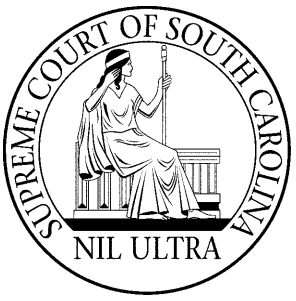

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 18, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Tyrone J. King, Respondent.

Appellate Case No. 2016-001161

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27826
Heard November 15, 2017 – Filed July 18, 2018

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General Alphonso Simon Jr., both of Columbia and Solicitor William B. Rogers, Jr., of Bennettsville, for Petitioner.

Howard W. Anderson III, of Pendleton; and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

JUSTICE JAMES: Tyrone J. King was convicted of murder, possession of a weapon during the commission of a violent crime, third-degree assault and battery, and pointing and presenting a firearm. The trial court sentenced King to life imprisonment for murder, a consecutive five year term for possession of a firearm during the commission of a violent crime, and thirty days for third-degree assault and battery.[1] King appealed his murder and possession of a firearm during the commission of a violent crime convictions, and the court of appeals remanded the case to the trial court to conduct a full Rule 404(b), SCRE, analysis regarding the trial court's admission of certain other bad act evidence. *State v. King*, 416 S.C. 92, 784 S.E.2d 252 (Ct. App. 2016). We granted the State's petition for a writ of certiorari to review the court of appeals' decision. We vacate the court of appeals' decision to remand the case for a Rule 404(b) analysis, we reverse King's convictions for murder and possession of a weapon during the commission of a violent crime, and we remand the matter to the trial court for a new trial on those two charges. King's convictions for pointing and presenting a firearm and third-degree assault and battery are unaffected by our holding, as King does not challenge those convictions.

I. FACTUAL AND PROCEDURAL HISTORY

King shot and killed his neighbor James Galloway (Victim) inside Victim's home during the early morning hours of November 11, 2011. The State contends King then pistol-whipped Karen Galloway (Wife) and pointed the gun at both Wife and Reggie Cousar (Cousin). King fled the scene when a Marlboro County Sheriff's Office (MCSO) deputy arrived. Following a foot chase, King was found hiding under a truck. MCSO recovered Victim's house phone at the scene where King was apprehended and retrieved a bottle of liquor from King's pocket. MCSO recovered a nine-millimeter handgun with an extended magazine from the wooded area behind King's home. MCSO also found a cartridge casing and a bullet hole in Victim's master bedroom and recovered a cartridge casing and a projectile from Victim's living room. The State claims the shooting was murder. King claims the shooting was an accident.

A. MCSO Interviews of King

[1] The record on appeal does not include King's sentence regarding his pointing and presenting a firearm conviction.

MCSO conducted two videotaped interviews of King after he was arrested and charged. While King has never denied he was present at the time Victim was shot, King's statements explaining the sequence of events varied greatly. In his first statement—given the morning of the shooting—King claimed a man named Aloysius McLaughlin went with him to Victim's home to purchase alcohol.[2] King claimed McLaughlin unexpectedly shot Victim. At the time, King was facing charges that he had recently kidnapped and robbed McLaughlin and McLaughlin's girlfriend Melissa Graham in McColl, South Carolina (McColl charges). During this first interview, King explained to MCSO that he and McLaughlin were back on "good terms." King stated that after the shooting, he took the gun from McLaughlin, tried to calm Wife, and "waved" or "swung" the gun at her. He claimed he then gave the gun back to McLaughlin and ran from Victim's home in fear.

During his second interview five days later, King informed MCSO he went to Victim's home alone and purchased some liquor. He explained he later went back to Victim's home alone to sell a handgun he obtained from a man named "Broom." King stated that while he was showing Victim the handgun and attempting to remove the magazine from the gun, the gun accidentally discharged, shooting Victim in the face. King explained he panicked and eventually ran from Victim's home in fear. Both recorded statements contain scattered references (by both King and law enforcement) to the McColl charges and to an unrelated murder charge against King. Both sets of charges are potential "other bad acts" under Rule 404(b), SCRE.[3] Over King's objection, the trial court permitted the jury to hear evidence of the pendency of these charges.

B. Pretrial Hearing

King was indicted for murder, possession of a weapon during the commission of a violent crime, assault and battery of a high and aggravated nature, and pointing and presenting a firearm. During a pretrial hearing, King moved to exclude several

---

[2] Victim sold alcohol from his home.

[3] Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.").

portions of his first recorded interview. Throughout King's objections, the State and the trial court commented on the apparent technological impossibility of redacting certain statements from the recorded interview.

Since the State contends King did not preserve the evidentiary issues for appellate review, we will summarize King's objections to the trial court. During the entire pretrial review of King's first recorded interview, King made numerous objections. King moved to have a reference to the McColl charges redacted:

> KING: Your Honor, at this point he just mentioned the McColl charge again. I will move to redact that part.
>
> THE STATE: Your Honor, he only mentioned the McColl charge because [King] is saying [McLaughlin] is the one [who] murdered [Victim]. He's saying, "You mean the same guy you just robbed two weeks ago."
>
> TRIAL COURT: I'm going to leave -- let that stand.
>
> KING: Your Honor, for the record my objection was 404(b).
>
> TRIAL COURT: I understand.
>
> KING: 403 and 401, Your Honor.
>
> TRIAL COURT: I think it's appropriate based on the totality of what he's saying. Go ahead.

King next objected to a statement he made regarding an unrelated murder for which he was charged:

> KING: Your Honor, at approximately 4:08 -- I mean 5:08:25 he said he already has murders on his record, and I move to redact that, 404(b).
>
> TRIAL COURT: What was that specific remark?

> KING: He said, "I've already got murders on my record."[4]
>
> THE STATE: Your Honor, he does not have a conviction for murder on his record.
>
> KING: And he's been charged with murder, Your Honor.
>
> TRIAL COURT: He said -- I'm going to leave it where it is. Go ahead.

King then objected to a reference to a prior incident in which he was stabbed, and the trial court ordered that discussion to be redacted.

King's second recorded interview was also played for the trial court during the pretrial hearing. King objected to a discussion of his McColl charges, and the trial court ordered that portion of the interview to be redacted.

On the morning the trial began, the State moved to admit both recorded interviews into evidence. King again noted his objections to the interviews and noted the redactions the trial court ordered the day before. King had also emailed the trial court a list of some of his objections with the specific timestamps for the record. The list was made a court's exhibit. The State then informed the trial court it was no longer seeking to admit the first portion of the first recorded interview, which included references to the unrelated murder charge and the McColl charges. King replied he objected to more than just the first portion of the video. King specifically noted his objection to the jury hearing evidence of the prior stabbing, the unrelated murder charge, and the McColl charges. King stated:

> KING: I made an objection to a prior murder and kidnapping charge at [5:08:09 through 5:08:10].
>
> . . . .
>
> KING: That hasn't been redacted, Your Honor.

---

[4] King's statement actually referenced both the unrelated murder charge and the McColl kidnapping charge.

> TRIAL COURT: Why?
>
> KING: He mentioned that -- I believe he stated on the record that he couldn't -- that Marlboro County was unable to go through line by line and redact every word or every reference to anything in the statement. . . .
>
> TRIAL COURT: Well, this equipment is not the best in the world. They have made every effort to do it. It's not as sophisticated as it should be, but you couldn't redact that part?
>
> THE STATE: Beg the Court's indulgence. That was one that at the time, and I recall that section where the Court ruled that that part could stay in. I can't recall exactly ---
>
> TRIAL COURT: If I ruled that I'm not going to beat a dead horse to death. If I ruled -- did I rule it stays?
>
> THE STATE: You did.

After further colloquy concerning the technological impossibility of redacting comments made in the interviews, the trial court concluded the comments regarding the McColl charges and the unrelated murder charge need not be redacted.

C. Trial Testimony

Shawn Feldner, an investigator for MCSO, testified to the jury that he conducted King's first recorded interview on the night of the shooting. Prior to a portion of the first recorded interview being played for the jury, the trial court permitted Investigator Feldner to testify as to what King said to "enable [the jury] to get the full context of what was said." Investigator Feldner did not mention King's unrelated murder charge or the pending McColl charges during his summary. However, when the first interview was published to the jury, it included references to both the unrelated murder charge and the McColl charges.

Jamie Seales, another MCSO investigator, testified he conducted King's second interview. Investigator Seales likewise gave a summary to the jury of what King communicated to him during the interview. A portion of the second recorded interview was published to the jury. It does not appear from the record that any

references to the unrelated murder and McColl charges were mentioned in the published portion of the second interview.

Wife testified she was in bed with Victim when there was a knock at their front door at approximately 2:30 a.m. She stated Victim answered the door, came back to the room, and told her King was at the door. Wife testified Victim went back into the living room and she heard a "pop" after hearing Victim say, "Naw, man, I don't have . . . ." Wife did not see the shooting. She testified King ran into her bedroom, pointed a gun in her face, and hit her in the head with the gun—causing it to discharge. Wife explained she called 911 when King ran out of the bedroom. Wife testified she went into the living room and saw Victim on the floor. She testified she saw King pointing a gun at Cousin and stated that when King saw her, he ran over and hung up the phone. Wife testified King answered the phone when the 911 operator called back and said, "Yeah, yeah, my home boy shot my neighbor. He came for some liquor. He shot my neighbor." Wife explained King ran out the back door when the MCSO deputy arrived. Wife made an in-court identification of King and noted King had been their neighbor for the last twelve or thirteen years.

Cousin testified he was asleep inside Victim's home the morning of the shooting. He testified he woke up after hearing Wife scream his name. Cousin stated he saw King in the living room with a gun to Wife's face. He noted King pointed the gun at his chest and told him, "One of [my] boys did it." Cousin made an in-court identification of King.

Victim's grandson (Grandson), who was ten years old at the time of the shooting and eleven years old at the time of trial, testified he was asleep inside Victim's home in a living room chair the morning of the shooting. Grandson stated he woke up after King came inside the house. Grandson explained that after King asked Victim for some "beer or liquor," King pulled a gun out from his pants, pointed it at Victim, and shot him. Grandson noted King was the only person he saw inside the house at that time. On cross-examination, Grandson clarified he saw King point the gun at Victim's stomach but admitted he was not looking at King and Victim when the shot was fired and only heard the shot. Victim was shot in the face.

