The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS

The South Carolina Bar has proposed amending Rule 43(k) of the South Carolina Rules of Civil Procedure (SCRCP) to permit counsel retained by an insurer to sign a mediated settlement agreement in place of a named party in certain instances.

The Court is considering submitting the Bar's proposed amendment to the General Assembly in accordance with Article V, Section 4A of the South Carolina Constitution. The proposed changes are set forth in the attachment.

Persons or entities desiring to submit written comments should submit their comments to the following email address, rule43comments@sccourts.org, on or before December 6, 2021. Comments should be submitted as an attachment to the email as either a Microsoft Word document or an Adobe PDF document.

Columbia, South Carolina
November 18, 2021

(k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel, or in the event of a settlement agreement involving payment by an insurer, the signature of counsel retained by an insurer on behalf of the Defendant(s) or third party administrator shall suffice in place of the signature of the insured party. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

Note to 2022 Amendment

The amendment to Rule 43(k) clarifies the existing practice in cases where plaintiff has waived the presence of the actual named defendant at a settlement conference and allows for more efficient enforcement of mediated settlements.

The Supreme Court of South Carolina

RE: Operation of the Trial Courts During the Coronavirus Emergency
(As Amended November 23, 2021)

Appellate Case No. 2020-000447

ORDER

On April 3, 2020, this Court issued an order entitled "Operation of the Trial Courts During the Coronavirus Emergency." This order was subsequently amended on four occasions, with the last amended order being filed on June 15, 2021.

On August 27, 2021, this Court issued a completely revised order relating to the operation of the trial courts during the coronavirus emergency. That order is scheduled to expire on November 29, 2021.[1]

This order amends the August 27, 2021, order to extend its provisions until February 4, 2022. While no substantive changes have been made, this introductory portion of the order has been shortened, footnotes have been revised or added, a citation to an Act has been updated, and temporal language contained in the August 27, 2021, order has been revised in several instances. For the benefit of the bench, bar and public, the language explaining which provisions of the June 15, 2021, have been continued, deleted or modified has been retained in this amended order.

(a) Terminology. The following terminology is used in this order.

(1) Judge: a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

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[1] This order is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2623.

(2) Remote Communication Technology: technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time.

(3) Trial Court: the circuit court (including master-in-equity court), family court, probate court, magistrate court and municipal court.

(4) Summary Court: a magistrate or municipal court.

(b) Authority of the Chief Justice to Impose Mitigation Measures. Throughout the coronavirus pandemic, the Chief Justice has issued administrative orders and guidance under Article V, § 4, of the South Carolina Constitution to mitigate the risk posed by the pandemic. This Court is confident that the Chief Justice will continue to issue and modify guidance as may be appropriate to reduce the risk posed by the coronavirus. Therefore, many of the restrictions and requirements in the June 15, 2021, order, which were designed to allow hearings, trials or other matters to be safely conducted during the pandemic, have not been included in this order, and these matters are now left to the Chief Justice.

(c) Discretion of the Trial Judges to Impose Mitigation Measures. In addition to the guidance the Chief Justice may issue, this Court is confident that trial judges will take appropriate mitigation measures to address any unique risk the coronavirus may pose in any individual case.

(d) Minimizing Hearings on Motions. Section (c)(4) of the June 15, 2021, order stated the following:

> While the practice has been to conduct hearings on virtually all motions, this may not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers.

This Court continues to encourage judges to follow this guidance. As discussed above, judicial resources need to be focused on the timely and just resolution of cases, and holding unnecessary hearings is inconsistent with this goal.

(e) Service Using AIS E-mail Address.[2] A lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary e-mail address listed in the Attorney Information System (AIS).[3] For attorneys admitted pro hac vice, service on the associated South Carolina lawyer under this method of service shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney. For documents that are served by e-mail, a copy of the sent e-mail shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. This method of service may not be used for the service of a summons and complaint, subpoena, or any other pleading or document required to be personally served under Rule 4 of the South Carolina Rules of Civil Procedure (SCRCP), or for any document subject to mandatory e-filing under Section 2 of the South Carolina Electronic Filing Policies and Guidelines. In addition, the following shall apply:

(1) Documents served by e-mail must be sent as an attachment in PDF or a similar format unless otherwise agreed by the parties.

(2) Service by e-mail is complete upon transmission of the e-mail. If the serving party learns the e-mail did not reach the person to be served, the party shall immediately serve the pleading or paper by another form of service in Rule 5(b)(1), SCRCP, or other similar rule, together with evidence of the prior attempt at service by e-mail.

(3) In those actions governed by the South Carolina Rules of Civil Procedure, Rule 6(e), SCRCP, which adds five days to the time a party has the right or is required to do some act or take some proceedings within a

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[2] The language of this section is identical to that contained in (c)(13) of the June 15, 2021, order.

[3] The e-mail addresses for a lawyer admitted in South Carolina can be accessed utilizing the Attorney Information Search at: https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm.

prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, shall also apply when service is made by e-mail under this provision.

(4) Lawyers are reminded of their obligation under Rule 410(g) of the South Carolina Appellate Court Rules (SCACR) to ensure that their AIS information is current and accurate at all times.

(f) Signatures of Lawyers on Documents.[4] A lawyer may sign documents using "s/[typed name of lawyer]," a signature stamp, or a scanned or other electronic version of the lawyer's signature. Regardless of form, the signature shall still act as a certificate under Rule 11, SCRCP, that the lawyer has read the document; that to the best of the lawyer's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

(g) Optional Filing Methods. Section (c)(15) of the June 15, 2021, order provided as follows:

> During this emergency, clerks of the trial courts may, at their option, permit documents to be filed by electronic methods such as fax and e-mail. If the clerk elects to do so, the clerk will post detailed information on the court's website regarding the procedure to be followed, including any appropriate restrictions, such as size limitations, which may apply. Documents filed by one of these optional filing methods shall be treated as being filed when received by the clerk of court and a document received on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. These optional filing methods shall not be used for any document that can be e-filed under the South Carolina Electronic Filing Policies and Guidelines. If a trial court does not have a clerk of court, the court shall determine whether to allow the optional filing methods provided by this provision.

If such an optional filing system has been created prior to August 27, 2021, the clerk of court may continue to operate this system. By October 1, 2021, any court with an optional filing system was required to provide the Office of Court Administration with information regarding this system, including a general description of the system, a copy of the procedures posted to the court's website,

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[4] The language in this section is identical to that contained in section (c)(14) of the June 15, 2021, order.

discussion of how successful and useful the system has been, how the system has been received by the users, and, if available, the approximate number of filings which have been made using this system.

(h) Use of Remote Communication Technology. During the coronavirus pandemic, WebEx and other remote communication technologies were successfully used by the trial courts. Based on this experience, Rule 612 was added to the South Carolina Appellate Court Rules to allow this Court to issue an order allowing remote communication technology to be used in proceedings before the courts of this state. Pursuant to Rule 612, SCACR, this Court issued an order regarding the use of remote communication technology in proceedings before the trial courts, including the administration of any required oath or affirmation.[5] Therefore, the provisions in the June 15, 2021, order relating to the use of remote communication technology are not included in this order.

This Court recognizes that various trials, pleas or hearings may have already been scheduled to be conducted using remote communication technology under the guidance contained in the order of June 15, 2021. If so, the use of remote communication technology for that trial, plea or hearing may continue to be conducted under the guidance contained in the June 15, 2021 order, notwithstanding any new limitations in the order governing the use of remote communication technology referenced in the preceding paragraph.

(i) Family Court Provisions. Section (f) of the June 15, 2021, order contained provisions applicable to the family court. Many of these provisions have proven to be very beneficial during the pandemic, and can be used to conserve judicial resources which can better be used to resolve cases that have been necessarily delayed by the impact of the pandemic. This Court, however, believes that hearings on consent agreements or orders regarding divorces or other final matters can now be safely conducted either in-person or using remote communication technology, and having hearings on these matters is beneficial to the litigants and the judicial system. Therefore, this order has significantly amended the language from the prior order.

(1) Granting of Uncontested Divorces Based on Separation for One Year Without a Hearing. The family court may grant an uncontested

[5] The current version of this order is dated September 21, 2021, and is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2628

divorce based on separation for one year without holding a hearing, including granting any requested name change, if:

(A) The relief sought is limited to a divorce and any related change of name. If other relief is sought, including but not limited to, child support, child custody or visitation, alimony, property distribution or fees for attorneys or guardians ad litem, the divorce may not be granted without a hearing.

(B) The parties submit written testimony in the form of affidavits of the parties and corroborating witnesses that address jurisdiction and venue questions, date of marriage, date of separation, and the impossibility of reconciliation.

(C) The written testimony must include copies of the parties' and witnesses' state-issued photo identifications.

(D) Any decree submitted by any attorney shall be accompanied by a statement, as an officer of the court, that all counsel approve the decree and that all waiting periods have been satisfied or waived by the parties.

(E) Should either party request a name change in connection with a request for divorce agreement approval, that party shall submit written testimony to the family court in the form of an affidavit addressing the appropriate questions for name change and the name which he or she wishes to resume. This relief shall be included in any proposed order submitted to the Court for approval at the time of the submission of the documents related to the relief requested.

(2) Approval of Agreements and Consent Orders Regarding Temporary Relief Without a Hearing. Based on the consent of the parties, temporary orders, including but not limited to those relating to child custody, child support, visitation, and alimony, may, in the discretion of the family court judge, be issued without a hearing. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the

guardian ad litem, if one has been appointed, and may be submitted and issued without the necessity of filing supporting affidavits, financial declarations or written testimony.

(3) Consent Orders under S.C. Code Ann. § 63-7-1700(D). Where all the parties consent and the family court determines a child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal, and the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being, the family court may order the child returned to the child's parent without holding a hearing.

(4) Consent Orders Regarding Procedural Matters. With the consent of the parties, a consent order relating to discovery, the appointment of counsel or a guardian ad litem (including the fees for, or the relief of, a counsel or a guardian ad litem) or any other procedural matter may, in the discretion of the family court judge, be issued without requiring a hearing.

(5) Submission of Additional Information. Nothing in this order shall be construed as preventing a family court judge from requiring additional information or documents to be submitted before making a determination that the order can be issued without a hearing or from holding a hearing where the judge finds a hearing is appropriate.

(6) Consent Orders or Agreements Submitted to the Family Court Prior to the Effective Date of this Order. Consent orders or agreements submitted to the family court on or prior to August 27, 2021, may continue to be processed under the guidance contained in the order of June 15, 2021.

(j) Rule 3(c) of the South Carolina Rules of Criminal Procedure (SCRCrimP). While this order remains in effect, the ninety (90) day period provided by Rule 3(c), is increased to one-hundred and twenty (120) days.[6]

(k) Alternatives to Court Reporters and Digital Courtrooms. A trial or hearing in the court of common pleas (including the master-in-equity court), the court of general sessions or the family court is usually attended by a court reporter

[6] This section is based on section (d)(1) of the June 15, 2021, order.

(before the master-in-equity this is usually a private court reporter) or is scheduled in one of the digital courtrooms with a court reporter or court monitor. While every effort will be made to continue these practices, this may not be possible ~~as~~ due to the impact of the pandemic and the expected increased demand for these resources to resolve cases which were delayed by the pandemic. In the event such resources are not reasonably available, a trial or hearing may proceed if a recording (preferably both audio and video) is made. The judge shall conduct the proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

(l) Amendment to Rule 3, SCRCrimP. The June 15, 2021, order contained a provision regarding the service of an arrest warrant on a defendant already in the custody of the South Carolina Department of Corrections, or a detention center or jail in South Carolina. Since Rule 3(a), SCRCrimP, has been amended to incorporate this language, this provision is not included in this order.

