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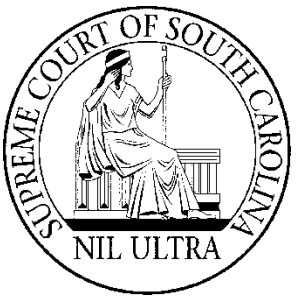

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
August 16, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner-Respondent,

v.

Charles Dent, Respondent-Petitioner.

Appellate Case No. 2021-001246

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Alex Kinlaw Jr., Circuit Court Judge

Opinion No. 28172
Heard April 20, 2023 – Filed August 16, 2023

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch Jr., both of Columbia; and Isaac McDuffie Stone III, of Bluffton, all for Petitioner-Respondent.

E. Charles Grose Jr., of The Grose Law Firm, LLC, of Greenwood, for Respondent-Petitioner.

JUSTICE KITTREDGE: Charles Dent was convicted and sentenced on one count of first-degree criminal sexual conduct (CSC) with a minor and two counts of disseminating obscene material to a minor. Dent appealed, and a divided court of appeals' panel reversed and remanded for a new trial, finding the trial court erred in failing to give the requested circumstantial evidence charge this Court articulated in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). *State v. Dent*, 434 S.C. 357, 863 S.E.2d 478 (Ct. App. 2021). Because this ruling was dispositive, the court of appeals did not reach Dent's other assignments of error. We granted the State's petition for a writ of certiorari and now reverse. While we agree with the court of appeals' finding of error in the trial court's failure to charge circumstantial evidence pursuant to *Logan*, the error was harmless. We reverse and remand to the court of appeals for consideration of Dent's remaining issues on appeal.

I.

Dent's minor granddaughter (Granddaughter) accused Dent of sexually abusing her when she was eight and nine years old. Following her disclosure, Granddaughter underwent two forensic interviews. During the first forensic interview, Granddaughter revealed that one of the initial incidents of abuse occurred when Dent went to the bathroom, took lewd pictures of himself, and showed them to Granddaughter. Granddaughter told the forensic interviewer, "After he showed me all of his pictures—he took like ten of them— . . . he told me, 'Here, go take pictures of yours,' and I said, 'No!'" Granddaughter also detailed occasions when Dent would touch her vagina, breasts, and buttocks: "He was just touching me everywhere. He was kissing me on the mouth." Granddaughter stated Dent made her watch a pornographic video. Dent also took pictures of Granddaughter's vagina while she was asleep and later showed the pictures to Granddaughter.

In Granddaughter's second forensic interview, she wrote on a piece of paper: "He made me touch it more than once," indicating that her hand had touched Dent's penis. Granddaughter also wrote, "He made me lick it," and stated Dent's penis had gone inside her mouth on multiple occasions. Granddaughter disclosed that Dent touched her vagina with his mouth and that his hands went inside her vagina. Granddaughter described seeing Dent's "urine," which she recalled was "whiteish" in color, looked "like a flour mix," and stained the carpet. In both forensic interviews, Granddaughter stated Dent bribed her with money and toys. Dent was paying rent for the house Granddaughter lived in, and he threatened that if Granddaughter reported the abuse, he would kick the family out of their home.

Dent was indicted for two counts of first-degree CSC with a minor and two counts of disseminating obscene material to a minor. At trial, the State presented mostly direct evidence against Dent. Granddaughter testified, "I remember he started kissing me, like, on my face, my mouth. He started licking my belly, like, my belly button and started, like touching me in weird places. And he took pictures of his private parts and told me to take pictures of mine." Granddaughter stated Dent touched her "private parts" and "made [her] lick his private parts." Granddaughter also testified that Dent showed her videos of "[p]eople having sex." In addition to Granddaughter's direct, in-court testimony, the trial court admitted videos of both forensic interviews into evidence, and the videos were published to the jury.

The State also presented circumstantial evidence at trial, including testimony from Granddaughter's mother and her mother's boyfriend concerning changes in Granddaughter's behavior around the time of the abuse.

At the end of trial, defense counsel requested a circumstantial evidence charge in accordance with *Logan*. *See Logan*, 405 S.C. at 99, 747 S.E.2d at 452 (providing language that trial courts should include in a circumstantial evidence charge when the charge is requested by a defendant). The State, to its credit, did not oppose the circumstantial evidence charge. The trial court, nevertheless, refused to provide the jury with the mandated *Logan* instruction. Dent noted his objection and, following the verdict, unsuccessfully moved for a new trial based in part on the *Logan* issue.

Dent subsequently appealed, raising eleven issues to the court of appeals. Finding the *Logan* issue dispositive, the court of appeals' majority declined to address Dent's remaining ten issues on appeal. The court of appeals held the trial court erred in not giving the full *Logan* charge and reversed and remanded for a new trial. Judge Thomas dissented. While Judge Thomas concurred with the finding of error in the trial court's failure to give the *Logan* charge, she pointed to the wealth of direct evidence and concluded "the error committed by the trial court was ultimately harmless." *Dent*, 434 S.C. at 364, 863 S.E.2d at 481 (Thomas, J., dissenting).

We granted the State's petition for a writ of certiorari to review the court of appeals' decision. The State argues the trial court's failure to give the entire *Logan* charge was harmless error. Dent filed a cross-petition for a writ of certiorari, raising as additional sustaining grounds the ten issues the court of appeals declined to address. We held Dent's cross-petition in abeyance pending resolution of the State's petition.

II.

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "When requested, the *Logan* charge must be given in cases based in whole or part on circumstantial evidence." *State v. Herndon*, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020). Nevertheless, "[i]n reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *Logan*, 405 S.C. at 90, 747 S.E.2d at 448. "To warrant reversal, a trial [court's] refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011) (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)).

III.

The parties concede the trial court erred in refusing to give the *Logan* circumstantial evidence charge following Dent's request. Therefore, the only issue before us is whether the trial court's failure to give the *Logan* charge was harmless. *See Herndon*, 430 S.C. at 373, 845 S.E.2d at 502 (acknowledging the failure to give a requested *Logan* charge is subject to a harmless error analysis); *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) ("An erroneous instruction alone is insufficient to warrant this Court's reversal.").

"Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. Rather, appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case." *State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909–10 (2015) (citations omitted). Our appellate courts have found a trial court's failure to give a requested *Logan* charge is prejudicial when the evidence against the defendant is almost entirely circumstantial. For example, in *Herndon*, this Court stated, "We acknowledge there may be a case in which a trial court's failure to give the *Logan* charge might be harmless error, but this is not such a case. The State's case against Petitioner was *almost exclusively circumstantial*." 430 S.C. at 373, 845 S.E.2d at 502 (emphasis added); *see also State v. Sanchez*, 435 S.C. 468, 475–76, 867 S.E.2d 595, 598–99 (Ct. App. 2021) (finding the error prejudicial where, "[s]imilar to *Herndon*, the evidence of [the defendant's guilt] was largely circumstantial").

Here, the evidence was largely direct, especially Granddaughter's extensive testimony. *See* 30 S.C. Jur. *Evidence* § 154 (Supp. 2021–2022) ("'Direct evidence'

is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness." (citation omitted)); *Logan*, 405 S.C. at 99, 747 S.E.2d at 452 ("Direct evidence directly proves the existence of a fact and does not require deduction."). Before the jury, Granddaughter directly named Dent as her abuser and detailed the sexual acts he perpetrated on her. The jury watched almost two hours of videotaped forensic interviews, during which Granddaughter recounted Dent's abuse over a two-year period. This was direct evidence.

