence of Robinson's guilt.

Robinson also contends the trial court ignored his argument that it was important for him to testify so he could explain to the jury that his prior convictions were guilty pleas, which showed he admits responsibility for the crimes he commits,

and that his refusal to plead to the instant charges would tend to establish he was not guilty of the instant charges. This argument is quite illogical. Following Robinson's rationale to its logical extreme, he should want the prior convictions to be introduced so he could explain to the jury that he accepts responsibility when he is guilty but denies responsibility when he is not guilty.

Robinson also cites authority discussing the constitutional right of an accused to testify in his defense regarding criminal matters. A defendant's right to testify is indeed fundamental. *See, e.g.*, *State v. Rivera*, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (declaring a criminal defendant's right to testify is a well-established right in South Carolina). However, this right does not preclude the State from impeaching a defendant's credibility with prior convictions. If the defendant's right to testify were to trump all other considerations relevant to *Colf* and Rule 609, then a defendant could never be impeached with prior convictions. The trial court did not abuse its discretion in weighing this factor as it did.

5. The centrality of the credibility issue.

Acknowledging the lack of physical evidence in this case, the trial court found the credibility of Williams, Robinson, and Robinson's other witnesses "was central to the case." The trial court explained this factor weighed in favor of admitting Robinson's prior convictions. However, the court of appeals disagreed, explaining it was error for the trial court to find this factor weighed in favor of admitting the prior convictions "because our courts are hesitant to admit evidence of prior convictions when credibility is central to the case." The court of appeals relied on *Green v. State*, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000), for this proposition.

In *Green*, we affirmed the post-conviction relief (PCR) court's finding that defense counsel was ineffective for failing to argue the probative value of the defendant's prior convictions for possession of crack cocaine was outweighed by their prejudicial effect pursuant to Rule 609(a)(1), when the defendant was on trial for distributing crack cocaine within proximity of a school. 338 S.C. at 432, 527 S.E.2d at 100. We noted the novelty of the issue: "whether the probative value of a prior conviction, similar to the crime charged, not involving dishonesty or false statement, outweighs its prejudicial effect, where credibility is critical." *Id.* at 432-33, 527 S.E.2d at 100. After listing the *Colf* factors and noting the trial court should have considered them, we reasoned:

> In the instant case, evidence in the record supports the PCR court's ruling that [the defendant] was prejudiced by defense counsel's failure to argue the prejudicial effect of the convictions outweighed their probative value. [The defendant] was impeached with evidence of two convictions for possession of cocaine that were four and five years old. His credibility was critical, as the jury had to choose between his version of events and that of the SLED agents.

Id. at 433-34, 527 S.E.2d at 101.

The court of appeals' analysis and reliance on *Green* is flawed. In *Green*, we were primarily concerned with the similarity of the prior convictions to the current charges. Further, we did not make a ruling as to which direction the credibility factor would turn, only recognizing "credibility was critical." This analysis did not constitute a broad conclusion that our courts are hesitant to admit evidence of prior convictions when credibility is central to a case.

Robinson also argues the following statement in *Bryant* supports the court of appeals' proposition: "[T]he State should not be allowed to attack the defendant's credibility with inadmissible prior convictions; especially where the [defendant's] credibility was essential to his defense." 369 S.C. at 518-19, 633 S.E.2d at 156. Importantly, Robinson overlooks our use of the word "inadmissible" in this passage. We made this statement in *Bryant* during a harmless error analysis. It goes without saying that an "inadmissible" conviction should never be admitted into evidence.

Contrary to the court of appeals' conclusion, when credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate. Rule 609 is entitled "Impeachment by Evidence of Conviction of Crime." Attacking the accused's credibility forms the entire basis for a party seeking introduction of prior conviction evidence under Rule 609. If the jury must choose between the defendant's credibility and that of another witness, there would be a high probative value in admitting evidence of prior convictions to impeach the defendant's credibility. On the other hand, if credibility is not central to the case, then the prior convictions would have less probative value, and the risk of a jury improperly using the prior convictions in an inappropriate manner, despite a limiting instruction, could be higher.

Other jurisdictions favor admissibility when witness credibility is central to a jury's deliberation. *See, e.g.*, *United States v. Jackson*, 696 F.2d 578, 589 (8th Cir. 1982) (finding the probative value of a prior conviction was further enhanced by the critical role a defendant's credibility would have played if he had chosen to testify); *United States v. Caldwell*, 760 F.3d 267, 287-88 (3d Cir. 2014) (providing that when credibility is important, this factor weighs in favor of admissibility); *United States v. Smith*, 181 F. Supp. 2d 904, 910 (N.D. Ill. 2002) ("[C]redibility will be critical. This factor tilts significantly in favor of admitting the prior convictions."); *State v. Swanson*, 707 N.W.2d 645, 655-56 (Minn. 2006) ("Because credibility was a central issue here, the fourth and fifth [] factors weigh in favor of admission of the prior convictions."); *Jordan v. State*, 592 So. 2d 522, 524 (Miss. 1991) ("The importance of the defendant's credibility weighs in favor of admissibility of the prior convictions."); *State v. Bohe*, 447 N.W.2d 277, 281 (N.D. 1989) ("[I]n light of the nature of [the defendant's] prior felonies and of the fact that the credibility of the witnesses was the main issue in the case, the probative impeachment value of [the defendant's] prior felony convictions appears to outweigh the prejudicial effect of their admission into evidence.").

The trial court did not abuse its discretion in weighing this factor as it did.

IV. CONCLUSION

The trial court did not abuse its discretion in evaluating the *Colf* factors as it did and in concluding Robinson's prior convictions were admissible under Rule 609(a)(1), SCRE. In any given case involving the same indicted charges, two different trial courts could examine the same prior conviction(s), evaluate the same five *Colf* factors, and perhaps reach opposite conclusions as to the admissibility of the prior convictions. In such an instance, it is conceivable that under our standard of review, both trial courts would be affirmed. This is the nature of our standard of review in Rule 609(a)(1) cases when a trial court weighs the probative value of a prior conviction against its prejudicial effect.

We affirm the court of appeals' decision to uphold Robinson's convictions for first-degree burglary and possession of a weapon during the commission of a violent crime. However, we modify the court of appeals' opinion by holding the trial court did not abuse its discretion in admitting Robinson's prior convictions under Rule 609(a)(1), SCRE. In light of our holding, we need not examine Robinson's harmless error argument. *See State v. Allen*, 370 S.C. 88, 102, 634 S.E.2d 653, 660 (2006)

(declining to address remaining issues when the disposition of a prior issue is dispositive of the appeal).

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice Thomas E. Huff concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Otha Delaney, Petitioner,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2017-000683

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 27884
Heard November 8, 2018 – Filed May 8, 2019

REVERSED

Philip L. Fairbanks, of The Law Offices of Philip Fairbanks, PC, Kathy D. Lindsay, of Kathy D. Lindsay, PA, and Frederick M. Corley, all of Beaufort, for Petitioner.

Stephen Lynwood Brown, Russell Grainger Hines, and Perry McPherson Buckner IV, all of Young Clement Rivers, LLP, of Charleston, for Respondent.

JUSTICE HEARN: This case concerns when a claim for deficient notice of disposition of collateral under Article 9 of the Uniform Commercial Code accrues for statute of limitation purposes. The circuit court held the limitations period began upon receipt of the allegedly deficient notice, and the court of appeals affirmed in a split decision. *Delaney v. First Fin. of Charleston, Inc.*, 418 S.C. 209, 791 S.E.2d 546 (Ct. App. 2016). We hold the limitations period begins only upon disposition; accordingly, we reverse.

FACTS/PROCEDURAL BACKGROUND

In October of 2007, Petitioner Otha Delaney bought a 2003 Chevrolet pick-up truck from Coliseum Motors pursuant to a retail installment sales contract. The dealership subsequently assigned the contract to Respondent First Financial of Charleston, Inc., which acquired a security interest under the UCC. After Delaney failed to make payments, First Financial lawfully repossessed the truck, and on May 2, 2008, it sent Delaney a letter entitled, "Notice of Private Sale of Collateral." Over seven months later, on December 15, 2008, First Financial sold the truck.

On October 3, 2011, more than three years after sending notice but less than three years from the sale of the truck, Delaney filed suit against First Financial, seeking to represent a class of individuals who had received notice that allegedly failed to comply with certain requirements in Article 9. Accordingly, Delaney asserted he was entitled to the statutory penalty under section 36-9-625(c)(2) of the South Carolina Code (2003). First Financial moved to dismiss pursuant to Rule 12(b)(6), SCRCP, asserting the statute of limitations had expired. Before the trial court, the parties disputed whether the appropriate limitations period was one, three, or six years.[1]

After a hearing, the trial court found: (1) the remedy Delaney sought pursuant to section 36-9-625(c)(2) was a statutory penalty; (2) the six-year Article 2 limitations period did not apply because Delaney failed to plead breach of contract,

[1] Delaney abandoned his assertion that the six-year limitations period under Article 2 governed, as he only addressed the one and three-year provisions in his brief before this Court. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (failing to provide arguments or supporting authority renders the issue abandoned). Additionally, at oral argument, counsel for First Financial conceded the three-year statute of limitations prescribed in section 15-3-540(2) (2005) applied.

the claim solely concerned deficient notice under Article 9, and even if Article 2 applied, the more specific limitations period on penalties governed; and finally, (3) under either limitation period, Delaney's claim was time-barred as his action accrued upon receipt of the allegedly deficient notice.

The court of appeals affirmed in a split decision, holding that because the claim concerned deficient notice, it accrued upon receipt of the notice. *Delaney*, 418 S.C. at 222, 791 S.E.2d at 552. Concluding Delaney's claim was untimely under either the one or three-year limitations period for an action upon a statutory penalty, the court affirmed. *Id.* at 222, 791 S.E.2d at 552. Judge Thomas concurred in the majority's decision that Article 2's six-year limitations period did not apply, but dissented on the issue as to when Delaney's cause of action accrued, finding that it accrued upon disposition of the collateral. *Id.* at 222, 791 S.E.2d at 552–53 (Thomas, J., dissenting). Delaney sought a writ of certiorari, which we granted.

ISSUES

Does the statute of limitations for an Article 9 deficient notice of disposition of collateral claim begin to when notice is provided or upon the disposition of the collateral?

STANDARD OF REVIEW

An appellate court reviews dismissal from a Rule 12(b)(6), SCRCP motion under the same standard employed by the trial court. *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014). The facts are construed in the light most favorable to the nonmoving party, and all well-pled allegations are considered true. *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). However, questions of law are decided *de novo*. *Town of Summerville v. City of North Charleston,* 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

DISCUSSION

I. Accrual Date

Delaney asserts the court of appeals erred in holding his claim accrued upon receipt of the notice instead of when First Financial disposed of the collateral, contending section 36-9-611(b) only requires a secured party "that disposes of collateral" to provide notice. Because in Delaney's view the notice is not final until

disposition, the statute of limitations does not begin to run until that point in time. Conversely, First Financial argues the limitations period began when the noncompliant notice was sent, without regard to the date of disposition. We agree with Delaney.

Section 36-9-611 of the South Carolina Code, entitled, "Notification before disposition of collateral," requires a secured party to provide notice of its plans to dispose of the collateral. Specifically, subsection (b) states, "Except as otherwise provided in subsection (d), a secured party that disposes of collateral under Section 36-9-610 shall send…a reasonable authenticated notification of disposition." While the contents and form of the notice are governed by sections 36-9-613 and 614, the statutory penalty pursuant to section 36-9-625(c)(2) for failing to comply with those provisions is triggered only when all the elements of section 36-9-611(b) are present. We agree with Judge Thomas that a claim for failing to comply with section 36-9-611(b) does not accrue "unless and until [the secured party] disposes of the collateral." *Delaney*, 418 S.C. at 223–24, 791 S.E.2d at 553 (Thomas, J., dissenting).