(m) Bond Hearings in Criminal Cases. Section (h)(1) of the June 21, 2021, order has not been included in this order. Judges should, of course, continue to hold bond hearings in accordance with the guidance provided by the Chief Justice.

(n) Notarizations. During the height of the pandemic, the ability to obtain notarial services was significantly impacted. To address this, the prior versions of this order contained provisions allowing a certification in lieu of affidavit. Since notarial services are now readily available, these provisions have not been included in this order. It is also noted that the General Assembly recently enacted the "South Carolina Electronic Notary Public Act" (Act No. 85 of 2021), now codified as S.C. Code Ann. §§ 26-2-5 to -210 (Supp. 2021). The provisions in this Act should greatly reduce the impact any future emergency will have on the availability of notarial services.

(o) Extensions by Consent. Prior versions of this order created an exception to Rule 6(b), SCRCP, allowing extensions by the agreement of the parties. This

exception is not included in this order, and Rule 6(b), SCRCP, shall govern any extension request made after August 27, 2021.

(p) Guilty Pleas by Affidavit or Certification in the Summary Court. Section (h)(3) of the June 15, 2021, order allowed a defendant to plead guilty by affidavit or certification before the summary courts. Since the order of the Chief Justice dated May 7, 2020 (available at https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2020-05-07-01, addresses this same issue, it is unnecessary to include the prior provision in this order.[7]

This order is effective immediately. Unless extended by order of this Court, this order will expire on February 4, 2022. Pursuant to Rule 611, SCACR, a copy of this order will be provided to the Chairs of the House and Senate Judiciary Committees.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

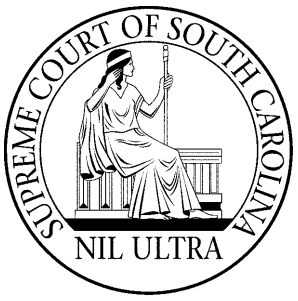
s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 23, 2021

[7] This Court does view a guilty plea by affidavit or certification as being a temporary measure in response to the coronavirus pandemic.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
November 24, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Encore Technology Group, LLC, Respondent/Appellant,

v.

Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, Appellants/Respondents.

AND

Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, Appellant/Respondent,

v.

Encore Technology Group, LLC, Respondent/Appellant.

Appellate Case No. 2018-001444

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

Opinion No. 5871
Heard September 15, 2021 – Filed November 24, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Joseph Owen Smith and Joshua Jennings Hudson, both of Smith Hudson Law, LLC, of Greenville, for Keone Trask and Clear Touch Interactive, Inc.

Gregory Jacobs English and Rita Bolt Barker, both of Wyche, PA, of Greenville, for Encore Technology Group, LLC.

HEWITT, J.: This is a consolidated appeal of two cases. We heard them in conjunction with a third case. All three arise out of a dispute between Encore Technology Group, LLC (Encore) and Keone Trask.

Trask is a former Encore executive. These controversies center around the fact that he was running another company—Clear Touch Interactive, Inc. (Clear Touch)—and competing with Encore at the same time he was working for Encore.

In the first of the consolidated cases, Encore sued Trask and Clear Touch on eight claims and won on six. A jury awarded a total of roughly $7.9 million against Trask and $1.7 million against Clear Touch. The total against Trask is hotly disputed. Election of remedies is the main issue and the predominant topic of this opinion.

In the second case, Clear Touch appeals an order dismissing the lawsuit it brought against Encore. The main issue in that case is res judicata.

As mentioned above, the third case is not consolidated with the others and is a case about Clear Touch's corporate structure. We will refer to that case as *Powell*, though we deal with it in a separate (and unpublished) opinion.

It is impossible to summarize our decision in a way that is comprehensive but concise. Depending on how you count, the parties raised as many as seventeen issues. In the first case, we hold Encore's damages for breach of contract with a fraudulent act necessarily encompassed Encore's damages for breach of contract, misappropriation of trade secrets, and breach of fiduciary duty. Thus, we find the circuit court erred in holding Encore did not have to elect between most of its remedies against Trask. In all other respects, the circuit court's decision is affirmed.

In the second case, we find the circuit court correctly held Clear Touch's lawsuit against Encore was barred by res judicata. Clear Touch used the same facts for an unclean hands defense in the first case.

FACTS

Encore, Trask, and Clear Touch are all in the "classroom technology" business. Trask's job at Encore included selecting a vendor to supply Encore with touchscreen technology to sell to schools. There is basically no dispute that Trask created Clear Touch before he joined Encore, used Clear Touch to import touchscreen technology from overseas, and sold the technology to Encore after marking up the price. Trask kept his involvement with Clear Touch a secret throughout his time at Encore.

Encore eventually learned this history and sued. It sued Trask for breach of the duty of loyalty, breach of fiduciary duties, breach of contract, and breach of contract accompanied by a fraudulent act. It sued Clear Touch for tortious interference, and it sued Trask and Clear Touch together for allegedly violating the South Carolina Trade Secrets Act, the Unfair Trade Practices Act, and for defamation. Encore additionally brought an equitable claim against Clear Touch for restitution.

About two weeks before trial, Clear Touch sued Encore in a separate case based on materials Encore turned over in discovery approximately four months earlier. Not long after the trial on Encore's claims ended, the circuit court dismissed Clear Touch's case based on res judicata. As noted in our introduction to this opinion, the reason for this dismissal was that Clear Touch used the same facts for an unclean hands defense against Encore's claims in the recently-concluded trial.

Damages are a key feature of this appeal. The parties argue at length over testimony from Encore's accounting expert about the different methods he used to calculate Encore's damages. The expert created three tables, all of which were entered into evidence separately from the expert's report.

Table 1 was the expert's calculation of the direct costs such as wages, benefits, expense reimbursements, and costs that Encore incurred during Trask's employment. Encore sought these as damages based on its claim that Trask and other allegedly disloyal employees were building Clear Touch's business while they were on Encore's payroll. Here, the total claimed damages were roughly $448,000.

Table 2 was the expert's calculation of Encore's lost profits. There were two categories of these: profits on sales Clear Touch made to Encore (again, at markup; diminishing Encore's profit margin) and profits on sales Clear Touch made to Leon County Schools—an Encore customer. The calculations were broken down into

periods correlating to the time Trask was employed with Encore, the time Trask's noncompete provision was in place, and the time between the expiration of Trask's noncompete and Encore terminating its relationship with Clear Touch. This table put Encore's lost profits at roughly $1.1 million.

Table 3 contained the expert's calculation of Encore's damages related to the loss of Clear Touch as a "business opportunity." Encore claimed Trask (its Chief Business Development Officer) was obligated to develop the opportunity he saw in Clear Touch as a part of Encore rather than as a separate business for his own benefit. Table 3 broke down Clear Touch's normalized profits into several different time periods. The expert calculated that the Clear Touch opportunity had a fair market value of $3.9 million as of December 31, 2015. The total damages in this table, including all normalized profits and the expert's fair market value calculation, amounted to about $5.5 million.

The jury found for Encore on six of its eight claims. It awarded the exact same amount of actual damages on two claims against Trask and two claims against Clear Touch. The awards of actual damages are as follows:

Against Trask	Against Clear Touch
Breach of Loyalty: $375,733.40	Trade Secrets: $424,945
Fiduciary Duty: $675,361	Tortious Interference: $424,945
Breach of Contract: $424,945	
Trade Secrets: $424,945	
Breach with Fraud: $1,476,039.40	

The jury awarded exemplary or punitive damages on all claims in which they were available. The largest punitive award against Trask was on breach of contract accompanied by a fraudulent act for $2 million.

The circuit court held Encore need only elect between the claims in which the jury awarded the same amount of actual damages. Against Trask, these were breach of contract and misappropriation of trade secrets. The court reasoned distinct facts gave rise to Encore's other various claims and that the jury used each of those claims to compensate for different injuries from Trask's wrongful conduct.

The court denied Trask and Clear Touch's post-trial motions and awarded Encore attorneys' fees and costs. The court also denied Encore's post-trial motion to be awarded the fair market value of Clear Touch as restitution.

Clear Touch paid the judgment against it into court, but the court appointed a receiver and allowed Encore to intervene in a separate case—*Powell*—to secure the judgment against Trask. Trask eventually paid the judgments against him into court. This appeal followed. After that, the circuit court stayed the receivership and dismissed Encore from *Powell*.

ISSUES

In Encore's case against Trask and Clear Touch, Trask and Clear Touch argue about election of remedies, a new trial absolute, a new trial nisi remittitur, judgment notwithstanding the verdict (JNOV), a new trial pursuant to the thirteenth juror doctrine, and attorneys' fees and costs. Trask also appeals the order appointing a receiver and argues the order allowed the receiver to violate South Carolina law.

Encore filed a cross-appeal in that same case and argues the circuit court erred in holding it was not entitled to restitution.

In the other of the consolidated cases, Clear Touch appeals the order dismissing (on the ground of res judicata) its suit against Encore.

ELECTION OF REMEDIES

The jury awarded Encore the same amount of actual damages—$424,945—for Encore's breach of contract and trade secret misappropriation claims. Actual damages for the other claims varied considerably.

The circuit court required Encore to elect only between the breach of contract and trade secret claims. Trask argues this was error because Encore should be required to elect between all of its claims as all of its claims overlap.

As it applies here, "election of remedies" refers to the fact that a party may not receive a double recovery. There may be multiple ways to recover for a single injury or set of injuries, but a party may only recover once for those injuries. *Austin v.*

Stokes-Craven Holding Corp., 387 S.C. 22, 56, 691 S.E.2d 135, 153 (2010) (noting the purpose of election of remedies is to prevent double recovery).

Evaluating whether a party must elect between remedies requires examining at least three things. One is whether there are overlapping elements of damages among multiple claims. Even if there is overlap, the plaintiff may avoid election if the claims were litigated as based on different injuries—put differently, whether different facts support the different claims. It can also be useful to look at how the jury was charged with respect to a double recovery. We will discuss these in turn.

To briefly illustrate overlapping damages, consider *Collins Music Co. v. Smith*, 332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998). There, we explained that though breach of contract and intentional interference with contract are separate torts (and brought against separate parties), the damages for intentional interference will necessarily include the damages for the contract's breach. *Id*. at 147-48, 503 S.E.2d at 482.

To illustrate claims based on different injuries—claims supported by separate facts—consider *Rivers v. Rivers*, 292 S.C. 21, 354 S.E.2d 784 (Ct. App. 1987), *superseded by statute on other grounds as recognized in Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 70 (1992). There, we noted that although the torts of criminal conversation and alienation of affection had distinct elements, the losses recoverable were similar. *Id*. at 29, 354 S.E.2d at 789. We held that a plaintiff could recover under both torts, but only if the plaintiff alleged a particular loss from each. *Id*. at 30, 354 S.E.2d at 789.

Rivers also shows how the jury charges are relevant. There, we said "the trial judge should caution the jury against giving damages under both [criminal conversation and alienation of affection] for the same loss and should instruct the jury that it should not allow the plaintiff to recover twice for the same thing." *Id*.; *see also Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct. App. 1998) (noting several jury instructions were given that the plaintiff was not entitled to multiple redress for a single wrong).

Applying these guideposts, there can be no question that, with one exception—breach of loyalty—Encore must elect between its causes of action against Trask.