It cannot be said that the evidence presented was almost entirely circumstantial. In discussing the nature of the evidence, the court of appeals' majority decision noted the absence of physical evidence of sexual abuse. We construe this finding as a comment on the issue of credibility, especially Granddaughter's credibility. *See Herndon*, 430 S.C. at 373 n.6, 845 S.E.2d at 502 n.6 ("Fundamental to a jury's role as fact-finder is making credibility determinations, which lie in the sole province of the jury."). Whether Granddaughter's testimony was credible is an entirely distinct issue from whether direct evidence existed. The fact that the State also utilized circumstantial evidence does not detract from the existence of direct evidence. The State recognized the importance of the direct evidence, highlighting Granddaughter's trial testimony and two forensic interviews in its initial closing argument.

Moreover, we agree with the State that the trial court's instruction, as a whole, accurately charged the law to be applied. Our appellate courts have previously held the failure to give the *Logan* charge was harmless error where "[t]he trial court's jury instruction, as a whole, properly conveyed the applicable law." *Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8; *see also State v. Jenkins*, 408 S.C. 560, 573, 759 S.E.2d 759, 766 (Ct. App. 2014) (holding "any error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law"); *State v. Drayton*, 411 S.C. 533, 546, 769 S.E.2d 254, 261 (Ct. App. 2015) (same), *aff'd in result and vacated in part on other grounds*, 415 S.C. 43, 780 S.E.2d902 (2015); *State v. Lynch*, 412 S.C. 156, 178, 771 S.E.2d 346, 357–58 (Ct. App. 2015) (same).

Other than the error in failing to give the *Logan* circumstantial evidence charge, the trial court thoroughly and properly charged the jury on the law, including the presumption of innocence, burden of proof, and reasonable doubt. As a result, in light of the trial court's charge as a whole and in light of the direct evidence, we hold the trial court's failure to give the requested *Logan* charge was harmless error. We

reverse the court of appeals' opinion and remand this matter for the court of appeals to address Dent's remaining issues on appeal.

REVERSED AND REMANDED.

BEATTY, C.J., FEW, JAMES, JJ., and Acting Justice Jan B. Bromell Holmes, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Johnathan Lamar Hillary, Appellant.

Appellate Case No. 2019-001048

Appeal from Horry County
William A. McKinnon, Circuit Court Judge

Opinion No. 6015
Heard June 15, 2023 – Filed August 16, 2023

AFFIRMED IN PART AND VACATED IN PART

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Senior Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

GEATHERS, J.: Johnathan Lamar Hillary (Hillary) challenges his convictions for murder, armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. He argues that (1) a statement he gave to law

enforcement, admitted into evidence at trial, was not voluntary; (2) evidence concerning a separate robbery allegedly committed by Hillary should not have been admitted at trial; and (3) the sentence for kidnapping was improper given that Hillary was also convicted and sentenced for murder. We affirm in part and vacate in part.

FACTS/PROCEDURAL HISTORY

In the fall of 2016, Kaitlin Buckley (Kaitlin) reported to police that her father, Timothy Buckley (Buckley), was missing. At that point, the elder Buckley had not been heard from for several days.[1] Family members and friends joined the search for Buckley, a retired police officer.

Among those involved in the search were Carl Wenner and his brother, who was a lifelong friend of Buckley. The two men found Buckley's truck around October 5, 2016, on 29th Street in Myrtle Beach. The bloodied passenger side of the vehicle interior indicated that Buckley's fate was likely dire, but neither Buckley nor his body were immediately found. John Caulder, a crime scene investigator, found tissues in some of the blood indicating an unidentified individual might have been shot in the head.

Buckley's body would not be recovered until around November 10, when two young men on a before-school excursion came upon what one of the men believed to be a dead animal; his companion realized instead that the badly decomposed corpse was human. According to a subsequent autopsy, Buckley had been killed when he was shot in the back of the head.

Following a request from Horry County authorities, law enforcement in Georgia tracked Hillary to a townhouse in Atlanta.[2] Based on the probation status of an individual at the unit, law enforcement began searching the home.[3] There, officers found a revolver hidden in an upstairs bathroom. The serial number of that revolver matched the serial number of a revolver belonging to Buckley.

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[1] It appears that September 28 was the last day on which Buckley was heard from.

[2] The circumstances of this request are not entirely clear in the record. A state member of the U.S. Marshals Fugitive Task Force in Georgia said that the force "received [a] lead and said that we needed to try to locate Mr. Hillary for the Horry County Police Department."

[3] Investigator Bradley Mark Willis testified that an initial search turned up a firearm, prompting a more thorough inspection.

Additionally, on the first floor of the townhouse, officers found a holster that had a broken snap—a characteristic of Buckley's holster, according to Kaitlin. Credit cards, a driver's license, and various other forms of identification under the name "Bocar Bah" were also found in the townhouse.[4] There were indications that Hillary and Bernithia Young (Young) resided in the upstairs portion of the townhouse.

While Hillary was held in Georgia, two Horry County detectives—Gregory Lent and David Dudley—traveled to Atlanta to interrogate him about Buckley's murder.[5] Hillary initially told the detectives that on the night Buckley disappeared, Hillary had given fake methamphetamine to a haggard man on the street in exchange for a chance to drive the man's truck. Hillary said he later abandoned the truck and threw the keys aside after the man began persistently calling Hillary's phone. Hillary then arranged for Young to pick him up.

During the interrogation, the detectives continued to draw out Hillary's version of events. Then, they started trying to poke holes in it. At one point, apparently frustrated by Hillary holding to his story, Detective Lent said: "Let him go back to South Carolina and he can tell it to a jury when they give him the death penalty."[6] At another point, Lent discussed some of the possible reasons for a conflict between Hillary and Buckley in the moments before Buckley's murder. Perhaps, Lent suggested, "[s]omeone tried hurting [Hillary] and [he] had to do what [he] had to do to defend [himself]." Lent also made clear that cooperation was in Hillary's best interest; he told Hillary that if Hillary did not "explain" the slaying, "I'm going to walk out those doors and I'm going to sing the story that John Hillary don't give a s**t about nobody and that he's a cold-blooded killer." Later, Lent told Hillary: "I told you, I'm not asking if you did it or not. I'm asking you what happened. I'm asking you how it happened. I'm asking you to provide some story that might just save your a**." Detective Dudley said: "Let's put it like this[:] When a jury sees you driving around in the truck for hours with blood on the inside with

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[4] Similar items belonging to individuals with the last name "Sitler" were also present.

[5] According to one of Hillary's filings at the circuit court, this interrogation took place on November 18.

[6] The quotes reproduced here are drawn in part from the transcript provided at trial and in part from the interrogation's recording, which differ in largely inconsequential ways. At certain points, chiefly for clarity, we have altered the transcript or its punctuation to conform to the recording. The audio was played for the jury at trial, but certain portions of the interrogation were redacted.

no remorse for what you did, you think they're going to hesitate to put a needle in your arm?"

The two detectives applied other techniques as well. They misled Hillary about the quantity and quality of evidence against him. Detective Lent indicated Hillary could "come up with a lie" explaining Buckley's death.[7] Detective Lent again posed potential narratives, including: "Maybe [Buckley] rolled up on you looking for sex." Eventually, Hillary began to tentatively suggest he might talk.

