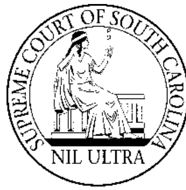

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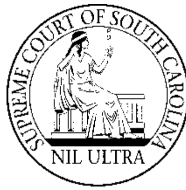

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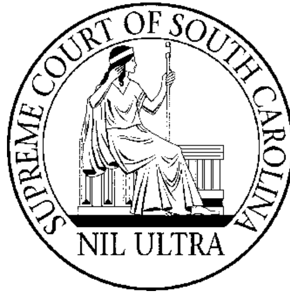

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rodney Jerome Furtick, Appellant.

Appellate Case No. 2019-001920

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

Opinion No. 6032
Heard December 6, 2022 – Filed November 8, 2023

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Joshua Abraham Edwards, both of Columbia, and Solicitor Samuel R. Hubbard, III, of Lexington, all for Respondent.

MCDONALD, J.: Rodney Furtick appeals his second-degree criminal sexual conduct (CSC) conviction and sentence, arguing the circuit court erred in finding certain prior convictions admissible under Rule 609, SCRE. Furtick contends the circuit court applied an improper balancing test and eliminated any probative value

the prior convictions may have once had by "sanitizing" them. Essentially, Furtick's position is that if the convictions needed sanitizing, the circuit court should have excluded them entirely. We disagree, and we affirm the circuit court's well-reasoned analysis.

Facts and Procedural History

In August 2015, J.H. (Victim), her then-husband (Husband), and their one-year-old daughter moved to Cayce. The couple did not own a vehicle, and they shared a cell phone. Husband generally worked a night shift and walked to work.

In October 2015, Husband befriended Furtick, who could often be seen walking around the neighborhood. Victim testified at Furtick's trial that she told Husband she did not want Furtick around when Husband was not present because Furtick made her uncomfortable. By that time, Furtick was visiting the couple's home once or twice a week.

At some point that same October, Victim reported to the police that Furtick or his girlfriend had stolen her Electronic Benefits Transfer (EBT) card; however, at the time of Furtick's trial, Victim did not recall making this report. She explained, "I probably did, but I was basically a single mother. My husband didn't do anything for my daughter. I was more focused on my daughter than anything else."[1]

On November 18, 2015, Husband left the house shortly before dark to visit a hobby shop. Victim recounted that while she was getting Daughter ready for bed, she heard a knock at the back door and saw the door begin to open as she approached it. Although she tried to push the door closed, Furtick entered the home uninvited, and Victim asked him to leave. At that point, Victim instructed Daughter to go lie down in her bed, but Daughter instead moved in front of Victim. Furtick put down a plate of food he was carrying, walked toward Victim, and pushed Daughter into a corner, causing a red mark on Daughter's back. When Daughter began to cry, Victim carried her to Victim's bedroom and instructed her to cuddle with the pillows there. Furtick then pushed Victim backwards into Daughter's room and ordered her to lie down. During all of this, Victim was scared for Daughter because Daughter "started crying and screaming." While backing into the bedroom, Victim tripped over Daughter's toys and Furtick shoved her to

[1] Victim and Husband have since divorced.

the floor. He then began trying to kiss her and attempted to remove her tights at the feet but became frustrated and yanked the tights down from Victim's waist. Furtick then raped Victim while Victim stared at Daughter in an effort to try to keep her from approaching. Following the sexual assault, Furtick cleaned himself with baby wipes.

When asked why she did not try "to fight him off," Victim explained she was afraid Furtick would hurt Daughter. Victim testified Furtick became annoyed because Daughter continued to cry and try to enter the room. At times, Furtick "kept turning to glare" at Daughter. Then, as he was leaving, Furtick told Victim that if she told anyone about what happened, "he would tell his friends that [her] house was free game."

After Furtick left, Victim grabbed Daughter and ran across the street to a neighbor's house. She told the neighbor she had been raped, and the neighbor called 911. Neighbor testified Victim was very upset and visibly shaking.

Shortly after receiving the dispatch, Sergeant John Robert Reese of the Cayce Department of Public Safety (CDPS) responded to the scene. Sergeant Reese testified Victim was very upset, her clothing was disheveled, and she identified her attacker as "a black male and the name was Rodney or Todd."[2]

Paramedic Marilyn Sanchez treated Victim at the scene and observed she was "very anxious, nervous, paranoid, looking around like she was looking for someone or something." Victim was then transported to Prisma Health Richland, where a forensic nurse examiner completed a sexual assault evidence collection kit. Lieutenant Jason Merrill responded to the hospital and interviewed Victim; he then gave her a ride home. In his search of the home, Lieutenant Merrill collected crumpled baby wipes and black tights from the floor of Daughter's room.

On December 10, Lieutenant Merrill and Sergeant Caleb Thomas questioned Furtick at CDPS headquarters. Lieutenant Merrill informed Furtick that CDPS was investigating a November 18 criminal incident at Victim's home. When Lieutenant Merrill asked Furtick if there was any reason his DNA might be found there, Furtick denied ever being inside the house. He further denied that he knew

---

[2] Victim provided Sergeant Reese with a description and a first name but did not know Furtick's last name.

Husband or Victim, even after being shown a photograph of Victim bearing her name.

On December 30, CDPS transported evidence from the scene and Victim's sexual assault kit to the South Carolina Law Enforcement Division (SLED), where it was tested for semen and saliva. Vaginal and rectal swabs from the kit tested positive for the presence of semen; the swabs from Victim's arm, breasts, and cheeks were positive for saliva. Cuttings from Victim's underwear were also positive for components of semen. SLED forensic scientist Samuel Stewart later developed a DNA profile.

CDPS then obtained a search warrant and collected Furtick's DNA, which matched the semen on the vaginal and rectal swabs. Stewart testified the probability of an unrelated individual matching the semen on these items was one in seventeen quintillion. He further noted Furtick was a minor contributor to some of the DNA found on other tested items.

A Lexington County grand jury indicted Furtick for first-degree CSC and first-degree burglary. At Furtick's subsequent trial, the State notified the circuit court that if Furtick testified, it intended to introduce evidence of his prior convictions: a 2010 conviction for burglary, a 2012 petit larceny conviction, two 2012 second-degree assault and battery convictions, and a 2015 conviction for a third-offense property crime.

The circuit court noted the petit larceny and property offense were crimes involving dishonesty, and Furtick requested that the court reference larceny only, not "a third or subsequent offense," because this was a petit larceny with a sentencing enhancement. The State consented to this request.

Furtick further argued that under Rule 609(a), SCRE, his convictions for burglary and assault and battery should be excluded due to their similarities to the crimes for which he was currently being tried. Furtick asserted that under Rule 403, the probative value of these prior convictions would be substantially outweighed by their prejudicial effect because the case "boils down to a swearing contest." The State countered that burglary was a crime of dishonesty and Furtick had frequently attacked Victim's credibility. The circuit court noted burglary was not a crime of

dishonesty under *State v. Bryant*[3] and the burglary conviction was indeed similar to one of the crimes for which Furtick was on trial. Thus, the court's "initial impression [was] to decline to allow the State to go into or specifically say a burglary."

The circuit court noted the assault and battery convictions were likely admissible because their similarities to the CSC count were insufficient to warrant exclusion. Still, the circuit court explained that after an evening review of the *State v. Colf*[4] factors and recent caselaw, the court would revisit the admissibility of these convictions the following day before trial resumed.

Upon reconvening the next morning, the circuit court explained:

> I have some further reflection on how to treat the assault charges or the assault convictions and after reviewing the caselaw, the Court has to conclude in order to allow those specific convictions to come in as assault and battery seconds that legally the Court would have to conclude that the probative value of that impeachment substantially outweighs any undue prejudice.
>
> And I've looked at the five factors, I've considered it. Doing a 403 balancing analysis, I think that the impeachment value mostly outweighs the danger of unfair prejudice but I cannot say it substantially outweighs the danger of unfair prejudice and the key to this—or the key to my reasoning is that by allowing the jury to hear that he was convicted of assault and battery second degree is tantamount to basically suggesting to the jury that the Defendant has a propensity towards violence, a propensity to assault people, and, of course, sexual assault is one of the charges he's facing.

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[3] 369 S.C. 511, 517–18, 633 S.E.2d 152, 155–56 (2006).

[4] 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).

The circuit court instructed the State to limit its questions relating to the assault and battery and burglary convictions to reflect Furtick was convicted of "two misdemeanors in 2012 and a felony in 2010 that carried a possible punishment of more than one year in prison."

Furtick's counsel responded,

> [O]ur position would be that if the rules don't allow it, if you can't fit a square box into a round hole, then why should we sand off the corners of the square box and now push it through the hole? I didn't see anything where that was addressed in any of the caselaw and so our position would be if the rules don't allow it, then it just shouldn't come in, it shouldn't be, quote unquote, sanitized.

Furtick's counsel further noted, "I can't find any cases that talk about this whole hey, sanitizing it is okay, but I've seen it in this circuit and I've seen it in some other circuits, I've just not seen it challenged."

The circuit court replied,

> [M]y opinion is that the prejudice flows from the similar nature of the crime, so calling something a burglary when you're on trial for burglary or calling something a rape when you're on trial for rape is what creates the prejudice if they have that prior conviction for that similar type of offense and the prejudice is substantially lessened if you're simply allowed to inquire as to a nameless felony or a nameless misdemeanor, and so that's—that's the reasoning that this Court is employing it and I think other judges [have] employed routinely.

Furtick testified he met Husband in October 2015 when he saw him in his yard smoking a cigarette. He and Husband talked all afternoon, walked to a store, and Husband eventually invited Furtick into his home. Later, when Husband left for work, Furtick stayed and socialized with Victim. He claimed the two "became fond of one another" and had consensual sex that afternoon. Furtick further claimed Victim and Husband were friendly toward him when they saw him after

this encounter. Although Furtick admitted he had Victim's EBT card at one point, he said Husband gave him the card and pin number and agreed for Furtick to sell it "and get them a few dollars."

Furtick admitted he was present at Victim's home on November 18, 2015. He testified he had agreed to help Victim sell some baby food that she no longer needed, but he returned the food to her when he was unable to sell it. Furtick denied Victim ever asked him to leave; he claimed he and Victim talked for a while, he asked her if she wanted to have sex, and she said yes.[5] He then remained at the house for another five to ten minutes. On cross-examination, the State brought out inconsistencies between Furtick's testimony at a pretrial hearing and his trial testimony, such as the location of the first alleged sexual encounter and what Victim was wearing.

