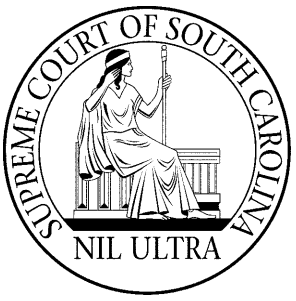

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 17, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Marquise Martin, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-002458

Appeal From Aiken County
Robert E. Hood, Circuit Court Judge

Opinion No. 27900
Submitted April 15, 2019 – Filed July 17, 2019

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan Wilson and Senior Assistant Deputy Attorney General Megan Harrigan Jameson, both of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the denial of Petitioner Anthony Martin's application for post-conviction relief (PCR). We reverse and remand for a new trial.

Petitioner was convicted of armed robbery and criminal conspiracy in Aiken County. Petitioner alleged in his PCR application that his trial attorneys were

ineffective for failing to elicit testimony from Petitioner's mother regarding the *specific* timeline of Petitioner's purported alibi. Petitioner contended that he was in Atlanta, Georgia, at the time of the robbery in South Carolina. Relief was denied because Petitioner failed to present his mother's testimony at the PCR hearing regarding the alibi defense. Ordinarily, the absence of a purported alibi witness's testimony is fatal, but in this case, counsel admitted they were aware of the specific timeline furnished by the mother, yet failed to introduce it. That testimony, if presented and believed, would have made it impossible for Petitioner to be in Aiken County at the time of the robbery. We grant post-conviction relief and remand for a new trial.

I.

Petitioner was convicted of robbing a branch of Bank of America on West Martin Town Road in North Augusta, South Carolina, at 12:20 p.m. on April 23, 2009, along with three codefendants. There was no evidence linking Petitioner to the robbery other than the testimony of the codefendants, who admitted their guilt, cooperated with law enforcement, and implicated Petitioner.

In his defense, Petitioner presented testimony from two witnesses, one of whom was his mother. At the time of the robbery, Petitioner lived with his mother in Snelville, Georgia, which is approximately thirty miles outside Atlanta. Regarding the day of the robbery, the mother's testimony at trial indicated only that she dropped Petitioner off in the morning at a bus stop in Atlanta. However, the mother had given a statement to trial counsel revealing that she dropped Petitioner off "around 11:15, 11:30" on the day of the robbery. Trial counsel conceded Petitioner's file contained that specific and critical piece of information.[1] Inexplicably, trial counsel did not elicit the precise drop-off time; the jury was left only with the fact that Petitioner was dropped off in Atlanta sometime in the morning.

During closing arguments, Petitioner's counsel challenged the codefendants' testimony, essentially arguing they were admitted thieves and liars who had changed their story to law enforcement multiple times. Counsel further argued that

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[1] Trial counsel acknowledged at the PCR hearing that it is about 150 miles from Atlanta to North Augusta. According to Google Maps, the shortest route from Atlanta to North Augusta is approximately 150 miles and takes more than two hours to drive.

no other evidence pointed to Petitioner's involvement, such as victim or third-party identification testimony or scientific evidence. However, trial counsel never argued Petitioner had an alibi for the time of the crime. Nevertheless, the jury asked to rehear the alibi testimony. Eventually, the jury found Petitioner guilty.

The PCR court denied Petitioner relief, finding Petitioner did not present evidence of an alibi defense and Petitioner could not prove prejudice because there was overwhelming evidence of his guilt. We granted Petitioner's petition for a writ of certiorari to review the PCR court's decision.

II.

The State first argues Petitioner failed to meet his burden of proof because he did not provide sufficient evidence—the in-person testimony of the alibi witness—at the PCR hearing. Additionally, the State asserts, even if Petitioner provided sufficient evidence, the PCR court correctly found Petitioner was not prejudiced because there was overwhelming evidence of his guilt. We disagree.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove that trial counsel was deficient and that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The PCR applicant "must show trial counsel's performance fell below an objective standard of reasonableness." *Matthews v. State*, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). Prejudice may be found where counsel's deficiency undermined confidence in the outcome of the trial. *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016). The Court "defer[s] to the PCR court's factual findings and will uphold them if supported by any evidence in the record. . . . Questions of law are reviewed de novo, and [the Court] will reverse the PCR court if its decision is controlled by an error of law." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436–37 (2018) (internal quotations omitted).