Hillary:	If I tell . . .
Det. Lent:	If you, if you're honest with me, it at least goes towards showing remorse. It goes towards helping that man's family understand why. Dude, they're burying him this weekend. You know what they got to bury? Probably a cardboard box about that big. With some loose f*****g bones in it. That's all they got.
Det. Dudley:	You tell us the truth and we'll help you. We ain't going to hang you out to f*****g dry. So tell us the truth, John.
Det. Lent:	Dude, you're probably, it's probably been eating you up for the last 50 days. Whatever it's been. You're right, I have looked at your criminal history. It ain't nearly as bad as a whole bunch of others that I've seen here.
Hillary:	I'm not that, I'm not a bad person, man.

Within moments of that exchange, Hillary began to unspool a new story. He told the detectives to "[p]ut yourself in this scenario," suggesting that Buckley had picked Hillary up on the road and attempted to sexually assault him in the truck. Hillary gradually seemed to abandon this framing of his narrative and tell the detectives

[7] The detectives, at other times, indicated they were interested in the truth.

what he claimed had happened. According to Hillary, Buckley pulled a gun. Hillary was able to grab the gun in a struggle between the two men.

Hillary said he fled through the passenger-side window of the truck with Buckley "on my tail." Hillary then said he used Buckley's gun to "defend" himself because he was worried that Buckley might have another firearm. Hillary said he did not know where the first shot he fired hit Buckley. The detectives then pressed Hillary on a second shot.

Det. Lent:	So now here, here's the question. The second time you shot him, where[8] did you have to shoot him to make sure that, that he wasn't suffering?
Hillary:	That he wouldn't end up, he wouldn't attack me no more. I just want[ed] to make sure.
Det. Lent:	Right.
Hillary:	You know what I mean but . . .
Det. Lent:	But where on his body did you shoot him?
Hillary:	I don't know.
Det. Lent:	The second time you shot him?
Hillary:	I don't know. I just, it wasn't premeditated. It wasn't no, it wasn't no thought about it, you know, it just . . .
Det. Lent:	How many times did you end up shooting him? How many times did

[8] The transcript has "why" here. Based on our review of the recording, Detective Lent asked Hillary a question about where Hillary shot Buckley. At the same time, Hillary's answer appears to show that he interpreted the question as one about why he shot Buckley again.

	you fire the gun that night [inaudible] to protect yourself; two times?
Hillary:	Twice.
Det. Lent:	Ok. Alright. The reason why I ask, 'cause obviously when we go out there, right where we found him, he had a gunshot wound to his head.
Hillary:	Oh, did he? I ain't aim to hit him in his head.

Hillary said that after the shooting, he left the body nearby. Hillary also appeared to admit to taking some money, an admission that followed after Dudley's comments that "[i]t's not like we're going to slap a robbery charge on you, ok. Please don't worry about that, that's not what we're after." Hillary also said he met up with Young, and they disposed of the truck.

Hillary was charged with murder, armed robbery, kidnapping, and a felony involving the use of a deadly weapon. The State did not seek the death penalty.

At trial, more than twenty witnesses testified over five days. That included testimony at hearings held to determine whether Hillary's statement to police was voluntary and whether the jury could hear about the robbery of a truck driver named Bocar Bah.

Regarding the first issue, Detective Lent and Hillary both testified about the interrogation. Detective Lent said the interrogation was an example of "progressive truth telling . . . when the interview subject will begin to tell one part of the truth, and then as the interview goes on[,] we'll add other information as he is presented with evidence that we have in, in the case." Detective Lent denied that his statements invoking the death penalty were meant to threaten Hillary with capital punishment and agreed with the State's contention that the detectives never promised Hillary that the State would not seek the death penalty. Detective Lent answered in the negative when asked whether Hillary "ever appear[ed] scared, fearful or threatened by the mention that he could possibly face the death penalty."

For his part, Hillary said the statement was an attempt to avoid capital punishment. "I told them what they wanted to hear because they felt like I need to

tell them something to help myself. They didn't want me to tell them the truth." Under cross-examination by the State, Hillary repeated his original story of the haggard man and the fake drugs. Hillary also suggested that the details mentioned by the detectives informed the narrative he gave. "They told me the scenario. They wanted my side of the offense and they elaborated on details that I had no idea of knowing about until they mentioned them to me."

The circuit court ruled that the statement could be admitted at trial. The court found that the officer's comments about capital punishment were "with regard to the jury imposing the death penalty, not a threat the officers are going to do it or the officers are going to manipulate the system." The court also did not view any of the statements made by the detectives during the interrogation as guaranteeing leniency to Hillary.

The court also considered whether the jury could hear the story of a truck driver from Memphis named Bocar Bah (Bah), who testified about an alleged robbery in Summerville. On a previous trip to South Carolina, Bah testified, he had met Young at a convenience store.[9] They exchanged phone numbers. Ahead of a trip in November, Bah called Young to ask about the possibility of a liaison in South Carolina. She agreed.

The pair met at a Walmart. Bah said Young was driving a white Chevrolet Impala. After purchasing some alcohol, the two drove to a hotel. At the same time, Bah noticed that Young was texting with an unidentified correspondent. At the hotel, when Bah stepped out of the car, a male stepped behind Bah and ordered him to "[l]ay on the ground." "Don't, don't try me. I will shoot you," the man said. Bah gave the man his wallet and phone. During his testimony at the pretrial hearing, Bah suggested that Hillary pretended to make Young come with Hillary unwillingly.

Bah later identified Hillary and Young in a lineup. At trial, Bah testified that Hillary's gun was a semiautomatic, and he identified the gun. Bah, however, conceded on cross-examination that his testimony was different in some respects from what he initially told law enforcement. For example, Bah admitted that he originally did not tell officers he had met Young before that night.

[9] We have incorporated aspects of Bah's testimony both at trial and during the pretrial hearing into this narrative.

After hearing testimony from Bah and Summerville Police Officer Chris Cooper, the circuit court found the evidence of the robbery admissible. Specifically, the court found that the robbery of Bah and the alleged attempt to rob Buckley was part of a common scheme or plan because "there's a strong connection[:] both robberies of single male victims, they're both driven away in the white Impala, cash from a wallet was stolen in both cases, and then obviously, the, the most, the strongest parallel is the communications between Mr. Hillary and Ms. Young, the text messages and the phone calls . . . ."

During the trial, jurors heard about the movements of the vehicles connected to the case during the evening of September 28 and the morning of September 29, as observed by Myrtle Beach traffic cameras. Additionally, Scott Eicher, a retired FBI agent and consultant, testified about the location of cell phones owned by or associated with Hillary, Young, and Buckley around the time when Buckley was believed to be murdered. The evidence heavily suggested that Hillary and Buckley, in particular, were in several of the same areas around the time of Buckley's murder.

After little more than an hour of deliberations, the jury convicted Hillary on all charges. The circuit court sentenced Hillary to life in prison for the murder charge; thirty years for the armed robbery; thirty years for the kidnapping charge; and five years on the weapons charge, all to run concurrently. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in finding that Hillary's statement was voluntary, despite the detectives' alleged threats and promises of assistance?

II. Did the circuit court err in allowing the testimony about the robbery of Bah under Rule 404, SCRE?

III. Should this court vacate Hillary's sentence for kidnapping because he was also sentenced for murder?

STANDARD OF REVIEW

We discuss the standard for review regarding some of Hillary's individual claims in greater detail below. However, we must keep in mind the limited scope of our review in all criminal matters. "In criminal cases, the appellate court sits to review errors of law only. This court is bound by the trial court's factual findings

unless they are clearly erroneous." *State v. Parker*, 381 S.C. 68, 74, 671 S.E.2d 619, 621 (Ct. App. 2008) (citations omitted).