Furtick's trial testimony also contradicted his statements to law enforcement during the investigation—the most notable contradiction was Furtick's trial admission that he knew Husband and Victim and began regularly interacting with them in October 2015. Furtick claimed that when law enforcement asked him if he knew Victim or Husband, he did not deny that he knew them but told the officers he could not see the pictures. He maintained he did not admit he knew Victim—despite being asked if he knew her by name—because he could not see her photo. He provided the same explanation as to Husband's photo and his initial denial. When asked why he did not identify the couple after the officers obtained a pair of glasses for him, Furtick claimed he ended the interview because the officers would not let him keep the glasses.

Furtick was convicted of the lesser included offense of second-degree CSC but acquitted of burglary. The circuit court sentenced him to twenty years' imprisonment.

Standard of Review

"In criminal cases, appellate courts sit to review errors of law only." *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019). "The admission of evidence concerning past convictions for impeachment purposes remains within

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[5] During her testimony, Victim denied the two ever had consensual sex.

the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law." *Id.* (alteration by court) (quoting *State v. Dunlap*, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)).

Law and Analysis

Furtick argues the circuit court erred in allowing the State to impeach him with sanitized convictions otherwise inadmissible under Rule 609(a)(1) and the *Colf* factors. He contends this error was not harmless because his defense hinged on the credibility of his testimony that any sexual encounter with Victim was consensual.

Rule 609(a), SCRE, provides:

> For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
>
> For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

In *Colf*, our supreme court delineated the following factors a circuit court must consider in a Rule 609 analysis when weighing the probative value of prior convictions against their prejudicial effect:

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

337 S.C. at 627, 525 S.E.2d at 248.

Our supreme court provided further guidance in *Robinson*,[6] explaining:

> Rule 609(a) invokes three impeachment scenarios. First, under Rule 609(a)(1), evidence that a witness other than an accused has been convicted of a crime punishable by death or imprisonment for more than one year (in the jurisdiction where the conviction occurred) is admissible, subject to Rule 403, SCRE. Under Rule 403, evidence of such a conviction "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Rule 403 test places the burden upon the opponent of the evidence to establish inadmissibility pursuant to Rule 403. Second, under Rule 609(a)(1), when the accused chooses to testify during his trial, if the State seeks to introduce impeachment evidence that the accused has been convicted of a crime punishable by imprisonment for more than one year, the evidence is admissible if the State establishes the probative value of admitting the evidence outweighs its prejudicial effect upon the

[6] In *Robinson*, the circuit court admitted into evidence several prior convictions, including a burglary conviction the circuit court ruled "had to be referred to generically as a 'prior felony conviction carrying more than one year in prison.'" 426 S.C. at 588, 828 S.E.2d at 207. The supreme court noted the admission of this conviction for the purpose of impeachment was not appealed. *Id.*

> accused. Third, under Rule 609(a)(2), if a witness, even an accused, has been convicted of a crime involving dishonesty or false statement, evidence of such a conviction shall be admitted regardless of the maximum punishment and regardless of the probative value or prejudicial effect of the evidence.
>
> . . . .
>
> Rule 609(a)(2) requires no balancing test for admissibility of a prior conviction for a crime involving dishonesty or false statement. However, Rule 609(a)(1) and Rule 609(b) require the trial court to balance—in three varying degrees—the probative value of evidence of a prior conviction and the degree of prejudice to the opponent of the evidence (as noted, the Rule 403 test also requires the trial court to consider confusion of the issues, misleading the jury, etc.). Even though these three Rule 609 admissibility tests differ from one another, we have, through *State v. Colf*, provided a uniform set of factors for the trial court to consider when applying each test.

426 S.C. at 593–94, 828 S.E.2d at 210.

"The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness's propensity for truthfulness, or credibility." *Id.* at 597, 828 S.E.2d at 212 (quoting *State v. Black*, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012)). "The tendency to impact credibility . . . determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness." *Id.* at 598, 828 S.E.2d at 212–13 (quoting *Black*, 400 S.C. at 21–22, 732 S.E.2d at 887) (omission by court). "Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1)." *Id.* at 599, 828 S.E.2d at 213.

"[U]nder Rule 609(a)(1), if the witness is the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the *Colf* factors and determine whether the probative value of the conviction outweighs its prejudicial effect to the accused." *Id.* at 595, 828 S.E.2d at 211. "An on-the-record balancing test is particularly important for prior similar convictions under Rule 609(a)(1) because the 'similarity of a prior crime to the crime charged heightens'" its prejudicial nature. *State v. Howard*, 384 S.C. 212, 221, 682 S.E.2d 42, 47 (Ct. App. 2009) (quoting *State v. Elmore*, 368 S.C. 230, 239, 628 S.E.2d 271, 275 (Ct. App. 2006)).

Relying on *United States v. Boyce*, 611 F.2d 530, 530 (4th Cir. 1979), our appellate courts have seemingly approved the sanitization of prior convictions in cases addressing Rule 609. In *Boyce*, a defendant convicted of defrauding a federally insured bank appealed his conviction in part because the prosecutor asked on cross-examination whether he had been convicted of a felony and inquired as to the nature and number of such convictions. *Id.* at 530. The Fourth Circuit noted Rule 609(a), FRE,[7] allows a defendant to be impeached by proof of his prior felony

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[7] Rule 609(a), FRE states:

> The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
>
> (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
>
> (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

convictions; a defendant may be asked matters including the name of the crime, the time and place of the conviction, and the punishment. *Id.* The Fourth Circuit found "[i]t follows that there was no plain error in permitting the United States Attorney to inquire about the number and nature of defendant's felony convictions, particularly since the defendant himself had already testified that he had been convicted of a felony and there was no objection at trial." *Id.* at 530–31. The court stated in a footnote, "In the special case, where the prior conviction is for the same offense as that for which the defendant is being tried, the trial court generally will not permit the Government to prove the nature of the offense on the ground that to do so would amount to unfair prejudice." *Id.* at 530, n.1.

In *Green v. State,* our supreme court referenced the *Boyce* footnote, stating, "One tactic the Fourth Circuit Court of Appeals employs is to allow the prosecutor to ask the defendant about the existence of prior convictions, but not their nature." 338 S.C. 428, 433 n. 5, 527 S.E.2d 98, 101 n.5 (2000). The *Green* court also explained:

> Federal courts have held that prior convictions for the same or similar crimes are highly prejudicial and should be admitted sparingly. While some federal circuits have held such convictions admissible if, after consideration of other factors, their probative value outweighs their prejudicial effect, the Fourth Circuit has been one of the stricter circuits, refusing to permit impeachment with similar prior convictions. We decline to hold similar prior convictions inadmissible in all cases. Trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence.

> (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

Id. at 433, 527 S.E.2d at 100–01 (internal citations omitted) (footnote omitted).

Two years later, in *State v. Rollins*, this court found the circuit court did not abuse its discretion in admitting evidence of a defendant's prior convictions because:

> In this case, the trial judge reviewed Rollins' history of convictions and adopted the tactic mentioned in the *Green* footnote. In addition to limiting the amount of detail about the prior convictions, the trial judge instructed the jury that the prior convictions could only be considered in determining Rollins' credibility. This procedure minimized the prejudice to Rollins.

348 S.C. 649, 653, 560 S.E.2d 450, 452 (Ct. App. 2002).

The court of appeals again referenced this approach in its 2006 *Elmore* opinion, explaining:

> One permissible approach, advocated by the United States Fourth Circuit Court of Appeals, is to allow the prosecutor to ask the witness about the existence of a prior similar conviction under Rule 609(a)(1) without disclosing to the jury the nature of the prior offense. *See Boyce*, 611 F.2d at 531 n. 1. The *Boyce* approach was approvingly referenced by our supreme court in *Green*, 338 S.C. at 433 n. 5, 527 S.E.2d at 101 n. 5. The *Boyce* approach still requires a meaningful balancing of the probative value and prejudicial effect before admission of the prior conviction, although the prejudice occasioned by the similarity of the prior crime to the crime charged is removed.

368 S.C. at 239 n.5, 628 S.E.2d at 276 n.5.

In Furtick's case, we acknowledge the circuit court used a different balancing test when it stated, "Doing a 403 balancing analysis, I think that the impeachment value mostly outweighs the danger of unfair prejudice but I cannot say it substantially outweighs the danger of unfair prejudice." Under Rule 609(a)(1), the Rule 403

balancing test is used in determining the admissibility of prior crimes of a witness other than the accused. When determining whether an accused's prior convictions may be admitted under Rule 609(a)(1), evidence of a defendant's prior convictions carrying more than one year of imprisonment "shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Thus, it appears the circuit court's use of a balancing test requiring the impeachment value to *substantially* outweigh the danger of unfair prejudice actually inured to Furtick's benefit.

The circuit court also indicated it considered the *Colf* factors, though it did not specifically reference each factor. Still, the court clearly considered the similarities of the various crimes and the centrality of the credibility issue at trial. The record demonstrates the circuit court weighed the prejudicial effect of admitting the convictions, finding any prejudice was due to the similarity of the convictions to Furtick's current charges. The circuit court then sought to mitigate this prejudice through sanitization—barring any reference to the specific similar crimes for which Furtick had been previously convicted. In requiring sanitization, the court referenced the dates of Furtick's various prior convictions; the oldest admitted conviction occurred five years before Victim's sexual assault. Considering the impact of the prior convictions on credibility, the circuit court explained credibility was "quite important in this case" and thus declined to allow the State to introduce the nature of the convictions. We find the circuit court's sanitization approach was appropriate and that its analysis satisfied the requirement of a meaningful on-the-record balancing of the *Colf* factors.