III.

If a PCR applicant claims trial counsel was ineffective for failing to interview or call alibi witnesses, then the "applicant must produce the witnesses at the PCR hearing *or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence*." *Glover v. State*, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (emphasis added). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's

burden of showing prejudice." *Id*. at 499, 458 S.E.2d at 540; *see Pauling v. State*, 331 S.C. 606, 611, 503 S.E.2d 468, 471 (1998) (finding PCR applicant established prejudice where applicant presented "evidence as to the nature of the nurse's testimony by introducing her [] notes," and even though the nurse may not have had an independent recollection of the case, "[her] notes . . . could have been used to refresh her recollection" at trial).

In some cases, there is "'overwhelming' [evidence] such that it categorically precludes a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 190–91, 810 S.E.2d 836, 844–45 (2018). However, "the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability the factfinder would have had a reasonable doubt' cannot possibly be met." *Id*. at 191, 810 S.E.2d at 845 (internal alteration marks omitted) (quoting *Strickland*, 466 U.S. at 695); *see, e.g.*, *Franklin v. Catoe*, 346 S.C. 563, 574, 552 S.E.2d 718, 724 (2001) (finding there was overwhelming evidence where the evidence included the applicant's DNA on the victim's body, the victim's blood on the applicant's pants, and the applicant's bloody palm print on the murder weapon). Additionally, the strength of the State's evidence should be viewed in light of trial counsel's errors such that there "is no reasonable possibility [counsel's errors] contributed in any way to [the applicant's] convictions." *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845 (quoting *Franklin*, 346 S.C. at 574–75, 552 S.E.2d at 725).

Here, we find as a matter of law that Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother. Lead counsel candidly admitted his file contained the mother's statement concerning the "around 11:15, 11:30 a.m." drop-off in Atlanta. Without the specific timeline testimony, Petitioner failed to establish a legal alibi. *See State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("[A] purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." (citation omitted)). We now turn to the question of whether Petitioner was prejudiced by counsel's deficient representation.

The State resists a finding of prejudice on the basis of overwhelming evidence of guilt, a position we categorically reject. The evidence against Petitioner was far from overwhelming. *See Smalls*, 422 S.C. at 191, 810 S.E.2d at 845. The only people who placed Petitioner at the robbery were the three codefendants, two of

whom conceded they testified in hopes of a favorable deal with the State and two of whom admitted lying to law enforcement during the investigation in an effort to exonerate themselves and their codefendants. Further, the three codefendants all claimed to be good friends with one another, but they hardly knew Petitioner. Additionally, the forensics team was unable to find anything of evidentiary value connecting Petitioner to the crime.

As noted above, the jury asked during deliberations to rehear the alibi testimony. *See State v. Blassingame*, 271 S.C. 44, 46–47, 244 S.E.2d 528, 530 (1978) (finding when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked); *see also Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 651 (2008) (finding a jury's questions during deliberations—asking to rehear testimony and jury charges—indicated they were struggling with several aspects of witnesses' accounts, and further finding "if additional witnesses had confirmed [the] petitioner's testimony, there is a reasonable likelihood the result of the trial would have been different"). Therefore, we conclude counsel's failure to present the known and available alibi evidence—the specific drop-off time in Atlanta—undermined confidence in the outcome of Petitioner's trial.[2] In sum, there is no evidence to support the PCR court's finding of no prejudice.[3]

IV.

We reverse and remand for a new trial.[4]

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[2] To state the obvious, if the mother's specific alibi testimony had been presented and believed, it would have made it impossible for Petitioner to travel by car from Atlanta to Aiken County and participate in the robbery at 12:20 p.m.

[3] The PCR court also based its finding of overwhelming evidence on the fact that Petitioner's three "co-defendants testified against him at trial . . . [and Petitioner] did not dispute the evidence against him." This finding of the PCR court is erroneous and troubling in two respects. First, Petitioner had a constitutional right to remain silent at trial. Second, Petitioner most assuredly disputed the charges through his alibi plea.

[4] Petitioner has raised other issues, which we need not address. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 612

REVERSED AND REMANDED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

(1999) (finding an appellate court does not need to address the remaining issues when the resolution of the prior issue is dispositive).