First, the full field of damages Encore sought to recover for breach of contract, misappropriation of trade secrets, and breach of fiduciary duty was available for the

jury to award under the claim for breach of contract accompanied by a fraudulent act. Trask's breach of his fiduciary duty was itself a breach of his employment agreement with Encore. Trask's misuse of Encore's trade secrets breached the same contract. The damages for breach of contract entitle the aggrieved party to recover all actual damages for the breach's direct and natural consequences. *Collins Music Co.*, 332 S.C. at 147, 503 S.E.2d at 482. Those damages include "profits or gains prevented, as well as losses sustained." *Nat'l Tire & Rubber Co. v. Hoover*, 128 S.C. 344, 348, 122 S.E. 858, 859 (1924). The actual damages available for breach accompanied by a fraudulent act are likely broader than for breach of contract because the fraud claim sounds in tort. *See Collins Music Co.*, 332 S.C. at 147-48, 503 S.E.2d at 482 (damages for intentional interference with contract are broader than for breach of contract). Thus, it is evident—and Encore does not dispute—that the damages available for these four claims completely overlap.

As noted above, that is not the case for the breach of loyalty claim. For that claim, the circuit court charged that an employee is entitled to no compensation for conduct that is disobedient and that if the employee's conduct is a willful and deliberate breach, he is not entitled to compensation, even for properly performed services. Disgorgement of wages is not an element of damages for breach of fiduciary duty, breach of contract, breach of contract with a fraudulent act, or misuse of trade secrets.

Second, Encore asserted the same facts in support of these claims. The circuit court's decision on election was controlled by its agreement with Encore's post-verdict argument that Encore had presented the case in a way that asked the jury to use the different claims to compensate for different harms. The court found the jury used breach of fiduciary duty to compensate for Clear Touch's "marked up" sales to Encore. It found the jury used trade secrets and breach of contract to compensate for Clear Touch's sales directly to Leon County Schools. And it found the jury used breach of contract with fraud to compensate for the lost chance to develop Clear Touch as part of Encore.

We cannot agree. The record directly refutes the suggestion Encore litigated the case that way. Encore argued the same overarching set of facts to prove its causes of action for breach of fiduciary duty, breach of contract, misappropriation of trade secrets, and breach of contract accompanied by a fraudulent act. Encore did not plead or argue that its breach of fiduciary duty claim was for Clear Touch's "marked-up" sales to Encore. Encore did not plead or argue that its breach of

contract with fraud claim was for the lost opportunity in Clear Touch. Encore argued that all of these claims stemmed from and encompassed Trask's failure to disclose his interest in Clear Touch and his web of self-dealing.

For proof, one need look no further than Encore's closing arguments. Encore asked the jury for the exact same amount of damages for breach of fiduciary duty, breach of contract, trade secrets, and breach of contract with fraud. The amount Encore asked for in damages for each of these causes of action—roughly $5.5 million—was Encore's full estimate of the lost Clear Touch business opportunity and necessarily encompassed all of the damages available under these causes of action. Encore correctly observes that arguments of counsel are not evidence, but the point remains that it litigated the case as though these four claims encompassed the same set of injuries and damages.

Third, the circuit court charged the jury that each cause of action was separate and that the jury was not to concern itself with a double recovery. In other words, the charges suggested the jury award Encore all damages that were justified under each claim; not that it should segregate Encore's harms under various claims.

Encore's argument for sustaining the verdict is two-fold. It points to the distinctly different awards for several of the claims and to how neatly some of those awards correspond to different categories of Encore's alleged damages. It also points to the principle that the court must sustain a verdict if it is possible to do so.

We cannot agree with either argument. As to the amount of damages, the jury may well have used breach of fiduciary duty to compensate for Clear Touch's "marked up" sales to Encore. The award for breach of contract corresponds exactly to the direct damages for sales to Encore from Encore's "Table 2." The jury may have used trade secrets and breach of contract to award damages for Clear Touch's sales to Leon County. The award for those claims corresponds exactly to the same exhibit.

But we do not know this is what the jury did—this is just speculation, even if it is speculation that seems to make good sense. What is more, we have no way whatsoever to know that the jury's award of nearly $1.5 million in damages for breach of contract with a fraudulent act does not include the damages mentioned above. Absent clarification from the jury (which nobody requested), we are not aware of any legal basis for finding that the jury used the breach with fraud claim to compensate Encore for damages that are different than the jury awarded elsewhere.

As to Encore's point that the court must enforce each of the separate verdicts if it is possible to do so, that is not an accurate statement of the law. A verdict will be upheld when it is possible to do so, but the guidepost for the court is enforcing the jury's intent. *Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997). Nothing from the jury indicated it intended the awards in this case to be added together. As noted above, the record directly refutes Encore's argument that it litigated the claims as seeking to compensate for separate harms.

After we conducted oral argument, Trask and Clear Touch filed a motion aimed at asking the circuit court to modify the part of its judgment that said Trask and Clear Touch were both separately liable for exemplary damages on the trade secret claim. We dismiss that motion as moot in light of our decision on election of remedies, as we presume Encore will elect to recover on the largest award—breach of contract with a fraudulent act.

NEW TRIAL ABSOLUTE

Trask and Clear Touch argue they were prejudiced by the admission of Table 3 into evidence. This was Encore's estimated value (or rather, its expert's estimated value) of Encore's "lost opportunity" in Clear Touch.

First, the circuit court did not abuse its discretion in allowing Table 3 into evidence. *See Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (holding the admission of evidence is within the trial court's discretion and will not be reversed absent an abuse of discretion). It is undisputed that Trask built the Clear Touch business using Encore's money, personnel, and other resources. Encore's expert explained how he calculated the damages in Table 3, and his report explained that calculation as well. Table 3 contained the expert's calculations regarding Clear Touch's profits through 2015 and the value of Clear Touch as a company as of December 31, 2015, both of which—profits and Clear Touch's value as a company—constitute ways to value the loss Encore suffered as a result of Trask's nondisclosure. *See Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996) (explaining damages for breach of contract should put the plaintiff in as good a position as he would have been if the contract had been performed, that the plaintiff's loss is the proper measure of compensation, and that damages need not be proved with mathematical certainty).

Second, the circuit court found the damages awarded were appropriate. The circuit court may grant a new trial based on damages "only when the verdict 'is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.'" *Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) (quoting *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (2000)). We defer to the jury's determination of damages, and we review the decision to grant or deny a new trial by asking whether the circuit court abused its discretion. *Id*. We cannot say the circuit court abused its discretion in determining the damages were fitting given the circumstances.

Third, we find the argument that Trask and Clear Touch were prejudiced by the admission of Table 3 is abandoned. Trask and Clear Touch provided no supporting authority, and precedent explains arguments without supporting authority are abandoned. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Trask and Clear Touch argue that Table 3 improperly set an artificially high "ceiling" for Encore's damages. We could not locate any case adopting this sort of argument, and we could not reconcile the argument with Trask and Clear Touch's insistence elsewhere that the jury did not award Encore any damages from Table 3.

NEW TRIAL NISI REMITTITUR

Trask and Clear Touch argue the circuit court abused its discretion in denying their motion for a new trial nisi remittitur. They claim the court erred in supporting its findings by stating the actual verdict amounts were appropriate and well within the range of damages supported by the evidence.

This court does not sit to determine whether it agrees with the jury's verdict or to decide whether it agrees with the circuit court's decision to let the jury's verdict stand. The standard of review is highly deferential when examining the circuit court's ruling on each ground for a new trial. *See Burke*, 393 S.C. at 57, 710 S.E.2d at 89 ("A jury's determination of damages is entitled to 'substantial deference.'" (quoting *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008)); *id*. ("The decision to grant or deny a 'new trial motion rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.'" (quoting *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56

(Ct. App. 2009))); *id*. at 56-57, 710 S.E.2d at 88-89 ("'The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion.'" (quoting *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006))); *see also Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur*."). We find this deference is appropriate given the facts in this case and especially given our holding requiring Encore to elect between most of its awards against Trask. The circuit court believed the verdict was appropriate and declined to invade the jury's province. We do not see a good reason to question that decision, much less an abuse of discretion.

JUDGMENT NOT WITHSTANDING THE VERDICT

There are multiple JNOV arguments. First, Trask asserts the circuit court erred in enforcing the restrictive covenants in his noncompete and confidentiality agreement. He contends the covenants were overbroad and that this entitles him to JNOV on the breach of contract and the breach of contract with fraud claims.

This argument is barred by the two-issue rule. Encore argued there were five ways Trask breached the parties' contract. Trask did not argue JNOV was inappropriate on all of these grounds; thus, the jury could have found Trask breached the agreement's non-piracy of employees provision, the business opportunity provision, the implied covenant of good faith and fair dealing, or any combination of those provisions. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 ("Under the two[-]issue rule, where 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 law of the case." (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010))).

Second, Trask and Clear Touch contend Encore failed to provide sufficient evidence to support Encore's claim for misappropriation of trade secrets. We disagree.

Encore presented evidence that Trask had confidential information related to Leon County Schools beyond the general knowledge that the school system was upgrading its technology. Trask knew Leon wanted to purchase specific Clear Touch panels, the number of panels Leon wanted, the price at which Encore was willing to sell the panels, and the price at which Leon was willing to buy the panels. Encore presented

evidence Trask learned this information because of his employment at Encore. Encore also presented evidence that it took steps to keep this information secret.

In other words, Encore presented evidence from which the jury could have found the information was a trade secret. *See* S.C. Code Ann. § 39-8-20(5) (Supp. 2020) (defining a trade secret as information deriving independent economic value from not being generally known or readily ascertainable if there are reasonable efforts to maintain its secrecy). There was also evidence Trask and Clear Touch misappropriated this information to make sales directly to Leon; thus, the trial court did not err in denying the motion for JNOV. *See Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004) ("The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law."); *id*. ("The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict."); *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998) ("A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.").

THIRTEENTH JUROR DOCTRINE

Trask and Clear Touch argue the circuit court abused its discretion by denying the motion for a new trial pursuant to the thirteenth juror doctrine. They assert the jury returned inconsistent verdicts because the jury awarded different actual damages for breach of contract and breach of contract with a fraudulent act.

The circuit court's grant or denial of a new trial motion under the thirteenth juror doctrine will stand unless it is wholly unsupported by the evidence or controlled by an error of law. *Folkens v. Hunt*, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990). Trask and Clear Touch cite *Perry v. Green*, but *Perry* mentions the trial court *sua sponte* found identical awards were required in that case for breach of contract and breach of contract with a fraudulent act, and the point was not raised on appeal. 313 S.C. 250, 252-53, 437 S.E.2d 150, 151 (Ct. App. 1993). Moreover, the court in *Perry* corrected for a double recovery by removing the smaller verdict and allowing the plaintiff to recover the greater. *Id*. at 253, 437 S.E.2d at 151. The different verdicts are not "irreconcilably inconsistent" as required for reversal. *See Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997) (explaining the court's job after a trial is to carry out the jury's intent and that the court should reverse a verdict

that is internally inconsistent and unexplainable). If anything, *Perry* suggests Encore should recover the larger verdict, not that there should be a new trial.

ATTORNEYS' FEES AND COSTS

Trask and Clear Touch argue the circuit court erred in awarding Encore all of its fees and expenses and that the court failed to consider attorneys' fees were only recoverable on three of Encore's eight causes of action. They argue Encore only prevailed on six claims. They also argue the court erred in finding that there was only minimal additional cost to Encore presenting claims that did not allow for a recovery of fees and that the court erred in finding Trask destroyed evidence. Trask and Clear Touch additionally claim Encore's fees are excessive and that Encore only used a fraction of the evidence it obtained in extensive and costly discovery.

