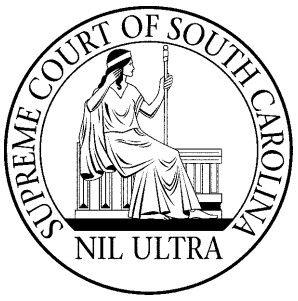

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40
October 14, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dr. Thomasena Adams, Rhonda Polin, Shaun Thacker, Orangeburg County School District, Sherry East, and the South Carolina Education Association, Petitioners,

v.

Governor Henry McMaster, Palmetto Promise Institute, South Carolina Office of the Treasurer, and South Carolina Department of Administration, Respondents.

Appellate Case No. 2020-001069

ORIGINAL JURISDICTION

Opinion No. 28000
Heard September 18, 2020 – Filed October 7, 2020

DECLARATORY JUDGMENT ISSUED

Skyler Bradley Hutto, of Williams & Williams, of Orangeburg, and W. Allen Nickles, III, of Nickles Law Firm, LLC, of Columbia, for Petitioners.

Thomas Ashley Limehouse, Jr. and Anita (Mardi) S. Fair, both of the Office of the South Carolina State Governor; Robert E. Tyson, J. Michael Montgomery, and Vordman Carlisle Traywick, III, all of Robinson Gray Stepp & Laffitte, LLC; and Michael J. Anzelmo, of

McGuireWoods LLP, all of Columbia, for Respondent Governor Henry D. McMaster.

Matthew Todd Carroll and Kevin A. Hall, both of Womble Bond Dickinson LLP, of Columbia, and Daniel R. Suhr and Brian K. Kelsey, both of Liberty Justice Center, of Chicago, IL, for Respondent Palmetto Promise Institute.

Shelly Bezanson Kelly and Shawn David Eubanks, both of the South Carolina Treasurer's Office, of Columbia, for Respondent South Carolina Office of the State Treasurer.

David Keith Avant, General Counsel, and Mason A. Summers, Deputy General Counsel, both of the South Carolina Department of Administration, and Eugene Hamilton Matthews, of Richardson Plowden & Robinson, PA, all of Columbia, for Respondent South Carolina Department of Administration.

Timothy J. Newton, of Murphy & Grantland, P.A., of Columbia, for Amicus Curiae Association of Christian Schools International.

Gray Thomas Culbreath, of Gallivan, White & Boyd, P.A., of Columbia, and Leslie Davis Hiner, of EdChoice, Inc., of Indianapolis, IN, for Amicus Curiae EdChoice, Inc.

Joshua W. Dixon, of Gordon Rees Scully Munsukhani, of Charleston, and Paul Sherman, of Institute for Justice, of Arlington, VA, for Amicus Curiae Institute for Justice.

Miles Landon Terry and Michelle K. Terry, both of Greenville, and Jay Alan Sekulow, Benjamin P. Sisney, and Jordan Sekulow, of Washington DC, all of The American Center for Law & Justice, for Amicus Curiae Members of South Carolina's U.S. Congressional Delegation and the American Center for Law and Justice.

David T. Duff, of Duff Freeman Lyon LLC, of Columbia, and Francisco M. Negron, Jr., Chief Legal Officer, of National School Boards Association, of Alexandria, VA, for Amicus Curiae National School Boards Association.

Reginald Wayne Belcher and Mark Brandon Goddard, both of Turner Padget Graham & Laney, P.A., of Columbia, for Amicus Curiae Palmetto State Teachers Association.

Lindsay Danielle Jacobs, of Public Education Partners Greenville County, of Greenville, and Robert Edward Lominack, of Richland County Public Education Partners, of Columbia, for Amici Curiae Public Education Partners Greenville County and Richland County Public Education Partners.

Matthew Anderson Nickles, of Richardson, Patrick, Westbrook, & Brickman, LLC, of Columbia, for Amici Curiae Public Funds Public Schools and Southern Education Foundation.

John Marshall Reagle, Vernie L. Williams, and Connie Pertrice Jackson, all of Halligan Mahoney Williams Smith Fawley & Reagle, P.A., of Columbia, for Amici Curiae South Carolina School Boards Association and South Carolina Association of School Administrators.

Eliot Bradford Peace, of Tampa, FL, and Lindsey C. Boney, IV, of Birmingham, AL, both of Bradley Arant Boult Cummings LLP, for Amici Curiae The Foundation for Excellence in Education, Inc., and The Alliance for School Choice.

CHIEF JUSTICE BEATTY: We granted the petition for original jurisdiction in this declaratory judgment action challenging the constitutionality of Governor Henry McMaster's allocation of $32 million in federal emergency

education funding for the creation of the Safe Access to Flexible Education ("SAFE") Grants Program. Petitioners contend the program, which provides one-time tuition grants for students to attend private and independent primary and secondary schools for the 2020-2021 academic year, violates our constitutional mandate prohibiting public funding of private schools. We hold the Governor's decision constitutes the use of public funds for the direct benefit of private educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution.

I. FACTS

On March 13, 2020, the President declared a national emergency based on a determination that the coronavirus ("COVID-19") poses an actual or imminent public health emergency, and Governor McMaster ("the Governor") subsequently issued a State of Emergency in South Carolina. On March 27, 2020, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) ("the CARES Act"). In the Act, Congress appropriated $30.75 billion to the Education Stabilization Fund to prevent, prepare for, and respond to COVID-19. Specifically, Congress ordered the Secretary of Education to allocate the money to three sub-funds: (1) the Governor's Emergency Education Relief ("GEER") Fund; (2) the Elementary and Secondary School Emergency Relief ("ESSER") Fund; and (3) the Higher Education Emergency Relief ("HEER") Fund. *See* CARES Act § 18001(b). This matter concerns the award of GEER funds to the State of South Carolina to be distributed at the direction of the Governor. Under the Act, Congress provided that GEER funds may be used to:

> (1) provide emergency support through grants to local educational agencies that the State educational agency deems have been most significantly impacted by coronavirus to support the ability of such local educational agencies to continue to provide educational services to their students and to support the on-going functionality of the local educational agency;
>
> (2) provide emergency support through grants to institutions of higher education serving students within the State that the Governor determines have been most significantly impacted by coronavirus to support the ability of such institutions to continue to provide educational services and support the on-going functionality of the institution; and

> (3) provide support to any other institution of higher education, local educational agency, or education related entity within the State that the Governor deems essential for carrying out emergency educational services to students for authorized activities described in section 18003(d)(1) of this title or the Higher Education Act, the provision of child care and early childhood education, social and emotional support, and the protection of education-related jobs.

Id. § 18002(c). Under this section, the eligible grant recipients include local educational agencies, institutions of higher learning, and other education related entities. *Id*. The grants are awarded to each State based on the relative population of individuals aged 5 through 24 and the relative number of children counted under section 1124(c) of the Elementary and Secondary Education Act of 1965. *Id*. § 18002(b). States receiving GEER Fund grants must award the funds to eligible entities within one year of receiving the allocation. *Id*. § 18002(d). Any funds not awarded within the one-year period must be returned to the Department of Education for reallocation to other states. *Id*.

On May 8, 2020, the Governor applied for a GEER Fund grant, which the Department of Education approved and awarded $48,467,924 to South Carolina. On July 20, 2020, the Governor announced the creation of the Safe Access to Flexible Education ("SAFE") Grants Program to be funded using $32,000,000 of the GEER funds awarded under the CARES Act. The program would provide one-time, need-based grants of up to $6,500 per student to cover the cost of tuition for eligible students to attend participating private or independent schools in South Carolina for the 2020-2021 academic year. Families with a household adjusted gross income of up to 300% of the federal poverty level would be eligible to apply through the program's online portal. The first 2,500 grants are to be awarded on a first-come, first-served basis, after which a lottery program will be instituted to allocate the balance of available grant funds.

Private schools wishing to participate in the SAFE Grants Program must satisfy certain criteria, including providing a certification that they have been impacted by COVID-19, and the Governor's advisory panel will select the independent schools eligible to receive grants. Once a student has selected the private school he or she would like to attend from a preapproved list, and the student's enrollment is confirmed, the parent or guardian directs electronic payment of the SAFE Grant funds to the school through a secure online platform. Approved schools enroll as a vendor within the online platform to receive SAFE Grant

payments. In the event a student withdraws from the school during the school year, the school must issue a pro-rated refund to the SAFE Grants Program for any unexpended or pre-paid tuition.

Prior to the creation of the SAFE Grants Program, the Governor signed Act 135 of 2020 into law, which provided for supplemental appropriations for the State's fiscal year to combat COVID-19 and for the operation of state government during the public health crisis. Act No. 135, 2020 S.C. Acts ___. Act 135 required the Executive Budget Office to "establish the Coronavirus Relief Fund as a federal fund account separate and distinct from all other accounts" and authorized the Governor to receive federal money designated for the Fund on behalf of the State. *Id*. § 2(C)–(D).

Petitioners challenged the Governor's use of the State's GEER funds for the SAFE Grants Program, seeking a declaratory judgment and injunctive relief in the circuit court and naming the State of South Carolina, the Governor, and Palmetto Promise Institute ("Palmetto Promise") as defendants. The circuit court issued a temporary restraining order and scheduled a hearing. The Governor and Palmetto Promise filed motions to dissolve the temporary restraining order, and all three of the defendants moved to dismiss Petitioners' complaint. At the hearing, the court dismissed the State, finding a lack of subject matter jurisdiction. Subsequently, Petitioners advised the court of their intent to amend their initial complaint to refine the pleadings and include additional plaintiffs and expressed their desire to file a petition for original jurisdiction in this Court. The circuit court extended the original temporary restraining order for another ten days, struck the matter from the docket pursuant to Rule 40(j), SCRCP, and allowed Petitioners to restore the action to the circuit court docket under the amended complaint if this Court did not grant the petition. Thereafter, Petitioners filed a petition for original jurisdiction, requesting declaratory and injunctive relief, which this Court granted.[1] We also granted Petitioners' request to expedite the case and for a preliminary injunction, ordering Respondents to temporarily cease and desist in distributing any SAFE Grants Program funds in order to avoid prejudice and the potential for irreparable harm.