In addition to section 36-9-611(b), the corresponding Official Comments provide, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification." S.C. Code Ann. § 36-9-611(b) cmt.8. Moreover, the comment notes that a secured party may send a revised notice if "the secured party acts in good faith, the revised notification is reasonable, and the revised plan for disposition and any attendant delay are commercially reasonable." *Id.* Thus, while a secured party is required to send notification when it plans to dispose of collateral, it is also permitted to send a revised notification up until a reasonable time before disposition. We believe that by allowing such revisions, the drafters intended the sufficiency of notice to be assessed as of the date of disposition.

We reject the notion that the availability of an injunction under section 36-9-625(a) compels a contrary result. This provision enables the circuit court to restrain disposition when the "secured party is not proceeding in accordance with this chapter." First Financial contends if a party can seek an injunction before the collateral is disposed of, then it can recover the penalty at the same time. However, the General Assembly used different terms for these two remedies, and we cannot impose the broader "not proceeding in accordance" language into section 36-9-625(c)(2)'s requirement that a secured party "failed to comply." *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not

do a futile thing."). To do so otherwise is contrary to our principle of construing statutory penalties narrowly. *Wallace v. Wannamaker*, 231 S.C. 158, 163, 97 S.E.2d 502, 505 (1957) ("The prime rule requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty."). Accordingly, Delaney's claim did not accrue until First Financial disposed of the collateral.[2] Having concluded the limitations period did not begin until December 15, 2008, we next turn to which statute of limitations governs.

II. Applicable Statute of Limitations

Before the trial court and the court of appeals, the parties disputed whether the one or three-year limitations period applied to an action upon a statutory penalty. At oral argument before this Court, counsel for First Financial conceded the three-year limitations period applied, and we agree.

Section 15-3-540(2) sets forth a three-year limitations period for "[a]n action upon a statute for a penalty or forfeiture *when the action is given to the party aggrieved* or to such party and the State, except when the statute imposing it prescribes a different limitation." (emphasis added). Conversely, section 15-3-570 provides in part, "An action upon a statute for a penalty or forfeiture given, in whole or in part, *to any person who will prosecute for it* must be commenced within one year after the commission of the offense." (emphasis added). We are persuaded by this reasoning by the Fourth Circuit:

> Section 15–3–570, however, was clearly intended to encompass more persons than only "the party aggrieved" (if it was meant to encompass "the party aggrieved" at all). To apply the more general section 15–3–570, and not the more specific section 15–3–540…would contravene the "basic principle of statutory construction that when two statutes are

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[2] We note that comment four to section 36-9-625(c)(2) states this provision "is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." However, pursuant to comment eight to section 36-9-611, a secured party prior to disposition may amend a noncompliant notice to remove the defect. While the sufficiency of the notice would still be assessed as of the date of disposition, the efficacy of an amended notice as to whether the secured party would remain liable for the statutory penalty is not before us.

> in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision."

Pressley v. Tupperware Long Term Disability Plan, 553 F.3d 334, 339 (4th Cir. 2009) (internal citation omitted). Moreover, as the Fourth Circuit noted, we have applied the three-year limitations period when the claim is brought by the aggrieved party and the one-year provision when filed by a third party. *Compare Tilley v. Pacesetter Corp.*, 333 S.C. 33, 41, 508 S.E.2d 16, 20 (1998) (applying the three-year statute in a class action lawsuit brought by buyers who alleged the seller failed to comply with the South Carolina Consumer Protection Code), *with Montjoy v. One Stop of Abbeville, Inc.*, 325 S.C. 17, 19, 478 S.E.2d 683, 684 (1996) (holding the one-year statute of limitations governed an action by a third party to recover gambling losses). Accordingly, because Delaney is an aggrieved party, the three-year limitations period under section 15-3-540(2) applies.

CONCLUSION

Delaney's claim for deficient notice of disposition of collateral did not accrue until First Financial disposed of the collateral. Accordingly, because Delaney filed this action within three years from that date, we reverse and remand for further proceedings.

REVERSED.

BEATTY, C.J., FEW and JAMES, JJ., concur. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE KITTREDGE: I concur with the majority insofar as the applicability of the three-year statute of limitations. I respectfully dissent on the date of accrual issue. Petitioner's claim is based entirely on an alleged noncompliant notice. The law makes clear that a debtor is entitled to bring an action prior to disposition of the collateral. Because the law provides for the commencement of an action prior to disposition, I do not agree with the majority of this Court that the action accrues only upon the disposition of the collateral. I adopt the well-reasoned court of appeals' majority opinion holding that the cause of action accrued when the allegedly deficient notice of sale was received. Accordingly, I would affirm the court of appeals as modified.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gerard E. Ziegler; Brenda Barrington III; James Stephen Greene, Jr.; William A. Harbeson; David Messinger; South Carolina Public Interest Foundation; and Dorchester County Taxpayers Association, individually, and on behalf of all others similarly situated, Appellants,

v.

Dorchester County; Dorchester County Council; Charles D. Chinnis, George H. Bailey, Sr., Jay Byars, Willie R. Davis, Carroll S. Duncan, Larry Hargett and William R. Hearn, Jr., in their official capacities as members of Dorchester County Council, Respondents.

Appellate Case No. 2018-000395

Appeal from Dorchester County
Edgar W. Dickson, Circuit Court Judge,

Opinion No. 27885
Heard October 18, 2018 – Filed May 8, 2019

REVERSED

Michael T. Rose, of Mike Rose Law Firm, PC of Summerville, and W. Andrew Gowder, Jr., of Austen & Gowder LLC, of Charleston, for Appellants.

Steve A. Matthews, of Haynsworth Sinkler Boyd, PA, of Columbia, for Respondents.

JUSTICE HEARN: This case concerns the validity of a referendum question—passed during the 2016 elections—which granted the Dorchester County Council authority to issue up to $30 million in bonds for library facilities *and* up to $13 million for recreational facilities. Finding there was no indication the voters did not understand it, the circuit court determined it was not improper. Because the question contained two separate bond proposals and required voters to support both or neither, we hold it was unlawful.

FACTUAL BACKGROUND

On July 18, 2016, the Dorchester County Council passed an ordinance ordering a referendum to be held during the November 8, 2016, elections. The referendum sought to determine whether the county would be authorized to issue no more than $43,000,000 in general obligation bonds to construct new library and recreational facilities. The question as written in the ordinance and to be placed on the referendum was:

> Shall Dorchester County, South Carolina be authorized to issue general obligation bonds in an amount not to exceed $30,000,000 for funding the acquisition of land and the design and construction of new library facilities in Summerville and North Charleston and general obligation bonds in an amount not to exceed $13,000,000 for funding recreational facilities, including the development of the Dorchester County Courthouse Park in St. George, the Ashley River Park and the Pine Trace Natural area in Summerville, and the development of hiking, biking and pedestrian trails, together with associated infrastructure, at various locations throughout the County?

On September 8, 2016, then-State Senator Paul Thurmond requested an Attorney General's Opinion on the legality of the wording of the Dorchester County bond referendum, as he believed a separate vote was required for each specific different purpose for which bonds are to be issued. On September 30, 2016, the Attorney General's Office issued an opinion agreeing with Senator Thurmond. The opinion concluded that "a court would likely determine neither the Constitution nor

the General Assembly intended to give county council the authority to combine multiple separate issues for bond issuance into one referendum question."

On October 3, 2016, the Appellants—residents of Dorchester County, the Dorchester County Taxpayers Association, and the South Carolina Public Interest Foundation—sent the Attorney General's Opinion to the County. Appellants requested the County correct the question by separating the parks and libraries issues into two different questions to be voted on separately, or cancel the referendum. They also filed a complaint in circuit court seeking: (1) a declaratory judgment that including two questions in one referendum question was unconstitutional, violated South Carolina law and the intent of the General Assembly, violated public policy, and, as a result, the issuance of any bonds and any other action taken based on the results of the referendum would be null and void; (2) a permanent injunction enjoining Dorchester County from conducting the referendum; and (3) costs and attorneys' fees. No hearing was held prior to the election. In fact, no hearing was held until August 24, 2017.

The question remained on the ballot as written and the referendum was held as scheduled. The referendum passed with just over 60% of the vote. The Appellants did not file an amended complaint after the referendum was held. Respondents—Dorchester County and the individual members of the Dorchester County Council—filed a motion for judgment on the pleadings under Rule 12(c) of the South Carolina Rules of Civil Procedure.

The circuit court granted Respondents' motion. The court determined the issue was the intent of the bond question and whether the voters of Dorchester County understood its results, and concluded there were no factual allegations to suggest they did not. Appellants filed a Rule 59(e) motion, which was denied. Appellants appealed to the court of appeals, but the case was transferred to this Court pursuant to Rule 204(a) of the South Carolina Appellate Court Rules. To date, the bonds have not been issued.[1]

ISSUE

[1] While South Carolina courts will not reach the merits absent a justiciable controversy, we find such a controversy is present here. *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018).

Did the referendum question containing proposals to authorize bonds for library facilities and for recreational facilities comply with South Carolina law?[2]

STANDARD OF REVIEW

Whether reviewing a grant of summary judgment or a judgment on the pleadings, we apply the same legal standards as the trial court. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 600, 799 S.E.2d 912, 916 n.11 (2017). We review questions of law *de novo*. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

DISCUSSION

Article X, subsection 14(4) of the South Carolina Constitution authorizes political subdivisions, such as counties, to incur general obligation bonded indebtedness for a "public purpose" that is also a "corporate purpose."[3] S.C. Const. art. X, § 14(4). Title 7 of the South Carolina Code applies to all elections in South Carolina. S.C. Code Ann. § 7-1-40 (1976). Section 7-13-400 provides, "[t]he form of ballot in an election on the issuance of bonds . . . shall be a statement of the question or questions" and must permit the voter to vote "In favor of the question" or "Opposed to the question." S.C. Code Ann. § 7-13-400 (1976).

We addressed the legality of the form of a bond referendum question in a similar context over 100 years ago. In *Ross v. Lipscomb*, 83 S.C. 136, 65 S.E. 451 (1909), "a majority of the freeholders of the town of Gaffney" signed a petition "asking for an election to be ordered to vote $125,000 bonds for the extension of the electric lights and waterworks and the installation of a sewerage system." 83 S.C. at

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[2] Appellants contend the circuit court erred in granting a judgment on the pleadings because there was a factual issue as to whether the question was misleading. *Lowery v. Shirley*, 234 S.C. 279, 282, 107 S.E.2d 769, 772 (1958). We find the question of law dispositive, and as a result, we need not decide this issue. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

[3] Appellants argue the singular language of this provision requires counties to incur bonded indebtedness for a single purpose at a time. Respondents contend Section 2-7-30 of the South Carolina Code requires singular nouns to include plural forms. Because we find the question unlawful on separate grounds, we need not pass upon this issue. *Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

137, 65 S.E. at 452. In an election conducted pursuant to the petition, a majority of Gaffney voters were in favor of the issuance of the bonds. 83 S.C. at 138, 65 S.E. at 452. As a result, the town council passed an ordinance authorizing and directing the issuance of coupon gold bonds to the amount not exceeding $125,000. *Id.* However, the board of public works "failed and refused" to sell the bonds. 83 S.C. at 139, 65 S.E. at 452.

Thereafter, petitioners—members of the Gaffney town council—sought a writ of mandamus requiring the board to sell the bonds. 83 S.C. at 142, 65 S.E. at 454. We noted, "The first ground of objection" by the board of public works "is 'that said election, and the bonds issued in pursuance thereof, are invalid and unsalable, and that the proposition submitted to the voters did not separately state the items, nor the amount of bonds to be issued, for the extension of the electric lights, for the extension of the waterworks, and for the installation of a sewerage system.'" 83 S.C. at 143, 65 S.E. at 454.

We held,

> The intention of the Legislature was that there should be separate and distinct statements as to the amount of the bonds for electric lights and waterworks and as to the amount of those for establishing a sewerage system, and that the question of issuing bonds for the extension of the electric lights and waterworks presented an entirely different proposition from that of issuing bonds for establishing a sewerage system. Therefore the failure to give notice of the amounts, respectively, of the proposed bonds, and the failure to submit the different propositions separately, to the voters, rendered the election illegal and the bonds invalid.