The circuit court did not abuse its discretion in awarding Encore all of its attorneys' fees and costs. *See Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) ("When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown."); *id*. at 494, 427 S.E.2d at 660 ("There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained."). Trask and Clear Touch do not challenge the reasonableness of the overall award amount; rather, they assert the award was unreasonable because Encore's attorneys' fees were not specifically attributable to the three causes of action for which attorneys' fees were available. The circuit court was not required to discount the attorneys' fees award because some of Encore's causes of action permitted such an award and others did not. Though it could have reduced the award, it was within the court's discretion to not do so. *See Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) ("[W]hen an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding."); *see generally Austin*, 387 S.C. at 57, 691 S.E.2d at 153 (holding "it would be difficult to dissect . . . counsel's fee affidavit to ascertain how much time was spent on this

particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud").

RECEIVER ORDER

Trask asserts the circuit court abused its discretion in authorizing a receiver to take possession of his assets and secure them for the purpose of satisfying Encore's judgment. He claims the order allowed numerous violations of South Carolina law. He also appeals the provision in the order explaining that he will be required to pay the receiver's fees and expenses if the judgment against him is affirmed.

Any argument about the receiver violating the law by collecting exempt assets became moot once the trial court stayed the receivership. *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) (noting "[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy"). And any argument about Trask being ordered to pay the receiver's fees is not yet ripe for review. Though the circuit court initially ordered that Trask would be automatically liable for the receiver's fees, a later order explained that this would be the subject of a future hearing after the appeal concluded. An argument is not ripe if it is contingent on future events. *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). We will not rule before the circuit court has spoken its last word on the matter.

RES JUDICATA

This issue relates to the case Clear Touch brought against Encore about two weeks before the trial began in Encore's case against Clear Touch and Trask. Clear Touch claimed Encore started using confidential data it previously acquired from Clear Touch while the companies were working together to unfairly compete with Clear Touch after the relationship between the companies fell apart. The circuit court granted Encore summary judgment under the doctrine of res judicata.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Precedent explains "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been

raised in the former suit." *Id*. (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)).

Clear Touch conceded its claims could have been litigated in the primary case. It received the information giving rise to its claims at the end of May 31, 2017, when Encore sent its last round of discovery approximately four months before trial. It goes without saying that it takes time to review discovery, particularly voluminous discovery, but Clear Touch does not dispute that it was well-aware before trial of information leading it to believe it had claims against Encore. The record is clear that Clear Touch never moved to amend its answer and never sought a continuance on the grounds that it needed more time to develop counterclaims that would be forthcoming in an amended answer. The point is made more salient by the fact that Clear Touch sought several continuances but never claimed it needed a continuance because it needed to amend its answer.

Finally (and in our view, critically), Clear Touch used the same factual basis—alleged unfair competition by Encore—as a defense to Encore's motion for restitution. As noted above, res judicata applies to claims that arise out of the same transaction or occurrence covered by a prior suit. Once Clear Touch raised unfair competition, it was obligated to raise all claims related to that unfair competition.

Clear Touch says Encore did not properly raise this preclusion argument to the circuit court, but the question of whether a claim in a later case should have been a compulsory counterclaim in a prior case is the same question as whether res judicata applies. *See Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109 ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties."); *Jaynes v. County of Fairfield*, 303 S.C. 434, 438 n.1, 401 S.E.2d 183, 185 n.1 (Ct. App. 1991) ("[A] counterclaim is compulsory if there is a logical relationship between the claim and the counterclaim.").

RESTITUTION

We come now to the cross-appeal. Encore argues Trask and Clear Touch have been unjustly enriched in the amount of Clear Touch's value and that the circuit court should have required Clear Touch to pay roughly $5.5 million as restitution. Encore claims the circuit court erred in concluding Encore had an adequate remedy at law.

We agree with the circuit court and respectfully disagree with Encore. Encore had an adequate remedy: it successfully brought claims for trade secret violations, breach of contract with fraud, tortious interference, and others. On many of these claims, Encore asked the jury award to award Clear Touch's full value—$5.5 million—in damages. The jury could have done so but declined to do so. We defer to that decision and, like the circuit court, decline to order equitable relief. *See Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009) ("Generally, equitable relief is available only where there is no adequate remedy at law."), *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012).

CONCLUSION

As noted above, we affirm in all respects except for the circuit court's decision not to require Encore to elect its remedy.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jonathan Stanley Ostrowski, Appellant.

Appellate Case No. 2018-000423

Appeal From York County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5872
Heard November 2, 2020 – Filed November 24, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

William G. Yarborough, III, and Lauren Carole Hobbis, of William G. Yarborough III, Attorney at Law, LLC, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Kevin Scott Brackett of York, all for Respondent.

GEATHERS, J.: Jonathan Ostrowski (Appellant) was convicted in 2018 of: (1) trafficking methamphetamine, (2) possession of a weapon during the commission of a violent crime, (3) possession of a handgun by a person convicted of a crime of

violence,[1] and (4) possession of a handgun with the serial number obliterated. He challenges his convictions on seven grounds, ranging from a motion to suppress to improper jury instructions. We reverse Appellant's convictions on methamphetamine trafficking and possession of a weapon during the commission of a violent crime;[2] affirm his convictions for possession of a handgun by a person convicted of a crime of violence and possession of a handgun with the serial number obliterated; and remand for a new trial on the reversed convictions.

FACTS/PROCEDURAL HISTORY

On the morning of January 25, 2017, while officers with the York County Multijurisdictional Drug Enforcement Unit ("MDEU") and Drug Enforcement Agency-Columbia ("DEA") were surveilling 162 Bailey Avenue in Rock Hill, they saw Alexandria Peters[3] ("Peters") exit the home, where she sporadically stayed. Peters, who was subject to an arrest warrant for prescription drug charges, drove to a nearby bank; law enforcement arrested her there.

Authorities then requested a search warrant for 162 Bailey Avenue. Peters allegedly told officers that there was marijuana at the home.[4] Additionally, in an affidavit in support of the request for a warrant, an officer assigned to the MDEU swore that "[o]fficers of the YCMDEU and the US Drug Enforcement

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[1] Ostrowski was convicted in 1995 of assault and battery of a high and aggravated nature.

[2] The conviction for possession of a weapon during the commission of a violent crime is dependent on Appellant's conviction for methamphetamine trafficking. *See* S.C. Code Ann. §§ 16-23-490 (defining possession of a weapon during the commission of a violent crime), 16-1-60 (defining "violent crimes"); *see also, e.g., Cook v. State*, 415 S.C. 551, 559 n.3, 784 S.E.2d 665, 669 n.3 (2015) ("Due to our reversal of Cook's voluntary manslaughter conviction, we also reverse his conviction for possession of a weapon during the commission of a violent crime, as the former conviction is a prerequisite for the latter.").

[3] Though both appellate briefs and the search warrant affidavit render Ms. Peters's first name as "Alexandria," she is consistently referenced elsewhere in the record as "Alexandra." It is unclear which name is correct.

[4] At Ostrowski's trial, Peters denied that she said there was marijuana at the residence.

Administration have been conducting an ongoing investigation of Jonathan Ostrowski in reference to narcotic violations."

A law enforcement officer later conceded that when Peters was apprehended, the officers had—in the words of Ostrowski's counsel—"no evidence that there was any type of drug distribution from [Ostrowski's] residence." Bond Judge Tanesha Lonergan authorized the warrant. Officers searched the home and found a glass pipe, packaging materials, tin foil with methamphetamine, 20 dose units of Alprazolam, a .32 caliber gun and ammunition, at least one digital scale, sandwich bags, a glass pipe with marijuana, methamphetamine, and possibly an LG cell phone.[5] The methamphetamine was found "in the right front pants pocket from a pair of men's Columbia pants sized 38[,] which were on a shelf in a make shift closet/makeup room," according to a case summary by MDEU. "The room and shelves contained both male and female clothing."

At trial, one officer characterized the area as "in the middle of the house. Where the front door was they had kind of made an area for a closet and a dressing area." Ostrowski called it "an open area" accessible to the kitchen and living room.

Later that afternoon, the Chester County Sheriff's Office arrested Ostrowski in Great Falls. Law enforcement confiscated an LG cell phone from Ostrowski and obtained a warrant for the contents of the phone.

Ostrowski was indicted for trafficking more than 28 grams of methamphetamine, possession of a weapon during the commission of a violent crime, possession of a handgun by a person convicted of a crime of violence, and possession of a handgun with the serial number obliterated.

At trial, Ostrowski moved to suppress the evidence found at the Bailey Avenue residence, alleging in part that the search warrant was based on a misleading or false affidavit. The circuit court denied the motion.[6]

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[5] It is not entirely clear whether the LG cell phone listed on the inventory was the same one from which officers pulled the text messages at issue in this case; if so, the cell phone with those messages was taken from Ostrowski that afternoon.

[6] Ostrowski also moved to suppress based on the warrant being "overly broad." Ostrowski does not raise this ground on appeal.

Later, the State attempted to have Investigator Hugh Leland Harrelson, a police officer then with the MDEU, "qualified as an expert in methamphetamine packaging, distribution, paraphernalia, and valuation." Investigator Harrelson was involved in the search of the Ostrowski residence following Peters's arrest. Ostrowski objected. The circuit court declined to qualify Investigator Harrelson; however, the circuit court ruled that Investigator Harrelson "can testify about what he saw, he can testify about the way the house was; he can testify about what he found it in, he can testify about what a pipe looks like, he can testify about what a sandwich bag is and the significance of a sandwich bag." The circuit court stated that "if we attach . . . the label of an expert opinion on that it's, you know, I believe it[']s more. I agree with [defense counsel] that it is substantially more prejudicial than []probative[,] so therefore I'm not gonna allow that." The circuit court later indicated: "[]I've allowed under Rule 701 him to offer -- I wouldn't want to call it opinion testimony. I've allowed him as a lay witness and based upon, you know, what he does for a living to identify things to say what it is, what he knows them to be."

Much of Investigator Harrelson's subsequent testimony was given over objections from Ostrowski, including statements that a box of razor blades could be used "[t]o cut up drugs into smaller amounts" and that "sandwich baggies are commonly used to package drugs." Investigator Harrelson was also asked to "summarize the contents of the house and what it meant to you." He responded: "Clearly somebody who was using, and also selling methamphetamine, due to the methamphetamine pipes, and digital scales used to weigh out drugs, and also the sandwich baggies and tin foil used also to package drugs for sale to another individual."

The court later heard testimony from Investigator Michael Ryan King, also with the MDEU. Investigator King was never offered or qualified as an expert. Investigator King testified, frequently over objection, about the meaning of certain code words in the drug trade. For example, he testified that "clear" is a word for "methamphetamine." He also characterized some text messages sent or received by a phone linked to Ostrowski. For example, he testified about one message: "No green means no marijuana, just clear, which means I don't have any marijuana, all I have is meth."

During Investigator King's testimony, the State sought to admit several text messages to and from the phone seized from Ostrowski.[7] Ostrowski moved to exclude the text messages as evidence about other bad acts under Rule 404(b), SCRE. The State offered two reasons for allowing the text messages to come in. First, the State noted that the relevant Code section on trafficking allowed multiple avenues of proving trafficking in addition to the weight of the drugs, and the evidence would go to intent on the other methods of trafficking. Second, the State said the evidence was relevant to prove "intent to control the disposition" of the methamphetamine as part of its case. In response, Ostrowski argued that the state's case was primarily based on possession of the statutorily sufficient amount of methamphetamine to trigger trafficking charges;[8] that evidence Ostrowski was dealing drugs might lead the jury to conclude that he owned the methamphetamine on improper grounds; and that "any []probative value that [the text messages] have . . . would be far substantially outweighed by the danger of unfair prejudice . . . ." The circuit court allowed the text messages into evidence, finding that they were "clear and convincing to me at least, as well as logically relevant to the issue at hand," and that the messages were "prejudicial to the defendant" but "substantially []probative to the State's case."[9] Those admitted included:

> [Ostrowski:] "Ok im in Richburg but I have them with me"
> [Ostrowski:] "And I have some clear if you want it"
>
> . . .
>
> [Ostrowski:] "Need to know what u want"

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[7] The vast majority of the text messages were from a period beginning three weeks before Ostrowski's arrest, but a handful were from early December.