[1] The Governor and Palmetto Promise filed substantive briefs in this case. The South Carolina Office of the State Treasurer defers to the Governor's brief on the substantive issues. The South Carolina Department of Administration states it "has acted and will act in this matter pursuant only to the authority bestowed upon it by the legislature of this State and in accordance with any order(s) issued by this Court."

Following oral argument, we extended the injunction until the issuance of this opinion.

II. DISCUSSION

A. Standing

At the outset, the Governor moves to dismiss Petitioners' complaint because they lack standing to sue. "Standing to sue is a fundamental requirement to instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Generally, a party must be a real party in interest to obtain standing, meaning the party has "a real, material, or substantial interest in the outcome of the litigation." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (quoting *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006)). Standing may be achieved by statute, constitutional standing, or the public importance exception. *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). The Governor claims Petitioners have failed to identify a statute that gives them standing. He also argues Petitioners are unable to prove constitutional standing because they cannot demonstrate an injury-in-fact that is personal to them, since the GEER funds are to be used at the Governor's discretion, and public schools are not inherently entitled to them.

Petitioners claim standing under the public importance exception. "Unlike with constitutional standing, a party is not required to show he has suffered a concrete or particularized injury in order to obtain public importance standing." *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017). The party also need not show that he has "an interest greater than other potential plaintiffs." *Davis v. Richland Cty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007). Instead, standing under this exception "may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). "Whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented . . . ." *Id.* This Court has explained:

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On

> the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). Thus, "courts must take these competing policy concerns into consideration . . . ." *S.C. Pub. Interest Found.*, 421 S.C. at 118, 804 S.E.2d at 859. We have also acknowledged "[t]he key to the public importance analysis is whether a resolution is needed for future guidance." *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341; *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 79–80, 753 S.E.2d 846, 853 (2014) ("Whether [public importance standing] applies in a particular case turns on whether resolution of the dispute is needed for future guidance . . . . [T]he need for future guidance generally dictates when [public importance standing] applies . . . .").

Applying this test to the case at hand, we find Petitioners have established public importance standing. The COVID-19 pandemic that has plagued our State in recent months has posed unprecedented challenges in every area of life and severely disrupted essential governmental operations. Since the President's declaration of a national emergency, the Governor has issued a State of Emergency and several Executive Orders implementing "social distancing" practices to slow the spread of COVID-19. This Court has likewise directed that judicial proceedings be conducted using remote communication technology to minimize the risk to the public, litigants, lawyers, and court employees. The virus's impact on education in this State has been no less great. Indeed, it is for this reason that Congress endeavored to appropriate emergency funds through the CARES Act to protect our nation's students and teachers and to supply states with additional resources to continue providing educational services during this difficult time.

A resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is likely the situation will occur in the future if and when Congress approves additional education funding in response to the continued COVID-19 pandemic. *See S.C. Pub. Interest Found.*, 421 S.C. at 119, 804 S.E.2d at 859 (finding although a "close call," the balance of the policy concerns weighed in favor of conferring public importance standing where the matter involved the conduct of a government entity and the expenditure of public funds and there was evidence the entity would undertake the conduct at issue again); *Breeden v. S.C.*

Democratic Exec. Comm., 226 S.C. 204, 208, 84 S.E.2d 723, 725 (1954) (finding the question of who is the nominee of the Democratic party for public office "is not only of public interest, but one which should be promptly decided"). Accordingly, Petitioners have public importance standing to bring this claim.

B. Constitutionality under Article XI, Section 4

Petitioners allege the Governor's use of GEER funds for his SAFE Grants Program violates Article XI, Section 4 of the South Carolina Constitution because the program uses public funds for the direct benefit of private schools.[2] Specifically, this constitutional mandate provides, "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." S.C. Const. art. XI, § 4.

Petitioners contend the GEER funds constitute "public funds" within the meaning of the constitutional provision because section 11-13-45 of the South Carolina Code requires the money be deposited in the State Treasury. They further argue the funds are not passively flowing through the State but are being actively utilized by the State, through the Governor as its Chief Executive, for the purpose of funding his grants program. In contrast, the Governor relies on this Court's decision in *Durham v. McLeod*, 259 S.C. 409, 413, 192 S.E.2d 202, 204 (1972) to support his argument that the GEER funds are not "public funds." In *Durham*, we considered the constitutionality of the State Education Assistance Act, which authorized the State Education Assistance Authority to issue "loans to students to defray their expenses at any institution of higher learning." *Id*. at 412, 192 S.E.2d at 203. The funds received by the Authority were "trust funds to be held and applied solely toward carrying out the purposes of the Act." *Id*. The Act also specified the funds did "not constitute a debt of the State or any political subdivision." *Id*. Accordingly, we held the funds used to support the program were not "public funds" but instead a

[2] Petitioners also challenge the Governor's decision under Article XI, Section 3, which requires the government to provide public education to all children in this State. Because our constitutional determination under Article XI, Section 4 resolves this case, we need not address this issue. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

"student loan fund under the Act" that is "held by the Authority as a trust fund." *Id*. at 413, 192 S.E.2d at 204.

We find this case is distinguishable from *Durham*. Here, the GEER funds awarded to South Carolina are to be received from the federal government in the coffers of the State Treasury and distributed through the Treasury, at the behest of the Governor, as a representative of the State, to be used in accordance with the education funding provisions of the CARES Act. Significantly, the General Assembly has mandated that all federal funds be deposited into and withdrawn from the State Treasury. S.C. Code Ann. § 11-13-45 (2011) ("All federal funds received *must* be deposited in the State Treasury . . . and withdrawn from the State Treasury as needed, in the same manner as that provided for the disbursement of state funds.") (emphasis added). *See id*. § 11-13-30 ("To facilitate the management, investment, and disbursement of *public funds*, no board, commission, agency or officer within the state government, except the State Treasurer shall be authorized to . . . deposit funds from any source . . . .") (emphasis added). Given this clear directive, we must conclude that when the GEER funds are received in the State Treasury and distributed through it, the funds are converted into "public funds" within the meaning of Article XI, Section 4. *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) ("Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature."); 63C Am. Jur. 2d *Public Funds* § 1 (2018) (defining public funds "to include money belonging to, received or held by . . . a state or subdivision thereof"). *See Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 402, 401 S.E.2d 161, 164 (1991) (characterizing federal grant money as "public funds" under the South Carolina Freedom of Information Act); *see also Cain v. Horne*, 202 P.3d 1178, 1183 (Ariz. 2009) (noting the parties did not dispute the funds at issue constituted "public funds" within the meaning of the state constitution's no aid provision, where they "are withdrawn from the public treasury"); *Mallory v. Barrera*, 544 S.W.2d 556, 561 (Mo. 1976) (holding federal funds deposited in the state treasury were "public funds" within the meaning of the state constitution's no aid provision); *Gardner v. Bd. of Trs. of N.C. Local Gov't Emps.' Ret. Sys.*, 38 S.E.2d 314, 316 (N.C. 1946) ("Monies paid into the hands of the state treasurer by virtue of a state law become public funds for which the treasurer is responsible and may be disbursed only in accordance with legislative authority."); *Cooper v. Berger*, 837 S.E.2d 7, 17–

18 (N.C. Ct. App. 2019) (expanding *Gardner* to hold federal block grant funds constitute "public funds" in the state treasury). Moreover, the GEER funds given to the private schools for student tuition must be returned pro rata to the State Treasury if the student leaves the school before the school term ends. The funds then remain funds of the State to be used presumably however the General Assembly chooses. There is no evidence in the record indicating a separate fund was created for the receipt of GEER funds.

Petitioners further claim the Governor's allocation of the GEER funds to create one-time tuition grants for students to attend private schools violates our Constitution's prohibition on using public funds for the "direct benefit" of a "private educational institution." Specifically, they argue the money is transferred directly from the State Treasury to the private school the student chooses to attend. Petitioners also assert the payment of tuition undoubtedly provides a direct benefit to the private educational institution receiving the money.

In contrast, the Governor claims the SAFE Grants Program does not directly benefit the participating independent or private schools. Instead, the funds provide a direct benefit to the student recipient and his or her family, and the grants only indirectly benefit the private school. The Governor relies on the history of the amendment to the former Article XI, Section 9 following this Court's decision in *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971) to conclude that our Constitution now permits the use of public funds for the indirect benefit of private schools. In *Hartness*, we considered the constitutionality, under the former provision, of a legislative act providing tuition grants to students attending independent institutions of higher learning. *Id*. at 505, 179 S.E.2d at 908. The grants were not made directly to the school but were made to the student who was then required to pay it to the school he selected to attend. *Id*. at 507, 179 S.E.2d at 908. This Court held the use of public funds to provide these grants to students attending private religious institutions was prohibited under the former Article XI, Section 9. *Id*. at 508, 179 S.E.2d at 909.

The former provision stated:

> The property or credit of the State of South Carolina, or of any County, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, *directly or indirectly*, in aid or maintenance of any college, school,

> hospital, orphan house, or other institution, society, or organization, of whatever kind, which is wholly or in part under the direction or control of any church or religious or sectarian denomination, society or organization.

S.C. Const. art. XI, § 9 (1895) (emphasis added), *amended by* S.C. Const. art. XI, § 4 (1972). In 1966, the West Committee engaged in a three-year study of the South Carolina Constitution and recommended revisions in its 1969 Final Report. In suggesting the amendment and adoption of the current provision, the Committee provided the following comments in the Report:

> The Committee evaluated this section in conjunction with interpretations being given by the federal judiciary to the "establishment of religion" clause in the federal constitution. The Committee fully recognized the tremendous number of South Carolinians being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased. From the standpoint of the State and the independence of the private institutions, *the Committee feels that public funds should not be granted outrightly to such institutions*. Yet, the Committee sees that in the future there may be substantial reasons to aid the students in such institutions as well as in state colleges. Therefore, the Committee proposes a prohibition on direct grants only and the deletion of the word "indirectly" currently listed in Section 9. By removing the word "indirectly" the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs . . . .

West Committee, Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, 99–101 (1969) (emphasis added). We offer no opinion on the efficacy of the Committee's report; however, based on this history and our decision in *Hartness*, the Governor urges this Court to find the private schools here only indirectly benefit from the SAFE Grants Program, and it is the students and their families who are the primary beneficiaries of the funding. Under the facts of this case, we disagree. *See, e.g.*, *Cain*, 202 P.3d at 1184 (refusing to apply a "true beneficiary theory exception" to find the individuals benefit rather than the institution receiving the public funds because such a holding "would nullify the Aid Clause's clear prohibition against the use of public funds to aid private or sectarian education"); *see also Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 960, 962

(Cal. 1981) (rejecting the application of the "child benefit theory" and noting it could be used to justify any type of aid to sectarian schools because "practically every proper expenditure for school purposes aids the child"); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550, 556 (Neb. 1974) (reviewing similar constitutional provision and holding application of the theory "would lead to total circumvention of the principles of our [State] Constitution").

We reject the argument that the SAFE tuition grants do not confer a direct benefit on the participating private schools because unlike the grants in *Hartness*, which were made directly to the student, the SAFE Grants are directly transferred from the State Treasury to the selected school through use of a secure online portal. The direct payment of the funds to the private schools is contrary to the framers' intention not to grant public funds "outrightly" to such institutions. Nevertheless, the Governor argues the student's act of choosing which school to attend and her parent or guardian's direction of the electronic payment attenuate the connection of the funds to the private school so as to transform it into merely an incidental, indirect benefit. This argument is unavailing. *See Cain*, 202 P.3d at 1184 ("[T]he voucher programs do precisely what the Aid Clause prohibits. These programs transfer state funds directly from the state treasury to private schools. That the checks or warrants first pass through the hands of parents is immaterial."). In fact, the CARES Act prohibits direct payment of the funds to individuals and instead permits the grants to be awarded only to entities. *See* CARES Act § 18002(c) (allowing the GEER funds to be used to provide support to local educational agencies, institutions of higher learning, and education related entities).

In addition, the facts of this case are distinguishable from our decision in *Durham*. There, we emphasized the "scrupulously neutral" nature of the student loan program, which left "all eligible institutions free to compete for [the student's] attendance," and the aid was not made "to any institution or group of institutions" in particular. *Durham*, 259 S.C. at 413, 192 S.E.2d at 203–04. Here, the SAFE Grants are made available for use only at private educational institutions selected by the Governor's advisory panel. The program does not provide students with the independent choice we found to be acceptable in *Durham*. *See Sheldon Jackson College v. State*, 599 P.2d 127, 131 (Alaska 1979) (holding a state tuition grant program violated the state constitution where the only incentive it created was to enroll in a private school). Accordingly, we hold the Governor's SAFE Grants Program uses public funds for the direct benefit of private educational institutions in violation of Article XI, Section 4 of our Constitution.

Notwithstanding our holding, the Governor claims the CARES Act grants him absolute discretion in using the GEER funds such that the federal law preempts this state constitutional provision under the Supremacy Clause. U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) ("The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution . . . .").

This Court has recognized that "[f]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement in the language of the legislation of Congress' intent to alter the usual constitutional balance of state and federal powers." *Edwards v. State*, 383 S.C. 82, 92, 678 S.E.2d 412, 417 (2009) (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991))). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. "Consideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the States [are] not superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Accordingly, "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Priester*, 401 S.C. at 43, 736 S.E.2d at 252 (quoting *Cipollone*, 505 U.S. at 516)). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Id*. (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990)).

We find there is no clear congressional intent in the education provisions of the CARES Act to allow the Governor to allocate the GEER funds in his discretion in contravention of our State Constitution. If that were the case, Congress certainly understood how to make such intention clear, as evidenced by its inclusion of a preemption clause in the provisions of the Act regarding support for health care workers. *See* CARES Act § 3215(c)(1) ("This section preempts the laws of a State or political subdivision of a State to the extent that such laws are inconsistent with this section, unless such laws provide greater protection from liability."). We

therefore reject the Governor's assertion that the discretion provided him in the CARES Act preempts our constitutional mandate prohibiting the use of public funds for the direct benefit of private educational institutions.

III. CONCLUSION

Without question, the effects of the COVID-19 pandemic have been unfathomable. While not an inclusive list, COVID-19 has taken precious lives, taxed our health care system, impacted our economy, and caused us to alter our court operations. Our system of education has not been spared as we have witnessed teachers valiantly work to adapt to different methods of educating South Carolina's children.

This crisis has created unprecedented challenges for the leaders in our state government. The Governor has faced issues that have never been presented to any other administration. We recognize and fully appreciate the difficulty of making decisions that impact our entire state during this public health emergency.

However, having accepted this matter in our original jurisdiction, we must fulfill our duty to review the Governor's decision to expend GEER Fund grant monies on the SAFE Grants Program. Even in the midst of a pandemic, our State Constitution remains a constant, and the current circumstances cannot dictate our decision. Rather, no matter the circumstances, the Court has a responsibility to uphold the Constitution.

Based on the foregoing, we hold the Governor's allocation of $32 million in GEER funds to support the SAFE Grants Program constitutes the use of public funds for the direct benefit of private educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution. We further find the issuance of an injunction unnecessary, as we are assured Governor McMaster, as a duly elected constitutional officer of this State, will adhere to this Court's decision. As the Governor's lawyer stated during oral argument, the Governor is a "strong proponent of the rule of law." Equally, we respect the Executive Branch, and our decision should in no way be construed as diminishing that respect. The preliminary injunction currently in effect is hereby dissolved.

DECLARATORY JUDGMENT ISSUED.

KITTREDGE, HEARN, FEW, JJ., and Acting Justice John D. Geathers, concur.

The Supreme Court of South Carolina

In the Matter of John Brandon Walker, Petitioner

Appellate Case No. 2020-001324

ORDER

By opinion dated April 8, 2020, Petitioner was suspended from the practice of law for four months, retroactive to March 5, 2020. *In re Walker*, 429 S.C. 631, 841 S.E.2d 627 (2020). He has now filed an affidavit requesting reinstatement pursuant to Rule 32 of the Rules for Lawyer Disciplinary Enforcement, contained in Rule 413 of the South Carolina Appellate Court Rules.

The request is granted, and Petitioner is hereby reinstated to the practice of law in this state.

FOR THE COURT

s/ Jason Bobertz
DEPUTY CLERK

Columbia, South Carolina
October 12, 2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

In the Matter of the Care and Treatment of Micah A. Bilton, Appellant.

Appellate Case No. 2017-001464

Appeal From Horry County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5775
Heard June 16, 2020 – Filed October 14, 2020

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

HEWITT, J.: The State called one witness during Micah Allen Bilton's trial for civil commitment as an alleged sexually violent predator. That witness—a forensic psychologist—was permitted to testify as an expert regarding a controversial test performed on Bilton she neither administered nor observed. She also shared the test results with the jury.

The witness had not reviewed the raw data the test produced. She also did not know whether the full testing protocol used on Bilton had been peer-reviewed.

The expert explained she had confidence in the lab that had performed the test and she saw no basis for questioning its results. She used these test results as part of the basis, but not the sole basis, of her opinion that Bilton was a sexually violent predator.

Bilton lodged several objections to this evidence, but we deal only with his argument that the testifying psychologist served as a "conduit" that improperly allowed the jury to consider the out-of-court test, which was inadmissible hearsay, with no baseline demonstration that the test was reliable. We agree. Thus, we reverse Bilton's adjudication as a sexually violent predator and remand for a new trial.

FACTS

Bilton molested his four-year-old stepsister when he was fifteen and his six-year-old niece when he was seventeen. The first incident resulted in a guilty plea to assault and battery of a high and aggravated nature. The second resulted in a guilty plea to criminal solicitation of a minor.

The State subsequently brought this action seeking Bilton's civil commitment under the Sexually Violent Predator Act. That act is codified at sections 44-48-10 through 44-48-170 of the South Carolina Code (2018). The trial on this civil charge occurred in June 2017. Bilton was twenty-two.

At the start of trial, Bilton moved in limine to prohibit Dr. Amy Swan—the court-appointed evaluator and the State's sole expert—from testifying about a penile plethysmograph or "PPG" test that a third party performed on Bilton at Dr. Swan's request. After a proffer of Dr. Swan's testimony, the circuit court ruled there was a sufficient foundation for her testimony's admission.

When she testified to the jury, Dr. Swan explained that although this PPG documented Bilton's greatest level of sexual arousal was to adult women in a consensual encounter, the test also showed Bilton demonstrated "deviant arousal," the most significant of which was to teen females in a coercive or rape scenario. Dr. Swan also said the test revealed Bilton was aroused in varying scenarios by preschool females, preschool males, grammar school females, and teenage males. Dr. Swan said sexual interest in children, as measured by the PPG, is "the one factor that carries the highest risk for committing another sexual crime."

ISSUE

Whether the trial court erred in allowing Dr. Swan to testify regarding the PPG test results.

STANDARD OF REVIEW

The standard of review for evidentiary rulings is very deferential. "The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 848 (2006)). "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. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

ANALYSIS

We begin by briefly discussing the statutory law and the test in question before addressing the parties' arguments. The Sexually Violent Predator Act provides that once a court determines there is probable cause, the court must appoint a qualified expert to evaluate whether a particular person is a sexually violent predator. *See* S.C. Code Ann. § 44-48-80(D) (2018). Here, that evaluator—Dr. Swan—ordered Bilton to undergo a PPG test as part of her evaluation. Another person—either Dr. William Burke or someone working at his facility—performed the PPG.

The PPG measures changes in blood flow to the male sex organ while the test subject views a series of visual and auditory stimulants corresponding to different ages, genders, and scenarios. Certain levels of increased blood flow are associated with arousal.

The test is controversial and has been criticized for a lack of standardization and for being subject to manipulation. *See United States v. Rhodes*, 552 F.3d 624, 626–27 (7th Cir. 2009); *United States v. Weber*, 451 F.3d 552, 565 (9th Cir. 2006). It has also been criticized as Orwellian when, as here, the State compels the subject to arouse himself sexually and then forces him to view deviant stimulants so the State can get a sense of the person's pre-dispositions and, potentially, use those pre-dispositions against him. *Weber*, 451 F.3d at 571–72 (Noonan, J., concurring).