The Supreme Court of South Carolina

In the Matter of Melisa Gay, Petitioner

Appellate Case No. 2019-001139

ORDER

By order dated July 3, 2019, Respondent was suspended from the practice of law for six months, retroactive to March 21, 2018. She has now filed an affidavit requesting reinstatement pursuant to Rule 32 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

FOR THE COURT

s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
July 15, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Melissa Leaphart Hagood, Appellant,

v.

James Buckner Hagood, Defendant.

Melody "Suzie" Hagood Sharpe, Third Party Defendant.

Of whom James Buckner Hagood and Melody "Suzie" Hagood Sharpe are the Respondents.

Appellate Case No. 2016-001898

Appeal From Richland County
Monét S. Pincus, Family Court Judge

Opinion No. 5664
Heard December 4, 2018 – Filed July 17, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James Ross Snell, Jr. and Vicki D. Koutsogiannis, both of Law Office of James R. Snell, Jr., LLC, of Lexington, for Appellant.

Peter George Currence, of McDougall, Self, Currence & McLeod, LLP, of Columbia, and Carrie Hall Tanner, of Speedy, Tanner, Atkinson & Cook, LLC, of Camden, for Respondents.

LOCKEMY, C.J.: In this appeal from a divorce decree, Melissa Hagood (Wife) argues the family court erred in (1) characterizing the majority of the estate as the nonmarital property of James Hagood (Husband), (2) equitably apportioning the majority of the marital property to Husband, and (3) refusing to award her alimony. We affirm in part, reverse in part, and remand.

FACTS

Wife and Husband married on August 8, 2004, and separated April 17, 2014. At the time of the separation, Wife was fifty years old and Husband was sixty-five years old. The parties share one child (Child), born in 2002. Husband has three grown children from a previous marriage.

In 1996, before the couple met, Husband inherited several large tracts of land in and around Blythewood, South Carolina, from his father. The properties included the following: a doublewide mobile home located on a one-acre tract of land at 837 Langford Road (837 Langford Road); 142 acres located at 1521 Muller Road (the Muller Road Property); and 159 acres on Langford Road (the Langford Road Property). Each of these properties were titled in Husband's name throughout the marriage, with the exception of the doublewide mobile home titled in his sister's name. When the parties met in 2002, Husband was living in the doublewide mobile home at 837 Langford Road. In December 2002, Wife and Child moved into the mobile home with Husband and lived there until July 2009.

In 2007, Husband received approximately $3.6 million from the sale of the Langford Road Property. In that same transaction, Husband acquired an additional 8.1 acres on Muller Road, near the Muller Road Property. Soon thereafter, Husband used $495,000 in proceeds from the sale of the Langford Road Property to construct a new home on the Muller Road Property. The home was completed in the summer of 2009, and the couple lived there continuously until their separation in April 2014.

The marriage began to deteriorate in the spring of 2014. On April 28, 2014, Wife initiated divorce proceedings against Husband, requesting custody of Child, child support, alimony, equitable division, and other related relief. By administrative order, the family court bifurcated the merits hearing in order to address the financial and custody issues separately. The family court held a hearing on June 15 and 16, 2016, to address the financial issues. At issue was the character, equitable division, and apportionment of: (1) the property and mobile home located at 837 Langford Road; (2) the marital home and Muller Road Property; (3) the

additional 8.1 acres on Muller Road; (4) several investment accounts; (5) two collectable vehicles—a green Corvette and a 1969 Camaro; (6) a 2014 Jeep Wrangler; (7) a horse named "Chevy"; and (8) two tractors. In addition, Wife requested alimony of "whatever the [c]ourt deemed necessary," and both parties requested attorney's fees. Neither party requested a specific percentage of the marital estate.

The family court issued a final order and divorce decree on August 2, 2016, granting Husband and Wife a no-fault divorce based on one year's continuous separation. In its order, the family court denied Wife's request for alimony; held the entirety of the real property and investment accounts were Husband's nonmarital property; and apportioned the horse, the John Deer tractor, the Jeep, and the 1969 Camaro to Husband. This appeal followed.