Timothy Shaw, a deputy with MCSO, testified he was the responding officer the morning of the shooting. He noted he arrived at the scene quickly because Victim's house was only 200 yards from MCSO. Deputy Shaw testified that when he arrived, one of the people on the porch informed him the suspect was running out the back door. Deputy Shaw explained he chased the suspect on foot before

apprehending him. He noted he recovered a bottle of liquor[5] and Victim's house phone from the suspect. He stated he arrested the suspect and read him his Miranda rights. Deputy Shaw testified he did not observe any other suspects running from Victim's home. Deputy Shaw made an in-court identification of King as the suspect he apprehended.

Aloysius McLaughlin and Melissa Graham, McLaughlin's girlfriend at the time of the shooting, both testified they were not with King on either the night before the shooting or the early morning of the shooting. The forensic pathologist testified the gunshot that killed Victim was fired between six inches and four feet away from Victim's face. John Roberts of the State Law Enforcement Division (SLED) testified there was gunshot residue (GSR) on King's right palm. Michelle Eichenmiller of SLED testified the two cartridge casings and one projectile recovered from Victim's home were fired from the handgun found in the woods behind King's home.

At the close of the State's case, the trial court denied King's motion for a directed verdict. The jury deliberated for approximately an hour and a half before requesting to be recharged on the three degrees of assault and battery. The jury also requested to be recharged on the difference between murder and involuntary manslaughter (which was charged to the jury as a lesser-included offense of murder). After further deliberation, the jury found King guilty of murder, third-degree assault and battery, pointing and presenting a firearm, and possession of a weapon during the commission of a violent crime.

King appealed, arguing the trial court erred in excluding some but not all of the references to the unrelated murder charge and the McColl charges. The court of appeals first found King properly preserved his argument for appellate review. *State v. King*, 416 S.C. 92, 107-09, 784 S.E.2d 252, 260-61 (Ct. App. 2016). On the merits, the court of appeals concluded the trial court "provided no indication that it properly considered Rules 401, 403, or 404(b) [of the South Carolina Rules of Evidence]." *Id.* at 110, 784 S.E.2d at 262. The court of appeals stated, "Even if these prior bad acts fell within a 404(b) exception, the [trial] court failed to determine whether the prior bad act evidence was clear and convincing, and failed to conduct an on-the-record Rule 403 balancing test." *Id.* The court of appeals remanded the

[5] The brand of the liquor recovered from King matched the brand of liquor that Victim sold at his home.

matter to the trial court to properly conduct the necessary analyses. *Id.* at 111, 784 S.E.2d at 262. We granted the State's petition for a writ of certiorari.

II. DISCUSSION

A. Preservation

The State asserts King's argument that the trial court erred in failing to conduct an on-the-record Rule 404(b) analysis regarding the other bad act evidence was not preserved for review. The State argues that although King did make a general objection under Rule 404(b), he did not specifically request the trial court to assess whether the State proved those other bad acts by clear and convincing evidence. Also, the State contends King did not specifically request the trial court to engage in an on-the-record prejudice analysis as required by Rule 403. The State asserts that because the argument which is now the basis for remand was never advanced at trial or ruled upon by the trial court, the issue was not preserved. We disagree.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Id.* at 142, 587 S.E.2d at 694. In *State v. Smith*, the court of appeals explained it is the defendant's duty to raise arguments regarding an improper Rule 403 or 404(b) analysis to the trial court. 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011), *rev'd on other grounds*, 406 S.C. 215, 750 S.E.2d 612 (2013).

King preserved his other bad act argument regarding his unrelated murder charge and his pending McColl charges. Pretrial, King moved for several references to these charges to be redacted from the recorded interviews. Although the trial court ordered some of the references to be redacted, the trial court permitted references to the unrelated murder and pending McColl charges to remain in the portion of King's first recorded interview published to the jury. When objecting to the references to the McColl charges in that portion of the interview, King cited to Rules 401, 403, and 404(b), SCRE. When objecting to evidence of the unrelated murder charge in that portion of the interview, King cited Rule 404(b), SCRE. Without any on-the-record explanation or analysis, the trial court made a pretrial ruling that this evidence was admissible. King memorialized his pretrial objections

in an email he sent to the trial court. On the morning trial began, King renewed his objections when the State offered the recorded interviews into evidence, but the trial court again overruled his objections. The trial court made its rulings final and stated, "I don't want you to make your objections again as to those items, the second part. You've made them and are protected for the record. . . . We don't want to waste another day with objections."

Had the trial court conducted the proper analyses under the foregoing Rules of Evidence, King indeed would have been required to raise any perceived errors in those analyses for the trial court to rule upon. *See Smith*, 391 S.C. at 365, 705 S.E.2d at 497. However, we agree with the court of appeals that this case is distinguishable from *Smith*, because unlike the defendant in *Smith* who failed to object to an improper Rule 404(b) or Rule 403 analysis, King is not arguing the trial court conducted an improper analysis. Rather, King argues the trial court erred by not conducting any analysis *at all* before deciding to admit evidence of the unrelated murder charge and the McColl charges. We find King's argument was sufficiently specific and apparent from its context to bring the trial court's attention to his claim of error. *See State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("[An] objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."). Therefore, we find King's argument was preserved.

B. Evidence of King's Other Bad Acts

Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). Nevertheless, this other bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE (providing that although evidence may be relevant, it may be excluded "if its probative value is substantially outweighed by the danger of unfair

prejudice").[6] "[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

Here, the court of appeals correctly held the trial court erred in failing to conduct a Rule 404(b) analysis before admitting evidence of King's unrelated murder charge and his pending McColl charges. The court of appeals remanded the matter to allow the trial court the opportunity to conduct the necessary analyses. However, during oral argument before this Court, the State conceded there was no valid reason for the trial court to admit evidence of King's unrelated murder charge. Because the State now concedes any reference to the unrelated murder charge was inadmissible, a remand for the trial court to consider its admissibility would be pointless.[7]

---

[6] Rule 403, SCRE, is sometimes misstated. *See, e.g.*, *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278-79 (2009) (incorrectly noting that for evidence to be admissible under a Rule 403 analysis, "[t]he probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant"). The correct test is the opposite: whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The test described in *Wallace* incorrectly places the burden on the proponent of the evidence to establish admissibility, while the proper test places the burden on the opponent of the evidence to establish inadmissibility.

[7] Even if the State did not concede the trial court's admission of King's unrelated murder charge was error, we would find the court of appeals erred in remanding the matter to the trial court to perform the appropriate analyses concerning that charge. In this case, there would be nothing for the trial court to analyze on remand. The only discussion in the record of the unrelated murder charge was in King's statement to law enforcement during his first recorded interview. There is no evidence of any facts concerning the unrelated murder in the record, and there is no evidence in the record of any logical relationship the unrelated murder charge may have to the instant murder charge; since the trial court could not receive any additional evidence on remand, a remand to determine its admissibility would serve no purpose. *See Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483 ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.").

Therefore, the question becomes whether the trial court's error in admitting this evidence was harmless beyond a reasonable doubt.

C. Harmless Error

The State argues that any error in admitting evidence of King's unrelated murder charge was harmless because of the overwhelming evidence of King's guilt. We disagree.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *Id.* Therefore, an insubstantial error not affecting a trial's result is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

The State bases its argument of overwhelming evidence upon the following trial evidence: the testimony of three eyewitnesses who placed King in Victim's home with the murder weapon (Wife's testimony that she heard an argument between King and Victim prior to hearing the gunshot; Wife's testimony that King ran into her room, pointed the gun at her, and pistol-whipped her after the gunshot; Cousin's testimony that King pointed the gun at him; Grandson's testimony that King pointed the gun at Victim's stomach prior to Grandson hearing the gunshot); evidence that Victim was shot in the face; Wife's testimony that King hung up her phone when she tried to call 911; King's attempt to run away from the scene; the murder weapon being found in the woods behind King's residence; the recovery of Victim's house phone and liquor bottle resembling the type sold from Victim's home near where King was apprehended; King's differing statements to MCSO; gunshot residue on King's right palm; and King's admission that he shot Victim.

There is no dispute at this stage that King shot Victim, as King conceded during closing argument that he was holding the gun when it discharged. To prove the act constituted murder, the State must prove beyond a reasonable doubt that King acted with malice. Despite the existence of the evidence cited by the State, we conclude the evidence as a whole does not constitute overwhelming evidence that King acted with malice. No witness saw the actual gunshot. We acknowledge Grandson testified he saw King point the gun at Victim's stomach; however, Victim was shot in the face—not the stomach. Grandson testified he was not watching when

the shot was fired. The evidence as a whole supports at least the inference that King pointed the handgun at Victim's stomach while showing it to him during a potential sale and then accidentally fired the gun into Victim's face while trying to remove the magazine. We acknowledge King's behavior following the alleged accident was erratic. However, this behavior does not constitute overwhelming evidence of malice at the time of the shooting. While jurors may doubt King's account of his killing of Victim, the evidence as a whole does not constitute overwhelming evidence that King acted with malice.

King claimed in his second interview with law enforcement that the gun accidentally discharged when he was attempting to remove the magazine while he was showing the gun to Victim. This account was published to the jury. The trial court charged the jury that the State was required to prove beyond a reasonable doubt that the shooting was not an accident. *See State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) ("For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of the weapon."). For the same reasons we conclude there was not overwhelming evidence of malice, we find there was not overwhelming evidence disproving King's defense of accident.

Based on the evidence presented at trial, we find King's guilt of murder was not conclusively proven such that no other rational conclusion could be reached. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). The admission into evidence of the unrelated murder charge is highly prejudicial to a defendant currently on trial for murder. *See State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) ("When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."). Since King was on trial for murder, it is entirely reasonable to conclude the jury considered the evidence of his unrelated murder charge in reaching its guilty verdict. Because evidence of King's guilt of murder was not overwhelming, we hold the erroneous admission of evidence of the unrelated murder charge was not harmless beyond a reasonable doubt.

Upon retrial, the admissibility of the McColl charges may turn upon issues other than Rule 404(b), as one of the alleged victims of the McColl incident, Aloysius McLaughlin, testified to the jury he was not with King at the time of the

shooting of Victim. An explanation as to why the jury should not believe McLaughlin would associate with King might be relevant to that inquiry. Upon retrial and upon proper objection by King, the trial court may resolve the admissibility of the McColl charges under applicable evidentiary authority, including, but not limited to, Rules 401, 402, and 403.

III. CONCLUSION

We find the court of appeals properly determined King's argument concerning the trial court's admission of evidence of other bad acts was preserved for appellate review. The trial court erred in admitting evidence of the unrelated murder charge, and we hold this error was not harmless beyond a reasonable doubt. We vacate the court appeals' decision to remand to the trial court for proper analysis of the admissibility of the unrelated murder charge, as a remand would be pointless. We hold King is entitled to a new trial on the charges of murder and possession of a weapon during the commission of a violent crime. Upon retrial, if the State seeks to introduce evidence of the McColl charges, the trial court must determine the admissibility of those charges through the application of Rules of Evidence that may be raised by proper objection. King's unappealed convictions for third-degree assault and battery and pointing and presenting a firearm are not affected by our holding.