Moreover, even if the circuit court erred in sanitizing or discussing its balancing of Furtick's prior convictions, such error would be harmless. When the circuit court admitted Furtick's two larceny convictions, Furtick's only request was that one of the convictions be called "larceny" with no "subsequent offense" or enhancement reference. Because evidence of two convictions for crimes of dishonesty had been admitted, the prejudicial effect of admitting other convictions referenced only as "two misdemeanors in 2012 and a felony in 2010 that carried a possible punishment of more than one year in prison" was low. *See Black* 400 S.C. at 27–28, 732 S.E.2d at 890 (finding erroneous admission of a witness's remote manslaughter conviction harmless due to the unchallenged admission of another prior conviction for shooting/throwing a deadly missile). Of further significance is the fact that when law enforcement initially questioned Furtick, he denied that he knew Victim or Husband. Furtick alleged a consensual sexual relationship with

Victim only after SLED's analysis revealed his DNA was a match for the DNA recovered from her sexual assault examination kit. For these reasons—and due to the other evidence detailed above, such as Furtick's odd claims about the reading glasses and not recognizing Victim or Husband in their photos—this was far from a "he said, she said" case. *See State v. Phillips*, 430 S.C. 319, 342, 844 S.E.2d 651, 663 (2020) ("As part of our harmless error analysis, we review 'the materiality and prejudicial character of the error' in the context of the entire trial."); *State v. Stukes*, 416 S.C. 493, 501, 787 S.E.2d 480, 484 (2016) (Kittredge, J., dissenting) (in which the dissent noted it would find harmless the erroneous jury charge because "[i]n addition to the evidence corroborating the victim's testimony, the jury was presented with Stukes's inconsistent statements. Stukes initially denied knowing the victim, much less having had sex with her. When pressed with the evidence, including the DNA match, Stukes remembered the victim and that they had consensual sex.").[8]

For these reasons, Furtick's conviction and sentence are

AFFIRMED.

GEATHERS, J. and HILL, A.J., concur.

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[8] We note that despite the admission of the sanitized convictions, the jury acquitted Furtick of the first-degree burglary charge and convicted him of the lesser included offense of second-degree CSC, not the first-degree CSC for which he was indicted.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David T. Stokes, Appellant,

v.

Oconee County, Wayne McCall, and Edda Cammick, Respondents.

Appellate Case No. 2019-001648

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

Opinion No. 6033
Heard February 16, 2023 – Filed November 8, 2023

AFFIRMED

Joseph Clay Hopkins, of Charleston, for Appellant.

Stephanie Holmes Burton, of Gibbes Burton, LLC, of Spartanburg, and Roberta Elizabeth Barton, of Roberta Barton Law, Ltd. Co., of Seneca, both for Respondent Wayne McCall.

James W. Logan, Jr., and Stacey Todd Coffee, both of Logan & Jolly, LLP, of Anderson, and Roberta Elizabeth Barton, of Roberta Barton Law, Ltd. Co., of Seneca, all for Respondent Edda Cammick.

James W. Logan, Jr., and Stacey Todd Coffee, of Logan & Jolly, LLP, of Anderson, both for Respondent Oconee County.

GEATHERS, J.: In this defamation action, Appellant David T. Stokes seeks review of the circuit court's rulings granting summary judgment to Respondents Wayne McCall and Edda Cammick and denying Stokes's motion to amend his complaint. Stokes also challenges the circuit court's ruling quashing a subpoena Stokes served on the Administrator for Respondent Oconee County (the County). Stokes argues that (1) Councilman McCall and Councilwoman Cammick were not entitled to immunity under the South Carolina Tort Claims Act because their alleged misconduct fell outside the scope of these council members' official duties; (2) the proposed amendment to his complaint would not have been futile because the alleged defamatory statements were not material to the purpose of the meeting at which they were made; and (3) Stokes was entitled to serve a subpoena on the County Administrator in his individual capacity because his prior deposition was taken in his capacity as a representative of the County pursuant to Rule 30(b)(6), SCRCP. We affirm the circuit court's orders granting summary judgment to McCall and Cammick and denying the motion to amend. We decline to address the circuit court's ruling quashing the subpoena as it is not immediately appealable.

FACTS/PROCEDURAL HISTORY

David Stokes worked as the County's "Building Official" from December 2011 to May 2017. "The Building Official is the administrator for building and/or code compliance within Oconee County[] and ensures that proper code is followed in the design, construction, and maintenance of buildings and structures within Oconee County." As such, Stokes oversaw the work of the Building Department's staff. In fall 2016, two county council members, Councilman McCall and Councilwoman Cammick, had several discussions with the County Administrator, Scott Moulder, about complaints the council members had received concerning various county departments, including the Building Department (the Department).[1] McCall and Cammick told Moulder that "they wanted the matters cured" and Moulder's job depended on the "departure" of certain individuals responsible for the departments in question.

[1] For ease of discussion, we henceforth refer to the council members by their last names only. No disrespect is intended.

In March 2017, Cammick shared with McCall her personal experience with the Department when she had applied for a freestanding carport permit. A Department employee, Cynthia Adams, advised Cammick that she needed stamped engineering plans, and a second employee in that office, Casey Neal, asked Cammick where she purchased her carport. According to Cammick, when she told Neal that she purchased her carport from a certain business, Neal shook her head and stated, "They don't help their customers. They . . . won't help you with the building permit process. They won't help you get the documents[.]"

Additionally, Cammick questioned why plans, or even the permit itself, were required for her carport. According to Stokes, Neal requested that he personally meet with Cammick to explain the need for the permit and plans. While Stokes explained to Cammick the reason for these requirements, Adams gave Stokes a sample set of engineering plans to show to Cammick. When Stokes showed Cammick the example, Cammick stated, "You are trying to push me to buy from this guy."[2] Two days later, Cammick returned to the Department to submit the plans for her carport, and the Department e-mailed a copy of the permit to her the following day.

In April 2017, a builder contacted McCall to complain about a Department inspector who failed to appear for an inspection. Because Moulder was on vacation, McCall telephoned Cammick, who contacted Stokes to learn more about the matter and to ask Stokes to "take care of it." When Stokes told Cammick the inspector had a flat tire, Cammick stated that it "was kind of a lame excuse."

Subsequently, at the April 25, 2017 meeting of the county council's Budget, Finance, and Administration Committee, McCall recounted certain citizen complaints about the Department, and Cammick recounted her experience with the Department when she obtained her carport permit. Several statements made about the Department comprise the basis for this defamation action, and the pertinent parts of the meeting transcript are copied into one of two addenda attached to this opinion. (Addendum I). For example, McCall quoted the complaint of a constituent in response to McCall's suggestion that the constituent lodge a complaint: "I'm not saying a word 'cause [if] you make them mad[,] they will make life miserable for you." McCall also relayed a complaint that the Department was making up the rules as they went along and accused the Department of having "a sweet deal going" by "funneling people down to" a certain carport business.

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[2] Stokes explained that he was just using the plans as an example. Cammick later denied that she met with Stokes to discuss her permit application.

Two days after the committee meeting, Moulder met with Stokes to advise him that he would be terminated unless he chose to resign. On the following day, the Oconee County newspaper, *The Journal*, published an article entitled "Oconee, building codes director part ways." The article's contents are copied into a second addendum attached to this opinion. (Addendum II).

On May 1, 2017, Moulder terminated Stokes. Subsequently, Stokes filed a grievance with the County over his termination, and the County's Grievance Committee recommended that the County either produce tangible evidence to refute Stokes's discipline-free personnel file or fully reinstate Stokes with back pay. Nevertheless, Moulder upheld the termination.

According to Stokes, people he knew in the community began to avoid him or had terse conversations with him. He also testified that two or three contractors and certain employees of the City of Seneca told his son, "Your dad's a crook," and "[he] got what he deserved." Another contractor told Stokes, "I heard that stuff," but "I didn't believe it."

Some of Stokes's former employees advised him that a video recording of the April 25 meeting on the County's YouTube channel showed accusations of criminal conduct within the Department. Stokes viewed the recording, and by the end of the month, he filed this defamation action against the County, McCall, and Cammick. The complaint included causes of action for slander per se and wrongful termination. The County and Cammick filed counterclaims for abuse of process and "frivolous lawsuit." Similarly, McCall filed counterclaims for defamation and "frivolous lawsuit."

Subsequently, the County and Cammick filed a joint motion for summary judgment, and McCall filed a separate summary judgment motion. Both motions listed multiple grounds, including immunity under the South Carolina Tort Claims Act.[3] At the motions hearing, Stokes advised the circuit court that he would be filing a motion to amend his complaint to bring claims against Cammick and McCall in their individual capacities, and he did so approximately one week later.

On June 14, 2019, the circuit court issued a Form 4 order denying summary judgment to Cammick and McCall on their abuse of process counterclaims but granting them summary judgment as to Stokes's slander per se claim and dismissing

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[3] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2022).

them from this action. The circuit court also granted summary judgment to the County on Stokes's slander per se claim but denied the County's summary judgment motion as to Stokes's claim for wrongful termination. The circuit court later issued a full written order concluding that Stokes did not sue Cammick and McCall in their individual capacities and even if he had, it would have been improper pursuant to the Tort Claims Act, specifically section 15-78-70 of the South Carolina Code (2005 & Supp. 2022), which requires a government agency or political subdivision to be substituted as the party defendant for a government employee named individually in a tort action.[4]

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[4] Section 15-78-70 provides, in pertinent part,

> (a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b).
>
> (b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties *or* that it constituted actual fraud, *actual malice*, intent to harm, or a crime involving moral turpitude.
>
> (c) . . .
>
> On or after January 1, 1989, a person, when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant *only the agency or political subdivision for which the employee was acting* and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. *In the event that the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant*.

The court also concluded there was no evidence that either Cammick or McCall acted outside of their official capacities as council members and they were absolutely privileged to make the statements in question in the course of their legislative functions.[5] As to Stokes's slander per se claim against the County, the court concluded that Stokes failed to produce sufficient evidence of actual malice and even if he had, section 15-78-60(17) relieves a governmental entity from liability for loss resulting from employee conduct constituting actual malice.[6] Additionally, the circuit court concluded that Stokes failed to show that the statements in question were directed at Stokes individually or that they were false.

On August 6, 2019, the circuit court conducted a hearing on Stokes's motion to amend. In its written order denying the motion, the circuit court stated that Stokes failed to present sufficient evidence "that Cammick or McCall acted outside of their official capacities as [council members]," and "[a]s a result thereof, Cammick and McCall cannot be sued in their individual capacities under section 15-78-70, so adding them as individual defendants would be futile." The court cited absolute legislative privilege as an additional basis for futility. This appeal followed.

LAW/ANALYSIS

I. Summary Judgment

Stokes argues that the circuit court erred by granting summary judgment to McCall and Cammick because their alleged misconduct fell outside the scope of these council members' official duties and, therefore, they were not entitled to immunity under the Tort Claims Act. We affirm the circuit court's order on the basis

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(emphases added). "'Scope of official duty' . . . means (1) acting in and about the official business of a governmental entity and (2) performing official duties." S.C. Code Ann. § 15-78-30 (2005).

[5] The court was referencing the common law privilege, which has been codified in the Tort Claims Act. Specifically, section 15-78-60(1) states: "The governmental entity is not liable for a loss resulting from . . . legislative, judicial, or quasi-judicial action or inaction[.]"