83 S.C. at 143-44, 65 S.E. at 454. Although we interpreted a statute in reaching our decision, we also noted that "even if the manner in which the different propositions were submitted to the voters is considered apart from the statute, the same result would follow." *Id*. at 144, 65 S.E. at 454. This is because "when several distinct and independent propositions for the issuing of bonds by a municipality are submitted to the qualified voters of the town or city, provision should be made in the

submission for a separate vote upon each. They cannot be lawfully combined as a single question." *Id*.[4]

Here, we agree with the circuit court that the referendum question was not misleading. Indeed, it was quite clear that, if a voter wanted to authorize up to $30 million in funding for library facilities, he must also vote to fund up to $13 million for recreational facilities. Libraries and recreational facilities are distinct for funding purposes.[5] *See* S.C. Code Ann. § 4-9-30(5)(a) (Supp. 2017) ("each county government . . . shall have the following enumerated powers . . . : to assess property and levy ad valorem property taxes . . . and make appropriations for functions and operations of the county, including, but not limited to, appropriations for . . . recreation; . . . libraries"); *see also id*. §§ 4-9-35, 38-39. As a result, the referendum question contained two separate questions, and therefore, it was not possible to vote "in favor" of one and "opposed" to another. S.C. Code Ann. § 7-13-400.

Our precedent and the statutory requirements for referendum questions render the question here unlawful. While Respondents argue Home Rule[6] delegated the authority to administer county bond referenda to local governments, they have cited no authority overruling *Ross*. Section 5-7-30 of the South Carolina Code grants municipalities broad power to enact regulations, resolutions, and ordinances, so long as they are not inconsistent with the Constitution and general law of the State. S.C. Code Ann. § 5-7-30 (Supp. 2017). We hold the rule requiring separation of distinct county bond propositions into different referendum questions—espoused in *Ross* and reflected in Section 7-13-400—is part of this general law.

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[4] The General Assembly later adopted a statute specifically authorizing municipalities to incur bonds for water, sewage, and lighting plants in a single question. Act No. 462, 1918 S.C. Acts 801; S.C. Code of Laws § 4422 (1922). However, the statute did not overrule the Court's decision in *Ross* or apply to other subjects.

[5] Respondents contend the single purpose of the referendum was to increase the county's debt limit. Notably, however, this purpose was not presented to the voters, as it does not appear in the referendum question.

[6] *See, e.g.* S.C. Const. art. VIII.

We find additional support for our holding in Eugene McQuillin's The Law of Municipal Corporations, which we have cited as persuasive authority. *See S.C. Dep't of Transp. v. Revels*, 411 S.C. 1, 9, 766 S.E.2d 700, 704 (2014). To wit:

> If there are two or more separate and distinct propositions to be voted on, each proposition should be stated separately and distinctly, so that a voter may declare his or her opinion as to each matter separately . . . .
>
> Elections are invalid where held under such restrictions as to prevent the voter from casting his or her individual and intelligent vote on the object or objects sough to be attained. The object of the rule preventing the submission of several and distinct propositions to the people united as one in such a manner as to compel the voter to reject or accept all, is to prevent rejection of popular or necessary propositions that are joined with other measures that are not so popular or necessary. . . . This may be done on a single ballot, but the ballot must state each proposition separately, so that the voter may be able to express his or her will with reference to each question.

15 Eugene McQuillin, The Law of Municipal Corporations § 40:9 (2016).

Contrary to Respondents' assertions, our holding today does not require municipalities to obtain and issue separate bonds for each project they seek to undertake; nor does it impact the Capital Project Sales Tax Act.[7] We hold only that a ballot referendum proposing bonded indebtedness must contain a single question for each proposal to which voters can respond affirmatively or negatively.

CONCLUSION

Based on the foregoing, we **REVERSE** the circuit court's decision and **REMAND** for entry of judgment consistent with this opinion.

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

[7] S.C. Code Ann. § 4-10-300 *et seq*. (Supp. 2012).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Grays Hill Baptist Church, Respondent,

v.

Beaufort County, and The Beaufort County Zoning Board of Appeals, Defendants,

and

The United States of America, Defendant-Intervenor,

Of which Beaufort County and The United States of America are the Appellants.

Appellate Case No. 2016-000687

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

Opinion No. 5646
Heard April 12, 2018 – Filed May 8, 2019

REVERSED

Mary Bass Lohr, of Howell Gibson & Hughes, PA, of Beaufort, for Appellant Beaufort County; David M. Wunder, of Camp Lejeune, North Carolina, and Lee Ellis Berlinsky, of Charleston, both for Appellant The United States of America.

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

MCDONALD, J.: In this consolidated appeal, Beaufort County and the United States of America (collectively, Appellants) argue the master-in-equity erred in reversing the Beaufort County Planning Commission's decisions requiring Grays Hill Baptist Church (the Church) to apply for a new development permit and denying the Church's subsequent application for the permit to construct a fellowship hall. Appellants contend the Church's 1997 development permit did not allow the Church to pursue additional development ten years later, and the County's 2006 ordinances addressing areas near the Beaufort Marine Corps Air Station proscribed approval of the Church's new development application. Appellants further argue the master erred in finding the Beaufort County Zoning Board of Appeals (the Zoning Board) erroneously denied the Church's request for a zoning variance. We reverse the decisions of the master and reinstate the orders of the Planning Commission and Zoning Board.

Facts and Procedural History

On December 4, 1996, the Church applied for a development permit from Beaufort County. The application narrative detailed that "Phase I of the development will consist of a 15,872 [square foot] church with 25,250 [square feet] of asphalt and concrete paving. Phase II of the development will consist of an 11,250 [square foot] building shown on the enclosed plans as the building south of the church."

On January 7, 1997, the Beaufort County Zoning and Development Administration issued the Church a development permit, which indicated: "All permits expire two (2) years from the date of approval unless substantial improvement has occurred or final Subdivision plat has been recorded." On February 27, 1997, the Beaufort County Department of Inspections issued the Church a construction permit for a 15,280 square foot building. The proposed use for the construction was "assembly," with a construction cost of $632,800. The Beaufort County Development Division issued a certificate of compliance on December 17, 1997, after the work listed on the construction permit had been completed.

In 2006, the Beaufort County Council (County Council) enacted ordinances for an "Airport Overlay District" (the AO District), creating "accident potential zones" (APZ) and "noise zones" in areas surrounding Beaufort's Marine Corps Air Station (MCAS-Beaufort). Certain land uses and building expansions are restricted within the AO District. Although the AO District ordinances (the Ordinances) prohibited places of worship, they allowed "non-conforming places of assembly and worship [to] expand [ ] by up to 15% in accordance with Table 106-9[1] provided that the expansion does not increase the occupant load of the building."

In 2007, the Church applied for a permit to build its fellowship hall. The Church contends it applied for a construction permit, but the County required it to first obtain a development permit. On June 29, 2007, the County notified the Church that the Beaufort County Development Review Team had reviewed the Church's application and determined it needed to seek a variance from the Zoning Board because the fellowship hall would increase the occupant load of the building and expand its area by more than fifteen percent, in violation of the AO District ordinance.

On October 10, 2007, the County notified the Church of the Review Team's staff recommendation to disapprove the project because the Church's proposed construction would increase the floor area by sixty percent. The Ordinances limit any increase to fifteen percent; further, such an increase must not "substantially increase the occupant load of the site." The Review Team subsequently disapproved construction of the fellowship hall, finding the Church's proposed construction did "not meet the intent of the [AO] District" because it would double the occupancy load.

The Church appealed the Review Team's decision to the Planning Commission. Following a hearing, the Planning Commission unanimously denied the Church's

[1] Table 106-9 referenced, *inter alia*, conforming uses and structures, correction of nonconformities, setbacks, density standards, and feasible landscaping and buffers.

appeal.[2] The Church appealed the Planning Commission's decision to the circuit court pursuant to S.C. Code Section 6-29-820.[3]

At a hearing before the master-in-equity, the parties agreed "that it would be in the best interest of justice" for the master to hold the appeal in abeyance to allow the County to review a variance request from the Church. The Church later applied for a variance, stating, "The Church seeks the construction of a fellowship hall as originally permitted, which would be a larger than 15% expansion of the existing building size." The Church asserted the fellowship hall would not increase the occupant load for the site.

The Board denied the variance request, finding the request did not meet the criteria for a variance under the Beaufort County Zoning and Development Standards Ordinance. The Church appealed the Zoning Board's decision; however, due to the lack of a record from the 2007 Planning Commission hearing, the master remanded the matter to the Commission for a de novo hearing on the question of whether the proposed fellowship hall would increase the Church's occupant load.

At the Planning Commission's December 5, 2011 hearing on the permit application, the Church explained it planned to build a fellowship hall as part of the 1997 development plan shown on the plat it submitted with the application for a development permit, but financial constraints delayed the construction of the hall. The Church claimed it contacted the County when it learned of the Ordinances, and the County informed the Church its development would not be impacted by the new restrictions. The Church further asserted the fellowship hall would not increase the occupant load because the fellowship hall and sanctuary would never be used at the same time.

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[2] There is no transcript or recording of this hearing. The Planning Commission's minutes from December 3, 2007, are included in the record; however, there are four pages missing, and it appears that these missing pages reported the Planning Commission's discussion of the Church's application.

[3] S.C. Code Ann. §§ 6-29-820 through 840 sets forth the requirements and procedures for appeals from local zoning boards to the circuit court.

The County argued the Church's 1997 permits did not cover the fellowship hall. It noted the narrative attached to the Church's application for the 1997 development permit divided the development into two phases. The County "closed out" the 1997 permit with a final inspection in December 1997 after it issued a certificate of compliance.[4] The County further noted the Church was not entitled to a new development permit because the fellowship hall would increase the occupant load of the site, explaining, "[W]hat the [C]ounty is tasked with isn't what the practical application is going to be; it's what the *potential* is for increasing. They have to look at not what representations are made because this building . . . may not always belong to the [C]hurch."

The County emphasized that regardless of whether the construction of the fellowship hall exceeded fifteen percent of the disturbed area or build area, the fellowship hall would increase the occupant load of the site. Occupant load is based on the potential number of people that could be present on the site, not the number the Church believes would be there.

The Church stated the only evidence it had showing the County had assured it that the new ordinances would not affect its development was a letter from its pastor to the board of trustees describing his conversation with county officials. The County objected to the letter as hearsay.

By a vote of six to two, the Planning Commission found the Development Review Team did not err in reviewing the Church's application for a permit or in

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[4] No development permit has ever been issued for "Phase II," the fellowship hall structure shown on the plat submitted with the Church's application for the 1997 development permit. The submitted narrative for the project describes Phase II as "an 11,250 [square foot] building shown on the enclosed plans as the building south of the church." At oral argument, Beaufort County's counsel explained that for the 1997 development permit to have included both the church building and the fellowship hall, it would have been necessary for the Church to seek a permit for the development of 27,122 square feet (the total for the two proposed structures), along with the 25,250 square feet of proposed asphalt and concrete paving. Instead, the permit application sought to develop only Phase I—the 15,872 square feet for the church building—along with the accompanying square footage for the asphalt and paving on the lot.

determining the requested development would increase the occupant load. The Planning Commission found the construction of the fellowship hall would significantly increase the potential occupancy load for the site and provided the Church with a letter of its written findings.

The master-in-equity reversed the decisions of the Planning Commission and the Zoning Board, holding the County erred in requiring the Church to obtain a new development permit. The master found the 1997 permit encompassed the fellowship hall; construction of the fellowship hall would not increase the occupant load; and the Planning Commission applied an incorrect expansion standard under the AO Ordinances. Finally, the master found the Zoning Board's denial of the Church's request for a variance was unsupported by the evidence.