Courts have noted that PPGs are routinely used as a tool in treatment programs. *Weber*, 451 F.3d at 562–63 (citing *Berthiaume v. Caron*, 142 F.3d 12, 16 (1st Cir. 1998)). Even so, with limited exceptions we will discuss later, courts have "uniformly" declared that PPG test results are "inadmissible as evidence because there are no accepted standards for this test in the scientific community." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000).

Bilton frames his challenge as based on due process. He relies chiefly on the fact that Dr. Swan testified regarding the PPG results even though she did not administer the PPG, observe the test's administration, or review the raw data the test generated. Bilton also relies on Dr. Swan's testimony that she did not know whether the set of stimulants Dr. Burke used in Bilton's PPG had been peer-reviewed. Bilton correctly notes that our decision in *State v. McCray* prohibits one expert from serving as a "conduit" for a non-testifying expert's testimony. 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015). He says that is what Dr. Swan did here.

The State contends it was appropriate for Dr. Swan to rely on Dr. Burke's work because, as an expert, Dr. Swan is permitted to rely on facts or data that are not themselves admissible in evidence as long as the facts or data are of the type reasonably relied on by experts in the field. *See* Rule 703, SCRE. The State relies chiefly on the fact that the Fifth Edition of the Diagnostic and Statistical Manual (DSM-V)—a publication recognized as authoritative—mentions the PPG as the most thoroughly researched method for providing a physiological indication of someone's sexual attractions and as the method that has been most extensively used to do so. The State also notes Dr. Swan's testimony that she was familiar with Dr. Burke's work, that Dr. Burke uses the same stimulus sets in every PPG test, and that Dr. Burke did not include any notations regarding quality control problems in the report from Bilton's test.

If this was a criminal case, the error would not be debatable. Our decision in *McCray* would be directly on point, as would the U.S. Supreme Court's decisions in *Melendez-Diaz v. Massachusetts*[1] and *Bullcoming v. New Mexico*.[2] These cases prohibit a testifying expert from acting as a "conduit" or "surrogate" for someone else's scientific analysis. Yet, those cases turned on the Sixth Amendment and its Confrontation Clause. We did not find any authority applying the Confrontation

[1] 557 U.S. 305 (2009).
[2] 564 U.S. 647 (2011).

Clause to civil commitment proceedings. Indeed, we found cases holding the Sixth Amendment does not apply to these proceedings. *See State v. Floyd Y.*, 2 N.E.3d 204, 209 (N.Y. 2013); *In re MH-2008-000867*, 236 P.3d 405, 407 (Ariz. 2010).

Authorities recognize, however, that the Due Process Clause of the Fifth Amendment applies. *See Allen v. Illinois*, 478 U.S. 364, 374 (1986). Indeed, our supreme court has noted civil commitment "constitutes a significant deprivation of liberty that requires due process protection." *Matter of Chapman*, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). The question here is whether due process dictates a different outcome in this civil case because it is civil rather than criminal.

New York's highest court discussed due process in the context of civil commitment proceedings at length and observed that, although experts may rely on hearsay in forming opinions, allowing an expert to disclose hearsay to the jury has the potential to make that expert a "conduit for hearsay." *Floyd Y.*, 2 N.E.3d at 212 (quoting *People v. Goldstein*, 843 N.E.2d 727, 731 (N.Y. 2005)). The court ultimately held due process "requires any hearsay basis evidence to meet minimum requirements of reliability and relevance" before the evidence can be admitted in a civil commitment proceeding. *Id*. at 213. We agree.

We deal here with a narrow question. As we mentioned earlier, some authorities take the position that the PPG has value in treating sex offenders but that concerns about reliability and a lack of uniform standards preclude its admission as evidence at trial. *See, e.g., Commonwealth v. Ortiz*, 100 N.E.3d 790, 796–97 (Mass. App. Ct. 2018) (collecting cases). Some jurisdictions have held that an expert may rely on a PPG as a basis for the expert's opinion but have expressly declined to consider whether the test results should be disclosed to the jury given the special weight the jury is likely to afford things that have the appearance of scientific evidence. *E.g., In re Commitment of Sandry*, 857 N.E.2d 295, 317 (Ill. App. Ct. 2006). Those questions are not before us, and we expressly note that we do not consider them here.

This case presents the question of whether the circuit court erred in allowing the State to introduce Bilton's PPG test results through Dr. Swan when the test was not performed by Dr. Swan and when there was no demonstration that Bilton's test was reliable beyond Dr. Swan's statements that she was familiar with Dr. Burke's work and that nothing in Bilton's test results indicated there were problems with his test. We agree with Bilton that the circuit court did indeed err.

Although Dr. Swan demonstrated basic familiarity with what a PPG is and how the test is performed, she had never seen one, nor had she seen Dr. Burke perform one. Dr. Swan was not familiar with Dr. Burke's stimulus sets or the machine Dr. Burke used. She also did not know whether Dr. Burke was actually present when the test was conducted.

Neither Dr. Swan nor Bilton had access to the raw data from Bilton's PPG. Bilton specifically mentioned this in the course of his objection below. Dr. Swan also did not perform her own scientific review of the test results. She accepted the test results at face value and disclosed the test results to the jury.

Dr. Swan even vouched for Dr. Burke's work, explaining that Dr. Burke's evaluation tools were "nationally recognized" and that it was important to use someone like Dr. Burke to perform the test because it was important to have a PPG test performed by someone who "does it like every single day."

We are not aware of any authority that would bless this evidence's admission. The State points us to cases in two jurisdictions—Illinois and Washington—but those cases are readily distinguishable. These cases appear to be the main exceptions to the nearly uniform approach of excluding PPG test results from evidence. *See Ortiz*, 100 N.E.3d at 796–97 (collecting cases).

We cited the case from Illinois earlier. Critically, Illinois courts do not examine reliability before "scientific" evidence is admitted. *Commitment of Sandry*, 857 N.E.2d at 312 ("Unlike these courts, our inquiry does not include reliability"). Reliability is one of the three things a South Carolina court *must* assess before an expert's testimony is admitted. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). That same Illinois case also said—explicitly—that it was *not* holding PPG test results could properly be disclosed to the fact finder. *Commitment of Sandry*, 857 N.E.2d at 317 ("We are expressly not presented with, and do not consider, any other questions, such as whether presenting the results of a PPG test directly to the trier of fact would be properly excluded because the prejudicial effect of such evidence would substantially exceed its probative value."). Disclosing the test results to the fact finder is, of course, precisely what happened here.

As for Washington, the State directs us to a case holding that PPG evidence was not novel and not subject to the test for scientific evidence. *See In re Det. of Halgren*, 132 P.3d 714, 719 (Wash. 2006). Also, the expert in that case did not

state that the PPG test results were directly related to a sex offender's risk of recidivism. *Id*. Thus, that case has the same distinctions that thwarted the Illinois case's usefulness here.

The State claims this situation is no different from *In re Manigo*, another civil commitment case in which the testifying expert told the jury about that expert's out-of-court conversation with the defendant's counselor. 389 S.C. 96, 105–06, 697 S.E.2d 629, 633–34 (Ct. App. 2010). The defendant had not been honest about his prior offenses with his counselor. *Id*. The counselor apparently shared this with the court-appointed evaluator. *Id.* There, as here, the evaluator appeared as the State's expert witness at trial. *Id*.

This court rejected the defendant's argument that the circuit court erred in allowing the hearsay, noting that an expert may state an opinion based on facts not within his firsthand knowledge and that the expert may testify to hearsay for the purpose of showing what information the expert used to give an opinion. *Id*. at 106, 697 S.E.2d at 634. The present case poses the different question of whether due process constrains the extent to which an expert may offer hearsay for the purpose of explaining the expert's opinion. As we have explained, due process does not allow an expert to serve as a "conduit" for hearsay without some baseline showing that the hearsay is reliable.

We do not hold that a baseline demonstration of reliability required affording Bilton the right to a face-to-face confrontation of the person who administered his PPG. That would render due process indistinguishable from the right to confrontation, and as we noted above, we did not find any authority applying the confrontation clause to these proceedings. Bilton objected that he had not been provided with the raw data generated by the test. Providing that data may have been sufficient, but we do not hold it would have been sufficient. We wish to emphasize that we are not called on to review whether some hypothetical procedure would qualify as a baseline demonstration that Bilton's PPG test results were reliable. We simply hold, as noted above, that due process does not allow a testifying expert to be a pipeline for someone else's scientific work to be admitted into evidence without a baseline demonstration of reliability. We also note that nothing requires the State to seek the admission of PPG test results as evidence in these cases.

Harmless Error

As with any improper evidence, the next step is to determine whether the erroneous admission qualifies as a harmless error. *See In re Gonzalez*, 409 S.C. 621, 636, 763 S.E.2d 210, 217 (2014) ("No definite rule of law governs this finding [of harmless error]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." (quoting *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009))). We do not weigh the evidence when determining this. Instead, we ask "whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012).

As we noted at the beginning, the facts that led to Bilton's two sex offenses are deeply disturbing. To those facts, we add the notes that Dr. Swan explained she did not use the PPG as the sole basis of her opinion and that the PPG results—that Bilton had some level of deviant sexual attractions—were arguably cumulative given that nobody disputed Bilton's two previous sex offenses.

Still, we cannot fairly say that beyond a reasonable doubt, the PPG test results did not contribute to the jury's verdict. The PPG test results were presented as empirical proof that the twenty-two-year-old Bilton had deviant sexual attractions and as a material factor for the jury to consider. Dr. Swan said PPG test results were "the one risk factor that carries the highest risk for committing another sexual crime." Many cases recount the special solicitude juries afford testimony that has the appearance of scientific evidence. We doubt the jury ignored the PPG test results in rendering its decision.

CONCLUSION

For the foregoing reasons, we reverse the circuit court's judgment and remand for a new trial

REVERSED AND REMANDED.