[6] Section 15-78-60 provides several exceptions to the general waiver of immunity set forth in section 15-78-20. Subsection 17 of section 15-78-60 sets forth the exception for "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."

that Stokes failed to produce sufficient evidence of at least two elements of his slander per se claim. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007) (holding that Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case[] and on which that party will bear the burden of proof" (first alteration in original) (quoting *Baughman v. Amer. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545–46 (1991))). Therefore, we decline to address the issue of immunity.

A. Defamation Law

> To prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

McBride v. Sch. Dist. of Greenville Cnty., 389 S.C. 546, 559–60, 698 S.E.2d 845, 852 (Ct. App. 2010). Further, slander

> is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. In a defamation action that is actionable per se, general damages are presumed and need not be proven by the plaintiff.

Goodwin v. Kennedy, 347 S.C. 30, 36–37, 552 S.E.2d 319, 322–23 (Ct. App. 2001) (citation omitted). In the present case, the alleged defamatory statements concern unfitness in one's profession, and therefore, damages are presumed.

Regarding the element of fault, a public-official plaintiff must prove the statements were made with actual malice. *See Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000) ("The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the

defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth."); *see also Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 513 n.9, 506 S.E.2d 497, 503 n.9 (1998) ("The presumption of common law actual malice cannot substitute for the requirement of proof of constitutional actual malice in a case where the First Amendment is involved."); *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 468, 629 S.E.2d 653, 666 (2006) ("Actual malice . . . should not be confused with the concept of [common law] malice as an evil intent or a motive arising from spite or ill will." (alteration in original) (quoting *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991))). Stokes concedes that he was a public official when the alleged defamatory statements were made.

"When ruling on a motion for summary judgment or directed verdict in a defamation action, the court must review the evidence *using the same substantive evidentiary standard of proof the jury is required to use* in a particular case." *Erickson*, 368 S.C. at 464, 629 S.E.2d at 663 (emphasis added). "An appellate court reviews the granting of such a motion using the same standard." *Id.* When the element of constitutional actual malice is required to show fault, as in cases involving a plaintiff who is a public official, "the appropriate standard at the summary judgment phase on [that] issue . . . is the clear and convincing standard." *George v. Fabri*, 345 S.C. 440, 454, 548 S.E.2d 868, 875 (2001); *see also Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330 n.2, 673 S.E.2d 801, 803 n.2 (2009), *overruled on other grounds by The Kitchen Planners, LLC v. Samuel E. Friedman, et al.*, 440 S.C. 456, 892 S.E.2d 297 (2023) (referencing the clear and convincing standard for summary judgment in a libel action brought by a public official as an example of a case requiring a heightened burden of proof). "Unless the [circuit] court finds, based on pretrial affidavits, depositions[,] or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant." *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980).

As we explain below, we conclude that Stokes—a public-official plaintiff—failed to produce sufficient evidence of actual malice and also failed to show that the statements in question were directed at Stokes individually or that they were false. *See Neeley v. Winn–Dixie Greenville, Inc.*, 255 S.C. 301, 308, 178 S.E.2d 662, 665 (1971) (stating that in a defamation action, the challenged statement must "be such that persons reading or hearing it will, in the light of surrounding circumstances, be able to understand that it refers to the person complaining, and it must have been so understood by at least one other person" (quoting 50 Am. Jur. 2d *Libel and Slander* § 143)); *Burns v. Gardner*, 328 S.C. 608, 615, 493 S.E.2d 356, 359 (Ct. App. 1997) ("To prevail in a defamation action, the plaintiff must establish that the defendant's

statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred.").

B. False Message

In *The New York Times Company v. Sullivan*, the plaintiff, a city commissioner who oversaw the police department for the City of Montgomery, Alabama, filed a libel action against the New York Times Company and several individuals, claiming that a full-page advertisement in the Times, which described a "wave of terror" against civil rights activists and sought financial support for their efforts, included false and defamatory statements about the commissioner. 376 U.S. 254, 256–58 (1964). The following statements were the basis of the commissioner's libel claim:

> In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> . . . .
>
> Again and again the Southern violators have answered Dr. [Martin Luther] King[, Jr.]'s peaceful protests with intimidation and violence. They have bombed his home[,] almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years.

376 U.S. at 257–58. The Court recounted the commissioner's assertions as follows:

> Although neither of these statements mentions [the commissioner] by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police

> Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested (Dr. King) seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. [The commissioner] and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

376 U.S. at 258 (footnote omitted). The Court observed:

> Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to [the commissioner] as an individual. Support for the asserted reference must, therefore, be sought in the testimony of [the commissioner's] witnesses. *But none of them suggested any basis for the belief that [the commissioner] himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct*; to the extent that some of the witnesses thought [the commissioner] to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been.

376 U.S. at 289 (emphasis added). The Court held such an assumption was unconstitutional:

> [S]uch a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and *there was no other evidence to connect the statements with [the commissioner]*, the evidence was constitutionally insufficient to support a finding that the statements referred to [the commissioner].

Id. at 292 (emphasis added); *see also Hosp. Care Corp. v. Com. Cas. Ins. Co.*, 194 S.C. 370, 377, 9 S.E.2d 796, 800 (1940) ("Where a publication affects a class of persons without any special personal application, no individual of that class can sustain an action for the publication[.]" (quoting 36 C.J. § 26)); *id.* ("[W]here defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action." (quoting 36 C.J. § 26)); *Holtzscheiter*, 332 S.C. at 508, 506 S.E.2d at 501 ("The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message *about the plaintiff*." (emphasis added)).

In the present case, the alleged defamatory statements did not reference Stokes's name and did not communicate any false message about him as an individual. Nor could these statements, by themselves, be reasonably interpreted to have any "special personal application" to Stokes. Similar to the references in *Sullivan*, the references here included "the Building Codes Department," "the Department," "they," and "them."

Although McCall mentioned that Cammick called "the head of the Building Codes," this was describing Cammick's investigation into a contractor's complaint about a specific unnamed inspector who failed to appear for an inspection. The "natural and reasonable import" of this sole reference to Stokes as an individual is that when Cammick called Stokes about a scheduling issue with a building inspector, Stokes explained that the inspector had a flat tire. *Cf. Burns*, 328 S.C. at 615, 493 S.E.2d at 360 (addressing the language in an advocacy group's position paper and stating that this court would not "hunt for a forced and strained construction to put on ordinary words, but will construe them fairly, according to their natural and reasonable import, in the plain and popular sense in which the average reader

naturally understands them" (quoting *Hosp. Care Corp.*, 194 S.C. at 379, 9 S.E.2d at 800)). In his deposition, Stokes confirmed that the reason for the scheduling problem in question was that the inspector had a flat tire. Further, the statement that the flat tire was "a lame excuse" was directed at the unnamed inspector.

We acknowledge that when Stokes viewed the meeting video on the County's YouTube channel, he could have connected some of the statements about carports with himself because of his personal involvement in the permit transaction with Cammick. However, the language used in the committee meeting, by itself, could not be reasonably interpreted by someone with no personal knowledge of the transaction as referring to Stokes. *Cf. Holtzscheiter*, 332 S.C. at 514, 506 S.E.2d at 504 (rejecting the newspaper's argument that a murder victim's mother failed to prove the statement that the victim lacked family support was "of and about her" when "there was evidence from which a jury could have found the statement was 'of and about'" the mother); *id.* ("While the general rule is that defamation of a group does not allow an individual member of that group to maintain an action, this rule is not applicable to a small group."). Stokes has not indicated how many individuals worked for the Department at that time, and we have not seen this information in the record. Therefore, we do not consider the Department to be a small group. *See Duckett by Duckett v. Payne*, 279 S.C. 94, 96, 302 S.E.2d 342, 343 (1983) ("[T]he appellant carries the burden of convincing this [c]ourt that the trial court erred.").

Stokes argues for the first time in his Reply Brief that (1) the act of termination may be considered defamation under South Carolina law, and (2) the fact that Stokes was terminated only a few days after the committee meeting made it clear that McCall and Cammick were referring to him when they made the alleged defamatory statements. First, this argument is not properly preserved. *See ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct. App. 2021) ("[A] party cannot raise an issue for the first time in an appellate reply brief."). Further, there is no evidence to indicate that the basis for Moulder's termination of Stokes was anything other than Stokes's mere official responsibility for the conduct of his staff.

We also acknowledge that the April 28, 2017 article in *The Journal* inferred a connection between Stokes' termination and the content of the alleged defamatory statements. However, nothing in the article indicates that the author made this connection on the basis of anything other than Stokes's official responsibility for the conduct of his staff. *Cf. Sullivan*, 376 U.S. at 289 (stating that none of the city commissioner's witnesses "suggested any basis for the belief that [the commissioner] himself was attacked in the advertisement beyond the bare fact that he was in overall

charge of the Police Department and thus bore official responsibility for police conduct").

As to the treatment Stokes received from members of the community after his termination, he did not present any evidence showing the basis for their connection between the alleged defamatory statements and Stokes as an individual. *Cf. Sullivan*, 376 U.S. at 289 (stating that none of the city commissioner's witnesses "suggested any basis for the belief that [the commissioner] himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct"). Moreover, as we explain below, we question whether there is sufficient evidence of the falsity of *any* of the statements made by McCall and Cammick. Contrary to counsel's assertion during oral argument, deposition testimony stating that a witness knows of no evidence to support the statements in question does not constitute evidence of the falsity of those statements.

Based on the foregoing, Stokes failed to establish that the alleged defamatory statements communicated false messages about Stokes as an individual.

C. Actual Malice

Stokes also failed to show clear and convincing evidence of actual malice. "The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth." *Elder*, 341 S.C. at 114, 533 S.E.2d at 902. Further, this standard applies even at the summary judgment stage. *George*, 345 S.C. at 454, 548 S.E.2d at 875.

Here, even in the light most favorable to Stokes, the evidence is less than clear and convincing. The standard for whether a defendant showed reckless disregard for the truth is a strict one:

> A "reckless disregard" for the truth . . . requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant **in fact entertained serious doubts as to the truth** of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) (emphasis supplied). There must be evidence the defendant had a "**high degree of awareness**

> **of . . . probable falsity**." *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (emphasis supplied).
>
> Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. Actual malice may be present, however, where one fails to investigate *and there are obvious reasons to doubt the veracity of the informant*.
>
> The actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. It is insufficient to show the defendant made an editorial choice or simply failed to investigate or verify information; there must be evidence at least that the defendant purposefully avoided the truth.