After the County filed its Rule 59(e), SCRCP, motion to reconsider, the Church and the County asked the master to take the motion under advisement so the parties could continue negotiating in an attempt to resolve the matter. When the parties informed the master they could not reach an agreement, the master denied the County's motion to reconsider.

Standard of Review

"The appellate court gives 'great deference to the decisions of those charged with interpreting and applying local zoning ordinances.'" *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 91, 791 S.E.2d 305, 308 (Ct. App. 2016) (quoting *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995)). "By statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it." *Town of Hollywood v. Floyd*, 403 S.C. 466, 476, 744 S.E.2d 161, 166 (2013) (citing S.C. Code Ann. § 6-29-840(A) (Supp. 2005)). "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Furr v. Horry Cty. Zoning Bd. of Appeals*, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014) (quoting *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007)). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) (quoting *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)).

"On appeal, we apply the same standard of review as the [special] circuit court below: the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence." *Id.*

Law and Analysis

I. Development Permit

A. Applicability of the 1997 Development Permit

Appellants argue the master-in-equity erred in finding the Church's 1997 development permit applied to the construction of a fellowship hall in 2007, because the permit had expired. We agree.

"A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare." *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 498, 536 S.E.2d 892, 901 (Ct. App. 2000) (quoting *F.B.R. Inv'rs v. Cty. of Charleston*, 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991)). However, "the mere contemplated use of property by a landowner on the date a zoning ordinance becomes effective precluding such use is not protected as a nonconforming use." *Lake Frances Props. v. City of Charleston*, 349 S.C. 118, 124–25, 561 S.E.2d 627, 631 (Ct. App. 2002).

In *Friarsgate, Inc. v. Town of Irmo*, a developer prepared to build a condominium project on property in Irmo, which had no zoning ordinances at the time the project was approved. 290 S.C. 266, 268, 349 S.E.2d 891, 892 (Ct. App. 1986). The developer implemented drainage, grading, landscaping, sewer, and water distributions; cleared a portion of the tract; obtained building permits for one building containing five units; and began constructing piers and foundations for the building. *Id.* at 268, 349 S.E.2d at 893. Thereafter, Irmo enacted zoning ordinances, which zoned the developer's property into a single family residential district. *Id.* The developer subsequently ceased construction and the building permits expired. *Id.* Upon learning Irmo would not issue new building permits for the project, the developer brought an action in circuit court; the circuit court found

the developer had a vested right to complete the project. *Id.* However this court reversed and held that because "a building permit was required to construct each of the fourteen buildings in the project, the commencement of construction on one building did not constitute an appropriation of the entire tract to the project." *Id.* at 272, 349 S.E.2d at 895. The court noted the developer could have obtained building permits for the entire project prior to the enactment of the zoning ordinances, but the evidence in the record indicated it did not do so for financial reasons. *Id.*

Similarly, in *F.B.R. Investors*, a developer owned fifteen acres on James Island, on which it planned to build a multi-family project consisting of quadruplexes; the land was zoned for such use. 303 S.C. at 525–26, 402 S.E.2d at 190. After receiving preliminary approval from the county, the developer decided to develop the property in two phases and began to build Phase I. *Id.* at 526, 402 S.E.2d at 190. Charleston County Council subsequently adopted the "James Island Land Use Plan," which "called for all undeveloped land along two lane roads on James Island to be zoned for single family use," including the developer's land. *Id.* Thereafter, the developer brought an action claiming it had a vested right to complete Phase II as a multi-family development. *Id.* at 526, 402 S.E.2d at 191. The circuit court agreed, holding the developer had a vested right to build Phase II because it had completed fifty-five percent of the total project and—although no building permits had been obtained for Phase II—the developer had made substantial expenditures for the entire development. *Id.* This court reversed, noting the developer had neither obtained building permits nor begun construction on Phase II. *Id.* at 527, 402 S.E.2d at 191. Although the developer could have developed the tract as one project, "it chose to divide it into two projects." The developer's expenditures—such as a water system, drainage and sewer lines—were "directed toward the completion of Phase I. Phase II was essentially barren land when the zoning change occurred." *Id.*

The analyses of *Friarsgate* and *F.B.R. Investors* apply to this matter. Here, in both the narrative included as part of the Church's initial development application and its 2007 application, the Church stated Phase I included the sanctuary, grass parking spaces, and asphalt and concrete paving; Phase II consisted of an 11,250 square foot fellowship hall. At the Planning Commission's hearing, the Church's pastor acknowledged the fellowship hall was part of the second phase of the project. And on its face, the Church's 1997 development permit stated it expired

two years from the approval date "unless substantial improvement has occurred." Although the Church made improvements to the site, these improvements were directed toward the construction of Phase I—the sanctuary and parking area. *See id.* at 527, 402 S.E.2d at 191 (holding a developer did not have a vested right to complete Phase II of its project because it chose to divide the project into two phases and its prior efforts were "directed toward" completing the first phase). Additionally, the Church's building permit covered only the sanctuary, and the Church's pastor explained the Church postponed building the fellowship hall for financial reasons. *See Friarsgate*, 290 S.C. at 272, 349 S.E.2d at 895 (holding the developer did not have a vested right to complete a condominium project because it could have obtained building permits for all fourteen buildings prior to the enactment of the zoning ordinance, but chose not to for financial reasons). Further, a review of the record reveals no evidence that the Church sought to extend the 1997 development permit. Therefore, the master-in-equity erred in finding the 1997 development permit authorized the Church to construct a fellowship hall some ten years later.

B. Denial of New Development Permit

Appellants argue the master erred in reversing the Planning Commission's denial of the Church's application for a new development permit because the evidence supports the Planning Commission's finding that construction of the fellowship hall would significantly increase the occupancy load of the site. We agree.

"Rezoning is a legislative matter. The legislative body's decision in zoning matters is presumptively valid, and the property owner has the burden of proving to the contrary." *Harbit v. City of Charleston*, 382 S.C. 383, 390, 675 S.E.2d 776, 779–80 (Ct. App. 2009), *as amended* (May 4, 2009) (citation omitted).

> [T]here is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and when the planning commission and the city council of a municipality have acted after reviewing all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or in clear abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority.

Id. at 391, 675 S.E.2d at 780. Accordingly, this court may not reverse a municipality's zoning decision if the decision is "fairly debatable." *See Knowles v. City of Aiken*, 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991) ("[W]e must leave the City's decision undisturbed if the propriety of that decision is even 'fairly debatable.'").

In 2006, the County Council enacted the Ordinances, which restricted land use in accident potential zones (APZs) and certain "noise zones" in areas surrounding MCAS-Beaufort.

> The AO District shall overlay other zoning classifications that shall be referred to as base zoning. The AO District includes all lands within an established footprint affected by airport operations at [MCAS-Beaufort]. The overlay includes all lands underlying the Noise Zones of 65 DNL (day-night average sound level) and above, and [APZ]s as designated in the most recent Air Installations Compatible Use Zones (AICUZ) Report for MCAS-Beaufort as authorized for use by the Department of the Navy, and as adopted by the [County Council].

Beaufort County, S.C., Code of Ordinances, Appendix A1 § 1 (2006).[5] The Ordinances require property owners within the district to be notified of their location within the district "to increase public awareness and to ensure the general safety and welfare of persons affected by adverse impacts common to military aircraft operations." Under the Ordinances, APZs are divided into three categories: (1) "Clear Zone" areas at the end of the runway which possess a high potential for accidents; (2) "APZ-1" areas that possess a "significant potential" for accidents; and (3) "APZ-2" areas that possess a "measurable potential for accidents." *Id.*

In 2007, when the Church applied for the new development permit, the Ordinances allowed "non-conforming places of assembly and worship [to] expand[ ] by up to

[5] The Ordinances have been recodified in the Beaufort County Community Development Code.

15% in accordance with Table 106-9 provided that the expansion does not increase the occupant load of the building." Beaufort County, S.C., Code of Ordinances, Appendix A1 § 7(A)(6) (2006).[6]

We find the master erred in reversing the Planning Commission's denial of the Church's permit application because the evidence in the record clearly supports the Planning Commission's finding that the fellowship hall would increase the occupant load for the site. *See Arkay, LLC*, 418 S.C. at 91–92, 791 S.E.2d at 308 ("This court will not reverse a zoning board's decision unless the board's findings of fact have no evidentiary support or the board commits an error of law."). At the Planning Commission's hearing on remand, Fire Marshal Tim Ogden explained, "[T]he occupant load is defined in the fire code as the maximum number of people allowed in a building." Ogden testified the current occupant load for the Church's site was 329 for the sanctuary. The occupant load for the Church's fellowship hall could range from 533 to 1,600, depending on a variety of factors, including the number of exits and use of the building, but a final occupant load could not be determined until completion of the building.

The only evidence presented to the Planning Commission that the fellowship hall would *not* increase the occupant load was the Church's assertion that the fellowship hall and the sanctuary would not be used at the same time. However, the Fire Marshal clarified that fire codes view occupant load for a sanctuary as separate from that for a fellowship hall where these are two separate buildings. Regardless of whether the fellowship hall would present only a fifteen percent increase of disturbed area at the site, its construction would at least double the occupant load. Therefore, we reverse the master-in-equity and reinstate the Planning Commission's denial of the Church's permit application. *See id*. at 91, 791 S.E.2d at 308 ("The appellate court gives 'great deference to the decisions of those charged with interpreting and applying local zoning ordinances.'").

II. Variance Request

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[6] County Council amended the Ordinances in 2008, to allow places of assembly and worship to expand by up to 15 percent of the *existing floor area* provided the expansion did not increase the occupant load of the building and so long as the expansions were minor "to accommodate bathrooms, storage space, kitchens, and office space."

In reversing the Zoning Board's decision to deny the variance, the master emphasized that "[l]ike the Planning Commission, [the Board] is assuming that the Fellowship Hall and the existing building would be occupied simultaneously (as opposed to alternatively), which is an assumption that has no evidentiary support." The master found that because the fellowship hall would not increase the occupant load, the Zoning Board's findings were unsupported by the evidence. As noted above, this was error because abundant evidence supported the Zoning Board's occupancy load concern.

"When deciding whether to grant a variance, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary." *Rest. Row Assocs.*, 335 S.C. at 214, 516 S.E.2d at 445. "Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions." *Id.* at 215, 516 S.E.2d at 445–46. The variant applicant bears the burden of proving its entitlement to a variance. *Id.* at 216, 516 S.E.2d at 446. A board's denial of a request for a variance is correct if the variant applicant fails to meet all requirements of a county's variance ordinance. *Id.*

At the time of the Church's request for a variance, the County Code of Ordinances allowed the Board to grant a variance "under limited circumstances, [for] a building or structure that does not comply with this chapter's standard when strict enforcement would represent a unique, undue, and unnecessary hardship." Beaufort County, S.C., Code of Ordinances, Section 106-521 (2006). To grant such a hardship variance, the Zoning Board considered whether:

> (1) There are extraordinary and exceptional conditions pertaining to the particular piece of property. Extraordinary conditions could exist due to topography, street widening, beachfront setback lines or other conditions which make it difficult or impossible to make reasonable use of the property.
>
> (2) These conditions do not generally apply to other property in the vicinity.

(3) Because of these conditions, the application of this chapter to the particular piece of property would effectively prohibit or unreasonably restrict utilization of the property.

(4) The authorization of a variance would not adversely affect adjacent property or the public good. Also, the character of the district would not be harmed by the granting of the variance.

(5) The hardship of which the applicant complains must:

a. Relate to the applicant's land, and not to the applicant's personal circumstances;

b. Be unique, or nearly so, and not one common to many surrounding properties;

c. Not be the result of the applicant's own actions; and

d. Be one suffered by the applicant and not the adjoining landowners or the general public.

Beaufort County, S.C., Code of Ordinances, Section 106-522(a) (2006). In addition, it was necessary that the Zoning Board find the variance:

(1) Is the minimum necessary to relieve the unnecessary hardship and permit a reasonable use of the land;

(2) Will not be injurious to the neighborhood surrounding the land where the variance is proposed and is otherwise not detrimental to the public welfare;

(3) Is in harmony with this chapter's purposes and intent; and

(4) Is consistent with the comprehensive plan.