LAW/ANALYSIS

I. VOLUNTARINESS OF THE STATEMENT

Hillary argues that his statement to police about the circumstances of Buckley's death was not voluntary. We disagree.

"On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion." *State v. Moses*, 390 S.C. 502, 510–11, 702 S.E.2d 395, 399 (Ct. App. 2010) (quoting *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004)). "When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Johnson*, 422 S.C. 439, 454, 812 S.E.2d 739, 747 (Ct. App. 2018) (alteration in original) (quoting *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)).

We do not wish to proceed without saying candidly that we are uneasy with the full sweep of the police officers' interrogation tactics in this case. However, we find that Hillary's statement was voluntary.

> In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession. Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use

> of physical punishment, such as the deprivation of food or sleep.

Moses, 390 S.C. at 513–14, 702 S.E.2d at 401 (citation omitted); *see also State v. Arrowood*, 375 S.C. 359, 367, 652 S.E.2d 438, 442 (Ct. App. 2007) ("A statement 'may not be extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence.'" (alterations in original) (quoting *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990))).

Given our "any evidence" standard of review and the existence of an uncontradicted audio recording of the interview, our task here is narrow and straightforward. If the actions and statements of the officers as captured on the recording can support the circuit court's view that the confession was voluntary under our state's precedents, we should affirm. Put another way, reversal would be proper only if the events on the recording *cannot* support the circuit court's ruling.

We find the detectives went up to the line of what is permissible under our precedents. No doubt, there are some troubling aspects of the interrogation. Judging by the evidence presented at trial, the detectives who interrogated Hillary repeatedly misrepresented the strength of the State's case at that point. They invoked the specter of the death penalty twice, even if they did not directly threaten Hillary's life. We find it particularly concerning that the detectives outlined potential stories that Hillary could tell and seemingly encouraged him to "come up with a lie" if he wanted to do so—shortly before floating the scenario that "[m]aybe [Buckley] rolled up on you looking for sex." That, of course, would end up nearly matching the explanation Hillary gave during the later stages of the interrogation for how he came to take Buckley's life.

Our courts have previously expressed disapproval of some tactics similar to those that Detective Lent and Detective Dudley used here. For example, in *State v. Peake*, our supreme court ruled that a confession should have been excluded when the officer answered affirmatively to a question about whether the officer had promised "that if [the defendant] would give you a statement . . . you would guarantee to him that you would not seek the death penalty." 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987). However, the court also ruled that "[a] statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." *Id.*

In this case, it does not appear that Hillary was promised leniency. At most, the officers assured Hillary that they would put in the proverbial good word for him—that they would not "hang [him] out to f*****g dry" when they talked to prosecutors. That is similar to the interrogation this court considered in *Arrowood*. There, the circuit court relied on testimony by law enforcement that "the only 'help' they offered Arrowood was to testify in court that he cooperated with the investigation." *Arrowood*, 375 S.C. at 368, 652 S.E.2d at 443. Our court held that "the officers' offer to attest to Arrowood's cooperation did not constitute promises of leniency. Consequently, Arrowood produced his statements in the mere 'hope' of leniency based on his cooperation, rather than as the consequence of promises." *Id.* at 368–69, 652 S.E.2d at 443 (citations omitted).

Here, as in *Arrowood*, the officers were not promising leniency; if the officers followed through on their offer, it would provide Hillary with "the mere 'hope' of leniency based on his cooperation." *See also Parker*, 381 S.C. at 91, 671 S.E.2d at 631 ("[D]iscussions of realistic penalties for cooperative and non-cooperative [defendants] . . . are normally insufficient to preclude free choice." (third alteration in original) (quoting *United States v. Mendoza–Cecelia*, 963 F.2d 1467, 1475 (11th Cir. 1992), *abrogated on other grounds by Davis v. United States*, 512 U.S. 452 (1994))).

Further, our courts have found that glancing references to the death penalty do not automatically render a statement involuntary. *See Johnson*, 422 S.C. at 456, 812 S.E.2d at 748 (affirming the circuit court's ruling even though talk of capital punishment "was not really a 'discussion' of possible penalties but a statement that keeping up this 'b[***]s[***] story' was going to land him in prison for life if not the death penalty" because "this comment was isolated, and the death penalty was a possible sentence for the crimes at issue").[10] Likewise, our courts have been hesitant to throw out statements encouraged by officers' false statements. *See id.* ("[C]ourts have routinely held the misrepresentation of evidence does not render a confession involuntary unless it is demonstrated the free will of the defendant was overborne."); *see also State v. Goodwin*, 384 S.C. 588, 603, 683 S.E.2d 500, 508 (Ct. App. 2009) ("While we do not condone the officers' statements regarding their evidence and

[10] The *Johnson* court also noted: "Johnson did not recant his [initial] story until well after the death penalty was mentioned, and it does not appear to have overborne his will." *Id.*

[threatening the appellant's] family, we do not find they overbore [the appellant's] will.").

Here, we find that even if the officers' tactics were at the extreme end of the allowable spectrum, they informed Hillary's mental calculation about whether to confess, rather than overbearing his will. *See Parker*, 381 S.C. at 89, 671 S.E.2d at 630 ("It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. . . . These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." (alteration in original) (quoting *State v. Von Dohlen*, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019))).

As part of his argument that the statement was involuntary, Hillary relies in part on *Bussey v. State*, 184 So.3d 1138 (Fla. Dist. Ct. App. 2015). Hillary says that the two cases represent a "strikingly similar factual scenario." We disagree.

The court in *Bussey* found that "detectives misled Bussey into believing that if he confessed to the victim's death being an accident, he would be charged with robbery, not murder, and he would not face the death penalty." *Id.* at 1146–47. Bussey's mother was brought in and told Bussey that she would "rather come visit you in jail than to bury you." *Id.* at 1145. The *Bussey* court also held that officers "repeatedly misled Bussey regarding what charges and penalties he could face if the victim's death was the result of what they referred to as an 'accident' or 'mistake,' i.e., a robbery resulting in a death." *Id.* at 1146.

While Detective Lent and Detective Dudley used some similar techniques to encourage Hillary to confess, their actions fall short of the sustained pressure campaign that prompted the *Bussey* court's ruling.[11]

[11] Further, Hillary's passing reference to this court's opinion in *State v. Hook*, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001), can be distinguished; in that case, the appellant was not even Mirandized. *Id.* at 412–13, 559 S.E.2d at 861. Likewise, we find Hillary's reliance on *State v. Corns* unavailing. *See* 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992). We do not read *Corns* to say that a "change in demeanor" is a decisive consideration on the voluntariness of statements, and while there is a change

Given all of these considerations, we find that the record presented at trial provides some evidence to support the circuit court's finding of voluntariness.

II. SUBSEQUENT BAD ACTS EVIDENCE

Hillary argues that the circuit court erred in admitting evidence concerning the robbery of Bah. We agree, but we find that any error in admitting the testimony was ultimately harmless.

"The [circuit court] has considerable latitude in ruling on the admissibility of evidence[,] and his decision should not be disturbed absent prejudicial abuse of discretion." *State v. Cope*, 405 S.C. 317, 334–35, 748 S.E.2d 194, 203 (2013) (quoting *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)).

"[E]vidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). However,

> [g]enerally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

Id. (quoting *People v. Molineux*, 61 N.E. 286, 294 (N.Y. 1901)). Under *Lyle*, the use of the common scheme or plan exception "involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged." *Id.* at 427, 118 S.E. at 811.