Elder, 341 S.C. at 114, 533 S.E.2d at 902 (third emphasis added) (some citations omitted).

First, there is insufficient evidence of the falsity of the statements made by McCall and Cammick. The clearest example of falsity is the following statement: "[T]hey sold Ms. Cammick a building permit." The implication was that the permit was unnecessary, and therefore, the Department's collection of a fee for the permit was unethical. Yet, in her deposition, Cammick admitted Moulder confirmed that the county code required the permit.

Nevertheless, Cammick's knowledge of what Moulder confirmed cannot be transferred to McCall, who made the statement in question. Thus, there is no evidence that McCall had the requisite "'high degree of awareness of . . . probable falsity.'" *Elder*, 341 S.C. at 114, 533 S.E.2d at 902 (quoting *Garrison*, 379 U.S. at 74). Further, it is unreasonable to infer from Cammick's preceding statements that she thought the permit was unnecessary in light of her testimony that although she understood the code required her to obtain a permit, she did not understand why the code would require a building permit for something that was not considered real estate. *See Osborne*, 346 S.C. at 7, 550 S.E.2d at 321 ("In determining whether any triable issues of fact exist, the evidence and all *reasonable* inferences therefrom must be viewed in the light most favorable to the non-moving party." (emphasis added)). The explanation in her testimony is consistent with her actual words in the

committee meeting, quoting the assessor who appeared at her home: "'What am I doing here? This isn't a permanent structure. . . . [T]his isn't going to be included in your assessment.'"

Moreover, we have found no probative evidence of the falsity of the other alleged defamatory statements, and this necessarily impacts Stokes's ability to show actual malice.[7] Further, although Stokes's testimony denies the truth of the alleged defamatory statements, he may not have had personal knowledge of any "sweet deal" his *employees* could have arranged or any misapplication of the code by his inspectors.

As to reckless disregard for the truth, McCall made the following statement about contractors' complaints during his deposition:

> Well, you get calls all the time from builders. Sometimes – and *you have to take all of them with a grain of salt. You don't know whether they are true or not*, but then over the course of time, the same complaints keep surfacing from different people over and over again. Then at one point, apparently it reached a boiling point and all these builders showed up at my shop. . . . [B]ut the same complaint comes over and over again. The complaint is that -- once again, I am not a builder, but they said they are making the rules up.

(emphasis added).

Later in McCall's deposition, the following exchange occurred:

> Q. Do you recall saying that the building codes department had a sweet deal going?
>
> A. Yes, sir.

---

[7] The most Stokes was able to produce was the testimony of council members that they had no evidence to support certain alleged defamatory statements made in the committee meeting. For example, in his deposition, McCall replied, "No" when asked if he was aware of any "written evidence of a sweet deal going." Cammick was asked the same question in her deposition, and she replied, "No."

Q. Can you explain that to me?

A. We['re] getting -- this is regarding the metal carports, and it came up, [we] got complaints from different people selling carports. First off, *you take it with a grain of salt*, maybe, you know, this, that and the other.

(emphasis added). Perhaps McCall should have investigated to verify the truth of these complaints. Yet, given the very high standard our courts have imposed for a conclusion that a defendant showed reckless disregard for the truth, this testimony is less than clear and convincing. *See Elder*, 341 S.C. at 114, 533 S.E.2d at 902 ("It is insufficient to show the defendant . . . simply failed to investigate or verify information; there must be evidence at least that the defendant *purposefully avoided the truth*." (emphasis added)).

Based on the foregoing, we affirm the circuit court's order granting summary judgment to McCall and Cammick.

II. Motion to Amend

Stokes also argues the circuit court erred by declining to allow him to amend his complaint to assert claims against McCall and Cammick in their individual capacities. However, given Stokes's failure to produce sufficient evidence on at least two elements of his slander per se claim, any amendment to his complaint would be clearly futile. *See Hansson*, 374 S.C. at 357, 650 S.E.2d at 71 (holding that Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case[] and on which that party will bear the burden of proof.").

Therefore, we affirm the circuit court's denial of the motion to amend on this ground. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019) ("[A] trial court may deny a motion to amend if the amendment would be clearly futile."). We express no opinion on the circuit court's own reasons for concluding that the amendment would be futile.

III. Motion to Quash

Stokes contends the circuit court erred by quashing the deposition subpoena served on Moulder because "the overwhelming consensus in other jurisdictions is that '[t]he same person may be deposed as a fact witness and a corporate representative in separate depositions.'" We decline to address this assignment of error because the order quashing the subpoena is not immediately appealable.

Section 14-3-330 of the South Carolina Code (2017) provides for appellate jurisdiction over the following:

> (1) Any intermediate judgment, order or decree in a law case *involving the merits* in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order *affecting a substantial right* made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

(emphases added).

In *Ex parte Wilson*, our supreme court held that an order quashing a subpoena duces tecum served on a non-party prior to the commencement of proceedings to enforce a judgment "neither involve[d] the merits nor affect[ed] a substantial right" and was, therefore, not immediately appealable. 367 S.C. 7, 13–14, 625 S.E.2d 205, 208 (2005). However, in the interest of judicial economy, the court addressed the novel issue of whether " post-judgment discovery may be properly conducted under Rule 69, SCRCP, without the issuance of a writ of execution or the commencement of supplementary proceedings." *Id.* at 14, 625 S.E.2d at 208.

Further, "[c]ourts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005). Yet, in *Brown*, the court declined to address the denial of a motion to dismiss certain claims, which was considered interlocutory, because the issue "lack[ed] a sufficient nexus or companionship" to the appealable issue, in that case, the denial of a preliminary injunction preventing a special audit, to justify the court's exercise of immediate review. *Id.*

Here, the circuit court's ruling quashing the subpoena served on Moulder does not have a sufficient nexus to either the granting of summary judgment for McCall and Cammick or the denial of Stokes's motion to amend. Further, issue novelty does not compel the panel to address the issue in the interest of judicial economy. Although Stokes claims there are no published opinions by a South Carolina appellate court concerning this issue, the County does not dispute the permissibility of two separate depositions for the same person as a fact witness and a corporate representative, respectively. Rather, the County sought to quash the subpoena on the ground that Stokes had already questioned Moulder in both capacities during the 30(b)(6) deposition.[8]

Based on the foregoing, we decline to address this issue because it is "not presently subject to appellate review." *Brown*, 366 S.C. at 362, 622 S.E.2d at 538.

[8] The County asserted the additional ground of attorney-client privilege. The County argued that its attorney spoke with Moulder "on behalf of [the] County, who was his employer, and therefore that privilege attache[d] throughout the entire lawsuit." The circuit court rejected this argument.

CONCLUSION

Accordingly, we affirm the circuit court's rulings granting summary judgment to McCall and Cammick and denying the motion to amend the complaint. We decline to address the circuit court's order quashing the subpoena Stokes served on Moulder.

AFFIRMED.

WILLIAMS, C.J., and VERDIN, J., concur.

ADDENDUM I

MR. MCCALL:

> [O]ne of the other things I want to bring up is the Building Codes Department. All of us [are] getting complaints. . . . [T]he last Easter weekend, let's make specific instances. . . . I get a call. Well, we're set up to pour a footing, a foundation, and the [b]uilding [i]nspector shows up and the concrete truck says he's going to be an hour late. Well, he said, "I ain't waiting. I'm leaving. You just reschedule for Monday." Well, these people call me about it. I say "Ah, golly." So I can't get . . . a hold, so I call Katie. . . . So finally she got a hold of [Cammick] and [Cammick] investigated. Well, the guy – [Cammick] called the head of the Building Codes and the excuse was, and [Cammick] was right, it's a lame excuse. "I had a flat tire." Even Mr. Moore said, "My 14 year-old kid can change a tire." Or is he – he just wanted – didn't want to drive that only vehicle. That vehicle just – he said, "What was going on here?"
>
> The Building Codes. Now, here's what I'm getting into. They -- I said, "Well, I've talked to plumbers, electricians, everybody." I said, "Why don't you complain? Why don't you go to the Administrator? I don't handle personnel policy. I don't -- you know, it's not my job." He said,

"Well, if you complain they will come after you. You'll never get another inspection again." I talked to a plumber today at lunch. He said, "No, I'm not saying a word 'cause you make them mad they will make life miserable for you." They don't -- Oconee County, you're on the phone with one of the electricians. We don't even follow the National Electric Code. It's -- it's like we make up the rules as we go and -- and I asked Mr. Moore for a cost-benefit analysis of Building Codes, and I'm going to get into this a little bit further. Are they -- are they just here to embarrass the entire Council? Are they -- are they making up the rules or is this a power play that they're instituting? They're -- they're -- they forget they work for the people of Oconee County. The people of Oconee County. The builders don't work for them. They have to be available for the builder because they serve the building community.

The next thing: carports and car sheds are temporary structures. They -- they're not -- you buy them. It's like buying a tent or whatever. It ain't permanent. After about three or four years you'll find out how not permanent they are 'cause they fall apart. Well, they . . . got a sweet deal going. They're recommending that you've got to go down to a certain other builder or seller of carports and sheds and he's the only person that can stamp the drawings. I asked Mr. Moore, I said, "Well, why don't you go to the Board of Licenses in South Carolina and find out whether this guy has got a PE number. He's claiming to be a structural engineer." As of this meeting, no such number exists. I'm looking for some papers right now, but Building Codes is . . . funneling people down to his office. And I see Mr. Lee is out in the hall. He was going to lend some comments. He's -- he' s over the Realtor, represents the Realtor's Association. Somebody tell him to get in here and get off the phone.

. . .

But this is -- this is -- it's embarrassing for us that are elected because the people elected us and then . . . these

Building Codes is -- is making up rules. Not serving. They -- they say, "Well, you've got to -- you just have to reschedule." Well, heck, if the concrete truck is on the way you can't stop time, tide, or the guy driving the concrete truck. You -- you can't do it. You're going to pay for that concrete regardless. And there's no reason. It's not Scott's problem for being out of town. He was out of town on legitimate vacation.

MR. MOORE:[9]

But if he's got ten more inspections lined up for the rest of that day and one scheduled for a certain time immediately following that one, and he's now going to wait around for an hour and miss the next one, then that contractor is going to be mad because he missed that one. So it does make it difficult sometimes to just completely accommodate the needs of a particular time.

MR. MCCALL:

I mean --

MR. MOORE:

Again, I don't know the specifics of that one. I'm just speaking in general terms.

MR. MCCALL:

Well, Edda could tell you what the excuse was. . . . .