Beaufort County, S.C., Code of Ordinances, Section 106-522(b) (2006).

In its appeal to the Zoning Board, the Church contended the "extraordinary and exceptional conditions" entitling it to a variance were that it obtained the 1997 development permit, which it believed covered the fellowship hall, prior to the enactment of the Ordinances. The Church further argued it was entitled to a variance because it believed the occupant load would not increase. Because such circumstances generally did not apply to other property in the area, the Church claimed it satisfied the hardship conditions. The Church asserted it would be unreasonable to restrict the use of the property to only the sanctuary because the fellowship hall was "a reasonable adjunct use" and the expansion would not harm the public good because "its mission . . . by definition is to promote the public good." Finally, the Church noted the County could use the fellowship hall in conjunction with the County's emergency preparedness plan.

In denying the Church's request for a variance, the Zoning Board found the Church's request did not meet the criteria of Section 106-522 because:

a. There were no extraordinary and exceptional conditions pertaining to this particular piece of property.

b. The authorization of the variance would adversely affect the adjacent properties or the public good. Also, the character of the district would be harmed by granting the variance.

c. [The requested variance] was not in harmony with the chapter's purposes and intent; and

d. [The requested variance] was not consistent with the comprehensive plan.

We find there is evidence in the record to support the Zoning Board's findings. In codifying the zoning restrictions for the AO District, County Council specified the purpose of the District, recognizing the public safety concerns in areas surrounding MCAS-Beaufort. Further, County Council required that property owners within the District to be notified "to increase public awareness and to ensure the general safety and welfare of persons affected by adverse impacts common to military aircraft operations." Beaufort County, S.C., Code of Ordinances, Appendix A1 § 1 (2006). Because of the risks inherent to the AO District, the Ordinances restrict property uses and building expansions therein to limit the potential number of people at risk should an accident occur. Beaufort County, S.C., Code of Ordinances, Appendix A1 § 5 (2006). According to the chairman of the board of trustees for the Church, the Church was classified as an APZ-2 area, meaning it possessed a "measurable potential for accidents."

Constrained by our standard of review, we cannot disregard the evidence supporting the Zoning Board's finding that allowing the Church to more than double its potential occupant load would "adversely affect . . . the public good" and be inharmonious with the purposes and intent of the County's legislation addressing the Airport Overlay District. Accordingly, we find the master-in-equity erred in reversing the Zoning Board's denial of the Church's variance request.

Conclusion

Based on the foregoing, we reverse the orders of the master-in-equity and reinstate the decisions of the Beaufort County Planning Commission and Zoning Board.

REVERSED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

April Gilbert Klein, Appellant,

v.

Mark Anthony Barrett, Respondent.

Appellate Case No. 2016-001491

Appeal From Greenville County
Tarita A. Dunbar, Family Court Judge

Opinion No. 5647
Heard February 5, 2019 – Filed May 8, 2019

AFFIRMED

Gwendolynn Wamble Barrett, of Barrett Mackenzie, LLC, of Greenville, for Appellant.

Jonathan P. Whitehead, of The Law Offices of Jonathan P. Whitehead, LLC, of Mauldin, for Respondent.

MCDONALD, J.: In this appeal from the family court, April Gilbert Klein (Wife) argues the family court erred in (1) setting joint custody, (2) ordering Wife to pay a portion of Mark Anthony Barrett's (Husband's) attorney's fees and costs, (3) ordering Wife to pay two-thirds of the guardian ad litem's fees and costs, and (4) ordering Wife to pay child support. We affirm.

Facts and Procedural History

Husband and Wife married in Greenville County on September 18, 1997, and subsequently had three children. On May 26, 2010, the family court issued a final order and decree of divorce (Original Order). At the time of the divorce, one child was deceased; the other two children (Daughter and Son) were ten years old and six years old. Prior to the final hearing, Husband and Wife entered into a settlement agreement (the Agreement), which the family court adopted and incorporated into the Original Order.

Pursuant to the settlement agreement, Husband had primary custody of the children while Wife received visitation in alternating weeks of Thursday night through Sunday evening, with a four-hour visit with the children in the off weeks. Additionally, the Agreement required Wife to pay Husband child support in accordance with the South Carolina Child Support Guidelines. At the time the parties entered the Agreement, Wife planned to attend school to become a certified registered nurse anesthetist (CRNA). The Agreement addressed this, providing, "Wife's child support obligation should be recalculated if Wife's income is reduced while attending school" but should be "re-adjusted upon her completing school and based upon her income at that time." The Agreement also included a clause stating, "Both parties shall have the right of first refusal to babysit the children." Because Wife was enrolled as a full-time student at the time of the divorce, the family court ordered that Wife "shall not pay child support so long as she is in school and without income." The court further found Wife's child support obligation "shall be recalculated once [] Wife either finishes school or ceases to attend."

On March 18, 2014, Wife filed an action for modification of custody, seeking sole custody of the children, with Husband to have scheduled visitation. In the alternative, Wife sought joint custody—with equal placement between parents—and for Wife to have final decision-making authority regarding all medical and educational decisions. Wife additionally filed a motion for temporary relief. Husband filed a reply in which he sought the dismissal of Wife's motion for temporary relief, retroactive child support, and attorney's fees.

After a hearing, the family court issued a May 2, 2014 temporary order (First Temporary Order) providing the parties would maintain the status quo and abide

by the terms and conditions of the Original Order. The First Temporary Order appointed a guardian ad litem (the Guardian) upon consent of the parties and authorized the Guardian "to request a second temporary hearing without prior approval of the Court."

On June 23, 2014, the Guardian filed a motion for a second temporary hearing, requesting that the family court address the temporary issues raised by the parties; the court held a second temporary hearing on August 15, 2014, and subsequently issued an order (Second Temporary Order) on September 26, 2014. Under the Second Temporary Order, Husband and Wife were to exercise temporary joint custody of the children, with Husband having primary physical placement and Wife having expanded visitation. The family court further determined neither party would receive child support at that time.

After the parties were unable to resolve the case at mediation, the family court appointed Dr. Luther A. Diehl, a clinical psychologist, to conduct a comprehensive custody evaluation. Following a five-and-a-half-day hearing, the family court issued an order on February 12, 2016.[1] Both Husband and Wife filed motions to reconsider, alter, or amend the judgment, and Husband additionally filed a motion to conform the pleadings to the evidence. On July 5, 2016, the family court issued an amended final order (Amended Final Order), vacating the February order. In the Amended Final Order, the court awarded Husband and Wife joint custody of the children, awarded Husband $15,000 in attorney's fees, allocated the Guardian's fees between the parties, and ordered Wife to pay Husband child support.[2]

Wife filed a notice of appeal with this court; however we returned jurisdiction to the family court to clarify its child support calculation. The family court issued a second amended order on February 2, 2018, clarifying its child support calculation.

Standard of Review

[1] At the time of the hearing, Daughter was sixteen years old and Son was eleven years old.

[2] Wife had not paid any child support prior to the Amended Final Order.

On appeal from the family court, the appellate court reviews factual and legal issues de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). Thus, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 392, 709 S.E.2d 650, 651, 655 (2011). However, this broad scope of review does not require the appellate court to disregard the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Id.* at 385, 392, 709 S.E.2d at 651–62, 655. Therefore, the appellant bears the burden of convincing the appellate court that the family court committed error or that the preponderance of the evidence is against the family court's findings. *Id.* at 392, 709 S.E.2d at 655.

Law and Analysis

I. Joint Custody

Wife argues the family court erred in setting the parameters of the joint custody arrangement and its findings are not supported by a preponderance of the evidence. Specifically, Wife asserts the court erred in giving Husband primary physical custody of the children because the schedule creates more stress and conflict among the parties whilst simultaneously placing an unfair physical and financial burden on Wife. Wife therefore contends the current joint custody arrangement is not in the best interest of the children. Wife further argues the family court gave Daughter's testimony too much weight and failed to properly consider the recommendations of Dr. Diehl. Wife maintains equal physical placement, as set forth in her parenting plan, is in the children's best interest. We disagree.

"In a child custody case, the welfare of the child and what is in the child's best interest is the primary, paramount, and controlling consideration of the court." *McComb v. Conard*, 394 S.C. 416, 422, 715 S.E.2d 662, 665 (Ct. App. 2011). "In order for a court to grant a change in custody, there must be a showing of changed circumstances occurring subsequent to the entry of the divorce decree." *Latimer v. Farmer*, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004).

> Because the best interest of the child is the overriding concern in all child custody matters, when a non-custodial parent seeks a change in custody, the

> non-custodial parent must establish the following: (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the overall best interests of the child.

Id. "While numerous prior decisions set forth criteria that are helpful in such a determination, there exist no hard and fast rules and the totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." *Clark v. Clark*, 423 S.C. 596, 605, 815 S.E.2d 772, 777 (Ct. App. 2018) (quoting *Davenport v. Davenport*, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975)). However, "[i]n determining the best interests of the child, the court must consider the child's reasonable preference for custody." S.C. Code Ann. § 63-15-30 (Supp. 2018). "The court shall place weight upon the preference based upon the child's age, experience, maturity, judgment, and ability to express a preference." *Id.* Additionally, the court may consider numerous factors, including "the temperament and developmental needs of the child[ren] . . . [and] the capacity and disposition of the parents to understand and meet the needs of the child[ren]." S.C. Code Ann. § 63-15-240(B) (Supp. 2018).

According to our de novo review of the record, the underlying conflict arose when Husband sent wife an email in November 2013, asking Wife to start paying child support pursuant to the Original Order, which provided Wife's support obligation would commence upon her completion of the CRNA program.[3] In response, Wife informed Husband that she intended to seek joint custody of the children, and a breakdown in the functionality of the arrangement between the parties followed.[4]

Prior to this action, Husband had primary custody of the children, and Wife had generous visitation. In her motion seeking a custody modification, Wife alleged her completion of her CRNA degree studies and subsequent employment constituted a substantial change in circumstances warranting an award of joint

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[3] Both Husband and Wife had remarried at this point.

[4] It is undisputed that the parties had a functional and communicative relationship prior to Husband's request that Wife begin her support payments as required by the Original Order.

custody. During the pendency of this case, the family court issued the Second Temporary Order, granting temporary joint custody of the children. Under this order, Husband had primary physical placement of the children, and Wife had expanded visitation consisting of every other weekend from Thursday to Sunday and every afternoon after school until 6:00 p.m.[5] Although the order required the parties to consult each other regarding decisions relating to the children, Husband retained final decision-making authority in the event the parties could not agree. This custody arrangement remained in effect from September 2014 until the family court issued its February 2016 final order.

Both parties submitted proposed parenting plans to the court. Husband's plan proposed either the arrangement from the Original Order or the arrangement from the Second Temporary Order. Wife's plan proposed either joint custody with her having primary placement and partial decision-making authority or joint custody with equal physical placement, alternating on a week-to-week basis, and divided decision-making authority.

At the hearing, Husband and Wife's testimony largely focused on the problems in their relationship. Specifically, conflicts between the parties arose when scheduling visitation and appointments and making decisions regarding the children's schooling and extracurricular activities. In his custody evaluation report,[6] Dr. Diehl noted Husband and Wife's personalities contributed to their communication issues; he explained Wife's psychological evaluation demonstrated she was more actively controlling in nature, whereas Husband displayed a more passive nature with tendencies to be reactively controlling. However, Dr. Diehl found both parents possessed "adequate psychological resources to function in the role of custodial parent." He believed both Husband and Wife possessed "good individual strengths as parent figures" and seemed to be "very devoted and

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[5] Under the Second Temporary Order, the children were to eat all weeknight dinners at Husband's home.