LOCKEMY, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Heyward, Appellant.

Appellate Case No. 2017-001542

Appeal From Richland County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5776
Heard February 6, 2020 – Filed October 14, 2020

AFFIRMED

Tara C. Sullivan, Jennifer Hess Thiem, and John Whitney McGreevy, all of K&L Gates, LLP, of Charleston; and Chief Appellate Defender Robert Michael Dudek, of Columbia, all for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody Jane Brown, Senior Assistant Attorney General Heather Savitz Weiss, Assistant Attorney General Susannah Rawl Cole, and Assistant Attorney General William Joseph Maye, all of Columbia, for Respondent.

WILLIAMS, J.: In this criminal appeal, James Heyward appeals his convictions for murder, burglary in the first degree, armed robbery, two counts of kidnapping, assault and battery in the first degree, pointing and presenting a firearm, and possession of a weapon by a person convicted of a violent crime. On appeal, Heyward argues the trial court erred in admitting (1) an eyewitness's out-of-court and in-court identifications of him, (2) a fingerprint card obtained from a New Jersey database and expert opinion testimony based on those fingerprints, (3) expert opinion testimony about the operational capabilities of the gun found at Heyward's residence, and (4) autopsy dissection photographs of the victim's internal head injuries. Heyward also argues the trial court erred in allowing his alias "Abdul Muslim" to be included in the indictments and in denying his request to remove his shackles during jury selection. Finally, Heyward argues he is entitled to a new trial due to the cumulative errors committed by the trial court. We affirm.

FACTS/PROCEDURAL HISTORY

On October 11, 2015, authorities responded to what they believed to be a burglary in progress and found Alice Tollison (Victim) strangled to death in her home. Her eight-year-old granddaughter (Granddaughter) was bound at her wrists and ankles.

At trial, Investigator Trisha Odom of the Richland County Sheriff's Department was qualified as an expert on latent print analysis. She testified that after uploading fingerprints found at the crime scene (the Crime Scene Fingerprints) into a national database known as the Integrated Automated Fingerprint Identification System (AFIS), the sheriff's department received a match for those fingerprints from New Jersey. The match linked to an FBI number, the name James Heyward, and the associated fingerprints (the N.J. Fingerprints). Investigator Odom compared the N.J. Fingerprints to the Crime Scene Fingerprints, determined they were a match, and wrote three reports. Heyward was subsequently arrested, and his fingerprints were taken at the jail (the Booking Fingerprints). Investigator Odom completed subsequent reports using both the N.J. Fingerprints and the Booking Fingerprints. Although she did not conduct a minutia comparison between the N.J. Fingerprints and the Booking Fingerprints, she conducted a pattern comparison, and she testified there was no doubt in her mind the same person made the two sets of prints. Heyward objected to the admission of summaries of Investigator Odom's reports, arguing the initial reports used the unauthenticated N.J. Fingerprints and any analysis of later fingerprints is

inadmissible because she did not indicate she compared a known standard (i.e. the Booking Fingerprints) with the N.J. Fingerprints. The trial court found the State presented sufficient evidence to satisfy the authentication requirements and overruled Heyward's objection.

The day after Victim's murder, Granddaughter was interviewed at the Assessment and Resource Center (ARC)[1] and that interview was video recorded (the Recording).[2] Following that interview, while she was still being recorded, Investigator Joe Clarke, an investigator in the Richland County Sheriff's Department's Special Victims Unit, met with Granddaughter. Investigator Clarke showed Granddaughter a lineup, which consisted of six African American men (the Lineup), and Granddaughter selected number three, which was a picture of Heyward. Heyward was subsequently arrested and indicted.

Prior to trial, the trial court conducted a hearing pursuant to *Neil v. Biggers*[3] to determine the admissibility of Granddaughter's identification of Heyward based on the Lineup. During the *Biggers* hearing, Investigator Clarke testified the South Carolina Law Enforcement Division (SLED) prepared the Lineup using a database and when he received the Lineup, he evaluated it to ensure it was fair. He also testified as to the contents of the interview, and the trial court viewed the recording of the interview. Granddaughter testified about her identification based on the Lineup, and when asked if she picked number three because she recognized him, Granddaughter responded affirmatively. Granddaughter pointed to Heyward in the courtroom when asked if that man was in the room. The trial court found there was no undue suggestiveness in Granddaughter's identification based on the Lineup and found the Lineup and the Recording were admissible.

Prior to trial, the trial court also held a hearing on and denied Heyward's motion to strike his alias, "Abdul Muslim," from the indictments. The trial court also denied Heyward's pretrial motion to remove his ankle shackles during jury selection. The trial court agreed to reserve its ruling on a pretrial motion concerning autopsy photographs until after the testimony of Dr. Amy Durso, the State's pathologist.

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[1] ARC is a third-party entity through the Department of Mental Health that has a medical team and forensic investigators who interview children in a controlled environment without law enforcement.

[2] Granddaughter's interview at ARC was consistent with her testimony at trial.

[3] 409 U.S. 188 (1972).

The photographs were admitted at trial following the in camera testimony of Dr. Durso.

At trial, Granddaughter testified she was at Victim's house when someone knocked on the door. Granddaughter later walked into the kitchen, where she found Victim and a man with a duffel bag. The man told her to sit down across the table from Victim before he put a gold rusty gun with two spots for bullets on the table. He demanded money from Victim, and when Victim denied having money, he put his arms around her neck and strangled her to death. The man then took Granddaughter to a closet and closed the door. When he returned and she asked him what was happening, he said Victim was sleeping. The man later took Granddaughter to a different room where he bound her hands and feet. Granddaughter struggled to get loose but eventually fell asleep, and when she woke up, the man was no longer in the home. Granddaughter was able to get to a phone and call 911. She further testified she remembered her interview at ARC and the Lineup, and she identified Heyward in the courtroom.

Mattie Canzater testified that at the time of Victim's murder, Heyward and his wife were renting two rooms in her home. She knew Heyward went by the names of Abdul and Rasheed. The Friday before the murder, she took Heyward to Victim's house to pick up tables for a yard sale, but they did not go inside. The day of Victim's murder, she did not see Heyward before church, and when she returned home after 3:00 P.M., Heyward's family was in the home, but he was not. When Heyward returned, he was carrying a large black trash bag. The next morning, she learned Victim was murdered, and she was afraid because the suspect's description matched Heyward's attire when he came home the day before. She confronted Heyward and told him Victim's gardener told the police she and Heyward had been there, the suspect's description fit him, and she knew he was not home around the time of the murder. Immediately after she confronted Heyward, he shaved his hair.

Lieutenant Kevin Isenhoward testified that during a phone call between Heyward and Heyward's wife that occurred while Heyward was incarcerated, Heyward's wife told Heyward she called CrimeStoppers and tried to blame a man named Derek for Victim's murder in an attempt to divert attention away from him. Chief Stan Smith testified a gun that matched the description given to officers by Granddaughter was found in a closet in the home where Heyward was residing. The handgun was admitted into evidence, and the State offered as an expert Investigator David Collins, a fire and tool marks examiner in the forensic sciences laboratory for the Richland County Sheriff's Department. Heyward objected to

Investigator Collins as a witness, arguing Investigator Collins would be testifying as to whether or not the gun found at Heyward's residence was operational, which was irrelevant. The trial court overruled Heyward's objection.

Dr. Gray Amick, the laboratory director with the Richland County Sheriff's Department, testified Heyward's DNA was found under Victim's fingernails, on a swab of her neck, and on a swab of a draft stopper found around her neck. There was additional testimony that Heyward's fingerprints were found on the interior side of the entry door at Victim's home, on a jewelry box, and on other items located inside the home.

The jury found Heyward guilty as indicted, and Heyward was sentenced to two consecutive terms of life imprisonment without the possibility of parole for murder and burglary, a consecutive term of thirty years for armed robbery, a consecutive term of thirty years for kidnapping, a consecutive term of ten years for assault and battery, and two concurrent terms of five years for pointing and presenting a firearm and unlawful possession of a firearm. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in admitting evidence and testimony regarding Granddaughter's identification of Heyward from the Lineup and her subsequent in-court identification?

II. Did the trial court err in admitting the N.J. Fingerprints and testimony based on the N.J. Fingerprints?

III. Did the trial court err in allowing expert opinion testimony about the operational capabilities of the gun?

IV. Did the trial court err in allowing Heyward's alias, "Abdul Muslim," to be included in the indictments and at trial?

V. Did the trial court err in admitting the photographs of Victim's internal head injuries?

VI. Did the trial court err in denying Heyward's request to remove his shackles during jury selection?

VII. Did the trial court err in denying Heyward's motion for a new trial?

LAW/ANALYSIS

I. Eyewitness Identification

Heyward contends the trial court erred in admitting evidence and testimony regarding (1) Granddaughter's out-of-court identification of him based on the Lineup and (2) her subsequent in-court identification. Specifically, Heyward argues Granddaughter's identifications should not have been admitted because (1) she did not make a positive identification when she viewed the Lineup and (2) the Lineup was unduly suggestive, unreliable, and conducive to irreparable misidentification. We disagree.

"Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

a. Positive Identification

First, Heyward contends Granddaughter did not make an out-of-court identification when viewing the Lineup. We disagree.