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). The appellate court generally defers to the findings of the family court regarding credibility because the family court is in a better position to observe the witnesses and their demeanor. *Id.* at 389, 709 S.E.2d at 653. The party contesting the family court's decision bears the burden of demonstrating the family court's factual findings are not supported by the preponderance of the evidence. *Barrow v. Barrow*, 394 S.C. 603, 609, 716 S.E.2d. 302, 305 (Ct. App. 2011) (citations omitted).

LAW/ANALYSIS

I. Marital Property

Wife argues the family court erred in failing to categorize and apportion as marital property: (1) the mobile home and property located at 837 Langford Road, (2) the marital home and the Muller Road Property (3) the investment and bank accounts, (4) the green Corvette, and (5) the John Deer tractor.

Section 20-3-630(A) of the South Carolina Code (2014) defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held." Section 20-3-630(A) specifies the following is nonmarital property:

> (1) property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse;
>
> (2) property acquired by either party before the marriage . . . ;
>
> (3) property acquired by either party in exchange for property described in items (1) and (2) of this section;
>
> . . .
>
> (5) any increase in value in nonmarital property, except to the extent that the increase resulted directly or indirectly from efforts of the other spouse during marriage.

S.C. Code Ann. § 20-3-630(A). Nonmarital property may be transmuted into marital property if: "(1) it becomes so commingled with marital property as to be untraceable; (2) it is jointly titled; or (3) it is utilized by the parties in support of the marriage . . . so as to evidence an intent by the parties to make it marital property." *Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001) (citing *Pool v. Pool*, 321 S.C. 84, 86, 467 S.E.2d 753, 756 (Ct. App. 1996)). "Whether transmutation of separate property into marital property has occurred 'is a matter of intent to be gleaned from the facts of each case.'" *Simpson v. Simpson*, 377 S.C. 527, 538, 660 S.E.2d 278, 284 (Ct. App. 2008) (quoting *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988)).

"The spouse claiming transmutation bears the burden of producing objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." *Greene v. Greene*, 351 S.C. 329, 338, 569 S.E.2d 393, 398 (Ct. App. 2002) (citations omitted). "The mere use of separate property to support the marriage, without some additional evidence of intent to treat the property as marital, is not sufficient to establish transmutation." *Id*.

A. Real Property

The family court found all real property in existence at the time of the divorce was Husband's nonmarital property. Wife argues the evidence presented at trial shows

the parties used the properties in support of the marriage in such a way as to transmute it to marital property.

As previously noted, Husband inherited the 837 Langford Road Property in 1996. He was living in a mobile home on the property with his sister and his daughter from a previous marriage when the parties met in 2002. Husband purchased the mobile home with proceeds from a certificate of deposit (CD) he had during his first marriage, but titled the mobile home in his sister's name. Wife and Child moved into the mobile home with Husband in 2002, prior to their 2004 marriage, and lived there with him until they moved into their new home in July 2009. Wife testified she, along with Husband, made improvements to the property such as installing insulation, working on the well, putting up a fence, and taking care of the dogs.

According to the record, the 837 Langford Road Property remained solely titled in Husband's name and remained traceable as nonmarital property throughout the marriage. Although Wife assisted in the care of the property, she did not make any significant contributions to this property. While Husband and Wife lived in the mobile home, Husband's sister owned it. Accordingly, Wife did not meet her burden to prove the 837 Langford Road Property transmuted to marital property.

Wife also claims the marital home and the Muller Road Property are marital property. Husband inherited the Muller Road Property from his father prior to the marriage and chose it as the site to build the marital home. Husband deposited $495,000 of the proceeds from the sale of the nonmarital Langford Road Property into a separate account exclusively for the construction of the home. Husband used this account to pay for the construction of the home and the work on the surrounding land. Furthermore, Husband titled the home and property in his name only.

Wife acknowledged at the final hearing that Husband paid to construct the home. Nevertheless, she claims the marital home and the Muller Road property transmuted to marital property because the parties utilized them in support of the marriage. Wife testified she was involved in the planning and building of the home, such as selecting the house plan, brick, and roof. She stated she participated in the landscaping and removed rocks from the property in preparation for building the home. Wife also stated she was involved in the continued maintenance of the home, especially after Husband became ill. She planted and maintained a garden, maintained the creek, and insulated pipes.