This court has observed the interplay between various standards of review when the State invokes the common scheme or plan exception.

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in tone by Hillary in the audio of the interrogation, we find it is not marked enough to indicate that his will was "overborne."

> Ordinarily, questions concerning the admissibility of evidence are treated as questions of fact. However, there are several cases in which the trial judge's admission of evidence under the common scheme or plan exception was reversed after the appellate courts in South Carolina found that the similarities between the charged and uncharged acts were insufficient to establish the existence of such a plan or design. Certainly, *the factual determination as to whether the prior assault occurred* in this case is left to the discretion of the trial judge. However, in light of these authorities, we believe *the determination of whether the facts surrounding that assault sufficiently evidence a common scheme or plan is a question of law*.

State v. Tutton, 354 S.C. 319, 326–27, 580 S.E.2d 186, 190 (Ct. App. 2003) (citations omitted) (emphases added). As a result, we do not need to focus on whether Bah's allegations against Hillary were true. Instead, we find it easy to conclude that the circuit court did not abuse its discretion in determining that the State had presented clear and convincing evidence of the robbery. *See id.* at 325, 580 S.E.2d at 189 ("When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous."). However, we must more closely consider the finding that there was a sufficient connection between the alleged robbery of Bah and the murder of Buckley to allow the jury to hear Bah's testimony.

Our supreme court has "held that the connection between the prior bad act and the crime must be more than just a general similarity." *State v. Parker*, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993). Furthermore, "[i]t is not enough to meet the 'logical connection' standard for admission of other crimes under the common scheme or plan exception to Rule 404(b) that the defendant previously committed the same crime." *State v. Perry*, 430 S.C. 24, 41, 842 S.E.2d 654, 663 (2020). "There must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." *Id.*

The State's argument that Bah's alleged experience with Hillary and Buckley's murder were part of a common scheme or plan is weakened by the almost complete lack of evidence that the two were, in fact, common to each other in any particularly meaningful way. Without more evidence to that effect, we do not have sufficient reason—and the circuit court did not have sufficient reason—to connect the

"criminal process" of the alleged robbery of Bah to the "criminal process" of the murder of Buckley.

For example, the State contends in its brief that "[c]ell phone records evidence supports that the victim Buckley first contacted [Young] at approximately 3 a.m. on September 29, 2016." That is incorrect, as the State conceded in a letter to this court after oral arguments. The citation used by the State in fact appears to point to testimony supporting only "a general indication that both the victim's phone and Ms. Young's phone were in the same area at the same time."

Instead, there is no evidence anywhere in the record of electronic contact between Young and Buckley—the very kind of communication that allegedly set in motion the robbery of Bah. Indeed, the State's own expert testified that there was no evidence that Buckley communicated with either Young or Hillary in the critical hours when the crime is believed to have been committed:

> So this was Ms. Young's phone, Mr. Hillary's phone and the victim's phone, and you can see the victim's phone here is not making any contact with any of these two other phones, but we do see a lot of contact between the Young phones and Mr. Hillary's phone.

Given the evidence that Young had multiple phones, there is a possibility that another phone was contacted by Buckley. It is also possible that Buckley somehow came into contact with Young somewhere in the general area of a camper that belonged to Buckley. However, that is nothing more than speculation. It is certainly not the type of evidence of a connection between the two crimes that can allow the State to qualify for the exceptions found in *Lyle*.

To the extent that the geolocation data shows that Young was in the "area" of Buckley's camper, the State offered one point of data showing that her phone used a tower that made it likely she was somewhere within a 120-degree arc, some of which overlapped with Buckley's camper. Neither the State nor Hillary called Young to testify about her role—if any—in the incident involving Buckley.

Furthermore, a chart of "similarities" between the two crimes used by the State at trial contains many of the same generalities that our courts have found insufficient to establish a common scheme or plan. Among the similarities are "incident occurred in SC," "male victim," "def[endant]s came from G[eorgia]"—where, again,

they lived at least some of the time—and "def[endant]s used cell phone." Some of the other similarities are stronger. Indeed, we cannot ignore that credit cards, a driver's license, and other items linked to Bah were found at Hillay's location. However, we find that these similarities and connections are not strong enough to say that the two offenses are the result of the same "criminal process."

We do not mean to suggest that the State needs to present a perfect match between two crimes to argue that they are part of a common scheme or plan. We also do not question the circuit court's view of the evidence that a carjacking or armed robbery scheme or plan involving Hillary and Young existed. However, we do not believe that the State produced enough evidence in this case to show that *the murder of Buckley* was part of that scheme or plan. *See Lyle*, 125 S.C. at 417, 118 S.E. at 807 (finding that, in considering admission of other bad acts, "[t]he acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced"). Given that, admitting evidence of the robbery of Bah under the common scheme or plan exception was error.

At the same time, we find this error to be harmless. *See State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) ("In determining whether error is harmless beyond a reasonable doubt, we often look to whether the 'defendant's guilt has been conclusively proven . . . such that no other rational conclusion can be reached.'" (quoting *State v. Collins*, 409 S.C. 524, 538, 763 S.E.2d 22, 29–30 (2014))).

Here, no other rational conclusion can be reached but that Hillary murdered Buckley. The cell phone evidence does not prove that Buckley's murder was part of a common scheme or plan, but it is nonetheless damning on the question of whether Hillary was involved in Buckley's death. Concluding that the mutual locations were happenstance would require not so much a reasonable doubt as a suspension of disbelief. Hillary's statement places him in the truck, and the location of the Buckley's gun and holster at a home where Hillary was living in Georgia can hardly be a coincidence.[12]

[12] The State proceeded under the theory that Hillary had used his own gun for the shooting. That gun was also found at the townhouse. However, the State did not point to any forensic evidence linking the gun used in the robbery of Bah with Buckley's murder; indeed, there could be no forensic evidence in the robbery of Bah because the gun was not fired. Additionally, no bullets or casings were found in

The only element of the crime of murder on which the jury's considerations could have been tainted by Bah's testimony was on the issue of malice—the dividing line between murder on one side and voluntary manslaughter, involuntary manslaughter, or self-defense on the other. However, we find beyond a reasonable doubt that there is overwhelming evidence in the record from which the jury would have inferred malice regardless. The evidence that Buckley was shot in the back of the head and the evidence that he was shot twice both indicate the presence of malice. Additionally, we note that the jury convicted Hillary of armed robbery and kidnapping—both of which are felonies. *See State v. Avery*, 333 S.C. 284, 294, 509 S.E.2d 476, 481 (1998) ("If a person intentionally kills another during the commission of a felony, malice may be inferred."); S.C. Code Ann. § 16-3-910 (defining kidnapping as a felony); S.C. Code § 16-11-330(A) (defining armed robbery as a felony); *see also State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) ("[A] trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon," but "if evidence is introduced that the deed was done with a deadly weapon, the State is free to argue to the jury that it should infer the existence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the defendant acted with malice aforethought."); 41 C.J.S. *Homicide* § 285 (as of May 2023 update) ("Malice may be inferred from the circumstances surrounding a defendant's conduct and the events leading up to the death of the victim.").

As a result, we find that evidence related to the robbery of Bah should not have been admitted, but that the error was harmless.

III. CONVICTIONS FOR MURDER, KIDNAPPING

Hillary finally contends that he should not have been sentenced for both kidnapping and murder. This issue was not preserved for appeal. However, for the sake of judicial economy, we will vacate the improper sentence for kidnapping.