In *State v. Washington*, while evaluating the reliability of the witness's identification of the defendant, this court addressed the certainty of the witness's identification. 323 S.C. 106, 111–12, 473 S.E.2d 479, 481–82 (Ct. App. 1996). When the witness picked the defendant from a photographic lineup, he indicated he was "ninety nine percent sure" the defendant was the person who attempted to rob him, and his signed statement noted the defendant "best resembles" the attempted robber. *Id*. at 411, 473 S.E.2d at 481. This court found certainty is not always required in the identification of witnesses "[b]ecause the jury ha[s] the opportunity to observe the witness and attach the credibility it deem[s] proper to [the witness's]

testimony, including the certainty or uncertainty of [the] identification." *Id*. at 111–12, 473 S.E.2d at 481–82.[4]

Granddaughter's out-of-court identification based on the Lineup was captured in the Recording. The Recording shows that after viewing the Lineup, Granddaughter indicated "Number three looks kind of like him . . . . Number three." Granddaughter circled the number three and wrote her first name next to it. Granddaughter then stated: "You're going to try to catch someone who looks like that . . . but it's probably not exactly because that isn't exactly . . . ." Investigator Clarke asked Granddaughter if she felt confident that was the man she picked out, and she stated, "Yes. That looked a lot like him . . . and I get really scared when I see him." When Granddaughter indicated that another man in the Lineup looked like her janitor, Investigator Clarke sought assurance that the other man did not look like the man who came into her house, and Granddaughter stated he did not. As the entirety of the trial transcript was not provided in the record, it is not clear if the jury viewed the Recording. However, even if the Recording was not viewed by the jury, Granddaughter stated, in the presence of the jury, that when viewing the Lineup, she looked for the person who looked most like the man who killed Victim and she selected number three because he scared her and he looked like him. Additionally, Heyward was able to cross-examine Granddaughter about the Lineup and about her conversation with Investigator Clarke. Based on the foregoing, we find the trial court did not err in admitting evidence regarding Granddaughter's out-of-court identification. Even though there was arguably some uncertainty in her initial selection, the jury was able to observe Granddaughter and attach credibility to her testimony. *See id.* (finding certainty is not always required in the identification of witnesses because the jury is able to observe the witness and consider the certainty or uncertainty of the identification when determining the witness's credibility).

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[4] In concluding that certainty is not always required in the identification by a witness, the court in *Washington* cited *United States v. Peoples*, in which the Fourth Circuit Court of Appeals upheld the South Carolina district court's admission of an in-court identification by a witness and noted "an identification is not unreliable because it is phrased in uncertain terms." 323 S.C. at 111, 473 S.E.2d at 481–82 (citing *United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984) (per curiam)).

b. Suggestiveness and Reliability

Heyward also argues Granddaughter's out-of-court identification from the Lineup and her subsequent in-court identification of him should not have been admitted because the Lineup was unduly suggestive, unreliable, and conducive to irreparable misidentification. We disagree.

"[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." *Moore*, 343 S.C. at 288, 540 S.E.2d at 448. "[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." *Id*. "In reviewing mixed questions of law and fact, whe[n] the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Id.*

In *Neil v. Biggers*, the Supreme Court set forth a two-prong inquiry to determine the admissibility of out-of-court identifications. 409 U.S. at 198–99. The first prong requires the court to determine whether the out-of-court identification was a result of "unnecessarily suggestive" police procedures. *State v. Dukes*, 404 S.C. 553, 557, 745 S.E.2d 137, 139 (Ct. App. 2013) (quoting *Biggers*, 409 U.S. at 198–99). If the court finds that impermissibly suggestive police procedures were not used, the inquiry ends, and the court does not consider the second prong. *Id*. at 557–58, 745 S.E.2d at 139. However, if the court finds impermissibly suggestive identification procedures were used, the court must determine whether the identification was "so reliable that no substantial likelihood of misidentification existed." *Id*. at 558, 745 S.E.2d at 139 (quoting *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). If an out-of-court identification is the result of unnecessarily suggestive police procedures, an in-court identification is inadmissible. *State v. Brown*, 356 S.C. 496, 502–03, 589 S.E.2d 781, 784 (Ct. App. 2003).

Heyward argues Investigator Clarke telling Granddaughter to be brave and help him without telling her she did not have to choose anyone before showing her the Lineup was unnecessarily suggestive. However, before showing Granddaughter the Lineup, Investigator Clarke said, "See *if* you can see the bad man who did this to your grandmomma" and noted "*if* you see the man you saw in your house yesterday that hurt your grandma, I want you to tell me, okay?" (emphasis added). Although Investigator Clarke did not specifically tell Granddaughter she did not

have to choose anyone from the Lineup, we found no authority requiring him to do so. Furthermore, Investigator Clarke's use of the word "if" suggested to Granddaughter she did not have to choose someone from the Lineup. The record also indicates Granddaughter did not believe she had to choose someone from the Lineup because at trial, she testified she would not have picked anyone from the Lineup if she did not see someone that looked like the man who killed Victim. At trial, Granddaughter stood by her selection of Heyward when she (1) indicated number three in the Lineup was the man who tied her up and killed Victim, (2) pointed to Heyward when asked if that man was in the courtroom, and (3) stated there was no doubt in her mind that Heyward was the man who hurt Victim.

Heyward also argues Granddaughter's repeated exposure to Heyward's photograph and the fact that Heyward was the only one from the Lineup present in the courtroom when Granddaughter made her in-court identification influenced her identification of Heyward as Victim's killer. We disagree. Nothing in the record indicates Granddaughter was exposed to Heyward's photograph repeatedly, and we found no authority requiring other members of a photograph lineup to be present in court. Because we find the Lineup was not unduly suggestive, we are not required to consider whether Granddaughter's identification of Heyward was reliable. *See Dukes*, 404 S.C. at 557–58, 745 S.E.2d at 139 (stating if the court finds that impermissibly suggestive police procedures were not used, the inquiry ends, and the court does not consider the second prong of reliability). Thus, we find the trial court did not abuse its discretion in admitting evidence and testimony regarding Granddaughter's out-of-court identification of Heyward. *See Moore*, 343 S.C. at 288, 540 S.E.2d at 448 ("[T]he decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error.").

Furthermore, Heyward's challenge of Granddaughter's in-court identification was predicated upon his argument that the out-of-court identification was improper. *See Brown*, 356 S.C. at 502–03, 589 S.E.2d at 784 (finding that if an out-of-court identification is the result of unnecessarily suggestive police procedures, an in-court identification is inadmissible). Because we find the trial court did not err in admitting the out-of-court identification, we find the trial court did not abuse its discretion in admitting the in-court identification. *See Moore*, 343 S.C. at 288, 540 S.E.2d at 448 ("[T]he decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error."); *see also Brown*, 356 S.C. at 502–03,

589 S.E.2d at 784 ("An in court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.")

II. Fingerprints

Heyward contends the trial court erred in admitting the N.J. Fingerprints because they were not properly authenticated by the State. Specifically, Heyward contends the trial court improperly allowed evidence regarding the match between the N.J. Fingerprints and the Crime Scene Fingerprints because the State failed to establish when and where the N.J. Fingerprints were taken. Although we agree the State failed to establish when and where the N.J. Fingerprints were taken, we, nevertheless, find the N.J. Fingerprints were properly authenticated.

"The admissibility of evidence is within the sound discretion of the trial judge." *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000). "Accordingly, evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of a legal error which results in prejudice to the defendant." *Id*. "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." *Id.* at 447, 710 S.E.2d at 60 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)).

In evaluating the admissibility of fingerprint cards, our supreme court has adopted a two-prong approach. *State v. Anderson*, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009). First, the court must determine "whether the fingerprint card was testimonial in nature and, if so, fell within an exception to the hearsay rule." *Id*. If there is an applicable hearsay exception, the court then must assess authentication. *Id.*

On appeal, Heyward does not contend the N.J. Fingerprints were hearsay. Thus, we confine our analysis to the determination of the authenticity of the N.J. Fingerprints.

In *Anderson*, our supreme court provided an analysis of the pertinent rules of evidence to highlight ways in which fingerprints could be authenticated. *Id*. at

128–29, 687 S.E.2d at 39. The court cited to the non-exhaustive examples of authentication contained in Rule 901(b), SCRE. *Id.* at 129, 687 S.E.2d at 39. The court found Rule 901(b)(4),[5] (7),[6] and (9),[7] provided for authentication of the fingerprints obtained from AFIS in that case. *Id*. at 129–32, 687 S.E.2d at 39–41. It also found even if the evidence did not precisely fit within one of the examples provided in Rule 901(b), a more generalized approach to Rule 901 would also provide for authentication in that case because an expert in fingerprint analysis "testified regarding the method and technology in which he analyzed the latent fingerprints with the known prints . . . [, which] included a thorough explanation of how an arrestee's fingerprints are taken, stored, and maintained." *Id*. at 131–32, 687 S.E.2d at 41. The court also noted that the expert used the officially-maintained known fingerprints and opined that they matched the latent fingerprint found at the victims' home. *Id*. at 132, 687 S.E.2d at 41. Our supreme court found this was sufficient "to support a finding that the matter in question [was] what [the State] claim[ed]." *Id*. (quoting Rule 901(a), SCRE).

In this case, we find Rule 901(b)(3), SCRE, allows the authentication of the N.J. Fingerprints. Rule 901(b)(3) provides "[a c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated" can authenticate evidence. On appeal, Heyward does not argue that the Booking Fingerprints were not authenticated. *Smith v. State*, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (stating an unappealed ruling is the law of the case). Investigator Odom was qualified as an expert in latent print analysis. Although she stated she did not conduct a minutia comparison between the N.J. Fingerprints and the Booking Fingerprints, she compared the two sets of fingerprints and stated that pattern wise, the prints were the same. Investigator Odom testified there was no doubt the same person made the N.J. Fingerprints and the Booking Fingerprints. Because

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[5] Rule 901(b)(4) states "[the a]ppearance, contents, substance, internal patterns, or other distinctive characteristics [of the item], taken together with all the circumstances" may be used to authenticate evidence.

[6] Rule 901(b)(7) provides authentication can be established by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept."

[7] Rule 901(b)(9) provides authentication can be established by "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."

Investigator Odom compared the N.J. Fingerprints with the authenticated Booking Fingerprints, the N.J. Fingerprints were authenticated by the comparison of the two sets of fingerprints by the expert witness pursuant to Rule 901(b)(3).[8] Thus, we find the trial court did not err in admitting the N.J. Fingerprints.

III. Operational Capabilities of the Gun

Heyward argues the trial court erred in allowing expert testimony about the operational capabilities of the recovered firearm. Specifically, he contends the testimony was not relevant to the charges against him and was needlessly cumulative and prejudicial. We find the trial court erred in allowing the expert testimony, but such error was harmless.