Transmutation is a matter of intent of the parties to treat the property as common property of the marriage. *Johnson,* 296 S.C. at 295, 372 S.E.2d at 110. Wife did not contribute financially to the construction of the home. The parties did not use marital funds to build equity in the property. The home and property remained in Husband's name throughout the marriage. Furthermore, Wife did not present evidence that Husband intended for the home to be a marital asset. While the parties used the home in support of the marriage, "[t]he mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Id.* at 295-96, 372 S.E.2d at 111. Therefore, we do not find the home and Muller Road Property transmuted to marital property.

However, Wife was significantly involved in the construction as well as the care and maintenance of the home. While we do not find these contributions satisfy the burden to prove transmutation, Wife's efforts in the construction and maintenance of the home added value to the home during the marriage. Section 20-3-630(A)(5) of the South Carolina Code allows a spouse to receive a special equity interest in the increase in the value of nonmarital property when the spouse contributes directly or indirectly to the increase. We recognize the contributions of a spouse to nonmarital property through the award of a special equity interest in such property. *See Murray v. Murray*, 312 S.C. 154, 159, 439 S.E.2d 312, 316 (Ct. App. 1993) ("A spouse has an equitable interest in appreciation of property to which she contributed during the marriage, even if the property is nonmarital."). Wife is entitled to a special equity interest based on her contributions to such property. As such, we remand this case to the family court to determine the amount of Wife's special equity interest.

B. Bank Accounts

On June 22, 2007, Husband deposited the $3,602,952.08 in proceeds from the sale of the Langford Road Property into various accounts with Wachovia and Community Resource Bank. On appeal, Wife asserts the family court erred in finding three of the Wachovia accounts were Husband's nonmarital property. Because her name appeared jointly with Husband's name on these accounts, Wife argues the accounts transmuted to martial property.

Husband deposited $25,000 of the proceeds from the sale of the Langford Road Property into a joint account Wife established with Wachovia before the marriage (the Wachovia Account). The family court's order does not specifically address the character of this account as marital or nonmarital. With regard to the bank

accounts generally, the family court's order stated, "Each party shall maintain the sole ownership, use and possession of any other bank accounts not listed herein in that party's name." On appeal, Husband states the family court did not find this account was a marital asset. He concedes this account is Wife's nonmarital property.

Wife also argues two other accounts opened with Wachovia at the time of the Langford Road Property sale, the Crown Account and the Money Market Account, are also transmuted nonmarital property. In its final order, the family court traced a portion of the proceeds from the sale of the Langford Road Property through these accounts and ultimately to an investment account, but it did not rule on the character of the accounts. The record indicates Husband closed the Money Market Account in 2007. We cannot determine from the record whether the Crown Account existed when the marital litigation commenced. Nonetheless, "[t]o preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court." *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006) (citations omitted). The family court did not address the character of the Crown Account or the Money Market Account. In addition, Wife did not file a Rule 59(e) motion to alter or amend the family court's order to address the character of these accounts. Therefore, the status of the Crown Account and the Money Market Account as marital or nonmarital is not preserved for our review.

C. Investment Accounts

Wife also argues the family court should have found the three investment accounts Husband holds in his name with Wells Fargo are martial property. After the sale of the Langford Road Property, Husband deposited $1 million of the proceeds into an account with Community Resource Bank. He immediately used $500,000 of the $1 million to purchase three CDs. Husband bought one CD for $200,000 in his name only, one CD for $200,000 in his and Child's names, and one CD for $100,000 in Husband and Wife's names[1]. In 2009, the two $200,000 CDs matured. Husband invested the proceeds from these two CDs into two investment accounts

[1] Husband testified Wife borrowed against this CD. Wife made some loan payments, but Husband testified he paid off the balance and cashed out the CD, depositing the proceeds into a money market account prior to the commencement of the marital litigation. Neither the character of this CD nor its proceeds are at issue in this appeal.

at Wachovia (now Wells Fargo). Husband still possessed these accounts at the time of the final hearing.