[6] In preparing his evaluation, Dr. Diehl conducted interviews and psychological evaluations of Husband, Wife, Daughter, and Son. He additionally interviewed the children's step-parents, Husband and Wife's co-parenting counselor, Daughter's therapist, and the Guardian.

concerned about the wellbeing of their children." Dr. Diehl further noted, "In considering their relative strengths and weaknesses, it seems that a balance attempting to utilize these strengths would be most desirable." He recommended adhering to a joint custody arrangement in which the children would alternate between households on a weekly basis. Regarding the children, Dr. Diehl noted "the children each enjoy the attention and interaction with both parents."

Similarly, in her report, the Guardian noted both Husband and Wife "demonstrated the capacity to meet the needs of the children." She reported the children were "bright, engaging, respectful, and well-mannered" and both children appeared to have friends and enjoy school. The Guardian stated Daughter had "a responsible, mature nature [,] which seems well beyond that of some of her peers." She noted Daughter was very aware of the tension between her parents, and this caused Daughter anxiety. Suzie Simon, Daughter's therapist,[7] testified Daughter started therapy because she was struggling with anxiety that often manifested in physical symptoms, sometimes causing her to leave class. According to Simon, the litigation of the instant case was "a very large contributing factor" to Daughter's anxiety. Simon opined, "The cause of the anxiety would be a combination of the family stressors, with her age[, the] internal pressure that she puts on herself[,] and trying to please two people who view the world very differently." When asked if Daughter ever discussed the custody arrangement between her parents, Simon responded,

> She's expressed to me that she likes the current arrangement where she's at [Husband's] house every night and she's at [Wife's] in the afternoon and then the every other weekend. She likes that she gets to see everybody in a given week. She likes that she doesn't have to pack.

Simon stated Daughter additionally expressed concern over a week-to-week arrangement because she and Son would go longer periods of time without seeing

[7] The family court qualified Simon as an expert in child therapy.

their other siblings.[8] Simon opined Daughter and Son would likely adapt better to smaller changes in the custody arrangement.

Dr. Diehl's evaluation of Daughter was consistent with Simon's testimony. He noted Daughter had a positive relationship with both parents. According to Dr. Diehl, Daughter expressed concern regarding a potential week-to-week custody arrangement for the same reasons previously mentioned by Simon. However, Dr. Diehl noted Daughter expressed wanting to spend a little more time with Wife. According to Dr. Diehl, Daughter suggested staying at Wife's house after school until 7:00 pm., rather than 6:00 p.m., to allow for more quality time and dinner.

In his evaluation of Son, Dr. Diehl noted Son had "Autism spectrum disorder requiring mild support." Son expressed positive feelings regarding his relationship with both parents and seemed pleased with the current custody arrangement; however, Dr. Diehl noted Son indicated he felt rushed when leaving Wife's house and would like some additional time there in the afternoons after school.

In considering a modification to the current custody arrangement, Dr. Diehl, Simon, and the Guardian all recommended a balanced schedule with clearly delineated visitation and decision-making authority to reduce unnecessary communication between the parties.

After taking testimony at the hearing and receiving detailed reports from the Guardian and Dr. Diehl, the family court found the instant case presented exceptional circumstances warranting an award of joint custody. Although it found Wife's alleged change in circumstances unpersuasive, the court explained the extensive breakdown of communication between Husband and Wife warranted a custody modification. Ultimately, the court held Husband would maintain primary physical placement of the children but Wife would receive expanded visitation; pursuant to the new schedule, the children would spend extensive time with both parents each week. The court terminated the right of first refusal provision, finding the parties' various interpretations of this clause caused a majority of the conflict.

[8] Husband has two step-children with his wife, and Wife has one child with her husband.

As for Wife's expanded visitation, the court provided Wife would receive alternating weekend visitation, starting Thursday after school and continuing until the start of school on Monday. In weeks for which Wife had weekend visitation (visitation weeks), Wife would additionally have after school visitation Monday through Wednesday until 7:00 p.m. During visitation weeks, the children would eat dinner with Wife. Conversely, during non-visitation weeks, Wife would have after school visitation Monday through Thursday until 6:00 p.m., and the children would eat dinner with Husband. In explaining its allocation of physical custody, the family court stated it considered all relevant factors of section 63-15-240(B) and found the modification served the children's best interests. The court stated,

> Both parents demonstrate the ability to provide for the developmental needs of the children and the capacity to understand and meet the needs of the children. By not changing the placement of the children to a week-to-week arrangement, and, instead, adding an additional overnight to [Wife's] visitation schedule, the Court finds that it has protected the preferences of each child.

Regarding legal custody, the court awarded equal decision-making authority by allocating different subjects to each parent. In considering the recommendations of the Guardian and Dr. Diehl, as well as the children's preferences, the court found such an arrangement was the best way to relieve conflict between the parties while serving the best interests of the children.

We find the joint custody arrangement fashioned by the family court serves the best interests of the children. *See McComb*, 394 S.C. at 422, 715 S.E.2d at 665 ("In a child custody case, the welfare of the child and what is in the child's best interest is the primary, paramount, and controlling consideration of the court."). Although our appellate courts have characterized joint custody as a unique and disfavored arrangement, the instant case presents exceptional circumstances[9] in

[9] The General Assembly imposed no "exceptional circumstances" requirement in 1996, when it codified joint custody as an option for family courts to consider in a child custody determination. *See* S.C. Code Ann. § 20-7-420(42) (Supp. 1996). In 1969, our supreme court deemed joint custody disfavored in *Mixson v. Mixson*, 253

which both parents have positive relationships with the children and either party could serve as the custodial parent. Therefore, we find the custody modification was warranted to balance the time spent between the parents and the children and to alleviate the brewing conflict arising from the previous arrangement delineated in the Original Order.

In considering the physical placement arrangement challenged by Wife, we commend the family court's efforts to serve the needs of all parties involved. We find the court properly weighed the preferences of the children and the recommendations of the experts and guardian ad litem. *See* § 63-15-30 ("In determining the best interests of the child, the court must consider the child's reasonable preference for custody."); *id.* ("The court shall place weight upon the preference based upon the child's age, experience, maturity, judgment, and ability to express a preference."); § 63-15-240(B) (providing the family court may consider numerous factors, including "the temperament and developmental needs of the child[ren] . . . [and] the capacity and disposition of the parents to understand and meet the needs of the child[ren]"). The court appropriately incorporated this input into the new custody framework. Specifically, the court addressed the children's desire to spend more time at Wife's home during the week by extending the visitation until 7:00 p.m. on certain evenings so as to increase quality time and allow for family meals with both parents. Additionally, the court expanded the duration of Wife's weekend visitation.

Moreover, we find the court's allocation of legal custody coupled with the adjusted physical placement schedule and the elimination of the "first refusal" clause will help to lessen conflict between the parties while also fostering a positive co-parenting relationship. Although Wife desired equal placement in alternating weeks, the record supports the conclusion that a week-to-week arrangement would

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S.C. 436, 446, 171 S.E.2d 581, 586 (1969). Later, Justice Waller's opinion in *Scott v. Scott*, while acknowledging the language of the Legislature's amendment, held the amendment "did not change the law in this State that, generally, joint custody is disfavored." 354 S.C. 118, 124–25, 579 S.E.2d 620, 623–24 (2003) (citing *Mixson*, 253 S.C. at 446, 171 S.E.2d at 586). Still, the *Scott* court's focus appropriately remained on the best interest of the child, and it affirmed the joint custody determination. *Id.* at 127, 579 S.E.2d at 624-25.

not be in the best interest of the children as the children are long accustomed to seeing both parents and their other siblings on a daily basis. Therefore, we affirm the family court's joint custody determination.

II. Attorney's Fees and Costs

Wife argues the family court erred in awarding Husband $15,000 in attorney's fees, asserting the parties should pay their own attorney's fees.[10] We disagree.

"In determining whether an attorney's fees should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fees on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992) (citation omitted). "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." *Srivastava v. Srivastava*, 411 S.C. 481, 489, 769 S.E.2d 442, 447 (Ct. App. 2015) (quoting *Rogers v. Rogers*, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001)).

Considering the applicable factors, we find the evidence in the record supports the family court's award of attorney's fees. Here, both Husband and Wife submitted fee affidavits reflecting fee totals of $28,330.61 and $29,189.52, respectively. At the hearing, Wife testified that since her divorce from Husband, she has completed school and is working as a CRNA. She submitted a financial declaration indicating she earns a gross monthly income of $9,510.80. Husband testified he works as a general contractor and owns two businesses; his submitted financial

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[10] Wife additionally argues the family court erred in ordering her to pay for the entire cost of the transcript in its February 12, 2016 order and failing to correct the error in its Amended Final Order. In his respondent's brief, Husband admits this was an error by the family court, which the court acknowledged via email dated February 16, 2016. Husband argues, and we agree, that the issue is moot because both parties have paid the court reporter as originally agreed upon. *See Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The court does not concern itself with moot or speculative questions.").

declaration reflected a gross monthly income of $5,181. We find the disparity of incomes between the parties weighs heavily in Husband's favor. In its Amended Final Order, the family court noted Wife "earns $51,969.60 more per year" than Husband. The court further noted Husband's attorney's fees amounted to approximately forty-four percent of his gross annual income whereas Wife's accrued fees were equivalent to around twenty-five percent of her gross income. Thus, Wife is in a superior position to bear the cost of the fees.
Furthermore, we find Husband obtained beneficial results, as Husband maintained primary physical placement of the children and Wife was ordered to commence child support payments. Finally, the family court properly considered the remaining *Glasscock* factors in fashioning the fee award. *See Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (in determining the amount of reasonable attorney's fees, the family court should consider "(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."). Accordingly, we affirm the family court's award of attorney's fees.

III. Allocation of the Guardian ad Litem's Fees and Costs

Wife argues the family court erred in ordering her to pay two-thirds of the Guardian's fees, asserting the parties should equally divide the fees.[11] Specifically, Wife contends the family court improperly penalized her for contacting the Guardian more often than Husband did. We disagree.

"A guardian appointed by the court is entitled to reasonable compensation, subject to the review and approval of the court." S.C. Code Ann. § 63-3-850(B) (2010). The Guardian filed a fee affidavit seeking $18,553 for her services. In its Amended Final Order, the family court found the Guardian was entitled to exceed her initial fee cap pursuant to section 63-3-850(A). *See* S.C. Code Ann. § 63-3-850(A) (2010) ("If the guardian ad litem determines that it is necessary to exceed the fee initially authorized by the judge, the guardian must provide notice to both parties and obtain the judge's written authorization or the consent of both parties to charge more than the initially authorized fee."). The court further found

[11] Wife has challenged only the family court's allocation of the Guardian's fees, not the fee amount.

the Guardian's fee was reasonable in light of the factors enumerated in section 63-3-850(B). *See* § 63-3-850(B) (In determining the reasonableness of the guardian's fees and costs, "the court must take into account: (1) the complexity of the issues before the court; (2) the contentiousness of the litigation; (3) the time expended by the guardian; (4) the expenses reasonably incurred by the guardian; (5) the financial ability of each party to pay fees and costs; and (6) any other factors the court considers necessary.").

In its allocation of the Guardian fees, the family court found both parties had the ability to pay the fees; however, it determined Wife should bear the majority of the fees and costs because (1) Wife's income was greater than Husband's, (2) Husband was the prevailing party, and (3) "a significant portion of the GAL fee was incurred solely as a result of [Wife's] continuously submitted documents and correspondence and other communication to the GAL over the course of this litigation."

Initially, we note the family court improperly weighed Husband's status as the prevailing party in its allocation of the Guardian's fee award. *See Loe v. Mother, Father, & Berkeley Cty. Dep't of Soc. Servs.*, 382 S.C. 457, 473, 675 S.E.2d 807, 816 (Ct. App. 2009) ("In reviewing the reasonableness of [the guardian's] fees, the family court erred in applying the factors indicated in *Glasscock* . . . rather than the factors mandated by the statute."). However, we find a preponderance of the evidence supports the family court's allocation of these fees because as previously discussed, *supra* issue II, Wife is in a superior financial position to bear the burden of fees and costs arising from the litigation of this matter. *See Stoney*, 422 S.C. at 596, 813 S.E.2d at 487 (providing that on appeal from the family court, the appellate court reviews factual and legal issues de novo). Pursuant to our de novo review of the record, we affirm the family court's allocation of the Guardian's fees and costs.