[8] During its opening statement, the State alluded to other forms of trafficking but relied on the theory that Ostrowski was in constructive possession of more than 28 grams of methamphetamine. The State said: "Trafficking in South Carolina is the constructive possession of 28 grams or more of methamphetamine. That's it. That's what trafficking is."

[9] Ostrowski also argued that the text messages were not properly authenticated and were hearsay, grounds that he also raises to this court. We need not address these grounds because we conclude the text messages were inadmissible on other grounds. *See infra*.

> [Other texter:] "Gram 1/4 smoke and any p.o. you got .what do I owe you 30"
> [Ostrowski:] "Yeah u owe me 30 so u want a g of clear 1/4 of smoke any pains"
> [Other texter:] "Yes Pp also"
> [Ostrowski]: "How many"
> [Other texter:] "10 give me a total on the money"
> [Ostrowski:] "I think I only have half quarter smoke so total will be 230"
> [Other texter:] "Ok I got it."
>
> ["MomaB":] "Hey u home"
> [Ostrowski:] "No buti need myc**k sucked"
> ["MomaB":] "Well I need some dope on front
> "MomaB"
> [Ostrowski:] "U already owe me one"
> ["MomaB":] "Yeah but not cash
> "MomaB"
> [Ostrowski:] "I know"
> ["MomaB":] "I need some f**king dope I get u when I [pick it] up"
> [Ostrowski:] "I need my f**king c**k sucked"[10]

(All errors *sic*).

Ostrowski testified in his own defense and admitted to being a drug addict. He answered affirmatively when asked by the State whether his "drug of choice is methamphetamine." Ostrowski also testified that he sometimes had as many as a dozen people—some of them also drug addicts—stay at the residence. When asked by defense counsel whether he would "classify [his] house as a party house," Ostrowski answered affirmatively. Ostrowski also admitted to owning the pipes and other paraphernalia found in the home, but denied owning the bag of methamphetamine found in the residence or trafficking in drugs.

[10] The State initially appeared to ask for all of the messages to be published to the jury, then clarified that it was "not publishing all of these at this time, but they are all into evidence."

The State and Ostrowski had the following exchange about the clothing found in the dressing room area:

> Q. And I know that closet was in an open area. Those would be your clothes, right?
> A. Well, not necessarily.
> Q. Okay. How about men's pants in that armoire?
> A. There's men's pants, women's pants.
> Q. But your clothes would be in there, maybe other people's clothes, but your clothes would be in there because that is your house?
> A. Just because my clothes [are] in there don't mean my drugs are in there.

After the presentation of evidence and closing arguments, during the charge to the jury, the circuit court gave the following instructions:

> As you know the Defendant has pled not guilty to these charges and that plea has placed the burden upon the State to prove the Defendant guilty beyond a reasonable doubt. A person charged with committing a criminal offense is never required to prove innocence. I charge you, ladies and gentlemen, it is an important rule of law that the defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be not guilty of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.
>
> . . . .
>
> This presumption of innocence is like a robe of righteousness. You see the robe I'm wearing, it's like a robe placed about the shoulders of the Defendant which remains with him until it's been stripped from him by evidence satisfying you of his guilt beyond a reasonable doubt.
>
> . . . .

> A reasonable doubt is a doubt which makes an honest sincere conscientious juror in search of the truth to hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon [it] in the most important of his or her own affairs.

After sending the jury out of the courtroom, the circuit court asked each party if it had any objections to the instructions as given. Ostrowski asked for a mistrial based on the circuit court's use of the phrase "in search of the truth." The court denied the request.

Ostrowski was convicted on all charges. The circuit court sentenced Ostrowski to five years on each of the weapons charges, to run concurrently, and 18 years on the drug trafficking charge. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in denying the motion to suppress evidence found at the Bailey Avenue residence based on allegedly false and misleading information in the search warrant affidavit?

2. Did the circuit court err in allowing law enforcement officers to testify, without being qualified as experts, about (1) the potential use of items found at the Bailey Avenue residence; and (2) the meaning of the text messages found on Ostrowski's phone?

3. Did the circuit court err in not requiring the State to take additional steps to authenticate the text messages?

4. Did the circuit court err in admitting text messages into evidence because the messages were inadmissible hearsay?

5. Did the circuit court err in admitting the text messages into evidence because they constituted impermissible character evidence?

6. Did the circuit court fail to properly consider or explain its ruling on a challenge to the text messages based on an argument that the messages were more prejudicial than probative?

7. Did the circuit court impermissibly charge jurors to seek the truth when the court defined "reasonable doubt" as "a doubt which makes an honest sincere conscientious juror in search of the truth . . . hesitate to act"?

STANDARD OF REVIEW

> On appeals from a motion to suppress based on Fourth Amendment grounds, [the appellate court] applies a deferential standard of review and will reverse if there is clear error. However, this deference does not bar [the appellate court] from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.

State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citation omitted).

On the other hand, "[t]he admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citation omitted).

Finally, "[a] jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003)). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.*

LAW/ANALYSIS

We begin by taking up each of Appellant's contentions that the circuit court erred. After that, we consider whether any errors made by the circuit court were harmless.

I. Motion to Suppress

Appellant first contends that evidence from the search of the Bailey Avenue residence should have been excluded at trial because the warrant was based on a misleading affidavit, in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). We disagree.

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Franks, 438 U.S. at 155–56. The rule recognized in *Franks* does not merely bar affirmative false statements by law enforcement.

> [T]he *Franks* test also applies to acts of *omission* in which exculpatory material is left out of the affidavit. To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.

State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999) (citation omitted) (footnote omitted). However, "*Franks* clearly requires defendants to allege more than 'intentional' omission in [a] weak sense. . . . To obtain a *Franks* hearing[,] the defendant must show that the omission is the product of a 'deliberate falsehood or of reckless disregard for the truth.'" *U.S. v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (quoting *Franks*, 438 U.S. at 171).

Appellant claims that law enforcement officials omitted from the search warrant affidavit exculpatory information that would have served to undermine probable cause and otherwise mischaracterized evidence. For instance, Appellant notes that the warrants for Peters's arrest traced back to an incident in Fort Mill in September 2016. Additionally, Investigator Daniel Burkhart, whose affidavit supported the request for a search warrant, conceded that the MDEU did not have evidence that drugs were being distributed from Appellant's residence when the search warrant was issued. Appellant further argues that Investigator Burkhart's references in the affidavit to the investigation of the Bailey Avenue residence, and

alleged implications of concrete evidence about the residence, were false or misleading.

At a pretrial hearing, Judge Lonergan testified that the investigation into drug activity was "absolutely" a factor in her decision to approve the warrant.[11] Appellant claims that Investigator Burkhart's failures to disclose that there was no concrete evidence of drug dealing from the residence and that the underlying offense for Peters's arrest was several months old and related to a different residence fatally undermine Judge Lonergan's finding of probable cause.

We find Appellant's claim falls short on all counts. Appellant cannot show that the information provided in the search warrant affidavit was false or misleading; that Investigator Burkhart or any other law enforcement official intentionally or recklessly made any false or misleading statements; or that the magistrate would have lacked probable cause if the purportedly false information was left out of, or the purportedly exculpatory information was placed in, the affidavit.

First, Appellant's efforts to turn minor disputes with the search warrant affidavit into false and misleading statements fail. Simply because there was no concrete evidence of drug distribution at the residence at the time the warrant was issued does not mean that there was no investigation of the residence underway. The warrant affidavit makes no explicit representation that Peters was distributing pills at the time she was arrested. Nor does it make any representation about where the incident at the root of Peters's arrest warrants took place.

Even conceding that the omission or inclusion of any of this information, or those omissions or inclusions put together, was false or misleading, Appellant has produced no evidence that Investigator Burkhart or any other law enforcement official acted recklessly or intentionally to falsify or conceal information appearing in the arrest warrant. Appellant simply puts forward the conclusory allegation that

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[11] There are limits on when a judge may "testify as a witness concerning actions taken in [her] official capacity." *See In re Whetstone*, 354 S.C. 213, 215–16, 580 S.E.2d 447, 448 (2003). However, it is not unheard of for magistrates to testify about the issuing of search warrants. *See, e.g., State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 677 (2000); *State v. Martin*, 347 S.C. 522, 529, 556 S.E.2d 706, 710 (Ct. App. 2001).

> [a]lthough Investigator Burkhart testified he was not aware that the outstanding warrants stemmed from controlled buys between Peters and a CI had occurred [at] a different location . . . [,] he acted with a reckless disregard to the truth because the location of the controlled buys [was] listed on the outstanding arrest warrants and in the YCMDEU case file summary.

That information was hardly material to the search warrant, and even if it was, there is nothing in *Franks* or its progeny that suggests law enforcement officials must go rifling through every file connected to a case before requesting a warrant. *See Franks*, 438 U.S. at 171 ("Allegations of negligence or innocent mistake are insufficient."); *see also Colkley*, 899 F.2d at 300 ("An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation."); *id.* at 301 ("*Franks* clearly requires defendants to allege more than 'intentional' omission in this weak sense.").

Finally, even if law enforcement officials had written the search warrant affidavit in precisely the fashion Appellant contends would have been accurate, there still would have been substantial reason for Judge Lonergan to find probable cause that evidence of illegal activity would be found at the residence. Investigator Burkhart's affidavit said that Peters had been properly Mirandized and had then "admitted there was some marijuana inside the residence." *See State v. Dupree*, 354 S.C. 676, 685, 583 S.E.2d 437, 442 (Ct. App. 2003) ("The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a *fair probability that contraband or evidence of a crime will be found in the particular place to be searched*." (emphasis added)). *See also State v. Keith*, 356 S.C. 219, 225, 588 S.E.2d 145, 148 (Ct. App. 2003) (finding probable cause to search a residence when an "affidavit outlined the investigative surveillance of [defendant]'s home, the officers' observation of [defendant]'s vehicle as it left the residence, the lawful stop, and discovery of marijuana.").[12]

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[12] We would note that, in contrast to Appellant's seeming notion that Peters's arrest must be tied specifically to evidence of trafficking at the Ostrowski residence, in *Keith*, the original offense for which the defendant's vehicle was seized was a tag violation. *See Keith*, 356 S.C. at 221, 588 S.E.2d at 146.

In this case, officers were surveilling Appellant's residence in connection to an investigation for the distribution of drugs. The officers observed Peters leaving the residence; stopped her lawfully in regards to a valid warrant for her arrest; and discovered potentially illegal drugs on her person.[13] Once stopped, she reportedly told officers there was marijuana in the residence. The additional information that Appellant believes should have been in the warrant is of minimal consequence at best, and is extraneous and irrelevant at worst.

As a result, we find no violation of *Franks*.

II. Testimony of Law Enforcement Officers

Appellant next contends that the circuit court erred by allowing Investigator Harrelson and Investigator King to provide opinion testimony during the trial, despite the fact that neither was qualified as an expert. The State counters that the opinion testimony was permissible, and alternatively, that any error was harmless.

At the outset, we note that law enforcement and other government officials are not permitted to offer opinions other than those that could otherwise be offered by lay witnesses. *See State v. Kelly*, 285 S.C. 373, 374–75, 329 S.E. 2d 442, 443 (1985) (finding a police officer "may only testify regarding his direct observations unless he is qualified as an expert."). *See also Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 410, 764 S.E.2d 249, 252 (Ct. App. 2014) (volunteer fire department chief not qualified as an expert could not provide opinion testimony about how fire started).