"The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). Thus, the trial court's admission of expert testimony will not be reversed unless there was an abuse of discretion, which occurs when the trial court's decision is based on an error of law or a factual conclusion without evidentiary support. *Id*. "'Relevant evidence' means evidence having any tendency

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[8] Furthermore, even if the N.J. Fingerprints would not have been properly authenticated, any error was harmless because it did not prejudice Heyward. *See State v. Adams*, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989))). Investigator Odom testified she used both the N.J. Fingerprints and the Booking Fingerprints to determine that Heyward's fingerprints matched the fingerprints found at the crime scene. Outside of the other fingerprint evidence, Granddaughter identified Heyward as Victim's killer; DNA evidence obtained at the crime scene was a match to Heyward; a gun matching Granddaughter's description of the assailant's gun was found in the home in which Heyward was living; there was testimony that Heyward's wife called in a false CrimeStopper tip to divert attention from him; and Canzater testified Heyward had been to Victim's home with her, was wearing clothing that matched the description of the suspect on the day of the murder, and shaved his head after she confronted him with the news of Victim's death.

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

The trial court found the operability of the gun was relevant to the pointing and presenting charge. The trial court also found the operability of the gun was relevant to the robbery charge as to whether or not the gun was an instrument that could cause great bodily harm. We disagree.

Section 16-23-410 of the South Carolina Code (2015) provides: "It is unlawful for a person to present or point at another person a loaded or unloaded firearm." Section 16-23-405 of the South Carolina Code (2015) defines "firearm" for purposes of chapter 23, which includes section 16-23-410, as a "rifle, shotgun, pistol, or similar device that propels a projectile through the energy of an explosive." Subsection 16-11-330(A) of the South Carolina Code (2015) defines armed robbery as follows:

> [R]obbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Id.* at 351, 688 S.E.2d at 575 (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)). However, "[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.*

Because section 16-23-410 provides it is unlawful to present or point an unloaded firearm at another person, it would produce an absurd result that would defeat the plain legislative intent of the pointing and presenting charge to require proof that

the firearm is capable of propelling a projectile while also allowing an unloaded gun to meet the criteria. Likewise, because subsection 16-11-330(A) provides that being armed with a representation of a deadly weapon meets the criteria for armed robbery, it would produce an absurd result to require proof that the firearm was operational. Thus, we find the trial court abused its discretion in allowing expert testimony about the operational capabilities of the firearm because such testimony was not relevant to Heyward's charges.

However, we find this error harmless because it did not prejudice Heyward. *See Adams*, 354 S.C. at 381, 580 S.E.2d at 795 ("[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584)). Granddaughter identified Heyward as Victim's killer; fingerprint and DNA evidence obtained at the crime scene were matched to Heyward; a gun matching Granddaughter's description of the assailant's gun was found in the home where Heyward lived; there was testimony that Heyward's wife called in a false CrimeStopper tip to divert attention from Heyward; and Canzater testified Heyward had been to Victim's home with her, was wearing clothing that matched the description of the suspect on the day of the murder, and shaved his head after she confronted him with the news of Victim's death. Thus, we find the admission of the expert testimony regarding the operational capabilities of the gun was harmless and does not require reversal.

IV. The Alias

Heyward contends the trial court erred in allowing his alias "Abdul Muslim" to be used in the indictments and at trial because use of the alias invited undue prejudice from the jury. We disagree.

An appellate court reviews the trial court's ruling on a motion to strike for an abuse of discretion. *United States v. Williams*, 445 F.3d 724, 733 (4th Cir. Ct. App. 2006); *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979).

In *United States v. Clark*, the Fourth Circuit Court of Appeals held:

> If the Government intends to introduce evidence of an alias and the use of that alias is necessary to identify the defendant in connection with the acts charged in the indictment, the inclusion of the alias in the indictment is

> both relevant and permissible, and a pretrial motion to strike should not be granted.

541 F.2d 1016, 1018 (4th Cir. 1976) (per curiam). "However, if the prosecution either fails to offer proof relating to the alias or the alias, although proven, holds no relationship to the acts charged, a motion to strike may be renewed, the alias stricken and an appropriate instruction given to the jury." *Id*. "Motions to strike surplusage from an indictment will be granted only where the challenged allegations are 'not relevant to the crime charged and are inflammatory and prejudicial.'" *United States v. Scarpa*, 913 F.2d 993, 1013 (2nd Cir. 1990) (quoting *United States v. Napolitano*, 552 F. Supp. 465, 480 (S.D.N.Y. 1982)). "[I]f evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken." *Id*. (alteration in original) (quoting *United States v. DePalma*, 461 F. Supp. 778, 797 (S.D.N.Y. 1978)). "Aliases and nicknames should not be stricken from an indictment when evidence regarding those aliases or nicknames will be presented to the jury at trial." *United States v. Rittweger*, 259 F. Supp.2d 275, 293 (S.D.N.Y. 2003).

We find the trial court properly denied Heyward's pretrial motion to strike the alias because the State established it intended "to introduce evidence of an alias and [that] the use of that alias [was] necessary to identify [Heyward] in connection with the acts charged in the indictment." *See Clark*, 541 F.2d at 1018 ("If the Government intends to introduce evidence of an alias and the use of that alias is necessary to identify the defendant in connection with the acts charged in the indictment, the inclusion of the alias in the indictment is both relevant and permissible, and a pretrial motion to strike should not be granted."). During the pretrial motions hearing, the State indicated DNA found under Victim's fingernail scrapings produced a Combined DNA Index System (CODIS) hit that linked the sample to Abdul Muslim. Heyward's name was not associated with the hit, but the information on Abdul Muslim found through CODIS included fingerprints that matched Heyward's fingerprints. The State argued it believed Heyward was going to challenge the DNA expert's, Dr. Greg Amick, findings, so it thought the alias was relevant because it supported Dr. Amick's findings. The State further indicated it would amend the indictment to remove "Abdul Muslim" if Heyward agreed not to challenge the DNA evidence. Based on the foregoing, we find the

State sufficiently established it intended to introduce evidence of the alias and that the alias was necessary to connect the acts charged with Heyward.[9]

Based on the foregoing, we find the trial court did not err in denying Heyward's motion to strike the alias from the indictments.[10]

V. The Photographs

Heyward argues the trial court erred in admitting autopsy dissection photographs (the Photographs) of Victim's internal head injuries because the Photographs were irrelevant, lacked probative value, and were calculated to inflame the passions of the jury. Specifically, Heyward asserts the Photographs lacked probative value because the cause of Victim's death was strangulation, not injuries to her head, and because the Photographs led to a risk of undue prejudice based on their gruesome nature. We disagree.

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[9] The State offered proof at trial that the alias held a relationship to the acts charged. However, even if it would have failed to do so, the use of the alias would not have been an error because Heyward did not renew his motion to strike. *See id.* ("[I]f the prosecution either fails to offer proof relating to the alias or the alias, although proven, holds no relationship to the acts charged, a motion to strike may be renewed, the alias stricken and an appropriate instruction given to the jury."); *id.* (finding even though the existence of the appellant's alias did not connect his identity to the robbery, because the appellant did not renew his motion to strike and because there was no showing the use of the alias was prejudicial, the use of the alias was not an error).

[10] Heyward also argues he was unfairly prejudiced by the inclusion of the alias. We disagree. *See Scarpa*, 913 F.2d at 1013 ("[I]f evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken." (alteration in original) (quoting *DePalma*, 461 F. Supp. at 797)). Furthermore, the trial court noted it believed any potential prejudice stemming from the alias could be addressed by voir dire, and Heyward conceded "I certainly do not disagree with you that voir dire can address the issue of prejudice." *See State v. Rios*, 388 S.C. 335, 341, 696 S.E.2d 608, 612 (Ct. App. 2010) (stating appellate review of an issue is not preserved when it was conceded at trial).

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). A trial court's "decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). In balancing the danger of unfair prejudice with the probative value of a piece of evidence, "the determination must be based on the entire record and will turn on the facts of each case." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).

"To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). However, "[i]t is well settled in this state that '[i]f the [. . .] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (first alteration in original) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353). Our courts have found autopsy photographs may be admitted "in an effort to show the circumstances of the crime and character of the defendant." *Id*. "'The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.'" *Collins*, 409 S.C. at 535, 763 S.E.2d at 28 (quoting *Nichols v. State*, 100 So. 2d 750, 756 (Ala. 1958)).

In *State v. Gray*, this court found the trial court did not abuse its discretion when it admitted three photographs, which were taken during an autopsy and showed the victim's exposed skull and brain. 408 S.C. 601, 609, 619, 759 S.E.2d 160, 165, 170 (Ct. App. 2014). This court found the photographs had probative value because they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and cause of death and were important to the State's ability to prove malice. *Id.* at 612–16, 759 S.E.2d at 166–68.

In the present case, we find the trial court properly evaluated the probative value of the Photographs with respect to the question of malice. *See State v. Hawes*, 423 S.C. 118, 130–31, 813 S.E.2d 513, 519–20 (Ct. App. 2018) (finding the trial court

did not abuse its discretion when it admitted crime scene photographs that established the circumstances of the crime scene, corroborated the testimony of a witness and a responding officer, and were relevant to the issue of malice); *id*. at 131, 813 S.E.2d at 520 (noting "the crime scene photographs were relevant to the issue of malice because they showed how, where, and how many times [the victim] was attacked."); *see also Nance*, 320 S.C. at 508, 466 S.E.2d at 353 (finding photographs of the victim's stab wounds were "relevant to the issue of malice"). Heyward was charged with murder, and section 16-3-10 of the South Carolina Code (2015) provides, "'Murder' is the killing of any person with malice aforethought, either express or implied." "'Malice aforethought' is defined as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime." *State v. Kinard*, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007) (quoting *Black's Law Dictionary* (7th ed. 1999)), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). Dr. Durso testified Victim's head injuries demonstrated that a struggle occurred and Victim suffered a violent death. Dr. Durso stated the injuries show Victim was struck on multiple planes of her head and there was not just one terminal fall, which indicated there was more than just a strangulation. Thus, we find the Photographs were important to establish that Heyward acted with malice. *See Nance*, 320 S.C. at 508, 466 S.E.2d at 353; *Gray*, 408 S.C. at 614, 759 S.E.2d at 167.