REVERSED AND REMANDED.

FEW, J., and Acting Justice Arthur Eugene Morehead III, concur. HEARN, Acting Chief Justice, dissenting in a separate opinion in which Acting Justice Jan Benature Bromell Holmes, concurs.

ACTING CHIEF JUSTICE HEARN: Because I am convinced that any error in the failure to redact King's admission of his prior murder charge and other bad acts is harmless beyond a reasonable doubt, I respectfully dissent. I agree completely with and adopt Judge Geathers' dissenting opinion from the court of appeals, as set out fully below:

> I would affirm King's conviction because the non-*Lyle*[] evidence of King's guilt was overwhelming. Victim's grandson saw King point the gun at Victim immediately prior to the gun's discharge. After shooting Victim, King pistol-whipped Wife, pointed the gun at Cousin's chest, and hung up the telephone Wife was using to speak to a 911 operator. When the 911 operator called back, King told the operator one of his homeboys shot Victim. When King learned police had arrived at the home, he fled the home and attempted to hide from police. King initially told police that McLaughlin shot Victim; only in his second statement to police did he allege that he shot Victim by accident.
>
> Therefore, any possible error in admitting the *Lyle* evidence was harmless beyond a reasonable doubt. *See State v. Gillian*, 373 S.C. 601, 609–10, 646 S.E.2d 872, 876 (2007) (finding that the admission of the specifics of the defendant's prior bad act in violation of Rule 403, SCRE, was harmless because the defendant's guilt was proven by other competent evidence "such that no other rational conclusion can be reached"); *State v. Keenon*, 356 S.C. 457, 459, 590 S.E.2d 34, 35 (2003) (holding the trial court erred in allowing the State to present evidence of multiple prior convictions "without first weighing the prejudicial effect against the probative value" but finding the error harmless "because of the overwhelming evidence of petitioner's guilt"); *State v. Brooks*, 341 S.C. 57, 62–63, 533 S.E.2d 325, 328 (2000) (holding whether the improper introduction of prior bad acts is harmless requires the appellate court to review "the other evidence admitted at trial to determine whether the defendant's 'guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached'" (quoting *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993))); *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)), *cert. denied*, (2004); *id*. (concluding even if the admission of evidence of an initial burglary of the victim's house violated *Lyle*, it did not affect the evidence that supported the defendant's guilt in the subsequent burglary).

State v. King, 416 S.C. 92, 113–14, 784 S.E.2d 252, 263–64 (Ct. App. 2016) (Geathers, J., dissenting).

Acting Justice Jan Benature Bromell Holmes, concurs.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Calhoun County. Effective August 7, 2018, all filings in all common pleas cases commenced or pending in Calhoun County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Chester
Clarendon	Colleton	Dorchester	Edgefield
Fairfield	Georgetown	Greenville	Greenwood
Hampton	Horry	Jasper	Kershaw
Lancaster	Laurens	Lee	Lexington
McCormick	Newberry	Oconee	Orangeburg
Pickens	Richland	Saluda	Spartanburg
Sumter	Union	Williamsburg	York

Calhoun—Effective August 7, 2018

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
July 18, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jeffrey Dana Andrews, Appellant.

Appellate Case No. 2015-001679

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5574
Heard February 14, 2018 – Filed July 18, 2018

AFFIRMED IN PART AND REVERSED IN PART

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

Attorney General Alan McCrory Wilson, Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Ernest Adolphus Finney, III, of Sumter, for Respondent.

WILLIAMS, J.: In this criminal appeal, Jeffrey Dana Andrews appeals his convictions of voluntary manslaughter and possession of a weapon during the commission of a violent crime. On appeal, Andrews argues the circuit court erred

in (1) denying him immunity under the Protection of Persons and Property Act[1] (the Act) due to inconsistent witness testimony, (2) refusing to qualify Investigator Terry Gainey as an expert in interrogation and force science when Gainey was qualified by experience and training, and (3) admitting the testimony of Emergency Medical Technician (EMT) paramedic Kimberly Graham when Graham was not an expert in crime scene investigation and her opinion was highly prejudicial. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

On the evening of March 25, 2014, officers responded to a residential shooting in Sumter County, South Carolina. Corporal Jerry Kelly arrived first on the scene and found Shamar Howell (Victim) lying on Andrews's front porch with one bullet wound above his right eye. Erika Andrews, the mother of Victim's child and Andrews's cousin, sat screaming and crying on the porch holding Victim's head. She told Corporal Kelly that Andrews killed her boyfriend and was inside the residence. When Corporal Kelly entered the residence, Andrews willingly surrendered, stating "I'm the guy you're looking for." Corporal Kelly arrested Andrews and placed Andrews in his patrol car while he secured the scene.

Andrews was indicted for murder and possession of a weapon during the commission of a violent crime. Andrews filed a motion to dismiss the charges pursuant to the Act on the ground he acted in self-defense. Prior to trial, the circuit court conducted an immunity hearing on the matter. At the hearing, Andrews testified that at the time of the incident, he lived with his wife and his father, Robert Andrews, in one of Robert's trailers. On the night of the incident, Andrews was celebrating his re-enrollment in school, and he invited his cousin Virlyn Gardner over to enjoy a bottle of brandy. Andrews, Gardner, and Robert left to eat dinner and hid the brandy bottle on the back porch next to the washer and dryer. Upon returning, Andrews noticed the dryer was in use[2] and the bottle of brandy was missing. Andrews discovered Erika's and Victim's clothes in the dryer. Andrews walked to Erika and Victim's nearby trailer and asked them if they had taken the bottle, which they denied, and Andrews left to get more alcohol. Later

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[1] *See* S.C. Code Ann. §§ 16-11-410 through -450 (2015).

[2] Three people had permission to use the washer and dryer: Jenny Bell, Erika, and Victim.

that night, Andrews and Robert were socializing at their trailer with Gardner when Erika arrived, followed shortly by Victim. Erika and Victim left and returned to the trailer soon thereafter. Andrews testified that when Victim returned, he had one forty-ounce bottle of beer wrapped in a paper bag. Later that evening, Andrews again mentioned the missing brandy bottle, which Erika and Victim repeatedly denied taking.

Andrews testified that when he asked Erika and Victim to leave, verbal and physical altercations ensued; Victim advanced towards Andrews cursing and holding the forty-ounce beer bottle. Andrews testified he removed Victim to the front porch, while Erika was still inside, and he locked the screen door and closed the wooden front door. Andrews went to Robert's bedroom to retrieve the phone to call the police when he heard the wooden front door open and Erika and Victim talking. Unable to find the phone, Andrews began to exit Robert's room when he heard Victim insinuate Andrews was scared to come outside for fear of an altercation. Andrews, still at Robert's bedroom door, heard Victim "snatch" the locked screen door open and saw Victim crossing the threshold of the front doorway. Andrews grabbed a gun sitting on Robert's dresser, turned, and shot Victim as he came through the threshold of the doorway. Robert corroborated Andrews's testimony.

At this point in the hearing, the eyewitness testimony of Andrews and Robert varied substantially from Erika, the only other eyewitness to testify. Erika testified Victim chose to leave peacefully when Robert asked him to leave, and Victim never tried rushing back into the residence or pulling the screen door open after exiting. She testified Andrews went to Robert's bedroom as Victim peacefully said goodbye, and Andrews followed Victim closely behind as Victim exited the residence onto the front porch. Erika testified she was still inside the residence when she heard a gunshot, and she ran to the front door to see Andrews holding a gun. She also testified that, prior to the shooting, Victim never had a forty-ounce bottle of beer at the residence[3] and he never threatened or hit Andrews.[4]

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[3] State's exhibit No. 7 was admitted at trial showing a forty-ounce beer bottle wrapped in a brown paper bag next to the front porch after the incident.

[4] Erika explained Victim would never hit Andrews as that behavior was out of character for him. However, Andrews attacked Erika's credibility with a police

Andrews proffered Investigator Gainey as an expert in interrogation and force science[5] during the immunity hearing. No court had previously qualified Investigator Gainey as an expert in this field. However, Investigator Gainey had twenty years of law enforcement experience and previously attended one forty-hour, week-long force science course about officer-involved shootings and the timeline for interviewing officers after fatally shooting someone. Investigator Gainey testified the "golden rule" was to wait "[forty-eight] hours or two good sleep cycles" before interviewing an officer involved in a fatal shooting. He stated shootings typically caused "memory fragmentation[, a]nd after a couple of sleep cycles[,] you're able to consolidate your memories" and remember the event more clearly. Furthermore, Investigator Gainey testified that if a shooter was interviewed thirteen minutes after a shooting, he or she would have a "completely fragmented" memory and would need time to decompress to chronologically sort out the events. However, the circuit court declined to qualify Investigator Gainey as an expert, noting his one-week course was insufficient qualification.

In response, the State called Corporal Kelly. After he arrested, *Mirandized*,[6] and placed Andrews in his patrol car, Corporal Kelly asked Andrews why he shot Victim. Corporal Kelly testified Andrews's initial answer was that Victim took the brandy bottle but later stated he shot Victim because Victim refused to leave when he was asked. At trial and during the immunity hearing, Corporal Kelly stated Andrews did not mention a physical altercation until his second or third conversation with Corporal Kelly, and Andrews did not mention fearing for his life until police interviewed him at the police station.[7]

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report, stating Erika and Victim assaulted Teresa Williams a few weeks before Victim's death. Erika maintained Victim was not involved with the Williams incident.

[5] Investigator Gainey described force science as the use of force issues within law enforcement.

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

[7] At the station Andrews indicated, "I need to talk about this in the morning. I'm all twisted."

At the end of the hearing, Andrews argued he was entitled to immunity under the Act because he was in imminent fear of bodily harm when Victim forcefully entered his residence. The circuit court rejected his argument, finding "very inconsistent" witness testimony created a jury question and finding Andrews failed to meet his burden of proof of a preponderance of the evidence. The case proceeded to trial.