. . . .

MS. CAMMICK:

[9] We believe the speaker identified as "Mr. Moore" was actually Scott Moulder, the County's Administrator.

I had -- as you know I had built one of those carports. And I know for a fact that the Building Codes Department discourages you from buying from certain people and encourage you -- encourages you to buy from others. But my bigger problem was the Assessor showed up at my property today and he said, "what am I doing here? This isn't a permanent structure. We're not -- you know, this -- this isn't going to be included in your assessment." And we said to him, "Oh, well, but since you're here we knocked down our deck so can you go back and re-measure this stuff because I know nobody came out for that." So he did. He went through the entire property and -- and kind of redid everything. But the thing he came for he -- he alleged that he didn't need to be there for that particular.

MR. MCCALL:

So they sold Ms. Cammick a building permit.

MS. CAMMICK:

Well, that's what -- you know, I don't mind but we need to streamline that process as well for a pre-engineered structure like that.

UNKNOWN COUNCIL MEMBER:

Madam chair, if I may, are we under Strategic Planning Meeting Summary & Discussion?

MS. CAMMICK:

We are, but one of the things we were talking about is government is slow to act in this kind of --

UNKNOWN COUNCIL MEMBER:

Okay.

MS. CAMMICK:

It's part of that discussion in a way. It's issues that have come up that need to be addressed to make -- or to either streamline our work or make it more efficient.

MR. MCCALL:

Ms. Cammick?

MS. CAMMICK:

Uh-huh.

MR. MCCALL:

Could I get Mr. Lee to come up here?

MS. CAMMICK:

Quickly.

MR. MCCALL:

Come on up here.

. . . .

MR. LEE:

So I was outside. What am I talking about?

MR. MCCALL:

Well, the same thing we were talking about this morning, not the (inaudible) house, but the other thing.

MR. LEE:

Uh- huh.

MR. MCCALL:

Building Codes.

MR. LEE:

Okay. What specifically?

MR. MCCALL:

Tell me your take on it.

MR. LEE:

There's -- in the past talking to multiple builders there's a -- they do get slowed down frequently with -- with the permitting process and the unavailability of – of inspectors.

MS. CAMMICK:

Okay. So that's your two major concerns?

MR. LEE:

Yeah.

MS. CAMMICK:

All right.

MR . LEE:

That's -- that's the conversation that we've had with -- with multiple ones.

MS. CAMMICIK:

Okay. Thank you.

MR . MCCALL:

All right. That's it.

. . . .

MS. CAMMICK:

All right. I think Mr. Moulder gets the general idea that that Department needs some work. Okay.

ADDENDUM II

Oconee, building codes director part ways

Posted on April 28, 2017

By Steven Bradley

The Journal

WALHALLA – Oconee County is in the market for a new building codes director, as county administrator Scott Moulder confirmed Friday that David Stokes[,] who previously held the role[,] is no longer employed with the county[.]

Scott Carroll has been asked to serve as interim director until a formal replacement can be found[,] Moulder told The Journal[.]

The change comes just days after a meeting of county council's budget committee in which members delivered sharp criticism of the department[.]

Councilman Wayne McCall said he'd received numerous complaints from those who dealt with the Building Codes Department about preferential treatment being given to certain contractors over others[.]

"I talked to a plumber today and he said 'If you make them mad[,] they will make life miserable for you,'" he said[.]

"Are they just here to embarrass the entire council? Are they making up the rules? Is this a power play that they're instituting? They forget that they work for the people of Oconee County[.] The builders don't work for them[.] They have to be available for the builders because they serve the building community[,]" McCall added[.]

McCall also alleged that the Building Codes Department "had a sweet deal going" in which staff would recommend that the public had to use "a certain other builder of carports and sheds, and (that builder is) the only person that can stamp the drawings[.]"

But McCall said the county had not been able to confirm that the builder in question was a licensed professional engineer but that "building codes is funneling people down to his office[.]"

"It's embarrassing for us that are elected because the people elected us and Building Codes is making up rules and not serving (the public)[,]" he said[.]

Council chairwoman Edda Cammick also weighed in[,] saying that she had recently built "one of those carports" that McCall had referred to and verified his claims[.]

"I know for a fact that the Building Codes Department discourages you from buying from certain people and encourages you to buy from others[,]" she said[.] "But my bigger problem is the assessor showed up at my property (Tuesday) and he said, "What am I doing here? This isn't a permanent structure? This isn't going to be included in your assessment[.]"

McCall pointed out the impact[.] "So they sold Mrs. Cammick a building permit[.]"

She replied[,] "I don't mind but we need to streamline that process as well for a pre-engineered structure like that[.]"

"I think Mr[.] Moulder gets the general idea that that department needs some work[,]" Cammick concluded[.]

sbradley@upstatetoday.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Dent, Appellant.

Appellate Case No. 2018-001257

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

Opinion No. 6034
Submitted September 6, 2023 – Filed November 8, 2023

AFFIRMED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

WILLIAMS, C.J.: In this criminal matter on remand from the South Carolina Supreme Court,[1] Charles Dent appeals his convictions for first degree criminal

[1] In *State v. Dent*, 440 S.C. 449, 892 S.E.2d 294 (2023), the supreme court reversed this court, finding that although the trial court did err in failing to grant Dent's

sexual conduct (CSC) with a minor and disseminating obscene material to a minor. We affirm.

FACTS/PROCEDURAL HISTORY

In August 2014, following the procurement of warrants by the Beaufort County Sheriff's Department, Dent was arrested at his home in Alabama for various charges stemming from alleged sexual abuse of his granddaughter (Victim).[2] At the time of the alleged abuse, Victim lived in South Carolina with her mother (Mother) and her brother. Victim and her family lived in South Carolina from 2012 through 2014, and Dent would periodically stay with them.[3] During this period, Victim and her family lived in two different townhouses on the same street (House One and House Two).

In May 2014, Mother began dating John Camelo. Thereafter, Victim made an initial disclosure of abuse by Dent to Camelo. Camelo notified Mother, and Mother reported the abuse to law enforcement. Thereafter, Victim underwent a forensic interview at Hopeful Horizons regarding her initial disclosure (First Interview). Following the interview, Victim made a second disclosure of abuse by Dent to Camelo. Victim subsequently went to Hopeful Horizons for a second forensic interview (Second Interview).

In October 2014, a Beaufort County grand jury indicted Dent with two charges of first degree CSC with a minor (2014-GS-07-01673; 2014-GS-07-01674) (the CSC Indictments) and two charges of disseminating obscene material to a minor (2014-GS-07-01671; 2014-GS-07-01672) (the Dissemination Indictments).

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request to charge the jury with a *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), instruction on circumstantial evidence, the error was harmless. *See State v. Dent*, 434 S.C. 357, 863 S.E.2d 478 (Ct. App. 2021) (holding the trial court erred in failing to charge the jury with a *Logan* instruction when the defendant requested the charge and remanding the matter for a new trial). The supreme court subsequently remanded the case back to this court to address Dent's remaining issues on appeal, which we now do in turn.

[2] Dent also faced charges in Alabama for child pornography.

[3] Victim was seven to nine years old during this time.

Prior to trial, Dent moved to quash the Dissemination Indictments, and the trial court denied his motion. In May 2018, the case proceeded to trial during which Victim and Dent both testified.[4] The jury found Dent guilty of both dissemination charges and one charge of first degree CSC, and the trial court sentenced him to an aggregate term of thirty years' imprisonment.[5] Dent subsequently moved for a new trial, and the court denied his motion. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in failing to quash the Dissemination Indictments?

II. Did the trial court err in admitting photographs of Victim?

III. Did the trial court err in admitting Tessa Trask's expert testimony?

IV. Did the trial court err in admitting Camelo's testimony?

V. Did the trial court violate Dent's Sixth Amendment rights in sustaining the State's objection to Dent's cross-examination of Camelo?

VI. Did the trial court err in denying Dent's motion for a directed verdict on one of the CSC Indictments?

VII. Did the trial court err in instructing the jury on the definition of sexual battery?

VIII. Is Dent entitled to a new trial pursuant to the cumulative error doctrine?

STANDARD OF REVIEW

In criminal cases, the appellate court reviews the underlying matter for an abuse of discretion, which occurs when the findings of the trial court lack evidentiary support or are controlled by an error of law. *State v. Hopkins*, 431 S.C. 560, 568–69, 848 S.E.2d 368, 372 (Ct. App. 2020).

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[4] Victim was thirteen years old at the time of trial.
[5] The jury found Dent not guilty of first degree CSC on Indictment No. 2014-GS-07-01674.

LAW/ANALYSIS

I. Failure to Quash Indictments

Dent argues the trial court erred in failing to quash the Dissemination Indictments because the State failed to follow the procedural requirements established in sections 16-15-305 and 16-15-435 of the South Carolina Code (2015), which require the solicitor's office to apply for any relevant arrest and search warrants. Dent therefore contends the trial court erred in failing to suppress the photographs collected from electronic devices obtained from the search of Dent's home. Additionally, Dent asserts the trial court erred in denying his motion for a directed verdict on the Dissemination Indictments because the State failed to comply with the aforementioned statutory prerequisites. We disagree.

"The indictment is a notice document." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). "A challenge to the sufficiency of an indictment must be made before the jury is sworn." *State v. Tumbleston*, 376 S.C. 90, 96, 654 S.E.2d 849, 852 (Ct. App. 2007). "A ruling on a timely objection . . . that an indictment is not sufficient will result in the quashing of the indictment unless the defendant waives presentment to the grand jury and pleads guilty." *Id.* at 97, 654 S.E.2d at 853. "[A]n indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." *Id.* at 98, 654 S.E.2d at 853.

After the Beaufort County Sheriff's Department obtained search and arrest warrants, a grand jury indicted Dent for multiple counts of first degree CSC with a minor and dissemination of obscene material to a minor. As to the Dissemination Indictments, Dent was specifically indicted for violating section 16-15-355 of the South Carolina Code (2015). Section 16-15-355 provides:

> An individual eighteen years of age or older who knowingly disseminates to a minor twelve years of age or younger material which he knows or reasonably should know to be obscene within the meaning of Section 16-15-305 is guilty of a felony and, upon conviction, must be imprisoned for not more than fifteen years.

Prior to trial, Dent moved to quash the Dissemination Indictments, asserting they were defective because the solicitor did not obtain the search and arrest warrants as required by subsection 16-15-435(A), which states "[a] search warrant or arrest warrant for a violation of Sections 16-15-305, 16-15-315, or 16-15-325 may be issued only upon request of a circuit solicitor." The trial court denied Dent's motion.