IV. Child Support

Wife argues the family court erred in ordering her to pay child support, asserting neither party should pay such support. Wife further asserts the Amended Final

Order contained typographical or clerical errors in its calculation of child support, making the requisite amount of ordered child support indiscernible.[12] We disagree.

To the extent Wife argues the family court's child support calculation contained typographical or clerical errors, we find this issue is moot as the family court corrected and clarified its calculation by order dated February 2, 2018. *See Sloan*, 380 S.C. at 535, 670 S.E.2d at 667 ("An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists."). In its February 2018 order, the family court explained it "considered whether to use Worksheet A and deviate from the guidelines or use Worksheet C." Using Worksheet C, the court found Wife should pay $747 per month in child support. In making this determination, the family court stated it weighed the parties' income, ability to pay, education, expenses, and assets. The court further noted that although there was a dispute about the exact amount of overnights Wife received, it found the child support calculation was in the best interest of the children and Wife had the ability to pay the ordered amount.

Regarding Wife's contention that neither party should pay child support, we find the family court's award of child support to Husband is supported by the record. The Legislature has required that

> In any proceeding for the award of child support, there is a rebuttable presumption that the amount of the award which would result from the application of the guidelines . . . is the correct amount of child support to be awarded. A different amount may be awarded upon a showing that application of the guidelines in a particular case would be unjust or inappropriate.

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[12] Regarding Wife's challenge of the portion of the family court's order requiring her to pay all of Daughter's orthodontic expenses, we find the court's judgment was appropriate because Wife told Husband via email that she would pay for Daughter's uncovered orthodontic expenses. To the extent Wife challenges the provision of the family court's order allowing for yearly reconciliation of uninsured medical expenses, we find Wife has failed to sufficiently present this argument on appeal.

S.C. Code Ann. § 63-17-470(A) (2010). Section 63-17-470(C) lists the following factors the family court may consider in determining whether to deviate from the guidelines and in considering "whether a change in circumstances has occurred which would require a modification of an existing order": (1) educational expenses; (2) equitable distribution; (3) consumer debts; (4) families with more than six children; (5) unreimbursed extraordinary medical or dental expenses; (6) mandatory deduction of retirement pensions; (7) support obligations for other dependents; (8) child-related unreimbursed extraordinary medical expenses; (9) monthly fixed payments by a court; (10) income of a child; (11) substantial disparity in income making it impracticable for the noncustodial parent to pay per the guidelines; (12) alimony; and (13) certain agreements reached between the parties. S.C. Code Ann. § 63-17-470(C) (2010). "Deviation from the guidelines should be the exception rather than the rule." S.C. Code Ann. Regs. 114-4710 (Supp. 2018).

We find Wife's assertion that neither party should pay child support unpersuasive. It is undisputed that Wife has not paid child support at any time since the entry of the divorce decree in 2010, even though, per the Agreement and the Original Order, she was to begin her support payments upon completion of her CRNA program and subsequent employment.

Husband has maintained primary physical custody of the children since the time of divorce, and although Wife has received expanded visitation, we find child support is warranted. The family court denied Husband's request for retroactive child support; we agree with this finding. But, as previously discussed, *supra* issue II, Wife is in a superior financial position. Therefore, we hold Wife has failed to meet her burden of establishing the family court's adherence to the child support guidelines was inappropriate or unjust, and we agree with the family court that the circumstances surrounding the instant case did not warrant a deviation.

Conclusion

Based on the foregoing, the orders of the family court are

AFFIRMED.

LOCKEMY, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant/Respondent,

v.

Edward Lee Dean, Respondent/Appellant.

Appellate Case No. 2016-001004

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

Opinion No. 5648
Heard February 5, 2019 – Filed May 8, 2019

APPEAL DISMISSED

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Appellant/Respondent.

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Respondent/Appellant.

LOCKEMY, C.J.: The State appeals the trial court's order granting a new trial in Edward Lee Dean's conviction of first degree burglary, grand larceny, and malicious injury to real property. We dismiss the State's appeal.

I. FACTS AND PROCEDURAL BACKGROUND

John Lester Hart, Jr. arrived at his Greenwood County home on August 13, 2012 to find the back door to his home and a storage room door had been forcibly opened. A door to a car in the yard had also been forced open. Hart immediately called the Greenwood County Police Department (the Department). When Hart went inside his home, "everything was ransacked." The gun cabinet in one of the bedrooms had been pried open and the weapons were missing. A second gun cabinet in the storage room had "the door ripped open" and several, but not all, of the firearms were missing. In total, fifteen firearms, jewelry, a gold coin collection, and money were missing from Hart's home. The value of the missing items exceeded $10,000.

Officer Travis Cox was the first responder from the Department. Officer Cox observed that the front door, the storage room door, and a gun cabinet had been forcibly opened, and that the house was in "disarray." Hart gave Officer Cox serial numbers for several guns that were missing. Officer Cox entered the serial numbers into NCIC, the national database for firearms and warrants. Additionally, officers photographed a wet shoeprint on the pavement and a second shoeprint on the front door. The shoeprints have never been matched to any shoes. Officers took a crowbar and a hammer with a wooden handle from the storage room to be processed for latent prints. No prints were ever recovered from either the crowbar or hammer. Hart later sent Investigator Dale Boyer a list of all the missing firearms in addition to the list of serial numbers he initially provided Officer Cox.

Edward Lee Dean lived in Unit A in a duplex on Taggart Street in Greenwood County. On August 27, 2012, the Department's dispatch received an anonymous call about items located underneath a home on Taggart Street. The call came from Christi Lopez, Dean's cousin. Captain Chip Davenport responded to the call and went to the Taggart Street address. The only person present was Mamie Quarles in Unit B of the duplex. Captain Davenport spoke with Mamie, who told him her daughter, Kaleeka Quarles, leased the apartment, but was not home. Captain Davenport then spoke to Kaleeka on the phone and received consent to search under the entire duplex. Dean was not home when Captain Davenport searched the duplex. Captain Davenport received consent to search inside Unit A of the duplex from Dean's mother, Annie Dean.

Officers found a .308 rifle and a second rifle, along with office equipment under the duplex. Captain Davenport ran the available serial number through NCIC and the .308 rifle matched a serial number Hart provided. The second rifle found under the duplex matched the description of Hart's missing bolt action rifle, but no serial number was listed. No fingerprints were ever recovered from either of the rifles

found underneath the duplex. Inside the duplex, officers found ammunition that matched the description of ammunition missing from Hart's home.

Adrian Gaston, Antwine Anderson, and two juveniles were arrested on August 31, 2012 for a separate burglary in Greenwood County. On September 5, 2012, Gaston implicated himself, along with Dean and Anderson in the burglary at Hart's home. Gaston testified Anderson drove Gaston and Dean to Hart's home. When they arrived, Anderson backed into the driveway and either Dean or Anderson kicked in the door while Gaston stayed outside as the look out. Gaston testified Dean "stripped the lock off [the storage room door] with his hand." Gaston, Dean, and Anderson all went into the storage room and took guns. They also took guns from a storage building on Hart's property. Gaston stated they took approximately nine or ten guns from Hart's home. After they loaded the guns in Anderson's car, they returned to Anderson's house to divide the guns between the three of them. They took Dean back to his home and watched Dean put the guns under his house on Taggart Street. Based on Gaston's statements to Greenwood County police, Dean was served with arrest warrants for the burglary at Hart's home on September 12, 2012.

A. Dean's Trial

Dean filed a pre-trial motion for continuance, judicial supervision, and a scheduling order, as well as a motion to dismiss or, in the alternative, motion to compel disclosure of *Brady*[1] information on December 11, 2013.

During the pretrial hearing on December 11, 2013, the State informed the court it was calling two of the three co-defendents' cases, Dean and Anderson, to trial and that Gaston was testifying against both. The trial court asked the State whether it had made any arrangements or deals with Gaston. The State responded that it had made no offers to Gaston. Dean's counsel responded that he had a "hard time believing that Mr. Gaston is testifying in order to give information to help the State seek a prison sentence of life without the possibility of parole. . . . And [he] can't believe that [Gaston's counsel] would allow [Gaston] to do that unless they had some sort of assurances that they were going to get some benefit from the State." The court asked the State a second time whether any deals had been made with

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) (finding suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution).

Gaston and the State assured the court that no deal had been made. The court then stated:

> I'm hearing that there's no deals, there's no testimony, there's no assurances, there's [been] no bargaining, there's been no promises made and if that is in fact the case and Mr. Gaston wants to plead straight up to burglary first degree, that's perfectly fine. If however that burglary first degree suddenly becomes petty [sic] larceny, that does seem somewhat peculiar.

The trial court denied Dean's motion to delay sentencing because Dean had not been convicted at the time of the pre-trial discussion. However, the court suggested delaying any sentencing of Dean and holding his new trial motion in abeyance pending Gaston's sentencing. The court also ordered that the State "shall be under a continuing duty to disclose any promises, agreements, deals, or arrangements made with any of the State's witnesses."

Dean's trial was initially called on January 14, 2014. The court continued the trial due to the threat of inclement weather, but reiterated that the State had a continuing duty to disclose any promises or deals made with Gaston. Dean's trial was called a second time on March 14-15, 2014 before Judge Addy. Gaston described Dean's involvement in the burglary. Gaston testified on cross-examination that he was not testifying "in order to get out of that trouble," but because he was "[j]ust being honest."[2] Gaston stated he was not expecting any benefit in exchange for his testimony. Dean's counsel asked Gaston whether he "plan[ned] to enter plea negotiations with the prosecutors" and Gaston responded "No, sir."

Dean was convicted by the jury of first-degree burglary, grand larceny, and malicious injury to property. Dean moved to defer sentencing in accordance with the court's suggestion from the pre-trial hearing in order to wait until Gaston was sentenced. The court stated it was "inclined to request that [it] hear [Gaston's] case as well, just so that everybody can be fed out of the same spoon and treated fairly."

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[2] Gaston was charged with two first-degree burglaries and thirteen non-burglary offenses that occurred between August 13, 2012 and May 21, 2013. In total, Gaston was facing the possibility of two life sentences, as well as 93 years, 300 days' imprisonment on the other charges.

The court denied Dean's motion to defer sentencing, but took jurisdiction over Gaston's case and requested a pre-sentence investigation for Dean.

Judge Addy sentenced Dean to twenty-five years' imprisonment on June 9, 2014.

B. Gaston's Plea Hearing and Sentencing

Dean was convicted in Greenwood County in the Eighth Judicial Circuit. Gaston's plea hearing and sentencing took place on May 14, 2015 in Saluda County in the Eleventh Judicial Circuit before Judge Thomas Russo. During Gaston's sentencing hearing, the court asked him:

> . . . Other than the reduction of [two indictments for attempted burglary and seven indictments for burglary] and the dismissal of [one charge from Saluda County], other than that, has anybody promised you anything, held out any hope of reward or threatened you in any way to get you to enter these pleas?
>
> Mr. Gaston: No, Sir.

Assistant Solicitor Sheek from Greenwood County then informed the court that the State was dismissing all thirteen indictments against Gaston for his cooperation in testifying against Dean and Anderson. Gaston's counsel stated:

> And that's the way these things are done, Judge . . . . He cooperated with the Solicitor's office . . . . Judge, we would implore you to consider . . . the fact that he's been so helpful and instrumental in securing these other convictions . . . .

Assistant Solicitor Young from Saluda County told the court that Saluda County had "absolutely no deal of any kind should he go forward with trial" with Gaston. Assistant Solicitor Sheek followed and told the court, "[l]ikewise, Judge, the understanding with [Gaston's counsel] was we would certainly convey to the [c]ourt if he cooperated in the trials but other than that there were no deals made beforehand."

Gaston was sentenced to seven years' imprisonment, suspended upon the service of 128 days, five years' probation with the special condition that probation could end after two years if restitution was paid, with credit for 128 days served.