At trial, both parties presented evidence similar to the evidence presented at the immunity hearing.[8] The State called Graham, the responding EMT paramedic. The circuit court qualified Graham as an expert in the field of Emergency Medical Services (EMS) without objection. Graham testified she received her Basic EMT certification in 1992; received her paramedic certification in 1998; and was certified in pediatric trauma life support, Hazmat, and cardiopulmonary resuscitation (CPR). Graham had responded to thousands of emergencies and was trained in taking vital signs, bandaging wounds, administering drugs and IVs, using a defibrillator, and intubating patients. Upon arriving on scene, Graham's job was to find the most critical patient and "begin life saving advances" on him or her. Graham testified that, when she arrived at Andrews's residence, Erika was screaming and lying on top of Victim on the front porch. She testified Victim was on his back with a gunshot wound above his right eye, his pupils were nonreactive, and the back of his head was "mushy," which she believed could have been attributed to the bullet or the back of his head hitting the concrete. The State further questioned Graham on direct examination:

> [The State]: [C]ould [Victim] have talked?
>
> [Graham]: No sir. When [Victim] was shot, the amount of force that it takes to go through and fracture the skull and then go through the brain, *my opinion is whenever [Victim] was shot, he dropped*."
>
> . . . .

[8] Andrews did not call Investigator Gainey to testify at trial.

> [The State]: So based on your observation of the body, and your observation of the injury, where was [Victim] when he got shot?
>
> [Graham]: He was standing on the porch.
>
> [The State]: Outside?
>
> [Andrews's Counsel]: Your Honor, I am going to object to that. Even as an expert, as an EMT, I don't think she's qualified with crime scene reconstruction work.
>
> THE COURT: I think based upon her testimony that was not objected [to], that he dropped right there. I think she can say where he dropped. Overruled.

(emphasis added).

The State later called Dr. Janice Ross, who the court qualified as an expert in forensic pathology. Dr. Ross testified that Victim would have "collapsed" after he was shot due to his injuries, but she conceded "my findings don't exactly tell me the positions of the shooter and the victim." She acknowledged her findings were consistent with: (1) Victim entering the residence, seeing the gun, backing up, and turning, which led to Victim falling backwards onto the porch; or (2) Victim leaving the residence and looking back when he was shot.

After the State rested, Andrews called numerous witnesses and testified on his own behalf. Andrews called John Davis, a private investigator, who testified that, based on measurements he had taken of Andrews's front porch and crime scene photos, he calculated the pool of blood from Victim's head wound was six feet, four inches from the door jam.[9] However, Davis testified he could not determine Andrews's and Victim's locations at the time of the shooting.

The jury found Andrews guilty of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The circuit court denied

[9] Dr. Ross previously testified Victim was six feet tall.

Andrews's motion for a new trial and sentenced Andrews to thirty years' imprisonment. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in denying Andrews immunity under the Act?

II. Did the circuit court err in refusing to qualify Investigator Gainey as an expert in interrogation and force science?

III. Did the circuit court err in allowing opinion testimony from Graham regarding Victim's location at the time of the shooting?

STANDARD OF REVIEW

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard of review." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007). "[T]he abuse of discretion standard of review does not allow [the appellate] court to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014). "A [circuit] court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

LAW/ANALYSIS

I. Protections of Persons and Property Act

First, Andrews argues the circuit court abused its discretion by denying him immunity from prosecution under the Act. We disagree.

Subsection 16-11-450(A) of the South Carolina Code (2015) provides immunity from criminal prosecution to a person using deadly force as permitted by the Act.

Further, section 16-11-440 of the South Carolina Code (2015) sets forth the circumstances under which the Act allows deadly force:

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

> or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

To claim immunity under the Act, an accused must demonstrate the elements of self-defense, save the duty to retreat, to the satisfaction of the circuit court by the preponderance of the evidence. *Curry*, 406 S.C. at 370–71, 752 S.E.2d at 266.

Specifically, Andrews argues that like in *State v. Duncan*,[10] after Andrews ordered Victim to leave his home, Victim attempted to reenter forcefully and without permission, which put Andrews in fear of great bodily harm, and caused him to lawfully shoot Victim in his residence. He further argues, the circuit court, "as the trier of fact at the immunity hearing, had the duty to make credibility findings whe[n] [the court] found the evidence was not consistent." Andrews maintains the court committed reversible error by finding the inconsistent testimony made Andrews's self-defense claim a "quintessential jury question."

In *Duncan*, the victim was a guest in the accused's residence when the accused asked him to leave. 392 S.C. at 407, 709 S.E.2d at 663. The victim left but returned a few minutes later. *Id*. The victim was opening the screen door when the accused exited the front door onto his porch with a gun. *Id*. The accused shot the victim as the victim continued to force his way onto the accused's porch. *Id*. Our supreme court found the accused was entitled to immunity under the Act because eyewitness testimony and statements were consistent and "showed by a preponderance of the evidence that the victim was in the process of unlawfully and forcefully entering [the accused's] home" when he was shot. *Id*. at 411, 709 S.E.2d at 665.

In *Curry*, our supreme court affirmed the circuit court's denial of immunity under the Act. 406 S.C. at 372, 752 S.E.2d at 267. The court noted the accused's testimony varied "substantially" from the State's eyewitness testimony as to whether the victim had attacked the accused. *Id.* at 369, 752 S.E.2d at 265. Thus, the accused's "claim of self-defense present[ed] a quintessential jury question, which, most assuredly, [was] not a situation warranting immunity from prosecution" under the Act. *Id.* at 372, 752 S.E.2d at 267.

[10] 392 S.C. 404, 709 S.E.2d 662 (2011).

Similarly, in *State v. Butler*, our supreme court affirmed the circuit court's denial of a motion for a directed verdict on self-defense, determining the evidence created a jury issue on the question of self-defense. 407 S.C. 376, 382, 755 S.E.2d 457, 460–61 (2014). The court noted the accused made various inconsistent statements about how the victim's stabbing occurred and also noted the accused's injuries were inconsistent with her testimony regarding how, and with what objects, the victim attacked the accused. *Id.* at 382, 755 S.E.2d at 460.

Unlike *Duncan*, in the instant case, witness accounts varied over whether Victim was in the process of unlawfully and forcefully entering Andrews's residence. Andrews's and Robert's testimonies—regarding whether Victim hit and threatened Andrews prior to the incident and whether Victim was peacefully leaving or forcefully entering the residence when Andrews shot him—varied substantially from Erika's eyewitness testimony.[11] The accused is not entitled to immunity under the Act, when the accused's testimony is in direct conflict with eyewitness testimony as to whether the victim attacked the accused. *Curry*, 406 S.C. at 372, 752 S.E.2d at 267. "When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury." *Butler*, 407 S.C. at 382, 755 S.E.2d at 460 (quoting *State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968)); *see also Curry*, 406 S.C. at 372, 752 S.E.2d at 267 (finding the accused's "claim of self-defense present[ed] a quintessential jury question, which, most assuredly, [was] not a situation warranting immunity from prosecution" when the defendant was in a prior altercation with the victim and later retrieved a gun and shot the victim). The conflicting eyewitness testimony created a self-defense issue for the jury; therefore, the circuit court properly submitted the case to the jury. We affirm this issue.

II. Expert Disqualification

Second, Andrews argues the circuit court abused its discretion during the immunity hearing by refusing to qualify Investigator Gainey as an expert in interrogation and force science. We disagree.

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[11] The circuit court found "[t]he testimony [was] conflicting as to what the different witnesses saw and what happened on the night in question," which created a question for the jury.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. However, "[b]efore a witness is qualified as an expert, the [circuit] court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) and the expert's testimony is reliable." *State v. Martin*, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011). Moreover, "[a] [circuit] court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *White*, 382 S.C. at 269, 676 S.E.2d at 686. "The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the [circuit] court has vetted the matters of qualifications and reliability and admitted the evidence." *Id.* at 274, 676 S.E.2d at 689.

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience[,] or both[,] such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Nelson v. Taylor*, 347 S.C. 210, 214, 553 S.E.2d 488, 489 (Ct. App. 2001) (quoting *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997)). "Qualification depends on the particular witness' reference to the subject." *Id.* at 214, 553 S.E.2d at 490. "The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony." *State v. Von Dohlen*, 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996). Despite Investigator Gainey's twenty years' experience in law enforcement, Andrews failed to demonstrate how Investigator Gainey was qualified to give expert testimony on fragmented post-shooting interrogation memory of a non-officer shooter. Investigator Gainey's one-week course on force issues in law enforcement did not address interviewing non-officer shooters and only dedicated one day to cognitive interviewing. We affirm the circuit court.

III. EMT Paramedic Testimony

Last, Andrews argues the circuit court erred in allowing opinion testimony from EMT paramedic Graham regarding Victim's location at the time of the shooting. We agree.

A. Qualification

Specifically, Andrews maintains Graham was not qualified as an expert in "crime scene reconstruction," and as a result, she was not qualified to offer opinion testimony on Victim's location at the time of the shooting.

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. However, an opinion may be offered on the ultimate issue of the case only when the witness is otherwise qualified. *State v. Wilkins*, 305 S.C. 272, 277, 407 S.E.2d 670, 672–73 (Ct. App. 1991). Likewise, an expert's testimony may not exceed the scope of his expertise. *State v. Ellis*, 345 S.C. 175, 177–78, 547 S.E.2d 490, 491 (2001).

In the instant case, the court qualified Graham as an expert in the field of EMS without objection. As such, Graham was qualified to testify, as she did, to prehospital emergency care administered to Victim and to the resulting medical observations of his body and injuries. *See Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 ("Qualification depends on the particular witness' reference to the subject."); S.C. Code Ann. Regs. 61-7 § 200(N)(1), (4) (Supp. 2017) (defining "paramedic" as a person "intended to provide leadership and to deliver prehospital emergency care and provide rapid on-scene treatment" and defining "EMT basic" as a person "specially trained and certified to administer basic emergency services to victims of trauma or acute illness before and during transportation to a hospital or other healthcare facility").

However, we find the circuit court abused its discretion in allowing opinion testimony from EMT paramedic Graham regarding Victim's location at the time of the shooting. Despite Graham's previous, un-objected to testimony—"whenever he was shot, he dropped"—we find Graham's subsequently challenged testimony—that Victim "was standing on the porch" when he was shot—exceeded the scope of her expertise in emergency medical services and was, therefore, inadmissible. In effect, by admitting into evidence Graham's challenged testimony that Victim was

on the porch when he was shot, the circuit court allowed Graham to give her opinion on the ultimate issue: whether Andrews acted in self-defense when he shot and killed Victim. *See Wilkins*, 305 S.C. at 276, 407 S.E.2d at 672–73 (stating an opinion may be offered on the ultimate issue only when the witness is otherwise *qualified*); *see also Ellis*, at 178, 547 S.E.2d at 491 (stating that by admitting the officer's testimony regarding the location of the body at the time of the shooting, the circuit court, in effect, allowed the officer to give an unqualified opinion on the ultimate issue of whether the defendant had been acting in self-defense when he shot and killed the victim). We find the circuit court erred in admitting Graham's testimony regarding Victim's location at the time of the shooting.