Section 16-3-910 of the South Carolina Code (2015) provides: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other

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Buckley's truck. *See State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001) ("In this case, *there is forensic evidence* that the same gun was used in both the barbershop and cab driver shootings. *This fact* establishes a substantial connection between the two crimes that supports the admission of evidence regarding the cab driver murder." (emphases added)).

person by any means whatsoever without authority of law . . . upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20."

As the State points out, Hillary did not raise this issue in the circuit court. Hillary contends that we can and should vacate the sentence in any case under *Owens v. State*. *See* 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) ("The [c]ourt has summarily vacated life sentences for kidnapping when the defendant received a concurrent sentence under the murder statute.").

Principles of judicial economy favor vacating the sentence in this case. *See State v. Vick*, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) ("While the case at hand does not present a threat that [the appellant] will remain incarcerated beyond the legal sentence . . . our courts have, in the past, 'summarily vacated' sentences for kidnapping where such sentences were precluded . . . because the defendant received a concurrent sentence under the murder statute."); *id.* ("Additionally, our courts have at times considered an issue in the interest of judicial economy."); *State v. Bonner*, 400 S.C. 561, 566, 735 S.E.2d 525, 527 (Ct. App. 2012) ("[T]here is an exceptional circumstance when 'the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence.'" (quoting *State v. Johnston*, 333 S.C. 459, 463, 510 S.E.2d 423, 425 (1999))); *cf. State v. Plumer*, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023) ("On occasion, we encounter illegal sentences to which no objection was taken in the trial court. In such cases, it is inefficient and a waste of judicial resources to delay the inevitable by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus.").

Here, the State does not specifically acknowledge in its brief that the sentence was wrongly imposed, instead stressing the importance of issue preservation. The State argues that one of our precedents "does not apply" and asserts that "this [c]ourt has been inconsistent in adherence to the [c]ourt's precedent to unpreserved sentencing issues." We note that *Vick* and *Bonner* have not been overruled by our supreme court. There is no cognizable legal argument the State can raise that this sentence was properly imposed. Nor do we believe that the interests of our state's justice system are served by requiring Hillary to go through a collateral appeal process to attack a facially invalid sentence that will not actually affect the length of his imprisonment. We vacate the kidnapping sentence as a result.

CONCLUSION

For the reasons stated above, the ruling of the circuit court is

AFFIRMED IN PART AND VACATED IN PART.

HILL, A.J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; and Eleanor N. Hawkins, Plaintiffs,

v.

Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; John Doe, a nominal Defendant representing all persons or entities unknown who may claim an interest in the property that is the subject of this action, Defendants,

And

Atlantic Development Company, LLC and Atlantic Coast Funding, LLC, Third-Party Plaintiffs,

v.

Barbara P. Swartz; Nancy S. Case; Winston Salem Daly Development, LLC; Charles F. Webber; Mark L. Skowron, as Trustee of Mark L. Skowron Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor, Trustee of the Norman W. Taylor Revocable Living Trust dated April 28, 2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut; Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G. Bauknight; Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015; GGK Properties, LLC; Leon Levine

and Sandra Levine; Joseph Moglia and Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable Trust under Trust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust dated August 1, 2017; Phillip Kleinman and Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP; Astorg Imports, Inc.; ABLP Properties, LLC; Sutton Children, LLC; Daniel C. Schuster and Mardell J. Schuster; Roy C. Putrino and Eileen M. Putrino; Spencer Squier and Sherri Squier; VDM 1004, LLC; Roger B. Matherly and Bonnie V. Matherly; ITAC 203 LLC; Rebecca R. Shroff and Kersi S. Shroff; Sandra P. Levine and Lori Ann Sklut, Co-Trustees of the Irrevocable Trust F/B/O Amy Beth Levine dated September 18, 1986; David E. Lukowski; Richard B. Kline and Leslie Kline; James P. Aplington and Carol D. Aplington; Michael L. Van Glish and Judith K. Van Glish; Anna A. Olsen; Anne Marie Murray; William J. Pridemore and Irina V. Pridemore; William B. Davidson and Julia Davidson; Bruce Alexander Henderson and Valerie Sokolov; Mark W. Lee; Sue David Kline; Thomas McKiernan and Anne McKiernan; Philip H. Strobl and Amy Mott Strobl; James M. Faircloth and Sylvia Faircloth; Cheryl Jackson and Phillip H. Jackson; Weldon Riggs and Tiffiany Riggs; Janet P. Merritt, Trustee of the Janet P. Merritt Living Trust U/A dated March 24, 2000; Melia Mooney Pavoris; William L. Mansfield and Patricia S. Mansfield; Stuart W. Gibbs and Helen R. Gibbs; Michael R. Blackburn and Pamela M. Blackburn; Jeffrey G. Edwards and Teresa T. Edwards; Michael J. Wilk, Third-Party Defendants,

Of which Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins, Barbara P. Swartz; Nancy S. Case; Winston Salem Daly Development, LLC; Charles F. Webber; Mark L. Skowron, as Trustee of Mark L. Skowron Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor, Trustee of the Norman W. Taylor Revocable Living Trust dated April 28, 2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut; Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G. Bauknight; Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015; GGK Properties, LLC; Leon Levine and Sandra Levine; Joseph Moglia and Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable Trust under Trust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust dated August 1, 2017; Phillip Kleinman and Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP; Astorg Imports, Inc.; ABLP Properties, LLC; Sutton Children, LLC; Daniel C. Schuster and Mardell J. Schuster; Roy C. Putrino and Eileen M. Putrino; Spencer Squier and Sherri Squier; VDM 1004, LLC; Roger B. Matherly and Bonnie V. Matherly; ITAC 203 LLC; Rebecca R. Shroff and Kersi S. Shroff; Sandra P. Levine and Lori Ann Sklut, Co-Trustees of the Irrevocable Trust F/B/O Amy Beth Levine dated September 18, 1986; David E. Lukowski; Richard B. Kline and Leslie Kline;

James P. Aplington and Carol D. Aplington; Michael L. Van Glish and Judith K. Van Glish; Anna A. Olsen; Anne Marie Murray; William J. Pridemore and Irina V. Pridemore; William B. Davidson and Julia Davidson; Bruce Alexander Henderson and Valerie Sokolov; Mark W. Lee; Sue David Kline; Thomas McKiernan and Anne McKiernan; Philip H. Strobl and Amy Mott Strobl; James M. Faircloth and Sylvia Faircloth; Cheryl Jackson and Phillip H. Jackson; Weldon Riggs and Tiffiany Riggs; Janet P. Merritt, Trustee of the Janet P. Merritt Living Trust U/A dated March 24, 2000; Melia Mooney Pavoris; William L. Mansfield and Patricia S. Mansfield; Stuart W. Gibbs and Helen R. Gibbs; Michael R. Blackburn and Pamela M. Blackburn; Jeffrey G. Edwards and Teresa T. Edwards; Michael J. Wilk, are the Appellants,

And

Of Which Vista Del Mar Condominiums, LLC, Atlantic Development Company, LLC, Atlantic Coast Funding, LLC and John Doe, a nominal Defendant representing all persons or entities unknown who may claim an interest in the property that is the subject of this action are the Respondents.

Appellate Case No. 2020-000528

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 6016
Heard June 15, 2023 – Filed August 16, 2023

AFFIRMED

Kenneth Ray Moss and Paul J. Ekster, both of Wright, Worley, Pope, Ekster & Moss, PLLC, of North Myrtle Beach; and Robert E. Lee, of Robert E. Lee, LLC, all for Appellants.

Demetri K. Koutrakos and Harry Alwyn Dixon, both of Callison Tighe & Robinson, LLC, of Columbia, for Respondents Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and John Doe.