Husband also funded the other investment account with proceeds from the sale of the Langford Road Property. On June 22, 2007, the date of the property sale, Husband opened the two accounts mentioned above, the Crown Account and the Money Market Account. Husband opened the Money Market Account in his name only and deposited $1,477,952.08 into the account. Husband opened the Crown Account in his and Wife's names and deposited $1.1 million into the account. On July 3, 2007, Husband transferred $1 million from the Crown Account to the Money Market Account. On July 6, 2007, Husband used the $1 million from the Money Market Account to purchase tax free bonds, which now represents the third Wells Fargo investment account.

As our supreme court explained in *Miller v. Miller*, 293 S.C. 69, 71, 358 S.E.2d 710, 711 (1987), "An unearned asset that is derived directly from nonmarital property also remains separate unless transmuted, as does property acquired in exchange for nonmarital property." These three accounts are traceable to the nonmarital proceeds from the sale of the Langford Road Property. In addition, the parties do not dispute the accounts originated from the $3.6 million Husband received from the sale of nonmarital property. While part of the proceeds passed through a joint account held by the parties, "the act of depositing an inheritance into the parties' joint account does not automatically render the inherited funds to be marital property." *Sanders v. Sanders*, 396 S.C. 410, 416, 722 S.E.2d 15, 17 (Ct. App. 2011). We find no evidence in the record to support a determination that these accounts transmuted to marital property. Accordingly, the family court correctly held these three investment accounts were Husband's nonmarital property.

D. Personal Property

Wife also argues the family court erred in finding the green Corvette and John Deer tractor were Husband's separate property.

Wife testified Husband borrowed money for the purchase of the green Corvette against two acres of the Muller Road Property. She further testified Husband paid off the loan using money from the sale of the Langford Road Property. Finally, Wife asserted Husband gave her the green Corvette as a gift and she considered it to be her property. In contrast, Husband presented the vehicle's title, which was in

his name only, as well as a receipt showing the $5,000 he put down on the vehicle was earnest money he received for the sale of the Langford Road Property.

Husband purchased the John Deere tractor during the marriage, but with funds from the sale of the Langford Road Property as evidenced by Husband's bank records. The tractor was also titled in his name. The only testimony Wife presented regarding her use of the tractor was that Husband taught her to drive it, and she occasionally drove it.

"[A]ny property inherited by a spouse, and any property acquired in exchange for such inherited property, is not 'property of the marriage.'" *See Hussey v. Hussey*, 280 S.C. 418, 422, 312 S.E.2d 267, 270 (Ct. App. 1984)). Husband purchased both the green Corvette and the John Deer tractor with funds from the sale of inherited property and titled them in his name. Accordingly, the family court did not err in determining the green Corvette and John Deer tractor were Husband's nonmarital property.

II. Equitable Distribution

The family court found the following assets were marital property: a Mazda Tribute, a 1969 Camaro, the horse, a 2014 Jeep Wrangler, and Wife's Thrift Savings Plan with the postal service. The family court also found the parties owed $28,000 on the 2014 Jeep Wrangler as a marital debt. The family court apportioned the Mazda Tribute and the Thrift Savings Plan to Wife and all other marital assets to Husband. The family court ordered Husband to sell the 2014 Jeep Wrangler and use the proceeds to pay off the debt. On appeal, Wife argues the family court erred in the overall apportionment of the marital estate, focusing her argument on the apportionment of the horse and the 1969 Camaro to Husband.

Section 20-3-620(B) of the South Carolina Code (2014) lists fifteen factors for the family court to consider in equitably apportioning the marital estate. These factors consist of:

> (1) the duration of the marriage together with the ages of the parties . . . ; (2) marital misconduct or fault of either or both parties . . . ; (3) the value of the marital property . . . ; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6) the need of each spouse or

> either spouse for additional training or education in order to achieve that spouses's income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for each or either spouse; (9) whether separate maintenance or alimony has been awarded; (10) the desirability of awarding the family home as part of equitable distribution or the right to live therein for reasonable periods to the spouse having custody of any children; (11) the tax consequences to each or either party as a result of any particular form of equitable apportionment; (12) the existence and extent of any support obligations, from a prior marriage or for any other reason or reasons, of either party; (13) liens and any other encumbrances upon the marital property, which themselves must be equitably divided . . . and any other existing debts incurred by the parties or either of them during the course of the marriage; (14) child custody arrangements and obligations at the time of the entry of the order; and (15) such other relevant factors as the trial court shall expressly enumerate in its order.