The trial court properly refused to quash the Dissemination Indictments. Although subsection 16-15-435(A) does require a circuit solicitor to obtain the search or arrest warrants for a statutory violation, it clearly states such a requirement *only applies* to violations of sections 16-15-305, 16-15-315, and 16-15-325. The Dissemination Indictments indicate Dent violated section 16-15-355. Therefore, subsection 16-15-435(A) does not apply, and Dent's argument is without merit. Further, the indictments provided sufficient notice of the crimes charged as required by our precedent. *See Gentry*, 363 S.C. at 102, 610 S.E.2d at 500 ("The indictment is a notice document."); *Tumbleston*, 376 S.C. at 98, 654 S.E.2d at 853 ("[A]n indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood."). Accordingly, we affirm the trial court on this issue.[6]

II. Admission of Photographs

Dent argues the trial court erred in admitting photographs of Victim when the photographs were not relevant and the State failed to authenticate them or establish a chain of custody. Specifically, Dent argues the trial court erred in admitting State's Exhibits 1, 3, and 4 (Group One Photos) because they were not relevant to establishing his guilt. Dent also asserts the trial court erred in admitting State's

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[6] Because the trial court did not err in declining to quash the Dissemination Indictments, this court need not address Dent's remaining arguments as to whether the trial court erred in failing to suppress the photographs obtained from the search of Dent's home and in denying his motion for a directed verdict on the Dissemination Indictments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

Exhibits 6, 11, 13, and 15 (Group Two Photos) because the prejudicial effect substantially outweighed any probative value. We disagree.

During the search of Dent's home in Alabama, law enforcement seized multiple electronic devices that were in plain view, including a camera and a camcorder. Law enforcement subsequently obtained a search warrant for the seized electronic devices and recovered various photographs of Victim. The State originally sought to introduce evidence of child pornography found on Dent's seized computer but ultimately decided not to present it. The State additionally sought to admit the photos of Victim found on Dent's camera and camcorder and proffered testimony from two Alabama law enforcement officials. However, the trial court found the State failed to properly authenticate the photos because the former law enforcement official who extracted the photos was unavailable to testify at trial. The State then sought to admit the photos through Victim's testimony and recalled her as a witness, and the trial court admitted the photos.[7]

During her testimony, Victim identified herself in each of the photos and verified the photos were taken at Houses One and Two when she lived in South Carolina from 2012 to 2014. The Group One Photos included three photos of Victim: (1) Victim at House 2 on her birthday (State's Ex. 1), (2) Victim cooking with Dent in the kitchen of House One (State's Ex. 3), and (3) Victim with Dent's pet rabbit in the guest bedroom where Dent stayed in House Two (State's Ex. 4). The Group Two Photos were more sexual in nature, but Victim was clothed in all of the photos. The Group Two Photos included three photos in which Victim was lying on a bean bag with her legs spread and pulled up towards her shoulders (State's Ex. 11) and standing facing the camera with her torso bent forwards with a view down her shirt (State's Ex. 6, 13). This group of photos also contained an image of a young girl's legs (State's Ex. 15). Victim identified herself in the photo, stating she recognized the green shorts she wore to her dance classes that she took while living in South Carolina. Victim further testified that although she was not positive who took the Group Two Photos, she believed it was Dent.

[7] Following the trial court's finding that the State failed to sufficiently establish a chain of custody for the photographs through the Alabama witnesses, the State did not make any assertions or suggestions to the jury that the photos came from Dent's camera or camcorder.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Hawes*, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018) (quoting *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)). "As a general rule, all relevant evidence is admissible." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014). However, "[a]ll evidence must be authenticated." *State v. Green*, 427 S.C. 223, 229, 830 S.E.2d 711, 714 (Ct. App. 2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020) ("For the reasons set forth by the court of appeals, we affirm the trial court's authentication determination and admission of the social media posts without further comment."). "The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims." *Id.* at 230, 830 S.E.2d at 714; *see also* Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). "[T]he burden to authenticate . . . is not high." *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (alterations in original) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

As to authentication, the trial court did not abuse its discretion in finding the State authenticated the Group One and Group Two Photos. Victim identified herself in each of the photos and confirmed the photos were taken at Houses One and Two. Although Victim's face was not in State's Ex. 15, Victim testified she believed herself to be the subject of the photo because she recognized her green shorts that she wore to dance lessons that she attended while living there. Accordingly, we find Victim's personal knowledge of the scene and subject of the photos was sufficient to authenticate them. *See State v. Hurell*, 424 S.C. 341, 353–54, 818 S.E.2d 21, 27 (Ct. App. 2018) ("Normally, it is sufficient for the admission of photographs that a person familiar with the subject, such as a scene, testify that the photographs truly represent what they purport to depict." (quoting Alex Sanders & John S. Nichols, *Trial Handbook for South Carolina Lawyers* § 19:12 (Sept. 2017))). Further, because Victim authenticated the photos through her testimony, the State was not required to establish a chain of custody for the photos. *See State v. Aragon*, 354 S.C. 334, 337, 579 S.E.2d 626, 627 (Ct. App. 2003) (holding establishing a chain of custody was not necessary when the evidence was "otherwise authenticated"); *see also United States v. Howard-Arias*, 679 F.2d 363,

366 (4th Cir. 1982) ("The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence.").

Regarding the relevance of the Group One Photos, we find the trial court did not err in admitting them because they corroborated Victim's and other witnesses' testimony that Victim lived in Houses One and Two during the time of the alleged abuse and that Dent stayed in both houses when he visited. The photos also corroborated Victim's age at the time of the abuse. *See State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it."); *see also Collins*, 409 S.C. at 534, 763 S.E.2d at 27 ("As a general rule, all relevant evidence is admissible."); Rule 401, SCRE (providing that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Finally, we hold the trial court properly found the Group Two Photos were admissible under Rule 403, SCRE. *See* Rule 403 (providing that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"); *Collins*, 409 S.C. at 534, 763 S.E.2d at 28 ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003))). Although the Group Two Photos were more sexual in nature, we find their probative value in corroborating Victim's testimony and forensic interviews and in establishing the elements of the offenses charged outweighed any prejudicial effect.

Based on the foregoing, we hold the trial court did not abuse its discretion in admitting the photographs of Victim. *See Hawes*, 423 S.C. at 129, 813 S.E.2d at 519 ("The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." (quoting *Johnson*, 338 S.C. at 122, 525 S.E.2d at 523)). Accordingly, we affirm the trial court as to this issue.

III. Admission of Testimony

A. Trask's Testimony

Dent contends the trial court erred in admitting the expert testimony of Tessa Trask. Specifically, Dent argues the trial court erred in failing to determine the reliability of Trask's testimony. We agree.

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020) (quoting *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015)). "A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion whe[n] the ruling is unsupported by the evidence or controlled by an error of law." *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018).

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. "Before admitting expert testimony, a trial court must qualify the expert and determine whether the subject matter of the expert's proposed testimony is reliable, as required by Rule 702, SCRE." *Prather*, 429 S.C. at 599, 840 S.E.2d at 559. "While both scientific and nonscientific expert testimony require the trial court make a finding of reliability, there is no formulaic approach for determining the reliability of nonscientific testimony." *Jones*, 423 S.C. at 638–39, 817 S.E.2d at 272.

During a pretrial hearing, the State sought to qualify Trask as an expert witness. Trask testified as to her qualifications, stating she worked as a counselor and forensic interviewer at Hopeful Horizons. Trask clarified she presently only had a provisional counseling license but would receive her full license the following August after completing the remainder of her required clinical hours. When asked what qualified her as an expert in the field, Trask responded, "I would say my training and my clinical experience would make me an expert . . . I'm referring to my training in general, all of my training, . . . including my forensic training." When Dent sought further information as to her training, the trial court sustained an objection by the State. Dent subsequently objected to the admission of Trask's testimony, asserting the State had failed to show that the substance of Trask's proposed testimony was reliable and requested the trial court assess the reliability through a proffer of her testimony. The trial court declined Dent's request, instead electing to have the State proffer "bullet points" of her intended testimony. Dent

thereafter renewed his objection, arguing the substance of Trask's testimony was still indiscernible. The following exchange occurred:

> Court: Well, you can object at the appropriate time. But I don't think that—I mean, Counsel gave you the bullet point of what she was going to testify to. You want the nuts and bolts. I can't give you the nuts and bolts tonight.
>
> Dent: I want you to review the nuts and bolts as you're required to do under *Watson v. Ford Motor Company* and *Chavis* as the gatekeeping function. That's what I'm asking for.

The trial court took the matter under advisement, deferring its ruling until the following morning. The trial court subsequently qualified Trask as an expert in behavioral characteristics of child abuse, noting Dent's objection. Dent renewed the objection at trial.

We find the trial court failed to appropriately dispense of its gatekeeping duties as required by our precedent. *See Prather*, 429 S.C. at 599, 840 S.E.2d at 559 ("Before admitting expert testimony, a trial court must qualify the expert and determine whether the subject matter of the expert's proposed testimony is reliable, as required by Rule 702, SCRE."); *see also State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) ("All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration."). Although Trask testified as to her education and professional qualifications, the State failed to establish that the substance of her testimony was reliable. When asked what specifically informed her assessments and opinions, Trask provided vague responses, and the trial court prevented Dent's attempt at further clarification. Although we recognize there is no formulaic approach in determining the reliability of non-scientific expert testimony, the record contains no indicia of reliability as to Trask's proposed testimony. Thus, the trial court failed to fulfill its gatekeeping function by declining to analyze the reliability of the testimony. *See, e.g.*, *Watson v. Ford Motor Co.*, 389 S.C. 434, 452, 699 S.E.2d 169, 178 (2010) ("In our view, the trial court's error in admitting Dr. Anderson's testimony is largely based on solely focusing on whether he was qualified as an

expert in the field of electrical engineering and failing to analyze the reliability of the proposed testimony.").

However, we find this error did not prejudice Dent's defense. *See id.* at 448, 699 S.E.2d at 176 ("Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence."). At trial, Trask testified solely as to general observations in behavior of children who suffered abuse. Trask further averred she was not involved in Victim's case and had not reviewed Victim's files. Accordingly, we affirm the trial court as to this issue.

B. Camelo's Testimony

i. Bolstering Testimony

Dent argues the trial court erred in allowing Camelo, Mother's ex-boyfriend, to provide lay opinion testimony as to whether Victim had been sexually abused. Dent contends this testimony contained improper bolstering in violation of the holdings of *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015), *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), and *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). We disagree.