James Christopher Clark, of McAngus Goudelock & Courie, LLC, of Myrtle Beach, for Respondent Vista Del Mar Condominiums, LLC.

VERDIN, J.: Vista Del Mar Condominium Association (the Association) and the individual unit owners (Unit Owners) of the Vista Del Mar Horizontal Property Regime (the Regime) (collectively, Appellants) appeal the circuit court's order granting summary judgment to Atlantic Development Company and Atlantic Coast Funding, LLC (collectively, Respondents), quieting title in favor of Respondents to a 2.58-acre tract (the Property), which had been a part of the Regime, and declaring Respondents had a valid easement (Access Easement) that ran with the title to the Property. On appeal, Appellants argue the circuit court erred in upholding the removal of the Property from the Regime because (1) the removal of the Property, which was a common area, was a violation of the Horizontal Property Act[1] (the Act); and (2) the developer, Vista Del Mar, LLC (Developer), no longer had authority to take any action concerning the Regime at the time of the removal. In addition, Appellants argue Developer did not have authority to grant an express easement over Regime property that benefitted the Property. We affirm.

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[1] S.C. Code Ann. §§ 27-31-10 to -430 (2007 & Supp. 2022).

FACTUAL/PROCEDURAL BACKGROUND

On December 4, 2003, Developer filed the Master Deed creating the Regime, which consisted of 5.853 acres. The Master Deed provided Phase I of the Regime was composed of Building Number 1, which contained twenty-five units. With the filing of the Master Deed, a transition period began (the Transition Period), during which Developer had authority to expand or contract the Regime and act on behalf of the Association. The Master Deed specified that Developer was entitled to expand the Regime in five additional phases to a total of 250 units. It also authorized Developer to "subdivide portions of the [c]ommon [a]rea from the [Regime] which are unimproved with structures[] and to remove the subdivided portion" through the use of an amendment of the Master Deed, with Developer acting on behalf of itself and as attorney-in-fact for all unit owners.

Developer submitted an additional five acres to the Regime with the First Amendment to the Master Deed filed June 27, 2006. The First Amendment also described Building 2, which consisted of forty-one units. Developer subsequently removed the Property, which was comprised of portions of the original acreage and the five acres added in the First Amendment to the Master Deed, by filing the Corrected Fourth Amendment to the Master Deed on April 6, 2009. The Corrected Fourth Amendment to the Master Deed referenced a plat that described the Property and showed the Access Easement.

On December 19, 2013, Developer sold the Property to GDMB Ocean, LLC (GDMB Ocean) and assigned the developer rights to GDMB Operations, LLC (GDMB Operations). On November 7, 2014, GDMB Operations filed an amendment to the Master Deed surrendering its Class B Membership, which it contended triggered the three-month phase to end the Transition Period. The Association subsequently granted GDMB Ocean an express easement consistent with the Access Easement shown on the plat referenced in the Corrected Fourth Amendment to the Master Deed.

GDMB Ocean sold the Property and an additional 26.53-acre tract to Atlantic Development Company (Atlantic Development) on January 6, 2016. Atlantic Development secured a promissory note from Atlantic Coast Funding for $24,600,000.00 with a mortgage on both tracts.

The Association and three unit owners brought this action seeking a declaration that the removal of the Property from the Regime was not effective and the Property remained a common area of the Association. Respondents filed counterclaims and a third-party complaint against all of the remaining Unit Owners seeking to quiet title and a declaratory judgment that Atlantic Development owned the Property and had rights to the Access Easement. Respondents filed a motion for summary judgment, which the circuit court initially denied. However, on Respondents' motion to alter or amend, the circuit court granted that motion and summary judgment to Respondents. It held Developer had the authority to remove the Property from the Regime pursuant to the Master Deed and the Act did not prohibit the removal. In addition, it found (1) GDMB Operations, acting on behalf of the Association pursuant to its developer rights, had the authority to grant the express Access Easement and (2) Respondents had an implied easement by plat. This appeal followed.

STANDARD OF REVIEW

The appellate court reviews the grant of summary judgment by applying the same standard the circuit court applied pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. *Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct. App. 2015) (omission in original) (quoting Rule 56(c), SCRCP). "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Id.* Furthermore, "[i]n determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Stoneledge at Lake Keowee Owners' Ass'n*, 413 S.C. at 620, 776 S.E.2d at 429. "Once the moving party carries its initial burden [of demonstrating the absence of a genuine issue of material fact], the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *Lord v. D & J Enters.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Stoneledge at Lake Keowee Owners' Ass'n*, 413 S.C. at 620, 776 S.E.2d

at 429 (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)).

LAW/ANALYSIS

I. Transition Period

Appellants argue the circuit court erred in finding no genuine issue of material fact existed as to whether the Transition Period ended before Developer filed the Corrected Fourth Amendment to the Master Deed, which removed the Property from the Regime. We disagree.

"When a motion for summary judgment involves a question as to the construction of a deed, the [circuit court] must first determine whether the language of the deed is ambiguous." *Edgewater on Broad Creek Owners Ass'n v. Ephesian Ventures, LLC*, 430 S.C. 400, 406, 845 S.E.2d 211, 214 (Ct. App. 2020). "The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Id.* (quoting *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 204, 743 S.E.2d 850, 853 (Ct. App. 2013)). "It is a question of law for the court whether the language of a contract is ambiguous." *Harbin v. Williams*, 429 S.C. 1, 8, 837 S.E.2d 491, 495 (Ct. App. 2019) (quoting *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001)). If a court determines the language is ambiguous, the question of the parties' intent becomes a question of fact, and the court may admit evidence to show the intent of the parties. *Id.* "On the other hand, the construction of a clear and unambiguous deed is a question of law for the court." *Id.* (quoting *S.C. Dep't of Nat. Res.*, 345 S.C. at 623, 550 S.E.2d at 303).

"In construing a deed, 'the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy.'" *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582-83 (2009) (quoting *Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977)). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." *Id.* at 201, 672 S.E.2d at 583 (quoting *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987)). "The intention of the grantor must be found within the four corners of the deed." *Id.* (quoting *Gardner*, 293 S.C. at 25, 358 S.E.2d at 392). "Therefore, 'summary judgment is proper and a trial unnecessary whe[n] the intention of the parties as to the legal effect of the [deed] may be gathered from the

four corners of the instrument itself.'" *Edgewater on Broad Creek Owners Ass'n*, 430 S.C. at 407, 845 S.E.2d at 214 (quoting *HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007)).

The Master Deed provided the Transition Period ended on the earlier of option 1: December 31, 2017; option 2: three months after the sale of 99% "of the maximum number of Units to be contained in all phases of the Regime"; or option 3: three months after Developer surrendered its authority as a Class B member of the Association.[2]

Appellants contend that option 2 is ambiguous as to whether the end of the Transition Period was triggered upon the sale of 99% of the Units actually constructed, as they interpret the provision, or upon the sale of the maximum number of Units that *could have been constructed* if all phases had been added to the Regime, as Respondents claim and the circuit court found. Appellants assert that because only the first two phases of the Regime were completed, the Transition Period ended around March 31, 2008, which was three months after 99% of the units in the completed buildings were sold; thus, Developer no longer had the authority to remove the Property from the regime on April 6, 2009.