However, in limited circumstances, law enforcement officers are allowed to draw on their experiences while testifying. The dividing line that many courts have drawn—and that our supreme court appears to have adopted—is that officers may provide lay opinions based on their observations, experience and training, but may not provide lay opinions on such matters if they did not either observe the events in question or actively participate in the investigation. *See Hamrick v. State*, 426 S.C. 638, 648–49, 828 S.E.2d 596 (2019); *United States v. Carrillo-Morones*, 564 F.Supp.2d 707, 710 (W.D. Tex. 2008) ("A law enforcement officer may render an

[13] Peters appeared to dispute the illegality of her possession of those drugs during her testimony at trial, saying officers "found my medication. To be clear on that, my own prescription."

opinion under Rule 701 where the opinion is based on the officer's personal knowledge of the events about which he or she is testifying.").[14]

For example, in *Hamrick*, our supreme court rejected the admission of lay opinion testimony from an officer who did not witness an accident but testified on a critical issue at trial based on his reconstruction of the accident. In that case, the officer in question "arrived on the scene forty-eight minutes after the incident occurred, and thus, he clearly *did not perceive the location of the impact*." *Hamrick*, 426 S.C. at 648, 828 S.E.2d at 601 (emphasis added). The court found error in the circuit court allowing the officer's testimony as lay opinion. *See id.* at 649, 828 S.E.2d at 601.

A. Investigator Harrelson's Testimony

Appellant argues that, because the circuit court declined to qualify Investigator Harrelson as an expert witness, the circuit court erred when it allowed Investigator Harrelson to testify about the significance of certain objects found during the search of Appellant's residence. We disagree.

The State attempted to qualify Investigator Harrelson "as an expert in methamphetamine packaging, distribution, paraphernalia, and valuation." The circuit court denied the expert qualification, but nonetheless ruled that Investigator Harrelson "can testify about what he saw, he can testify about the way the house was; he can testify about what he found it in, he can testify about what a pipe looks like, he can testify about what a sandwich bag is and the significance of a sandwich

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[14] It is virtually impossible to entirely reconcile federal decisions on this rule. *See generally* Kim Channick, *You Must Be This Qualified to Offer an Opinion: Permitting Law Enforcement Officers to Testify as Laypersons Under Federal Rule of Evidence 701*, 81 FORDHAM L. REV. 3439, 3458 (2013) (observing that, among the federal circuit courts, some "allow a law enforcement officer to testify about the specifics of an investigation based solely on an after-the-fact review of the investigation materials"; others "have allowed law enforcement officers to testify about specific aspects of an investigation where the officer's after-the-fact knowledge of the event in question was combined with first-hand knowledge of related information"; and still others, including the Fourth Circuit, "have refused to admit law enforcement officers' lay opinion testimony where the testimony was not based on personal, first-hand knowledge of the specific event in question that extended beyond simply reviewing the investigation record").

bag." In ruling that Investigator Harrelson could testify to those things, though, the circuit court used language reminiscent of the standard for an expert opinion. "He can testify all about that in his *experience and knowledge and skill as an officer*, an investigating officer with the DEU without attaching the label of an expert on that." (emphasis added). *See* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which . . . do not require *special knowledge, skill, experience*, or training." (emphasis added)). However, it is evident that the court was allowing Investigator Harrelson to testify based on his personal knowledge of this case.

Our research reveals few state cases that are directly on point to the issues raised by Appellant. However, federal courts have dealt with similar issues in drug cases. This court has held before that "[f]ederal authority construing [an] identical element in Rule 701 of the Federal Rules of Evidence is instructive." *State v. Fripp*, 396 S.C. 434, 439–40, 721 S.E.2d 465, 467 (Ct. App. 2012) (considering the "helpful to . . . the determination of a fact in issue" prong of Rule 701, SCRE). *See also State v. Taylor*, 333 S.C. 159, 170–72, 508 S.E.2d 870, 875–76 (1998) (examining federal authorities when "Rule 106, SCRE, has not been interpreted by this [c]ourt," but was "substantially similar to Rule 106 of the Federal Rules of Evidence").

The South Carolina and federal rules on lay opinion testimony are identical in all meaningful respects. *Compare* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.") *with* Fed. R. Evid. 701 ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."). *See also* D. Garrison Hill, *Lay Witness Opinions*, S.C. LAW., Sept. 2007, at 34, 36 ("The federal rule is worded only slightly differently. . . ."); *id.* at 39 ("The South Carolina version of Rule 701(c), as noted above, is phrased slightly differently but carries a virtually identical intent.").

Courts have frequently held that law enforcement officers can offer their opinion on certain aspects of the drug trade based on their *personal experience or knowledge* regarding the *particular investigation* at issue, or how those experiences

and knowledge shaped their contemporaneous perceptions of what they saw *while acting in the course of an investigation*. *See, e.g., United States v. Perez*, 962 F.3d 420, 436 (9th Cir. 2020) (finding FBI agent could "match[] gang members to monikers and vice versa, translate[] gang jargon, and identif[y] indicia of drug trafficking, such as small plastic bags and digital scales" because he "directly observed the communications, meetings, and searches he described"); *id.* at 436–37 (finding FBI agent's "interpretation of the wiretapped conversation . . . is just the kind of 'ambiguous conversation[]' *a lay witness with direct knowledge of an investigation*—and, in this case, long hours spent listening to wiretaps and observing meetings—can clarify for the jury" (emphasis added)); *Colon-Diaz v. United States*, 899 F.Supp.2d 119, 137–38 (D.P.R. 2012) (permitting lay opinion testimony by law enforcement official and informant because "these witnesses were limited to testifying to opinions gleaned from factual information that *they personally perceived*" (emphasis added)); *United States v. Malagon*, 964 F.3d 657, 662 (7th Cir. 2020) (finding officer's "understanding of the meaning of the words used *in those conversations to which he was a party* fall within the proper scope of lay testimony, and there was no error in allowing the admission of the testimony" (emphasis added)); *United States v. Ayala-Pizarro*, 407 F.3d 25, 26, 29 (1st Cir. 2005) (ruling that an officer could "testif[y] about . . . how heroin is normally packaged for distribution at [drug distribution] points" without being qualified as an expert because the officer's perception that objects in the defendant's possession resembled heroin "decks" that the officer had encountered before was "testimony as to what he saw").

Here, Investigator Harrelson was discussing how the objects he found were sometimes used in drug trafficking based on what he had seen in previous investigations and how it informed his perception of what he saw while investigating Appellant. This testimony was permissible lay testimony, and there was no error in its admission.

B. Investigator King's Testimony

Appellant additionally argues that Investigator King's testimony should not have been admitted as lay opinion. The State concedes that it did not attempt to qualify Investigator King as an expert, "[p]erhaps in light of the trial judge's ruling on Investigator Harrelson." The State argues that Investigator King's knowledge of "drug slang terms" was (1) "acquired from his *experience* as a drug investigator," (emphasis added), and yet (2) "did not require special knowledge or training." We agree with Appellant.

Several federal courts have found that "drug jargon" testimony based on *general* terminology—i.e., not based on a witness's experience in a particular investigation—calls for expert testimony. *See, e.g., United States v. Haines*, 803 F.3d 713, 727 (5th Cir. 2015) ("We have 'recognized that in the context of drug conspiracies, "[d]rug traffickers' jargon is a specialized body of knowledge, familiar only to those wise in the ways of the drug trade, and therefore a fit subject for expert testimony." ' " (quoting *United States v. Akins*, 746 F.3d 590, 599 (5th Cir. 2014))); *United States v. Gadson*, 763 F.3d 1189, 1212 (9th Cir. 2014) ("*Unlike a lay witness*, a witness who is an expert on drug jargon may interpret encoded drug terms *even if the witness had not been involved in that particular investigation*." (emphases added)); *Carrillo-Morones*, 564 F.Supp.2d at 711 ("[A]ny testimony rendering an opinion formed as a result of facts and circumstances about which an officer lacks *personal knowledge* constitutes expert testimony under Rule 702." (citing *United States v. Peoples*, 250 F.3d 630, 642 (8th Cir. 2001))).

The Fourth Circuit found in *Johnson* that the admission of a Drug Enforcement Agent's testimony under circumstances similar to the current case was "exactly what Rule 701 forbids." *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010). In that case, the agent listened to wiretaps that caught the defendant's communications and interviewed other "suspects and charged members of the conspiracy" in the investigation before his testimony, but after the communications. *Id.* The court ruled that because the agent "did not testify to directly observing the surveillance or even listening to all the relevant calls in question," the agent did not have the "the foundational personal perception needed under Rule 701" to give his opinion as a lay witness. *Id.*

Like the agent in *Johnson*, Investigator King was not closely involved in the investigation until after Ostrowski was arrested.[15] While he extracted text messages from the cell phone after the fact, he was not personally involved in the surveillance

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[15] Investigator King testified that he "was not there at the time of the arrest and search warrant but [he] did download the cell phone." Later, the following exchange took place with Appellant's counsel:

> "Q. So, you were solely contained to just taking the information off a phone and that is it?
> "A. Correct."

and appears to have had no other role in the investigation of Ostrowski before then. Instead, he interpreted the messages based on his "general drug-investigation experience alone." *Id.* at 295. This was textbook expert testimony and should not have been admitted unless the court first qualified Investigator King as an expert. *See id.* at 292–93.

III. Text Messages as Evidence of Other Bad Acts

Appellant next argues that the text messages were used by the State as improper character evidence to show Appellant was attempting to traffic the drugs in the current case because he had a general propensity to traffic drugs. We agree.

"*State v. Lyle*[16] is the classic South Carolina case for understanding the admissibility of a defendant's other crimes [or bad acts]." *State v. Perry*, 430 S.C. 24, 31, 842 S.E.2d 654, 658 (2020). There, our supreme court laid out the factors to be considered when determining whether potentially inadmissible propensity evidence could instead be brought into court for other, permissible purposes.

> The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. . . . [I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.

Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923). The court laid out five general exceptions to the rule against evidence of other bad acts.

> (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. at 416, 118 S.E. at 807 (quoting *People v. Molineux*, 61 N.E. 286, 294 (N.Y. 1901)). Non-criminal bad acts that fall under one of the exceptions must be proven

[16] 125 S.C. 406, 118 S.E. 803 (1923).

by clear and convincing evidence. *See State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) (citing *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). "Further, even though the evidence is clear and convincing and falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (italics added).

The State advances two primary reasons why the circuit court was right to admit the evidence of Appellant's previous alleged drug dealing in this case. Each essentially turns on the issue of the ownership of the drugs.[17] Still, we consider each of the State's arguments in turn.

A. The Door-Opening Argument

First, the State argues that "Appellant invited a reply and opened the door for the State to admit his text messages based on his assertion in his opening statement that the methamphetamine belonged to another specific person."[18] We disagree.

The State relies heavily on *State v. Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003) to advance the proposition that "the State was entitled to introduce Appellant's text messages to prove he was not a mere addict but was actively engaged in the sale of methamphetamine." The State's reading of *Dunlap* is too broad. In *Dunlap*, the defendant was charged with distribution of crack cocaine based on the testimony of a witness who claimed to have bought the drugs at issue from the defendant. *See State v. Dunlap*, 346 S.C. 312, 315, 550 S.E.2d 889, 891 (Ct. App. 2001), *aff'd as modified*, *Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003). Therefore, in *Dunlap*, the State was permitted to try to rebut the claim that the defendant did not try to sell drugs as a course of business, because the charge was

[17] At trial, the State appears to have relied at least briefly on *res gestae* to support the admission of the text messages. The State does not advance that argument on appeal.