During trial, the State called Camelo as its first witness. Camelo testified he dated Mother in 2014 for four or five months and spent time with Victim during their relationship. On direct examination, the State questioned Camelo about his prior law enforcement experience but did not seek to qualify him as an expert. Dent objected to the questioning, asserting the State was attempting to "portray Mr. Camelo as somebody who had special training in order to be able to detect child abuse or sexual abuse." The trial court held an in camera hearing during which the State proffered the remainder of Camelo's testimony regarding his interactions with Victim. Following the proffer, the trial court limited Camelo's testimony, stating "there will be no questions regarding whether or not he had an opinion regarding abuse."

Thereafter, Camelo testified he had personal experience with sexual abuse, stating he was sexually abused by a family friend between the ages of twelve and thirteen. Camelo further testified he had personal experience with raising young girls because he raised his stepdaughter. When asked about his time spent with Victim, Camelo testified he noticed "red flags" in her behavior. Specifically, Camelo

stated he noticed "[g]estures of a sexual nature that a nine-year-old . . . wouldn't normally know without having been shown or taught by someone." According to Camelo, Victim liked to kiss him on the cheek, grope his groin area, and hug him "more than you would expect [for] someone [who] isn't her guardian or parent raising her." Based on these behaviors, Camelo asked Victim "if anyone had done anything inappropriate to her." In response, Victim made a disclosure to Camelo (Initial Disclosure).

Camelo neither testified as to what Victim said nor made any assertions as to whether he believed the Initial Disclosure to be true. Rather, he testified the information was "very concerning" and he immediately informed Mother, who notified law enforcement. Camelo further testified Victim made an additional disclosure (Second Disclosure) to him some time after her initial forensic interview. According to Camelo, Victim handed him a piece of paper with a handwritten note on it and then ran off. After reading the note, Camelo gave it to Mother. Camelo did not testify as to what the note said but stated he found it more concerning than the Initial Disclosure.

Based on the foregoing, we find the trial court did not err in allowing Camelo's testimony. *See Kromah*, 401 S.C. at 349, 737 S.E.2d at 494–95 ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006))). Under *Jennings* and its progeny, it is improper for a witness to provide opinion testimony regarding the credibility of a child victim in a sexual abuse case. *See Anderson*, 413 S.C. at 218–19, 776 S.E.2d at 79 (cautioning against calling the forensic interviewer who examined the child victim as a witness because of "the risk that the expert will vouch for the alleged victim's credibility"); *Kromah*, 401 S.C. at 358–59, 737 S.E.2d at 500 ("[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter."); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper."). However, Camelo made no assertions relating to Victim's credibility but merely recounted his personal experiences regarding Victim's disclosures. *See Watson*, 389 S.C. at 446, 699 S.E.2d at 175 ("[A] lay witness may only testify as to matters *within his personal knowledge* and may not offer opinion testimony which requires special knowledge, skill, experience, or training." (emphasis added)). Therefore, we affirm the trial court on this issue.

ii. Confrontation Clause

Dent additionally asserts the trial court violated the Sixth Amendment Confrontation Clause when it prevented him from questioning Camelo regarding the reasons for Camelo's breakup with Mother. We disagree.

"The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.'" *State v. Henson*, 407 S.C. 154, 161, 754 S.E.2d 508, 512 (2014) (alterations in original) (quoting U.S. Const. amend. VI). "This constitutional right, which applies to the states through the Fourteenth Amendment, guarantees a defendant in a criminal trial the right to cross-examine the witnesses against him." *Id.*

On direct examination, the following exchange occurred:

> The State: At some point, did your relationship with [Mother] end?
>
> Camelo: Yes.
>
> The State: When was that?
>
> Camelo: Very shortly after—after all of this initiated, which, unfortunately, became very stressful, a very stressful, strange situation. And I just felt it was best to end the relationship.

On cross-examination, the following exchange occurred:

> Dent: Right. And you said that—earlier, you talked about you and [Mother] breaking up; isn't that right?
>
> Camelo: Correct.
>
> Dent: And you attributed it to the stress of this; is that right?

> Camelo: On my part.
>
> Dent: Okay. You had, also, learned some information about [Mother's] background, hadn't you?
>
> Camelo: What information are you, specifically, asking me about?
>
> Dent: That she had been a stripper in Florida and had smoked marijuana—

At this point, the State objected as to relevance, and the trial court sustained the objection. Dent then sought an in camera hearing, asserting his Sixth Amendment rights under the Confrontation Clause entitled him to question Camelo regarding the breakup because the State initiated the line of questioning on direct. Specifically, Dent argued he was entitled to rebut the suggestion made on direct examination that Victim's disclosures were the reason for the end of the relationship between Camelo and Mother. In response, the State asserted the testimony was irrelevant and that Dent was improperly attempting to tarnish Mother's credibility as a witness. The trial court then had Dent proffer Camelo's proposed testimony. Ultimately, the trial court sustained the State's objection and struck the prior question from the record, finding the testimony was irrelevant to Dent's guilt.

The trial court did not abuse its discretion in sustaining the State's objection. *See State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012) ("This [c]ourt will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion."). "Evidence which is not relevant is not admissible." Rule 402, SCRE. Evidence is relevant if it has "any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." Rule 401, SCRE (emphasis added). We fail to see how Mother's former occupation and possible recreational habits bear relevance to the charges of first degree CSC and dissemination of obscene material to a minor brought against Dent. Thus, we affirm the trial court on this issue.

IV. Directed Verdict

Dent argues the trial court erred in denying his motion for a directed verdict on the 2014-GS-07-01673 indictment. We disagree.

Following the close of the State's case, Dent moved for a directed verdict on the CSC indictment alleging the State failed to present evidence that Victim performed fellatio on Dent at House Two. Specifically, Dent argued the evidence was insufficient to withstand a directed verdict motion because Victim testified she only performed fellatio one time, and in the Second Interview, she stated the first time she performed fellatio on Dent was at House One. The trial court denied Dent's motion, finding sufficient evidence existed to support a finding that Victim performed fellatio on Dent at House Two. Dent later renewed his motion, which the trial court denied.

When ruling on a directed verdict motion, the trial court "must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). "In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013). "On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State." *State v. Davis*, 422 S.C. 472, 482, 812 S.E.2d 423, 429 (Ct. App. 2018) (quoting *State v. Stanley*, 365 S.C. 24, 41, 615 S.E.2d 455, 464 (Ct. App. 2005)). "[T]he appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." *State v. Lindsey*, 355 S.C. 15, 20, 583 S.E.2d 740, 742 (2003).

During trial, the State admitted both of Victim's forensic interviews into evidence, and the interviews were played for the jury. Victim did not make a disclosure regarding fellatio until the Second Interview. During the interview, Victim stated the first time she performed fellatio on Dent was at House One; however, she indicated multiple times that Dent had her perform fellatio on him more than once, and she did not state the abuse occurred only at House One. In fact, Victim provided detailed accounts of the suffered abuse, which included other types of sexual battery, and stated the abuse occurred at both houses. At trial, Victim provided conflicting testimony, stating she only performed fellatio on Dent once. However, she did not testify as to where that incident occurred.

Based on the foregoing, we find the trial court did not abuse its discretion in denying Dent's motion for a directed verdict as the State presented evidence from which a reasonable juror could conclude that Victim performed fellatio on Dent at House Two. *See Bennett*, 415 S.C. at 237, 781 S.E.2d at 354 ("[A]lthough the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt."). Accordingly, we affirm the trial court on this issue. *See Lindsey*, 355 S.C. at 20, 583 S.E.2d at 742 ("[T]he appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling.").

V. Jury Instruction

Dent asserts the trial court erred in charging the jury with the full definition of sexual battery when fellatio was the only sexual battery listed in the CSC Indictments.[8] Specifically, Dent contends this was an improper variance of the indictment. We disagree.

"A person is guilty of criminal sexual conduct with a minor in the first degree if . . . the actor *engages in sexual battery* with a victim who is less than eleven years of age." S.C. Code Ann. § 16-3-655(A)(1) (2015) (emphasis added). "'Sexual battery' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2015).

During the charge conference, Dent requested the trial court limit its definition of sexual battery to only fellatio as that was the only battery listed on the CSC Indictments. Dent asserted charging the full definition created a variance in the indictment and allowed the State to seek a guilty verdict based on multiple sexual batteries not listed in the indictments. *See Bailey v. State*, 392 S.C. 422, 433, 709 S.E.2d 671, 677 (2011) (alteration in original) ("In South Carolina, '[i]t is a rule of universal observance in administering the criminal law that a defendant must be

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[8] The jury found Dent not guilty of first degree CSC alleged in Indictment No. 2014-GS-07-01674; therefore, Dent's contention on appeal only applies to Indictment No. 2014-GS-07-01673.

convicted, if convicted at all, of the particular offense charged in the bill of indictment.'" (quoting *State v. Gunn*, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993))); *id.* ("A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense." (quoting *Gunn*, 313 S.C. at 136, 437 S.E.2d at 82)); *id.* (alteration in original) ("[W]hile a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged." (quoting *Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994))). The trial court denied Dent's request and charged the full definition of sexual battery as listed in subsection 16-3-651(h). Following the jury charge, Dent renewed his objection, and the court declined to recharge the jury.

We hold the trial court did not err in charging the full definition of sexual battery. Engaging in a sexual battery is the element of the crime charged—first degree CSC. *See* § 16-3-655(A)(1). Fellatio is a type of battery that can satisfy this element. Thus, it was not improper for the court to charge the full definition even though the indictment specifically listed fellatio as the sexual battery at issue. Accordingly, we affirm the trial court on this issue. *See Hopkins*, 431 S.C. at 568–69, 848 S.E.2d at 372 (providing appellate courts review criminal matters for an abuse of discretion).

VI. Cumulative Error Doctrine

Based on the foregoing allegations, Dent contends he is entitled to a new trial based on the cumulative error doctrine. We disagree. The defendant must "demonstrate more than error" to obtain reversal on the ground of the cumulative error doctrine. *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). The combined "errors must adversely affect his right to a fair trial." *Id.* Although the record reveals errors, we find these errors did not impact the fairness of Dent's trial when considered in the context of the foregoing analysis. Accordingly, we hold Dent is not entitled to a new trial based upon the cumulative error doctrine.

CONCLUSION

Based on the foregoing, Dent's convictions are

AFFIRMED.

THOMAS and HEWITT, JJ., concur.