B. Harmless Error

The State contends Graham's testimony was harmless. We disagree.

Graham's testimony improperly undermined Andrews's self-defense claim as it was beyond the scope of her expertise and went to the heart of Andrews's defense. *See Ellis*, at 178, 547 S.E.2d at 491 ("While the State was free to argue that the evidence supported an inference that the victim was astride the bicycle when shot, and while the jury could certainly have concluded that he was, [the officer] was not qualified to give such an 'expert' opinion. An officer's improper opinion which goes to the heart of the case is not harmless."); *State v. Huckabee*, 419 S.C. 414, 430, 798 S.E.2d 584, 592–93 (Ct. App. 2017) (finding improper testimony was not harmless, in part, because it went to the heart of the appellant's defense), *cert. denied*, S.C. Sup. Ct. Order dated May 24, 2018. Further, Victim's location was not a well-established fact because eyewitness and expert testimony was either inconclusive or conflicting regarding Victim's location at the time of the shooting. *See State v. Doctor*, 306 S.C. 527, 530, 413 S.E.2d 36, 38 (1992) ("When a witness' testimony is disputed or his credibility called into question, other testimony verifying the facts or opinions given by the witness is not merely cumulative."); *but see Douglas*, 411 S.C. at 326, 768 S.E.2d at 243 (finding improperly-admitted testimony harmless when the subject of the challenged testimony is well-established by properly admitted evidence prior to the admission of the improper testimony).

Graham's challenged testimony was not merely cumulative to Dr. Ross's testimony. Although Dr. Ross's testimony—that Victim would have "collapsed" after being

shot—is comparable to Graham's testimony—that "whenever he was shot, he dropped"—Dr. Ross did not testify as to Victim's location at the time of the shooting. Rather, Dr. Ross conceded her findings were inconclusive as to the positions of Andrews and Victim at the time of the shooting, and that Victim could have been entering or exiting Andrews's residence when he was shot. Thus, Graham's testimony that Victim "was on the porch" was not merely cumulative to Dr. Ross's testimony that Victim collapsed.

We reverse and remand for a new trial on this issue. *See Ellis*, 345 S.C. at 180, 547 S.E.2d at 492 (reversing and remanding appellant's sentence and conviction because "an unqualified witness was permitted to offer an expert opinion on the ultimate issue").

CONCLUSION

Based on the foregoing analysis, the circuit court is

AFFIRMED IN PART and REVERSED IN PART.

LOCKEMY, C.J., and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Builders Mutual Insurance Company for itself and its insured, Peachtree Electrical Services, Appellants,

v.

Bob Wire Electric, Inc. and South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2015-002626

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. Op. 5575
Heard May 16, 2018 – Filed July 18, 2018

AFFIRMED

Richard C. Detwiler, of Callison Tighe & Robinson, LLC, of Columbia, for Appellants.

Pope D. Johnson, III, of Columbia, for Respondents.

HILL, J.: This dispute between two workers' compensation insurance carriers arose in 2005, and now reaches us for the second time. The dispute centers on which carrier is responsible for benefits paid to Christopher Price after November 3, 2003, the date Peachtree Electrical Services (Peachtree) and its carrier Builders Mutual Insurance Company (Builders Mutual) (collectively Appellants) contend Price suffered a second back injury while working for Bob Wire Electric, Inc. (Bob Wire).

Price first injured his back while working for Peachtree in 2002. He filed a workers' compensation claim, which Appellants paid. Price reached maximum medical improvement in the summer of 2003, and in October began working for Bob Wire. On November 15, 2003, he returned to his authorized treating doctor complaining of additional back problems. Appellants resumed paying benefits to Price, but in 2005 sought to stop payment, contending they had just discovered Price had re-injured his back on November 3, 2003, while on the job with Bob Wire. Appellants also joined Bob Wire and its carrier South Carolina Home Builders Self Insurers' Fund (collectively Respondents), in the Workers' Compensation Commission (WCC) action, seeking reimbursement for benefits paid to Price after his alleged second injury. That action ended with the decisions in *Price v. Peachtree Elec. Servs., Inc.*, 396 S.C. 403, 721 S.E.2d 461 (Ct. App. 2011) (*Price I*), *aff'd as modified*, 405 S.C. 455, 748 S.E.2d 229 (2013) (*Price II*), which detail the parties' procedural journey.

In *Price I*, Respondents appealed a circuit court order that had upheld a series of WCC orders requiring Respondents to equitably reimburse Appellants for all benefits paid to Price after November 3, 2003. Finding the WCC lacked subject matter jurisdiction to fashion an equitable apportionment of benefits between carriers (as opposed to the statutory apportionment authorized by section 42-9-430 of the South Carolina Code (2015), an avenue the WCC for some reason never explored), we vacated the WCC orders.

Appellants then brought this action in circuit court, seeking a declaratory judgment that Respondents were responsible for Price's post-November 3, 2003 benefits, and asking for reimbursement under theories of quantum meruit and equitable indemnity. Appellants maintained this court's decision in *Price I* did not affect the WCC's factual finding that those benefits were caused by Price's alleged second injury while working for Bob Wire. After a bench trial, the circuit court entered judgment for Respondents, from which Appellants now appeal.

I.

Appellants contend the circuit court erred in ruling *Price I* vacated the finding of the WCC that Price's post-November 3, 2003 benefits were causally related to his November 3, 2003 injury. According to Appellants, *Price I* only vacated the WCC's ruling that Respondents equitably reimburse Appellants for those benefits, and did not disturb the WCC's underlying factual findings related to injury and causation. Appellants further note the WCC had exclusive jurisdiction to render those factual findings, and Respondents never challenged them on appeal in *Price I*.

Consequently, Appellants insist these findings control the outcome of this appeal because they are the law of the case. Alternatively, Appellants claim the findings control under a theory of res judicata.

We review this issue of law *de novo*, and agree with the circuit court. First, Respondent's appellate briefs in *Price I* reveal they did appeal the WCC's causation findings. Second, as relevant here, the doctrine of "law of the case" is just that—the law of the case in which it was made, not the law of future cases. *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guérard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96–97 (1999) (law of the case doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision"); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571–72, 776 S.E.2d 397, 403 (Ct. App. 2015) (collecting cases and noting law of case doctrine prohibits matters decided on appeal from being relitigated in the trial court in the same case). *See also Messenger v. Anderson,* 225 U.S. 436, 444 (1912) ("[T]he phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."); Wright & Miller, *Fed. Prac. & Proc.* § 4478 (2d. ed.) (law of the case rules "do not apply between separate actions").

More fundamentally, when *Price I* vacated the prior WCC orders, it stripped them of any effect. *See Moore v. N. Am. Van Lines*, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995) ("When the award of the Commission was reversed . . . it became of no effect and was no longer in existence."); *Brown v. Brown*, 286 S.C. 56, 57, 331 S.E.2d 793, 793–94 (Ct. App. 1985) ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."); *Johnson v. Bd. of Educ. of City of Chicago*, 457 U.S. 52, 53 (1982); *Falcon v. Gen. Tel. Co.,* 815 F.2d 317, 320 (5th Cir. 1987) (vacating judgment removes any precedential effect and "[a]ll is effectually extinguished" (quoting *Lebus v. Seafarer's Int'l Union, Etc.*, 398 F.2d 281, 283 (5th Cir. 1968)).

Price I, as modified by *Price II*, not only became the sole law of that case, it ended it. *See O'Connor v. Donaldson,* 422 U.S. 563, 577 n. 12 (1975). As to this appeal in this separate case, *Price I* is not the law of the case; it is stare decisis.

Still, Appellants claim the vacated findings of the WCC survive and are res judicata in this action, barring Respondents from asserting Price's post-November 3, 2003 benefits were not causally linked to his second injury. We need not box these shadows, for a vacated judgment carries no preclusive effect under res judicata or any other doctrine known to us. *See Shaw Components, Inc. v. Nat'l Bank of S.C.*,

304 S.C. 114, 115, 403 S.E.2d 153, 154 (Ct. App. 1991) (issue preclusion cannot be based on reversed judgment). *See also Erebia v. Chrysler Plastic Prod. Corp.*, 891 F.2d 1212, 1215 (6th Cir. 1989) (vacated judgment is "deprived of all conclusive effect, both as res judicata and as collateral estoppel"); *No E.-W. Highway Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) ("A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case. *See, e.g.*, *De Nafo v. Finch,* 436 F.2d 737, 740 (3d Cir. 1971): 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4432 at 302 (1981)."); 50 C.J.S. *Judgments* § 1045 (2018).

We are aware of the length of the parties' litigation odyssey, now well into its second decade (Odysseus' voyage home took just 10 years). Appellants' grasp at res judicata is understandable but misguided. Both sides no doubt crave finality, and would agree, as our supreme court has, with the view of the nameless but "distinguished English judge: 'Human life is not long enough to allow matters once disposed of being brought under discussion again . . . .'" *Warren v. Raymond*, 17 S.C. 163, 189 (1882) (discussing res judicata). But the course of human events is rarely so simplistic, and as to Appellants' claim here of res judicata ("the thing decided"), the thing *Price I* and *II* decided is that the WCC orders were vacated and their underlying factual findings disposed.

II.

Appellants acknowledge their claims here are premised on the factual findings of the WCC, which, as we have now confirmed, were vacated by *Price I*. Nevertheless, Appellants contend they presented sufficient independent evidence to prove their quantum meruit and equitable indemnity claims, and the circuit court erred in finding otherwise. We review these equitable claims tried by the circuit court alone based on our view of the greater weight of the evidence. *Walker v. Brooks*, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015).

Appellants would be entitled to quantum meruit if they proved they conferred a benefit upon Respondents, which Respondents have unjustly retained without paying its value. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616–17, 703 S.E.2d 221, 225 (2010).

Appellants assert they conferred a benefit on Respondents by paying Price's post-November 3, 2003 workers' compensation claims, claims Appellants contend should have been Respondents' responsibility. We see many problems with this argument, including this insuperable one: other than the vacated WCC orders, nothing in the

record establishes Price's November 3, 2003 accident caused a new injury for which Respondents were liable to pay him workers' compensation benefits. As Respondents point out, Price never filed a claim against them. Price testified without objection he believed his November 3, 2003 back injury was merely a continuation of his old one. Appellants offered no expert medical evidence to the contrary, which was necessary to prove causation. Rule 702, SCRE; *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) ("[E]xpert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge.").