[18] The State does not appear to have raised this issue before the circuit court. However, "a respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

based on Dunlap's alleged sale of drugs. *See Dunlap*, 346 S.C. at 541, 550 S.E.2d at 319.

Unlike the defendant in *Dunlap*, Appellant was not charged with trafficking *because of* a third party's testimony that Appellant had actively trafficked the drugs. Rather, Appellant was charged because he was allegedly in possession of a large enough quantity of the drugs to constitute trafficking. Therefore, whether Appellant was regularly involved in the sale or distribution of drugs was not crucial to the State's case as it was in *Dunlap*. Even if Appellant were just a user, if he had the requisite quantity of drugs, he could be found guilty of trafficking.[19]

For that reason, the defense's argument that Appellant was not actively involved in the distribution of methamphetamine did not by itself open the door for the State to introduce the contested evidence if it would otherwise be improper.

B. Identity and Intent

Next, the State argues that the evidence was admissible under the identity and intent exceptions to *Lyle*. We disagree on both counts.

The State asserts that the text messages prove the Appellant's identity as the owner of methamphetamine. However, nowhere does the State cite any specific facts or evidence offered at trial that illustrate how the text messages—even if they do prove a drug trafficking scheme—connect Appellant to the specific drugs at issue in this case. *See Lyle*, 125 S.C. at 417, 118 S.E. at 807 ("[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, *the accused should be given the benefit of the doubt*, and the evidence should be rejected." (emphasis added)). Indeed, an argument that Appellant owned these drugs because Appellant is a drug dealer is a definitional example of propensity evidence. The inference that the State clearly wanted jurors to draw was that because some of the text messages indicated Appellant was dealing drugs earlier—sometimes weeks before the incident at issue—then he must have owned the drugs found on January 25, 2017. *Cf. State v. Carter*, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996) ("[T]he purpose of

[19] *Cf. State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (allowing evidence of a previous drug sale in a possession with intent to distribute case when "the amount of crack seized was less than one gram and *the element of intent was not subject to the statutory prima facie showing*" (emphasis added)).

the State's use of the evidence appears similar to that articulated by this [c]ourt in *Campbell* in that the State was not trying to prove a common scheme or plan[] but was instead trying to convince the jury that because [the defendant] sold crack cocaine . . . on January 14th, he was selling crack cocaine on January 18th. This is the precise type of inference prohibited by *Lyle*.").

The facts in this case are similar to those at issue in *Lyle*. In *Lyle*, the defendant was charged with a forgery that resembled similar crimes carried out in the same area on the same day, and those carried out in other, nearby cities on earlier dates. The court ruled that the crimes carried out on the same day could be admitted for identity purposes, reasoning that they were inconsistent with the defendant's alibi defense. However, the *Lyle* court did not allow the earlier crimes to be admitted under the identity exception because there was "no connection of time and place" between the alleged crime in Aiken and the earlier crimes in Georgia. Indeed, the court found this lack of time connection in an incident just 10 days earlier.

> [S]uch evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but *that is the precise inference the general rule was wisely designed to exclude*. . . . The mere fact that the Georgia crimes were similar in nature and parallel as to methods and technique employed in their execution does not serve to identify the defendant as the person who uttered the forged check in Aiken as charged, unless his guilt of the latter crime may be inferred from its similarity to the former. To warrant such inference[,] the similarity must have established such a connection between the crimes as would *logically exclude or tend to exclude the possibility that the Aiken crime could have been committed by another person*. There is nothing to indicate that the defendant held any monopoly of the methods and means used in passing the forged checks in Georgia, or that they were unique in the annals of crime.

Lyle, 125 S.C. at 420, 118 S.E. at 808 (emphases added) (citations omitted).[20]

We decline to say precisely how far back in the history of the text messages the State could go, or even if text messages over a shorter period of time would be permissible in this case to prove the defendant was the owner of the methamphetamine. We concede that the closer the messages were to the date of the Appellant's arrest, the closer this case would become. However, we believe in this case that three weeks is too long, and six weeks is certainly too long for the handful of text messages that fall that far before Appellant's arrest.

On intent, the statute at issue in this case does not require Appellant to have any intent beyond knowing possession of the requisite amount of methamphetamine. *See* S.C. Code Ann. § 44-53-375(C) (2018) (making it a crime to traffic methamphetamine or "knowingly [be] in actual or constructive possession or . . . knowingly attempt[] to become in actual or constructive possession of ten grams or more of methamphetamine"). Showing that the defendant had intent to distribute the drugs is not listed in the statute as necessary for a conviction. Our supreme court has held that "[f]or constructive possession cases, the State must prove by other evidence the defendant had the right and power to exercise control over the drugs. Second, the State must prove the defendant had knowledge of the drugs and the intent to control the disposition or use of the drugs." *State v. Stewart*, 433 S.C. 382, 858 S.E.2d 808, 811 (2021), *reh'g denied* (June 16, 2021).

The statute also provides that anyone "who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State" methamphetamine is acting illegally. *Id.*

While the State cites several cases as supporting the circuit court's ruling in this case, none of them are precisely on point. For example, in *State v. Gore*, our supreme court found that evidence of prior drug sales was admissible to help prove

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[20] The *Lyle* court also noted that, on the issue of identity, its "conclusion is re–enforced by an additional consideration which we deem decisive"—namely, concerns about whether the proof of the defendant's participation in the other crimes was strong enough to be admitted. *Lyle*, 125 S.C. at 422–24, 118 S.E. at 809–10. However, while that might have tipped the balance for the *Lyle* court, its preceding discussion indicates that the earlier forgeries would have been inadmissible even if that evidence was more convincing.

intent. 299 S.C. 368, 369–70, 384 S.E.2d 750, 750–51 (1989). An informant testified about two instances on which the defendant, who was charged with possession with intent to distribute cocaine and conspiracy, had sold cocaine to the informant. The court reasoned that "evidence that appellant sold cocaine from the trailer on two occasions only one month earlier tends to establish his intent regarding the cocaine in his possession at the time in question." *Id.* at 370, 384 S.E.2d at 751. The court added: "We conclude the probative value of this evidence outweighs its prejudicial effect and find no error in the trial judge's ruling." *Id*.

Likewise, in *State v. Wilson*, our supreme court ruled evidence of a prior drug transaction should have been allowed when the defendant was accused of trafficking while being in possession of less cocaine than needed to trigger the statutory presumption. 345 S.C. 1, 7–8, 545 S.E.2d 827, 830 (2001). In that case, the court noted "that the amount of crack seized [in the incident leading to charges] was less than one gram and the element of intent was not subject to the statutory prima facie showing," and so the State was required to prove intent through circumstantial evidence.[21] *Id.* at 7–8, 545 S.E.2d at 830 ("We have held that evidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute. . . . Under *Gore*, this evidence is relevant on the issue of intent.").

However, unlike the defendant in *Gore*, Appellant in this case does not face a conspiracy charge in addition to the drug charge. While the supreme court did not dwell at length on its reasoning in *Gore*, the conspiracy charge inherently involved a question of intent—the intent to enter a criminal conspiracy to distribute drugs—that is not required in Appellant's case. *See generally State v. Crawford*, 362 S.C. 627, 636–646, 608 S.E.2d 886, 891–896 (2005) (outlining conspiracy law in South Carolina); *id.* at 637, 608 S.E.2d at 891 ("The gravamen of the offense of conspiracy is the agreement, or combination."). Additionally, unlike the State in *Wilson*, the State here only needed to show that Appellant knowingly possessed at least 28 grams of methamphetamine to meet its burden on intent.

The State could use any text messages that showed or tended to show that Appellant was in possession of the drugs that were at issue in the present case. None of the messages did so. They established Ostrowski dealt drugs, at times from his

[21] Unlike *Wilson*, the supreme court's decision in *Gore* did not specifically mention whether the drugs seized in the search of the defendant's residence exceeded the level necessary for a prima facie distribution case.

home. But they did not, for example, establish that he usually kept them in his pants.[22]

In *State v. Scott*, this court affirmed the admission of a drug defendant's concurrent possession of drug paraphernalia and marijuana seeds to show *knowing* possession of other drugs in a trafficking case where ownership was disputed.[23] 303 S.C. 360, 363, 400 S.E.2d, 784, 786 (Ct. App. 1991). In that case, the court considered only *relevance* and specifically found the defendant to have abandoned his argument that the evidence was unduly prejudicial. *Id.* at 362 n.1, 400 S.E.2d at 785 n.1.

Even so, Appellant's case can be distinguished from *Scott*. In *Scott*, drugs and paraphernalia found at the defendant's residence "tended to prove that Scott *knowingly possessed* the cocaine that the officers testified they found *in his hand*." *Id.* at 363, 400 S.E.2d at 786 (emphases added). In other words, the fact that the defendant had drugs and paraphernalia at his residence at the same time that he was found with drugs on his person showed that he intended to possess *the drugs that were found on his person*. *Id.* In the present case, the drugs at issue were not found on Appellant's person, but at his home.[24] The State was attempting to prove that, because Appellant had text messages indicating that he was dealing some methamphetamine at around the same time, he must have known of the drugs that were at his home and yet not specifically referenced in any of the text messages. This pattern of inferences could work only for the exact reason that such evidence is generally barred: because Appellant often owned drugs, he must have owned *these* drugs. *Cf. Carter*, 323 S.C. at 468, 476 S.E.2d at 918 ("[T]he purpose of the State's use of the evidence appears similar to that articulated by this [c]ourt in *Campbell* in that the State was not trying to prove a common scheme or plan[] but was instead trying to convince the jury that because [the defendant] sold crack cocaine . . . on

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[22] We do not intend to suggest that this is the only way that a text message might be relevant to the issue of intent. This is merely an illustration.

[23] The court in *Scott* did not specifically rule on whether it considered the evidence in question evidence of identity or intent. Because the question in *Scott* was related to the *mens rea* of the crime, we treat it as a decision on intent.

[24] There are indications in the record that Appellant had drugs on his person at the time of his arrest. However, the circuit court excluded that evidence, and those drugs are not a part of the charges in this case.

January 14th, he was selling crack cocaine on January 18th. This is the precise type of inference prohibited by *Lyle*.")

Furthermore, the link here is far more attenuated than in *Scott*. In *Scott*, the evidence supported an inference of the defendant's knowing possession because the drugs and paraphernalia were found at his home at the same time he was in possession of cocaine. *Id.* Here, the State sought admission of text messages not just from the day of Appellant's arrest, but from up to six weeks before Appellant's arrest. Many of these messages are completely extraneous to the events that were the subject of the trial, and the State made no real effort to link the text messages to the specific drugs at issue in this case. *See Lyle*, 125 S.C. at 417, 118 S.E. at 807. ("[I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.").

The text message evidence should not have been admitted at trial because it was not probative of Appellant's intent as to the offense with which he was charged in the present case. *See Lyle*, 125 S.C. at 420, 118 S.E. at 808 ("[S]uch evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude."); *cf. State v. Perry*, 430 S.C. at 41, 842 S.E.2d at 663 ("When evidence of other crimes is admitted based solely on the similarity of a previous crime, the evidence serves only the purpose prohibited by Rule 404(b), and allows the jury to convict the defendant on the improper inference of propensity that because he did it before, he must have done it again." (decided under common scheme or plan exception)).

C. Prejudicial vs. Probative Value

Appellant argues that even if the evidence could be used to prove intent, its admission was substantially more prejudicial than probative. We agree.

Because Appellant did not need to have a subjective intent to traffic the drugs in order to be convicted under the statute, the probative value of the text message evidence is relatively small on that aspect of intent. As previously discussed, the evidence is less direct than it was in *Scott*; furthermore, this court explicitly did not consider the question of whether the evidence was more prejudicial than probative in *Scott*. 303 S.C. at 362 n.1, 400 S.E.2d at 785 n.1. In any case, given that the

statutory amount alone exposed Appellant to trafficking charges, the probative value of the text messages is more limited than it was in *Scott*.