We hold option 2 is not reasonably susceptible to more than one interpretation, and thus, it is not ambiguous. *See Edgewater on Broad Creek Owners Ass'n*, 430 S.C. at 406, 845 S.E.2d at 214 ("The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." (quoting *Penza*, 404 S.C. at 204, 743 S.E.2d at 853)). This option triggered the end of the Transition Period with the sale of 99% "of the maximum number of Units to be contained in *all phases* of the Regime." (emphasis added). The Master Deed clearly contemplated Developer constructing the Regime in phases and allowed it the authority to expand and contract the Regime as it desired. The Transition Period was to end the earlier of December 31, 2017 (option 1); when Developer completed the entire Regime (option 2); or when Developer chose to end the development by surrendering its authority as a Class B member (option 3).

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[2] The Association's Articles of Incorporation designated Developer as a Class B member, authorizing it to have three votes for every vote held by Type A members, plus one vote, and granting it the right to appoint or remove any member of the Association's Board of Directors.

Furthermore, we hold option 2 was never triggered because Developer never completed all phases of the Regime contemplated in the Master Deed. Instead, the Transition Period did not end until February 2015, which was three months after GDMB Operations filed an amendment to the Master Deed surrendering its Class B authority. Accordingly, we hold the circuit court did not err in finding the Transition Period had not ended and Developer still possessed the authority to remove the Property from the Regime on April 6, 2009.

II. Removal of a Common Area

Appellants argue the circuit court erred in allowing Respondents to divide the common elements and remove the Property from the Regime because the plain language of section 27-31-70 of the Act explicitly bars such division. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The legislature's intent should be ascertained primarily from the plain language of the statute." *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 339 (Ct. App. 2004). "Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." *Id.* "The interpretation of a statute is a question of law." *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 300, 814 S.E.2d 513, 516 (2018) (quoting *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013)).

"The rights and authority of [a horizontal property r]egime must be gleaned from the . . . Act and from the master deed." *Roundtree Villas Ass'n v. 4701 Kings Corp.*, 282 S.C. 415, 421, 321 S.E.2d 46, 49 (1984). "The Act requires the developer of the regime to record a master deed which expresses a comprehensive list of particulars." *Heritage Fed. Sav. & Loan v. Eagle Lake & Golf Condos.*, 318 S.C. 535, 539, 458 S.E.2d 561, 564 (Ct. App. 1995); *see, e.g.*, § 27-31-100 (setting forth the particulars a master deed must contain). A developer may "reserve certain rights provided he states those rights with specificity in the master deed." *Heritage Fed. Sav. & Loan*, 318 S.C. at 541, 458 S.E.2d at 565. Specifically, a developer may reserve the right to amend the master deed without the consent of all of the unit owners. *Id*. If the developer plans to develop the property in phases, the master deed must contain a general description of the plan of development

including (1) the maximum number of units in each future phase; (2) the date the developer will elect whether to proceed with each phase; (3) a general description of any additional common elements; and (4) a chart showing each original unit owners' percentage interest in the common elements if the developer elects to proceed with all stages of development. § 27-31-100(g). In addition, the developer must attach to the master deed a plot plan and building plans showing proposed improvements and common elements. § 27-31-110.

Generally, the unit owners in a horizontal property regime hold the common elements as tenants in common. *See Baker v. Town of Sullivan's Island*, 279 S.C. 581, 584, 310 S.E.2d 433, 435 (Ct. App. 1983) ("[T]he . . . Act provides that the ownership of the land upon which is built a condominium is held as co-tenants by the owners . . . ."); § 27-31-60(a) (stating the unit owners in a horizontal property regime "have a common right to a share, with the other co-owners, in the common elements of the property, equivalent to the percentage representing the value of the individual apartment, with relation to the value of the whole property"); § 27-31-80 ("Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners."). Usually when parties share in the co-ownership of property, they have a right to request partition of the property. *See* S.C. Code Ann. § 15-61-10(A) (Supp. 2022) (allowing "joint tenants and tenants in common" to request partition of . . . lands, tenements and hereditaments"); S.C. Code Ann. § 15-61-50 (2005) (allowing the court of common pleas to order the partition of "real and personal estates held in joint tenancy or in common"). The unit owners in a horizontal property regime, however, do not have a right to partition the common elements. Section 27-31-70 of the Act provides, "The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the contrary shall be void." *See Baker*, 279 S.C. at 584, 310 S.E.2d at 435 (stating the unit owners' tenants in common ownership of common elements is not subject to partition). Thus, the unit owners cannot partition their interest in common elements from other apartment owners, nor can they divide their ownership interest in the common elements from their ownership interest in their units.

The Act clearly allows for a developer to develop a regime in phases and requires a developer to set forth in the master deed and plot plan the details of proposed buildings and common elements. *See* § 27-31-100(g) (setting forth the particulars

the developer must have in the master deed to develop the regime in two or more phases). The Act also contemplates that a developer may choose to forgo completing all phases of the development. Section 27-31-60(b) of the Act grants unit owners "the right to require specific performance of any proposed common elements for recreational purposes set out in the master deed which are included in the next stage of the development that applies to recreational facilities in the event the additional stages of erection do not develop." The Act does not grant unit owners similar rights to demand specific performance of the remaining common elements that are not recreational. However, this court recognized "once common elements are set aside and vested in the co-owners, such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer." *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 211, 494 S.E.2d 465, 468 (Ct. App. 1997).

Considering the Act as a whole, we hold Section 27-31-70's prohibition of partition or division of common elements concerns the unit owners' rights in the common elements and does not prohibit a developer from removing non-recreational common elements from a regime unless those common elements have vested in the unit owners pursuant to the terms of the master deed. Therefore, we look to the terms of the Master Deed to discern whether Developer's removal of the Property from the Regime was valid.

The Master Deed authorized Developer to expand or contract the Regime and act on behalf of the Association during the Transition Period. It also allowed Developer to "subdivide portions of the Common Area from the Project which are unimproved with structures and to remove the subdivided portion" with an amendment of the Master Deed, with Developer acting on behalf of itself and as attorney-in-fact for all unit owners. Because Developer had the right to unilaterally remove common areas unimproved with structures from the Regime, the common areas did not become vested in the Unit Owners until they were improved or the Transition Period ended. *See Vested*, Black's Law Dictionary (11th ed. 2019) (defining "vested" as "[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute). Appellants have not presented any evidence the Property was improved with structures. *See Lord*, 407 S.C. at 553, 757 S.E.2d at 699 (stating that "once the moving party carries its initial burden [of demonstrating the absence of a genuine issue of material fact], the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth

specific facts to show that there is a genuine issue for trial"). Accordingly, we hold Developer's removal of the Property from the Regime was valid and the circuit court did not err in granting Respondents summary judgment.[3]

III. Access Easement

As to the circuit court's findings concerning the Access Easement, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 451, 814 S.E.2d 643, 653-54 (Ct. App. 2018) ("Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." (alterations in original) (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 902 (2010), *abrogated on other grounds by Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018))).

CONCLUSION

Based on the foregoing, the circuit court's order granting summary judgment to Respondents is

AFFIRMED.

WILLIAMS, C.J., and GEATHERS, J., concur.

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[3] We note the circuit court erred in holding the Property was not a statutory common element. Section 27-31-20 of the Act defines "general common elements" in part as "[t]he land whether leased or in fee simple and whether or not submerged on which the apartment or building stands" and "[a]ll other elements of the property . . . rationally of common use or necessary to its existence, upkeep, and safety." The Master Deed defined "common area" as "all of the Regime property after excluding the Units . . . ." The Master Deed's use of the term "common area" was the equivalent of the statutory term "common element"; the Property, which indisputably was a common area of the Regime, was, therefore, a common element.