Absent such evidence, we agree with the circuit court that Appellant's quantum meruit claim fails. For the same reasons, we also affirm judgment in favor of Respondents on Appellants' claim for equitable indemnity, a cause of action dependent on proof Respondents caused Appellants' damages. *See Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010).

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Oien Family Investments, LLC, Appellant,

v.

Piedmont Municipal Power Agency, Respondent.

Appellate Case No. 2016-001037

Appeal From Newberry County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. Op. 5576
Heard June 15, 2017 – Filed July 18, 2018

AFFIRMED IN PART, VACATED IN PART

Thomas H. Pope, III and Kyle B. Parker, of Pope & Hudgens, PA, of Newberry, for Appellant.

Oscar W. Bannister, Bruce Wyche Bannister, and Luke Anthony Burke, all of Bannister, Wyatt & Stalvey, LLC, of Greenville, for Respondent.

MCDONALD, J.: In 2015, Oien Family Investments, LLC (OFI) brought this action against Piedmont Municipal Power Agency (Piedmont), seeking to permanently enjoin Piedmont from condemning a portion of its 116-acre property in Newberry County (the Property). In the alternative, OFI sought an order directing Piedmont to reroute its proposed power transmission line along the

southern border of the Property. The circuit court denied OFI's request for injunctive relief, granted Piedmont's motion for a directed verdict, and denied the parties' respective requests for attorney's fees and costs. OFI argues the circuit court erred by (1) failing to properly apply *Southern Development v. South Carolina Public Service Authority*[1] and (2) failing to find Piedmont violated the applicable industry standard in selecting the route for its high voltage transmission line. Finally, OFI challenges certain circuit court findings as erroneous or internally inconsistent. We affirm in part and vacate in part.

Facts and Procedural History

In December 2005, Lynn and June Oien (collectively, the Oiens) purchased the Property for $400,000.[2] The Oiens made substantial improvements to the Property, such as grading a road, running underground power, and constructing a 7,000 square foot shop to house track hoes, tractors, mowers, and other equipment. The Oiens invested $160,000 in the shop, which included a well and septic tank. They also prepared to build their retirement home by clearing timber and grading the land. By the time of the nonjury trial, the Oiens had invested approximately $370,000 in the Property.

Piedmont is a joint agency formed by ten upstate municipal electric utilities to purchase wholesale electrical power from Duke Energy. The City of Newberry (City) owns and operates its own electrical distribution system (EDS); it receives service from three Duke Energy "power deliveries." The City's EDS demand peaked in 2012. At this time, Kraft Foods, Piedmont's largest customer and one of the City's largest employers, informed the City that it intended to enlarge its plant and would therefore require additional power. Thereafter, the City sought to install a new substation to increase electrical output and reliability for its customers, including Kraft Foods.[3] The City subsequently partnered with Piedmont to secure the right-of-way for the transmission line needed to energize the new substation.

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[1] 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991), *aff'd as modified by* 311 S.C. 29, 426 S.E.2d 748 (1993) (*Southern I* and *Southern II*, respectively).

[2] In 2012, the Oiens transferred the Property to OFI, a limited liability company the Oiens created to hold their investment properties.

[3] The construction of the new substation was completed in April 2014.

On February 28, 2013, Piedmont's consulting engineer, Alan Cobb, issued a report (the Report) to Piedmont's transmission committee recommending a route for the transmission line. The proposed route was to run over two miles through the property of fifteen landowners—including the Oiens—and include poles approximately ninety feet tall. The Report, based in part on Google Earth and Newberry County geographic information system (GIS) maps, considered several factors including: environmental impact, land use, impact to individual landowners, costs for the route, and visual impact. The transmission committee approved the project, including the proposed route, on March 5, 2013. The Piedmont board of directors subsequently voted to build the new transmission line from a nearby Duke Energy line to a new substation near Kraft Foods.

The Oiens first learned about the project in a February 2013 email from a neighbor, Misty West. West informed the Oiens of the City's plan to construct "a new 100 KW transmission line from the service line near your house to the Kraft plant." West attached a drawing of a proposed route for the transmission line along the southern boundary of the Property and noted she told the City "there is no way [the Oiens] would willingly give [you] an easement to cut [their] property in half." She also told the Oiens someone from the City would contact them regarding the project. After this point, the parties disagree as to the pertinent facts.

Todd Guy, an electric foreman for the City, testified that he first contacted the Oiens regarding the right-of-way "somewhere around" February 2013. Guy presented the Oiens with the selected route for the transmission line, which went through the middle of the Property (the Middle Route). At the Oiens' request, Guy then presented alternative routes along the Property's southern boundary (the Southern Route) and northern boundary (the Northern Route). He testified the Oiens rejected both potential alternative routes and asked him to again explore the Middle Route.[4] Guy's last contact with the Oiens was through their forester and appraiser, Paul Major, whom the Oiens had engaged to communicate with the City and Piedmont.

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[4] However, Marc Regier, the City Utilities Director, testified the Oiens told him that they preferred the Northern Route.

By contrast, Mr. Oien claimed neither the City nor Piedmont reached out to the Oiens. He testified his first contact with the City was in June 2013, when he found a Duke Energy employee on his Property and called Todd Guy. Mr. Oien claimed he never saw any proposed routes, other than the route reflected in West's email attachment, until he met with City representatives in September 2013. Further, Mr. Oien maintains he never rejected the Southern Route. In late September, City representatives met with the Oiens and Major, and the Oiens expressed their preference for the Southern Route.

On November 26, 2013, representatives from Piedmont and the City met with the Oiens and Major. The Oiens brought their house plans to show Piedmont why the Middle Route was problematic and believed they made clear their desire for the Southern Route. Still, Piedmont indicated it planned to use the Middle Route. Major, on behalf of the Oiens, requested a timber count and values as well as a pole count with proposed pole locations. According to Regier, "the interactions with the Oiens were pretty pleasant. The interactions with Mr. Major were pretty adversarial." Piedmont explained it would need to survey the Middle Route in order to provide the requested information, and Mr. Oien eventually consented to the survey.

Mike Frazier, Piedmont's Director of Engineering and Power Supply, testified the Oiens agreed to the Middle Route following the November 26, 2013 meeting. Although the Oiens dispute any contention that an agreement was reached at this meeting (or ever), Mr. Oien left the following voicemail for Frazier:

> Michael, it's Lynn Oien. We met with you the other day in regard to the power line. We walked it. We made the decision we want to stay with what you have right now that you've originally drawn up as opposed to changing it, so move forward and get final surveying done.

In early 2014, Piedmont provided the Oiens with the survey results and proposal illustrating the Middle Route. At a March 2014 meeting with the City, the Oiens indicated they would not accept the City's offer and again expressed their desire for the Southern Route. By this point, the City had spent $3,600,000 on the new substation and was waiting to have it energized by the new transmission line.

On August 14, 2014, the Oiens received a right-of-way agreement from Piedmont describing the Middle Route (the Agreement). Piedmont requested that the Oiens either sign the Agreement or otherwise provide a response by August 22. The Oiens rejected the Agreement. On September 29, 2014, the Oiens and their attorney met with representatives from the City to again discuss the route for the proposed transmission line.

On February 9, 2015, Piedmont served OFI with a notice of condemnation and tender of payment for the "right-of-way and easement to be taken" for constructing the transmission line. OFI then filed an action challenging the condemnation and seeking injunctive relief, attorney's fees, and litigation costs. Piedmont answered and counterclaimed, seeking reasonable costs and litigation expenses.

Following a nonjury trial, the circuit court directed a verdict in favor of Piedmont. After OFI moved for reconsideration and to alter or amend, the circuit court amended its order, specifying that the Middle Route was the most feasible route for the transmission line. The circuit court denied OFI's subsequent motion to alter or amend.

OFI appealed and sought entry of a statutory automatic stay, injunction, and supersedeas. That same day, this court granted the statutory stay. Piedmont filed a motion to lift the stay or require the posting of bond. Following oral argument on the motion to lift the stay and the consideration of additional briefing, we lifted the stay.[5]

Standard of Review

"An order granting or denying an injunction is reviewed for [an] abuse of discretion." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006)). "An abuse of discretion occurs when the trial court's decision *is based upon an error of law* or upon factual findings that are without

[5] The transmission line has been constructed and energized. At the oral argument on the merits, the court repeatedly asked what the Oiens were seeking through the continuing litigation. The response: "Take the line down and do a new survey . . . Do a new route analysis."

evidentiary support." *Id.* (emphasis in original) (quoting *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85–86 (2008)).

Southern I, upon which OFI heavily relies, provides a further review framework, explaining:

> Southern's action is based upon [section 28-2-470 of the South Carolina Code (1991)] . . . . [, which] provides that a condemnee's action challenging the condemnor's right to condemn must be brought in a separate proceeding from the condemnation action. Under prior [case law], such a proceeding was in equity in the court of common pleas. Since this is an equitable action for an injunction this court may review the findings of fact of the [circuit court] based upon our own view of the preponderance of the evidence.

305 S.C. at 509, 409 S.E.2d at 429 (citation omitted); *see also Lambries*, 409 S.C. at 8, 760 S.E.2d at 788 ("We find that, while an injunction is equitable and subject to the trial court's discretion, [when] the decision turns on statutory interpretation . . . this presents a question of law. As a result, this Court need not give deference to the trial court's interpretation."). However, unlike the analyses in *Southern I* and *Lambries*, the circuit court's decision in this case did not turn on statutory interpretation. Additionally, OFI conceded at oral argument that "abuse of discretion" is the appropriate standard of review. Thus, while we review the circuit court's order denying injunctive relief for an abuse of discretion, we must keep in mind the caution that our courts "will not interfere with the exercise of the condemnation power unless the condemning authority has acted in bad faith, fraudulently, or with a clear abuse of discretion." *Southern I*, 305 S.C. at 515, 409 S.E.2d at 433.

Law and Analysis

I. Injunctive Relief

Relying on *Southern I* and *Southern II*, OFI argues the circuit court erred in denying injunctive relief because Piedmont abused its discretion when it selected

the Middle Route over the Southern Route. OFI asserts Piedmont lacked a rational basis to support its selection of the Middle Route because it failed to conduct an adequate alternate route analysis or properly compare land acquisition and engineering costs for the Middle and Southern Routes. We disagree.