Additionally, the amount of attention drawn to a prior bad act can play a role in determining whether the evidence is unduly prejudicial. *See State v. Johnson*, 293 S.C. 321, 326, 360 S.E.2d 317, 320 (1987) ("Considering the volume of testimony and evidence presented about the armed robbery, grand larceny and Swanson's murder, as well as the solicitor's numerous references to appellant's prior crimes in closing argument, it can be asserted with reasonable certitude that the prejudicial impact of the excessively detailed evidence presented concerning appellant's prior crimes outweighed its probative value.").

The State did not devote an overwhelming amount of time to the text messages relative to the whole of the trial. However, the text messages or testimony about them comprised almost the entirety of Investigator King's testimony, and the State produced a sizable amount of such evidence. By our count, the State admitted 113 text messages into evidence, covering a period from December 8, 2016, to January 25, 2017, during Appellant's trial. Some of them included crude or threatening language that appears to have little or no connection to the drugs allegedly found at Appellant's home. Nor did the State make much of an overt attempt to connect most of the messages to the drugs at issue in Appellant's indictments.

Further, the State said in its closing argument that the evidence on the phone was "the State's strongest evidence in this case and . . . will completely destroy the credibility of any defense argument because you take one look at that phone and you know the truth beyond a reasonable doubt." Despite the limited probative value of the texts, the State counted on the jury to devote considerable attention to them. Considering the state's focus on the text messages, the sheer number of text messages admitted, and the limited probative value of the evidence, the presentation of the text messages proved to be substantially more prejudicial than probative. Allowing this was error.[25]

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[25] The State argues that the text messages are somehow less prejudicial than drug convictions admitted into evidence in other cases. The State does not explain this concept fully, but it is groundless and irrelevant. Even if the text messages were for some reason less prejudicial, a point we are not willing to accept, the *weighing* of probative value against prejudicial effect is case-specific and not simply an issue of whether the evidence is more or less prejudicial than evidence admitted in prior

V. Jury Instructions

Finally, Appellant argues that the circuit court's instructions amounted to reversible error as a charge to the jury to seek the truth, at least partially shifting the burden of proof from the State to Appellant. We disagree.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.*

Our supreme court has urged judges to avoid suggesting to jurors at any point during a trial that they should embark on a search for truth rather than basing their decision solely on the evidence and their inferences from that evidence.

> [A] trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. . . . We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt.

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cases. *See State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) ("The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally *turn on the facts of each case*." (emphasis added)); *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) ("When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will *turn on the facts of each case*." (emphasis added)); *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) ("The evaluation of probative value cannot be made in the abstract, but should be made in the *practical context of the issues at stake in the trial of each case*." (emphasis added)).

State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) (footnote omitted). *See also State v. Aleksey*, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) ("Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" (quoting *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998))).

This court has previously interpreted *Beaty* as "echo[ing]" *Needs*. *See State v. Pradubsri*, 420 S.C. 629, 640–41, 803 S.E.2d 724, 729–30 (Ct. App. 2017).[26] In *Needs*, the supreme court "upheld the conviction because the circuit court reiterated the 'beyond a reasonable doubt' standard twenty-six times and the rest of the charge did not contain other disfavored language[.]" *Id.* (citing *Needs*, 333 S.C. at 154–55, 508 S.E.2d at 867–68). In *Pradubsri*, this court likewise upheld a verdict when the court repeated the standard "at least twenty times." *Id.*

There is no doubt that the circuit court in this case used a truth-seeking instruction. However, when viewed in their entirety, these instructions were "substantially correct" and unlikely to mislead the jury. The circuit court emphasized the importance to the jury of holding the state to its burden multiple times when charging them, and gave instructions that closely resembled those in cases where convictions were upheld despite similar phrases about "truth" being included in the jury instructions. *See, e.g., Pradubsri*, 420 S.C. at 640–41, 803 S.E.2d at 730 (affirming conviction when "the circuit court referenced the 'beyond a reasonable doubt' standard at least twenty times during its instructions" and used a "robe of righteousness" simile). Because of that, we find no reversible error in the jury charge.

VI. Harmless Error

We have found error in two of the trial court's decisions: the admission of Investigator King's opinion testimony and the admission of the text messages. We will not reverse a verdict over harmless errors. *See State v. White*, 372 S.C. 364, 386, 642 S.E.2d 607, 618 (Ct. App. 2007) ("Generally, appellate courts will not set

[26] Our court was referring to the supreme court's original decision in *Beaty*. The case was reheard in 2018, but its findings on the truth-seeking comments were substantively unchanged. *Compare State v. Beaty*, 423 S.C. at 32–34, 813 S.E.2d at 505–06, *with State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse 2017 Adv. Sh. No. 1) at 13, 14–16.

aside convictions due to insubstantial errors not affecting the result."), *aff'd in result*, 382 S.C. 265, 676 S.E.2d 684 (2009). However, because of the degree to which the phone evidence became a central aspect of the State's case against Ostrowski, we find that neither of the circuit court's erroneous rulings in this case were harmless.

> "[O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether *beyond a reasonable doubt the trial error did not contribute to the guilty verdict*." Put simply, the harmless error rule embodies a commonsense principle our appellate courts have long recognized—"*whatever doesn't make any difference, doesn't matter*."
>
> 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*." Thus, "overwhelming evidence" of a defendant's guilt is *a relevant consideration* in the harmless error analysis.

State v. Reyes, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (emphases added) (alterations in original) (citations omitted).

In the case before us, we cannot find that the errors were harmless. We struggle to say that beyond a reasonable doubt the erroneous evidence did not affect the verdict; that the impermissible evidence did not make any difference; or that a jury hearing the case could reach no other rational conclusion.

The State does not explicitly argue that the admission of the text messages was harmless error, but it does argue that the expert witness testimony of Investigator King was harmless. We disagree.

We question the consistency of the State pleading harmless error in this case when it comes to any evidence, such as Investigator King's testimony, tied to the text messages. During its closing statement at trial, the State called the phone evidence "the State's strongest evidence in this case," suggesting that nothing more was

needed to prove the case beyond a reasonable doubt.[27] At least some of the text messages likely would have meant little to the jury without Investigator King's interpretation of the messages. Because Investigator King translated some of the most damning text messages for the jury, the State's case against Appellant was *by its own admission* built on testimony we have found to be impermissible. It is difficult to imagine how the State can call a portion of its presentation "the State's strongest evidence in this case" during trial, then turn around and argue to this court that the admission of a significant portion of that evidence constitutes harmless error. *See State v. Bell*, 430 S.C. 449, 473, 845 S.E.2d 514, 527 ("[B]ecause the State continuously stressed the improper statements in its closing argument, 'it is impossible under these circumstances to conclude the improper evidence did not impact the jury's verdict.'" (quoting *State v. King*, 334 S.C. 504, 515, 514 S.E.2d 578, 584)); *see King*, 334 S.C. at 514–15, 514 S.E.2d at 583–84 ("The improper evidence suggested to the jury that appellant was guilty of committing the charged crimes because of his criminal propensity to commit crimes and his bad character. The State continuously stressed this improper testimony in its closing argument. Therefore, it is impossible under these circumstances to conclude the improper evidence did not impact the jury's verdict."); *cf. State v. Phillips*, 430 S.C. 319, 342–43, 844 S.E.2d 651, 663 (2020) (ruling, in a case where witness and prosecutor both misportrayed DNA evidence, "[w]e need not determine whether the risk of innocent confusion materialized in this case, however, because the incorrect statements in closing argument all but guaranteed the jury was confused and misled. *If there were any possibility we might find the error of admitting the evidence harmless, the assistant solicitor extinguished that possibility with her incorrect statements in her closing argument*." (emphasis added)).

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[27] Among the allusions to the evidence made by the State during its closing arguments: "Let's talk about the phone because *that is the State's strongest evidence in this case* and it will completely destroy the credibility of any defense argument because you take one look at that phone and you know the truth beyond a reasonable doubt." (emphasis added); "You want a gram of clear. *You know from Investigator Harrelson, Investigator King, what clear is*." (emphasis added); "Investigator King told you what a reup is . . . ."; "It just so happens [Appellant] has a bunch of meth text dealing."

The State obviously *wanted* Investigator King's interpretation of the text messages to contribute to the verdict. We take the State at its word—as presented at trial—that the messages and their translation by Investigator King did so.

For the same reason, we find that the improper admission of the text messages was not harmless. Having heard testimony about numerous texts suggesting Appellant was involved in drug trafficking, it seems unlikely that the jury could screen out that information and focus solely on whether Appellant was the owner of the methamphetamine at issue in this case.

It is useful to remember what was at the heart of Appellant's trial on the drug trafficking charge in this case: the allegation that Appellant was the owner of the methamphetamine found in the pants. Appellant was not on trial for any of the drug transactions recorded in his text messages.

By the end of the trial, though, Appellant was no longer defending himself merely against the charges in the indictments in this case, but also against the implicit charge that he had previously dealt drugs on multiple occasions. *Lyle*, 125 S.C. at 426, 118 S.E. at 810 ("Admission of the evidence as to the alleged Georgia offenses forced him to undertake in this case the trial of three other cases, not for the purpose of disproving the admitted criminal intent of the act charged, but to rebut the illegitimate inference of his guilt that would be raised by evidence that he had committed or was accused of having committed other similar crimes."). The evidence that Appellant was involved in the methamphetamine trade on previous occasions could be viewed as clear and convincing. But the State did not charge Appellant based on those occasions; it charged Appellant with owning a specific quantity of drugs at a specific place at a specific time. It does not take an imaginative mind to see how even a juror who held a reasonable doubt that the drugs in Appellant's home were his could be persuaded to convict Appellant nonetheless, or how the evidence in the text messages might have been the final quantum of proof needed to persuade a hesitant juror that the Appellant was indeed the owner of the drugs. *See Lyle*, 125 S.C. at 416, 118 S.E. at 807 ("Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty[] and thus effectually to strip him of the presumption of innocence."). *See also King*, 334 S.C. at 514–15, 583–84 ("The improper evidence suggested to the jury that appellant was guilty of committing the charged crimes because of his criminal propensity to commit crimes and his bad character. The State continuously stressed this improper testimony in

its closing argument. Therefore, it is impossible under these circumstances to conclude the improper evidence did not impact the jury's verdict.").

We are unable to say, without a reasonable doubt, that the evidence in this case is so strong "that no other rational conclusion can be reached." *Reyes*, 432 S.C. at 406, 853 S.E.2d at 340 (quoting *State v. Collins*, 409 S.C. 524, 538, 763 S.E.2d 22, 29–30 (2014)). It might seem *unlikely* under the facts of this case that the drugs belonged to someone other than Appellant. The State asserted that the methamphetamine belonged to Appellant, he contended that it did not, and the decision of whether the State had proved its version of the narrative beyond a reasonable doubt was one for the jury to make without the impermissible evidence. Given those considerations, neither the admission of Investigator King's testimony nor the admission of the text messages was harmless.

CONCLUSION

We reverse Appellant's conviction on methamphetamine trafficking and possession of a weapon during the commission of a violent crime; affirm the convictions possession of a handgun by a person convicted of a crime of violence and for possession of a handgun with the serial number obliterated;[28] and remand for a new trial on the reversed convictions.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and WILLIAMS, JJ., concur.

[28] Appellant does not contest before this court the latter two firearms convictions on any grounds other than the denial of his motion to suppress and, potentially, the jury charge. Because we affirm on those grounds, we do not reverse these convictions.