Furthermore, we find the trial court properly determined the Photographs corroborated Dr. Durso's testimony. *See Torres*, 390 S.C. at 623, 703 S.E.2d at 229 ("It is well settled in this state that '[i]f the [. . .] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" (first alteration in original) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353)). Although Victim's cause of death was strangulation, Dr. Durso testified Victim's head injuries indicated she suffered a violent death involving more than just strangulation and that those injuries contributed to her conclusion of the cause of death. Dr. Durso also testified the Photographs would be necessary to assist her in explaining Victim's head injuries to the jury. Thus, we find Dr. Durso's testimony increased the probative value of the Photographs because her use of the Photographs to explain Victim's injuries demonstrated "the extent and nature of the injuries in a way that would not be as easily understood based on [expert] testimony alone." *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009).

Moreover, we have viewed the photographs, and we find they were not unduly prejudicial to Heyward. *See Torres*, 390 S.C. at 623, 703 S.E.2d at 228–29 ("To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" (quoting *Franklin*, 318 S.C. at 55, 456 S.E.2d at 361)). Based on the foregoing, we find the trial court did not abuse its discretion in admitting the Photographs.

VI. The Shackles

Heyward contends the trial court erred in denying his request to remove his shackles during jury selection. Specifically, Heyward argues the trial court abused its discretion because (1) it failed to properly exercise its discretion and (2) there was no evidence of a security concern that would outweigh the prejudice to Heyward of appearing before potential jurors in shackles. We agree the trial court abused its discretion in denying Heyward's motion to remove his shackles during jury selection, but we find such error was harmless.

"Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security." *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995).

In *Deck v. Missouri*, the defendant was shackled with leg irons, handcuffs, and a belly chain, which would have been readily apparent to the jury, during the penalty phase of a capital case. 544 U.S. 622, 624 (2005). The State claimed the Missouri Supreme Court's decision met the Constitution's requirements regarding the shackling of a defendant during trial because the Missouri Supreme Court properly found (1) the record lacked evidence that the jury saw the defendant's restraints, (2) the trial court acted within its discretion, and (3) the defendant suffered no prejudice. *Id*. at 634. The Supreme Court disagreed, noting the record (1) indicated the jury was aware of the defendant's shackles and (2) contained no formal or informal findings. *Id*. The Supreme Court further indicated Missouri's argument failed to take into account the Court's statement in *Holbrook v. Flynn* that shackling is "inherently prejudicial." *Id*. at 635 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)). Ultimately, the Supreme Court held "the Constitution forbids the use of *visible* shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—

such as the interest in courtroom security—specific to the defendant on trial." *Id.* at 624 (quoting *Holbrook*, 475 U.S. at 568–69 (emphasis added)).

Like in *Deck*, the record contains no formal or informal findings of fact to indicate the trial court exercised its discretion in denying Heyward's request to remove his shackles as the trial court merely stated "that motion is denied." *Id*. at 634 (rejecting Missouri's argument that the trial court acted in its discretion because the record contained no formal or informal findings). The record is devoid of any reason why Heyward should have been shackled. There were no concerns of courtroom decorum or security raised, as the only mention of courtroom security was Heyward's assertion that he was well-behaved in his three prior court appearances. Thus, we find the trial court abused its discretion in denying Heyward's request to remove his shackles during jury selection. *See Tucker*, 320 S.C. at 209, 464 S.E.2d at 107 ("The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security"); *see also Deck*, 544 U.S. at 624 ("[T]he Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." (quoting *Holbrook*, 475 U.S. at 568–69)); *State v. Brawley*, 137 A.3d 757, 761 (Conn. 2016) (noting a trial court must ensure its reasons for ordering the use of shackles are detailed in the record).

However, we find any error in denying the motion to remove Heyward's shackles was harmless because Heyward was not prejudiced. *See State v. Northcutt*, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985))).

In regards to the burden of proof, *Deck* provided:

> [W]here a court, without adequate justification, orders the defendant to wear shackles *that will be seen by the jury*, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling]

> error complained of did not contribute to the verdict obtained.'

544 U.S at 635 (second alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967) (emphasis added)). However, the court in *Deck* repeatedly noted the visibility of the defendant's shackles,[11] and we have not found any Supreme Court or South Carolina authority directly addressing whether the heightened burden in *Deck* applies when it is not obvious from the record that the shackles were observed.

In *State v. Johnson*, the defendant argued the trial court erred in denying his motion for mistrial based on his being brought into the courthouse in handcuffs and accompanied by police personnel because he argued jurors may have seen him and that he had been prejudiced by the indicia of guilt. 422 S.C. 439, 446, 812 S.E.2d 739, 742, 745 (Ct. App. 2018). This court did not directly address *Deck* or whether the heightened burden of proof is applied when it is not obvious from the record that shackles were observed. However, this court found the trial court did not err in denying the defendant's motion for a mistrial based on his being brought into the courthouse in handcuffs and surrounded by police personnel because "the record fail[ed] to demonstrate any juror observed this activity or that any juror was prejudiced." *Id*. at 458, 812 S.E.2d at 749.

We find this court's approach in *Johnson* is in line with courts in other jurisdictions that have specifically found "that *Deck*'s heightened constitutional standard is applicable only when there is evidence that jurors observed the restraints or that they were plainly visible," and thus, "absent evidence that a juror observed the restraints . . . a trial court's error in shackling a defendant is harmless."[12] *Hoang v.*

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[11] The Court noted the record made it "clear that the jury was aware of the shackles." *Id*. at 634. The Supreme Court also referred to "visible shackles," "restraints visible to the jury," and "shackles that will be seen by the jury." *Id*. at 624, 626, 628–29, 632, 635.

[12] *See also Brawley*, 137 A.3d at 760 (indicating that in cases in which the jury cannot see any shackling, "'[t]he defendant bears the burden of showing he has suffered prejudice by establishing a factual record demonstrating that the members of the jury knew of the restraints'" except for in cases in which a court requires a defendant to wear shackles that will be seen by the jury without adequate justification (quoting *State v. Webb*, 680 A.2d 147, 183 (Conn. 1996))); *id*. at 762 n.3 ("*Deck* makes clear that a heightened burden falls on the state when the

People, 323 P.3d 780, 785–86 (Colo. 2014).[13] Although Heyward objected to being shackled at his feet, arguing any potential juror in the first two rows of the gallery directly behind him could see the shackles, nothing in the record indicates

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unwarranted restraints *are visible* to the jury, and not when as in [*United States v.*] *Banegas* [600 F.3d 342 (5th Cir. 2010)], the record is silent on the matter."); *Mendoza v. Berghuis*, 544 F.3d 650, 654 (6th Cir. 2008) ("*Deck*'s facts and holding . . . concerned only *visible* restraints at trial. The Supreme Court was careful to repeat this limitation throughout its opinion."); *People v. Letner & Tobin*, 235 P.3d 62, 106 (Cal. 2010) (indicating *Deck* did not support the contention that the prosecution was required to disprove the visibility of the restraints when the record contained no evidence that the jury observed the defendant wearing shackles); *United States v. Baker*, 432 F.3d 1189, 1246 (11th Cir. 2005) (finding the combination of the number of defendants, the defense's opportunity to respond to the court's concerns and raise alternative proposals, "and the lack of any record evidence that the jury could see the shackles" showed the district court did not abuse its discretion in shackling a defendant), *abrogated on other grounds by Davis v. Washington*, 547 U.S. 813, 821 (2006); *State v. Johnson*, 229 P.3d 523, 533 (N.M. 2010) (indicating the factors tending to show prejudice were not violated when there was no indication the jury saw the defendant's leg irons so that the defendant's presumption of innocence was not violated); *Bell v. State*, 415 S.W.3d. 278, 283 (Tex. Crim. App. 2013) (indicating when the record did not show a reasonable probability that the jury was aware of the defendant's shackles, the heightened constitutional standard did not apply).

[13] In contrast, we note that in *Banegas*, the Fifth Circuit Court of Appeals applied the heightened harmless error standard set forth in *Deck* for cases in which the circuit court did not provide a reason for shackling a defendant and the reasons for shackling a defendant are not apparent based on the specific facts of the case. 600 F.3d at 345–46. The court found "the defendant need not demonstrate actual prejudice on appeal to make out a due process violation; rather the burden is on the government to prove 'beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.'" *Id.* (footnote omitted) (quoting *Deck*, 544 U.S. at 635). The court in *Banegas* vacated the defendant's conviction and remanded his case for a new trial because the district court did not express individualized reasons for its decision to shackle the defendant with leg irons and the government did not proffer evidence to prove beyond a reasonable doubt that the defendant's presumably visible leg irons did not contribute to the jury verdict. *Id*. at 347.

that any of the jurors who were selected for Heyward's trial could or did see his shackles. We also note Heyward was only shackled during the jury selection and he was not shackled during trial. *See State v. Clark*, 24 P.3d 1006, 1029 (Wash. 2001) (en banc) ("Because the impact of shackling on the presumption of innocence is the overarching constitutional concern, it would logically follow that in the minds of the jurors [the defendant's] shackling on the first day of voir dire was more than logically offset by over two weeks of observing Clark in the courtroom without shackles."). Based on the foregoing, we find the trial court's error in denying Heyward's motion to remove his shackles during jury selection did not constitute reversible error.

VII. Cumulative Error

Heyward argues he is entitled to a new trial because cumulative errors committed by the trial court had the effect of preventing him from receiving a fair trial. We disagree.

We find this issue is not preserved for our review because Heyward neither raised the cumulative error doctrine to the trial court nor did he argue he was entitled to a new trial based upon errors made during the trial. *See State v. Beekman*, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (noting the cumulative error doctrine was not preserved for appeal when the appellant did not raise the doctrine to the trial court or argue he was entitled to a new trial based upon errors made during the trial), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2016).

CONCLUSION

Based on the foregoing, Heyward's convictions are

AFFIRMED.

KONDUROS and HILL, JJ., concur.