In *Southern I*, a land development company (Southern) challenged Santee Cooper's condemnation of a portion of its property—which Southern planned to develop as a high-end golf course and residential community—for the construction of a high-voltage transmission line. 305 S.C. at 508–10, 409 S.E.2d at 429–30. The master-in-equity granted injunctive relief, finding Santee Cooper (1) "was estopped from using the proposed route based upon certain representations of its officers which were relied upon by Southern to its detriment" and (2) "clearly abused its discretion in selecting the transmission line route because it did not consider or improperly considered certain criteria." *Id.* at 509, 513, 409 S.E.2d at 429, 431; *see also Florida Power & Light Co. v. Berman*, 429 So.2d 79, 80–82 (Fla. Dist. Ct. App. 1983) (holding the condemning authority abused its discretion by selecting a route without weighing and considering all of the required criteria—availability of an alternate route; cost; environmental factors; long-range planning; and safety considerations—because the selected route would cause "substantial destruction of this unique ecological niche because of the removal of trees and the intrusion of sunlight").

Relying on *Berman*, the master determined the total cost for the route chosen by Santee Cooper was $5,762,000, whereas the costs for the two alternate routes Southern proposed were $1,284,000 and $1,315,000. *Id.* at 514, 409 S.E.2d at 432. Further, the master found there was "no material difference in the reliability of the three routes although he considered the two alternate routes somewhat safer due to their distance from a nearby airstrip and also more aesthetically pleasing." *Id.*

The court of appeals reversed the master's equitable estoppel holding. *Id.* at 512, 409 S.E.2d at 431. In reviewing the master's "abuse of discretion" finding, this court noted, "[t]he parties have not cited any reported South Carolina case in which a planned condemnation was permanently enjoined by a court because the court found the condemning authority abused its discretion in the selection of a chosen route." *Id.* at 514, 409 S.E.2d at 432. "The legal principle enunciated in the South Carolina case law is that a court of equity will not interfere with the exercise of the condemnation power unless the condemning authority has acted in bad faith,

fraudulently, or with a clear abuse of discretion." *Id.* at 515, 409 S.E.2d at 433. The court observed our jurisprudence has "not outlined what constitutes a clear abuse of discretion in the condemnation context." *Id.*

Ultimately, this court determined Santee Cooper had established legitimate criteria—safety, reliability, aesthetics, and cost—for a rational decision making process and a valid exercise of discretion. *Id.* at 516, 409 S.E.2d at 433. However, because Santee Cooper "assumed all land in a general area was worth the same" and "their cost estimates presented to the board of directors did not include land acquisition costs," the court found Santee Cooper's "failure to legitimately consider land acquisition costs indicate[d] [its] choice of a route lack[ed] a factual basis." *Id.*

Vacating the master's abuse of discretion analysis, the court of appeals remanded "with instructions that the master direct Santee Cooper to re-evaluate its proposed route and the alternate routes proposed by Southern." *Id.* at 516, 409 S.E.2d at 434. The court explained, "Santee Cooper should consider its criteria of safety, reliability, aesthetics, and costs," including land acquisition costs, "along with any other appropriate factors such as environmental conditions and long range area planning by public authorities. . . . Santee Cooper should then exercise its discretion in the choice of a route based upon a reasoned analysis of the relevant factors." *Id.* The court clarified, "By this opinion we do not imply that any route previously considered is eliminated from the consideration process or that any new route cannot be considered. We simply hold that a condemning authority must exercise its discretion by a rational decision making process [that] is supported by facts." *Id.* at 516–17, 409 S.E.2d at 434.

Our supreme court reversed the court of appeals' equitable estoppel holding. *Southern II,* 311 S.C. at 34, 426 S.E.2d at 751. Focusing on the master's finding as to representations made to Southern by high-level Santee Cooper executives, the supreme court affirmed the master's order enjoining Santee Cooper from proceeding with the condemnation. *Id.* at 33–34, 426 S.E.2d at 750–51. Although the supreme court agreed with this court's abuse of discretion analysis, the court found "the remand as ordered by the Court of Appeals unnecessary" due to its holding on the estoppel question. *Id.* at 34, 426 S.E.2d at 751. As the supreme court found the estoppel question dispositive and did not analyze the abuse of

discretion question in *Southern II*, we consider the abuse of discretion framework provided by this court in *Southern I*.

In the current case, the record reflects that Piedmont's consulting engineer, Alan Cobb, issued the Report to the transmission committee recommending the Middle Route for the transmission line. Cobb's Report was based on Google Earth and Newberry County GIS maps and considered the following factors: environmental impact, land use, impact to individual landowners, costs for the route, and visual impact. Cobb estimated land acquisition costs at $100,000 based on a land value of $5,000 per acre. He testified he neither visited the Property nor met with the Oiens, nor any other affected landowners, prior to issuing the Report. Cobb had no notes regarding the factors he considered and did not issue additional reports.

After the transmission committee and the Piedmont Board of Directors approved the Middle Route, the Oiens and the City were in contact at some point between February and June 2013. Mr. Oien indicated his preference for the Southern Route and requested several changes, which led Cobb to walk the Southern Route. However, based on Duke Energy's preference for Piedmont's tap to be "as close to mid-span as possible" as well as the number of turns that would be required, additional poles and costs, environmental impact to the Oiens' pond, and potential issues with the United States Corps of Engineers, Cobb concluded the Southern Route was not feasible. He estimated the additional poles and installation for the Southern Route would cost $200,000. Cobb explained he did not conduct a full analysis of the wetlands after estimating the additional cost for the Southern Route because he was then informed that the Oiens did not want the Southern Route.

Cobb testified he next completed the engineering for the Northern Route. He estimated the additional costs for the Northern Route would be less than $100,000. However, Cobb was informed to stop working on the Northern Route because the Oiens had rejected it.

Piedmont's Director of Engineering, Mike Frazier, testified he did not complete an alternate route analysis. He acknowledged Piedmont did not physically inspect the properties along the Middle Route before approving the line in March 2013. He estimated the two turns required by the Southern Route would cost an additional $30,000 to $40,000. However, Frazier admitted Piedmont never considered the total cost of the Southern Route. Likewise, he never saw anything in writing

confirming there was anything unsuitable about the Southern Route. Further, he never saw anything in writing from Cobb regarding increased costs, if any, for the Southern Route "because no final engineering [was] done on the [S]outhern [R]oute."

David Graydon, an expert in the field of real estate appraisal, estimated the land acquisition cost for the Middle Route was $21,075 and valued the Property at $5,000 per acre. He opined that implementation of the Middle Route would not exclude the Property from use as high-end residential real estate, and the Middle Route would not create any damages to the remainder.[6] He stated, "unless a house is within 300 feet or less [of] a transmission line, that it . . . does not have any loss in value."

OFI's appraiser and forester, Major, testified the Oiens paid $3,500 to $3,700 per acre for the Property in 2005, which was top dollar at that time. Major explained the highest and best use of the Property is as a high-end rural residential estate, and the value of the Property at the time of trial was $603,000 (approximately $5,200 per acre). Major estimated the land acquisition cost for the Middle Route was $20,500.

Due to its proximity to the home site, Major opined the Middle Route would decrease the value of the remaining acreage by ten to fifty percent.[7] He testified that a fifteen percent damage would create remainder damages of $87,000, and twenty percent would create damages of $116,000. Major further opined the Southern Route would not create any damage to the remainder because the line would not be visible from the Oiens' home site.

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[6] The circuit court noted, "Contrary to the authority's expert, who I thought was very credible[,] that there were no damages to the remainder, I thought that was almost beyond believability in the sense you can build a high-rise transmission line through the middle of somebody's property, especially as pristine as [the Property] is[,] and there not be any damages."

[7] On cross-examination, Major testified that in determining the diminution in value, he used comparable sales, jury verdicts for contested right-of-way cases, the opinion of an Alabama auctioneer, and aesthetics.

Bill Rogers testified as OFI's expert in right-of-way acquisitions. Rogers explained that in early 2016, he retired from Central Electric Power Cooperative (CEPC), where he served as manager of right-of-way services. Following the supreme court's decision in *Southern II*, CEPC and other utilities developed protocols for alternate route selection, including assessing the costs to acquire the right-of-way on alternate routes based on land use and other factors. He noted a utility company cannot conduct an alternate route study without physically going to the property. According to Rogers, if a selected route goes through the middle of a landowner's property, the utility will have to "pay a heck of a lot more for it than if [it] go[es] along property lines." He stated studies show damages to the remainder of such properties range from ten to thirty-five percent.

Relying on Major's appraisal and the estimated fifteen percent in damaged value to the remaining acreage, Rogers estimated the total right-of-way acquisition costs, including damages, was $64,120 for the Northern Route, $182,960 for the Middle Route, and $29,100 for the Southern Route. He further calculated total cost estimates, which included costs for construction, engineering, and right-of-way acquisition for each route: $271,200 for the Northern Route, $364,200 for the Middle Route, and $292,700 for the Southern Route. Rogers stated there would be no damage to the remainder using the Southern Route. Rogers indicated his alternate route analysis showed the Southern Route was preferable to the Middle Route in terms of cost, tap access, aesthetics, and structures.

Piedmont presented testimony that it considered environmental impact, land use, impact to individual landowners, costs for the route, and visual impact in selecting the Middle Route. Further, although the timeframe is disputed, it is clear that Piedmont did present the Oiens with three route proposals, including the Southern Route and the Northern Route.[8] Ultimately, Piedmont elected to stay with the

[8] At oral argument, Piedmont's counsel summarized the efforts made to accommodate the Oiens: Todd Guy presented the Oiens' Southern Route request to engineer Alan Cobb, who began to draw a potential line. "Then, the Oiens said, 'No, we don't want it to go there because it puts us too close to the neighbors—it takes some bushes down and the neighbors will be there' . . . So at that point, he [Cobb] quit drawing the line." Next—at the Oiens' request—Guy went back to Alan Cobb and asked him to look at the Northern Route. But the Oiens rejected

Middle Route because Cobb determined it was shorter, straighter, and less expensive than the Southern Route. *See Bookhart v. Cent. Elec. Power Co-op.*, 219 S.C. 414, 432, 65 S.E.2d 781, 789 (1951) (affirming the trial court's conclusion that "[e]conomic and engineering considerations require [transmission] lines to be constructed as nearly straight as practicable"). Significantly, the Southern Route would have required Piedmont to construct costly angled poles, as well as incur additional costs to work around the pond and any wetlands issues. While the land acquisition costs are disputed, Piedmont relied on Graydon's appraisal. Thus, although Piedmont did not apply the presented "industry standard" in precisely the manner the Oiens' right-of-way acquisitions expert, Rogers, might have, even Rogers admitted that if Piedmont applied the *Southern I* factors, it did not abuse its discretion in selecting the Middle Route. *See Southern I*, 305 S.C. at 517, 409 S.E.2d at 434.