C. Dean's New Trial Hearing

On June 18, 2014, Dean filed a motion for a new trial based on after-discovered evidence. Because that motion was not ripe, Dean filed a second motion for a new trial on June 9, 2015 following Gaston's plea hearing and sentencing. Dean filed a supplement to his motion for a new trial on April 7, 2016.

Solicitor Stumbo stated in an email to Assistant Solicitor Odom, Dean's counsel (Charles Grose), Judge Addy, and Judge Russo prior to the hearing on Dean's motion for a new trial that Assistant Solicitor Odom stated on the record to the trial court that Gaston was told his cooperation would be considered and taken into account when his charges were dealt with at a later date. Solicitor Stumbo also stated that Gaston was never extended a plea offer on any of his pending charges until a few weeks before his plea hearing and sentencing in Saluda.

Judge Addy presided over the hearing for Dean's motion for a new trial on April 13, 2016. Solicitor Stumbo stated at the hearing that even though Assistant Solicitor Sheek told Judge Russo that Gaston testified against Dean, the Solicitor's office did not recommend or negotiate probation as a sentence. The court noted its concern about not hearing Gaston's plea and sentencing by stating:

> The [c]ourt would retain jurisdiction over Gaston and Anderson. And this [c]ourt did not place that in the file. Honestly, Solicitor, the thing that the [c]ourt is struggling with more than anything else is, and I've said this before in front of everyone assembled here, I always try to be the man of my word. I promised that I would assume jurisdiction of the other two cases. . . . But, again, what this [c]ourt is struggling with more than anything else is the integrity of the [c]ourt, not so much your integrity, Solicitor. . . . But the [c]ourt is more concerned about the promises that I made to Mr. Dean, to retain jurisdiction over the other co-defendants. And it just – it doesn't look right. For a lack of a more artful explanation, it doesn't look right that the [c]ourt has assured the defense that the [c]ourt would handle those other pleas so that the [c]ourt

> would be in a position to assess whether any kind of deal or 'approached in chambers' kind of situation arose.

Additionally, the court stated that while Dean and Grose "clearly feel that there was some deal. There was some back room deal. I don't see where it's necessary at all to reach that point or to address that. On re-trial, that kind of thing, can be addressed through Gaston or Anderson."

In a May 4, 2016 order, the trial court granted Dean's motion for a new trial based on "reasons explained at the April 13, 2016 hearing."

II. STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "The State may only appeal a new trial order if, in granting it, the trial judge committed an error of law." *State v. Smith*, 383 S.C. 159, 165, 679 S.E.2d 176, 180 (2009) (quoting *State v. Johnson*, 376 S.C. 8, 10, 654 S.E.2d 835, 836 (2007) (citing *State v. Des Champs*, 126 S.C. 416, 120 S.E.2d 491 (1923)) (quotations omitted). "A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion." *Johnson*, 376 S.C. at 11, 654 S.E.2d at 836 (citing *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983)).

III. LAW/ANALYSIS

The State argues the trial court abused its discretion by granting Dean a new trial. The State asserts Dean's rights were not violated because the trial court declined to find a discovery violation. We disagree.

A. Preservation

Dean argues the State's appeal should be dismissed because the State's argument is not preserved. "Our appellate courts have consistently found issues preserved for review when the issue was raised to and ruled upon by the trial court." *State v. Cain*, 419 S.C. 24, 33-34, 795 S.E.2d 846, 851 (2017). *See, e.g., State v. Williams*, 417 S.C. 209, 228 n.10, 789 S.E.2d 582, 592 n.10 (Ct. App. 2016) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003))). "While a party may not argue one ground at trial and another ground on appeal, *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989), we do

not require a party to use the same language on appeal as it did at trial, *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011)." *Id.* at 33-34, 795 S.E.2d at 851. "A party may not argue one ground at trial and an alternate ground on appeal." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694.

Dean argues the State failed to object to or allege that the trial court granted a new trial based only on concerns about a broken promise to Dean and not because a discovery violation occurred. Dean filed his amended motion for a new trial after Gaston's sentencing and argued that a new trial was appropriate based on after-discovered evidence. In the State's response to Dean's motion for a new trial, the State argued "there has been absolutely no plea deal or offer."

The trial court granted Dean's motion for a new trial for "the reasons discussed at the April 13, 2016 hearing." During the hearing, Solicitor Stumbo repeatedly stated there were no improper promises, negotiations, or deals made with Gaston in exchange for his testimony against Dean. Similarly, on appeal, the State argues the trial court did not find a discovery violation at the hearing, but granted Dean's motion based on the trial court's desire to fulfill its promise to retain jurisdiction. Thus, the State argued before the trial court and on appeal that no discovery violation occurred. Therefore, whether the trial court erred as a matter of law by granting Dean's motion for a new trial is preserved for appellate review.

B. Appealability

As a threshold issue, this court must determine whether the State may appeal the trial court's grant of a new trial. *Smith*, 383 at 165, 679 S.E.2d at 180. "When determining whether an error of law exists, and therefore whether the State has the right to appeal, it is necessary to consider the merits of the case." *Id.* at 166, 679 S.E.2d at 180 (quoting *Johnson*, 376 S.C. at 11, 654 S.E.2d at 836).

"A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence. . . ." Rule 29(b), SCRCP.

> It is well-settled that the granting of a new trial based upon after discovered evidence is addressed to the sound discretion of the trial court once the movant has made the requisite showing that the new evidence: (1) would likely change the result if a new trial were granted; (2) was

> discovered since trial; (3) could not have been discovered prior to trial by the exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.

State v. Caskey, 273 S.C. 325, 329, 256 S.E.2d 737, 738-39 (1979); *see, e.g., State v. Fowler*, 264 S.C. 149, 213 S.E.2d 447 (1975). "It is also true that the rule is well settled that a motion for a new trial on the ground of after-discovered evidence is addressed to the sound discretion of the trial court and will not be reviewed unless there is abuse of that discretion or that the decision was influenced by an error of law." *State v. Clamp*, 225 S.C. 89, 96, 80 S.E.2d 918, 921 (1954).

"Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 70 S.Ct. 1173, 1177 (1959)). "We do not, however, automatically require a new trial whenever 'combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." *Id.* (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2nd Cir. 1968)).

"[I]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with witnesses against him." U.S. Const. amend. VI. "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.E.2d 347 (1974)). "The fact that a cooperating witness avoided a mandatory minimum sentence is critical information that a defendant must be allowed to present to the jury." *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012).

Dean argues Gaston's sentence is after-discovered evidence material to Dean's guilt or punishment. Gaston was the only witness against Dean and primarily connected him to the burglary. While one of the rifles found under the duplex matched the serial number Hart provided, no other forensic evidence was recovered in the investigation. Gaston's testimony was essential for the State to charge Dean with first-degree burglary, grand larceny, and malicious injury to property and to *nolle prosequi* the receiving stolen goods charge. Without Gaston's testimony linking

Dean to the burglary, the State would likely have been able to charge Dean merely with receiving stolen goods under section 16-13-180 of the South Carolina Code (2015).

On direct examination, Gaston testified he had not been promised anything in return for his testimony. On cross-examination, Dean's counsel raised Gaston's pending charges and the potential sentences he was facing. Dean's counsel attempted to question Gaston about whom he was relying upon to gain his freedom, but this line of questioning was ended by the court for being argumentative. Gaston's cross-examination left the jury with the impression he was not testifying for any personal benefit, he would not negotiate with the Solicitor's office, and he was not motivated by receiving reduced charges or a lenient sentence.

Our supreme court has considered whether testimony regarding prosecutorial immunity or leniency in exchange for testimony amounted to after-discovered evidence in *State v. Caskey*. In *Caskey*, the "asserted after-discovered evidence was a conversation between the solicitor and a [co-defendant] whereby the [co-defendant] was promised immunity or leniency in return for his testimony against [the defendants]." *Id.* at 329-30, 256 S.E.2d at 739. Because the conversation was "practically identical to statements by the solicitor at a pre-trial conference . . . that his office was not pursuing the [co-defendant's] charge," the statements did not meet the requisite factors needed to grant a new trial. *Id*. Additionally, the statements were merely impeaching and not material to the defendant's guilt or innocence. *Id.* Therefore, the supreme court found that the lower court committed a manifest abuse of discretion amounting to an error of law in granting the motion for a new trial. *Id.* at 330, 739.

The facts in this case are distinguishable from *Caskey*. The State assured the trial court many times that no deals, negotiations, or agreements had been offered to Gaston in exchange for his testimony. However, at Gaston's plea hearing, Assistant Solicitor Sheek stated that the "understanding" with Gaston was that the Solicitor's office would convey his cooperation to the court if he cooperated in the trials and *other than* this agreement to convey cooperation, no other deals existed. These statements differ from the State's statements throughout the pre-trial hearing, trial, and new trial hearing that absolutely no deal, negotiations, assurances, or promises had been made to Gaston, including any agreement from the State that it would communicate Gaston's cooperation to the court.

Additionally, Gaston was the only witness linking Dean to the burglary. The Department's evidence custodian, Wesley Love, testified that no prints were found on the hammer or crowbar taken from the scene. Officer Cox, the first police responder, testified the two shoeprints observed on the pavement outside the home and on the door were never matched to any shoes. Apart from Gaston's testimony, no other evidence linked Dean to the burglary. Thus, Gaston's testimony was material to determining Dean's guilt or innocence. *See Giglio*, 405 U.S. at 154-55 ("Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the cases, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it."). Because Gaston's testimony was material to determining Dean's guilt or innocence, Dean has a constitutional right to cross-examine Gaston about his motive and bias and whether he had any deal with the State regarding his cooperation. Therefore, Dean has shown that the after-discovered evidence would likely change the result if a new trial were granted, is material to the issue of guilt or innocence, and is not merely cumulative or impeaching.

Beginning with pre-trial motions, Dean requested the State disclose any plea, negotiation, or deal with Gaston. The trial court ordered and reiterated throughout trial that the State was under a continuing duty to disclose any plea deals or negotiations.

The evidence of Gaston's sentence and whether he received a reduction in charges and any leniency in sentencing in exchange for his cooperation was discovered after Dean's trial and sentencing. Additionally, Dean's counsel consistently requested pre-trial and during the trial that the State disclose any agreements, negotiations, promises, or deals it had with Gaston. Therefore, Dean has shown that the evidence was discovered since trial and it could not have been discovered prior to the trial by the exercise of due diligence.

The decision to grant a new trial is soundly within the trial court's discretion and this court "is confined by an extremely limited 'abuse of discretion' standard of review." *Smith*, 383 S.C. at 167, 679 S.E.2d at 181. Based on our review of the record, there is evidence to support the trial court's decision. Gaston was the key witness in the State's case. Dean was unable to cross-examine Gaston about the details of any understanding with the State that his cooperation would be communicated to the court. Thus, no evidence was presented to the jury about Gaston's motive or bias for testifying against Dean.

Further, the trial court was primarily concerned with upholding the integrity of the court. Gaston faced one indictment in Saluda County and nine indictments in Greenwood County. Even though the trial court at Dean's trial retained jurisdiction to hear Gaston's case in Greenwood County, the State brought all of Gaston's charges in Saluda County. Although Judge Addy stated he did not doubt the integrity of the Eighth Judicial Circuit Solicitor's Office, both Judge Addy and Judge Russo expressed great concern for the appearance of "judge shopping" in this case. We share this concern. Protecting the integrity of our judicial system is fundamental to administering justice. In addition to recognizing "the necessity to uphold the integrity of our judicial system," *Id.* at 168, 679 S.E.2d at 181, we likewise emphasize the need for respect of the constitutional principles raised in the handling of these matters. The trial court committed no error of law in granting a new trial.

CONCLUSION

Based on the foregoing, the State's appeal is

DISMISSED.[3]

SHORT and MCDONALD, JJ., concur.

[3] In light of our disposition of the case, it is not necessary to address Respondent's issues on cross appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).