Evidence in the record supports the circuit court's finding that Piedmont exercised its discretion in selecting the Middle Route through a rational decision making process supported by a proper factual basis. Since Piedmont in no way "acted in bad faith, fraudulently, or with a clear abuse of discretion," the circuit court properly denied OFI's request for injunctive relief. *See id.* at 515, 409 S.E.2d at 433.

II. Factual Findings and Legal Conclusions

OFI argues the circuit court's erroneous findings of fact and conclusions of law resulted in a misapplication of *Southern I* and *Southern II*. Although we disagree that the circuit court misapplied the case law, we vacate one contradictory finding as discussed below.

OFI argues Finding 17 is not supported by the record. We disagree.

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the Northern Route because it ran too close to the house. Thus, the Oiens said, "[G]o with the Middle." The Oiens then asked that the Middle Route be adjusted to avoid the removal of certain oak trees; the line was adjusted. These efforts occurred before forester Major became involved and before Mr. Oiens' voice message reporting that the Oiens wanted "to stay with what you have right now that you've originally drawn up."

> 17. [Piedmont] presented testimony concerning the three proposed routes across [the Property]. The [N]orthern [R]oute was rejected by [OFI] as being too close to the home site where [the Oiens] proposed to build their home. The [S]outhern [R]oute required several bends in the transmission line[,] which are expensive. In addition, it requires engineering to cross the pond on the southern tract of [the Property]. Also, because [Mr.] Oien restricted access to [the Property], neither [Piedmont] nor [the City] completed the [S]outhern [R]oute engineering plan. All parties acknowledged that the [S]outhern [R]oute would be more expensive from an engineering standpoint and that the necessary poles could be viewed from the only house on the two tracts of [the Property]. Running the transmission lines around the pond could involve the Corps of Engineers or the Environmental Protection Agency.

Marc Regier, Utilities Director for the City, described his interactions with the Oiens as "pleasant" and "good." However, Regier described Major as "agitated." Todd testified Mr. Oien gave him permission to have the City's surveyors come out to the Property to stake the Middle Route. Nevertheless, Major subsequently accused Todd of trespassing. Mr. Oien complained a surveyor went on the Property without permission, which he claimed constituted a trespass. OFI seeks to mitigate this behavior on appeal by arguing that section 28-2-70 of the South Carolina Code (2007) granted Piedmont the ex parte right to access the Property to perform studies.[9] While this is a correct citation of the statute, it does not render the circuit court's restricted access finding erroneous. Because evidence in the

[9] *See* S.C. Code Ann. § 28-2-70(C) (2007) ("The condemnor shall have the authority, after reasonable notice to the landowner, to enter upon the real property in which an interest is proposed to be acquired for the purpose of making a survey, determining the location of proposed improvements, or making an appraisal. In the event a landowner refuses to allow entry, the circuit court may issue an ex parte order enforcing this section. A landowner shall have no cause of action for trespass arising out of the exercise of authority pursuant to this section.").

record supports the circuit court's finding that Mr. Oien (and his agent, Major) restricted access to the Property, we find no error as to Finding 17.

As to Finding 26, OFI argues the circuit court erred in relying on *Bookhart* because it was overruled by our supreme court in *Southern II*. We disagree.

> 26. "Economic and engineering considerations require [transmission] lines to be constructed as nearly straight as practicable, and there is no other feasible route for the line except the route across the lands in question, because any other route would increase the length of the line by several miles, and the cost would be substantially increased by reason of the additional guy wires, anchors[,] and appropriate structures[,] which would be necessitated at each of four additional angles." *Bookhart v. Cent. Elec. Power Co-op.*, 219 S.C. 414, 432, 65 S.E.2d 781, 789 (1951).

Based on our analysis of the Oiens' request for injunctive relief, *see supra* Issue I, Finding 26 is not erroneous.

Further, our review of *Southern II*, does not suggest that our supreme court overruled *Bookhart*. *Bookhart* affirmed the trial court's conclusion:

> [T]here is no other feasible route for the line except the route across the lands in question, because any other route would increase the length of the line by several miles, and the cost would be substantially increased by reason of the additional guy wires, anchors and appropriate structures which would be necessitated at each of four additional angles.

219 S.C. at 432, 65 S.E.2d at 788–89. In *Southern I*, this court determined safety, reliability, aesthetics, and cost were legitimate criteria for a condemning authority to consider as part of a rational decision making process and valid exercise of discretion. 305 S.C. at 516, 409 S.E.2d at 433. In *Southern II*, our supreme court

agreed with this court's analysis of the abuse of discretion question in *Southern I*. 311 S.C. at 34, 426 S.E.2d at 751.

Regarding Finding 29, OFI argues that because the industry standard identified by Rogers is not contradicted in the record, the circuit court had no factual basis to support its rejection of the industry standard analysis.

> 29. [OFI]'s expert witness, William Rogers, testified about the procedure for right-of-way acquisition at [CEPC] and other entities Mr. Rogers has worked for. However, the Court finds that there is no legal requirement for [Piedmont] to conform to the standard created by Mr. Rogers[,] which involves numerous written and detailed alternate route studies. Further, Mr. Rogers admitted in his testimony that, if [Piedmont] considered the factors laid out in [*Southern I*], then it had not abused its discretion, even if [Piedmont] did not perform written alternate routes.

Because OFI did not cite to any authority and failed to present further argument as to how this ruling was an abuse of the circuit court's discretion or otherwise legally erroneous, we find it has abandoned this issue on appeal. *See* Rule 208(b)(1)(D), SCACR (requiring "discussion and citations of authority" for each issue in an appellant's brief); *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned when the party's brief cited only one family court rule and presented no argument as to how the family court's ruling was an abuse of discretion or constituted prejudice). In any event, as noted above, Rogers's own testimony provides a factual basis for the circuit court's finding.

OFI further argues Finding 29 demonstrates the circuit court misapprehended Rogers's testimony. We disagree. Our review of the record reveals the circuit court accurately summarized Rogers's testimony. Rogers explained that if Piedmont mentally or verbally conducted an alternate route analysis, which he believed would be a difficult thing to do, then it did not abuse its discretion in selecting the Middle Route. While logic dictates that written analyses would be preferable, we are unable to find that either this court or our supreme court has specifically required that a condemning authority must present a writing to satisfy

a finding that it used a rational decision-making process in considering alternate routes. In *Southern I*, this court explained:

> The record indicates that although Santee Cooper asserted it utilized the criteria of safety, reliability, cost, and aesthetics in selecting a route[,] no concrete consideration was given to land acquisition cost. Santee Cooper witnesses testified they assumed all land in the general area was worth the same. When Santee Cooper employees considered the alternate routes proposed by Southern, their cost estimates presented to the board of directors did not include land acquisition costs. No notes or memoranda were kept by Santee Cooper employees of their analysis. The decision making process was departmentalized with the need for a transmission line decided by system planning; the route chosen by the design department; and the right of way department was required to secure the property for the chosen route.

305 S.C. at 515–16, 409 S.E.2d at 433. Although it would have been difficult for Piedmont to have adequately considered all of the necessary factors—environmental impact, land use, impact to individual landowners, costs for the route, and visual impact—with regard to all three routes without any written notes, memoranda, or subsequent reports, based upon Rogers's testimony, as well as the facts of this particular case, we find no error.[10]

OFI argues Finding 32 is contradicted by Finding 33's statement, "Based upon the manner in which Piedmont conducted its alternate route analysis, the Court does not find [the Oiens'] challenge to be brought in bad faith." We agree.

[10] There can be no doubt that the Oiens' equivocating behavior complicated the route analysis process in this matter. Both the City's and Piedmont's efforts to accommodate the Oiens, as well as Mr. Oien's instructions "to stay with what you have right now that you've originally drawn up" voicemail make it difficult to find otherwise.

> 32. Finally, the Court finds that [OFI] brought this action . . . , not for a legitimate purpose, but in an attempt to reroute the transmission line off of [the Property]. Mr. Oien admitted that their goal was to keep [Piedmont] from building the transmission line across [the Property]. Further, although [OFI] presented evidence attempting to show its preferred route, it failed to present any evidence that [Piedmont] abused its discretion in choosing the location of the route.
>
> 33. S.C. Code § 28[-]2[-]510(A) allows this Court to award [Piedmont] reasonable costs and litigation expenses if it finds [OFI] did not raise and litigate the challenge to condemnation in good faith. Based upon the manner in which [Piedmont] conducted its alternate route analysis, the Court does not find [OFI's] challenge to be brought in bad faith.

At trial, the following colloquy ensued during Mr. Oien's cross-examination:

> Q: So you guys don't really want any transmission line on [the Property] at all?
>
> A: We already have one that spans the entire width of [the Property]. We just didn't want another one.
>
> Q: That's what I meant. So you don't want another one?
>
> A: We don't.
>
> Q: This is really about you and your wife [] not want[ing] another transmission line on [the Property]?
>
> A: That's correct, and I don’t think you would be very comfortable with a transmission line across your property.

Aside from this line of questioning, the record demonstrates OFI presented evidence showing it preferred the Southern Route; however, the record also provides support for Piedmont's position that OFI acquiesced as to the Middle Route, thus stopping the surveys and further studies. Moreover, in Finding 35, the circuit court explained:

> 35. The alleged grounds for [its] challenge to the condemnation show [OFI]'s intent. Thus, the grounds were abandoned. The abandoned grounds were [(]1) the proposed taking was not necessary; (2) the proposed taking is not reasonably calculated to fulfil[l] a public purpose, rather, the proposed taking has been initiated to further arbitrary and capricious decision and actions taken by [Piedmont]; (3) the proposed taking is not for public use.

In Finding 37 of its amended order, the circuit court concluded "The single motivating favor for [the Oiens] was to force Piedmont to relocate the transmission line to the [S]outhern [R]oute or to avoid [the Property] altogether." We agree that these findings are at odds with the referenced portion of Finding 33. Accordingly, we vacate Finding 33.

Finally, OFI argues Finding 38 is also contradicted by Finding 33.

> 38. The Court finds that forcing a public utility to locate a transmission line where the landowner wants it by challenging the condemnation is not good faith.

Vacating Finding 33 resolves this inconsistency as well.

Conclusion

We affirm the circuit court as to Issue I. We further affirm the circuit court's amended order as to Findings 17, 26, 29, 32, 35, 37, and 38. We vacate Finding 33.

AFFIRMED IN PART, VACATED IN PART.

HUFF and GEATHERS, JJ., concur.