S.C. Code Ann. § 20-3-620(B). "On appeal, this court looks to the overall fairness of the apportionment and it is irrelevant that this court might have weighed specific factors differently than the family court." *Id*.

Initially, we note neither party asked for a specific percentage of the marital estate. In addition, the family court considered all of the relevant factors as evidenced by its order. As noted by the family court, the marital debt exceeded the value of the marital assets. While Husband received several marital assets, the family court also made him responsible for the marital debt. Wife received several assets without responsibility for the marital debt. As such, the family court did not err in its apportionment of the marital property.

III. Alimony

Finally, Wife argues the family court erred in denying her request for alimony. Specifically, Wife contends the family court failed to give sufficient weight to the standard of living the parties enjoyed during the marriage. In the alternative, Wife asserts the family court should have ordered rehabilitative alimony.

Alimony is a substitute for the support normally incident to the marital relationship. *Spence v. Spence*, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

> Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant.

Id. (citing S.C. Code Ann. § 20-3-130(C) (2014)). No one of the above factors is dispositive. *Lide v. Lide*, 277 S.C. 155, 157, 283 S.E.2d 832, 833 (1981).

In its order, the family court addressed each factor in section 20-3-130(C). The parties were married for ten years. At the time of the divorce, Husband was sixty-five and Wife was fifty. Husband is in poor health, while Wife recently had shoulder surgery and will require therapy before she is able to work. Wife has a high school education; Husband has training from the Air Force as well as two years of community college. Wife acknowledged she could return to work and receive an annual salary of $40,000 to $50,000 with the postal service and Husband receives social security, rental income, and interest from his investment accounts totaling approximately $5,600 per month. Wife alleged Husband was physically violent toward her, but the family court did not consider her claims credible and did not find fault on behalf of either party. Both parties have significant attorney's fees and financial obligations to support their child, although Wife does not have custody. These factors do not weigh in favor of an alimony award to Wife.

However, we find the family court gave insufficient weight to the parties' standard of living and Husband's significant nonmarital property. During the marriage, the parties moved from a mobile home to a large new home. Wife and Husband frequently traveled to car shows and purchased numerous collectable cars. Wife received several large cash gifts from Husband. In addition, Husband has over $3 million in nonmarital assets according to his financial declaration. We find Wife should be allowed alimony in some form. Thus, we remand the issue of alimony to the family court to determine the appropriate type and amount of alimony Wife should receive.

CONCLUSION

Based on foregoing, we affirm the family court's determination that the 837 Langford Road Property, the Muller Road Property and the marital home, the investment accounts, and the personal property are nonmarital property. However, we find Wife is entitled to a special equity interest in the marital home and the Muller Road Property. We remand this case to the family court to determine the special equity interest Wife is entitled to because of her contributions to the home and property. In addition, we remand to the family court to determine the type and amount of alimony award to Wife. The family court's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Jay Finley, Appellant.

Appellate Case No. 2016-002480

Appeal From Greenville County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5665
Heard April 2, 2019 – Filed July 17, 2019

AFFIRMED

Appellate Defender Victor R. Seeger, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody J. Brown and Assistant Attorney General Sherrie Butterbaugh, all of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

WILLIAMS, J.: In this criminal appeal, Michael Jay Finley appeals the circuit court's denial of his pro se motion to reconsider his sentence pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). Finley argues his mandatory

sentence of life imprisonment with the possibility of parole upon the service of thirty years' imprisonment is functionally equivalent to a sentence of life imprisonment without the possibility of parole (LWOP), which violates the Eighth Amendment's prohibition of cruel and unusual punishments. We affirm.

FACTS/PROCEDURAL HISTORY

In February 1992, a Greenville County grand jury indicted Finley for murder, first-degree burglary, first-degree arson, and armed robbery for his involvement in the death of eighty-year-old James Brockman (Victim). Finley was seventeen years old at the time of Victim's murder. On February 25, 1993, Finley pled guilty as indicted. At the plea hearing, the State provided the following recitation of the facts.

Prior to the night of Victim's murder, Finley and his co-defendant, who both lived in Spartanburg, formed a plan to kill Victim for his money. After making preparations, the pair drove to Victim's home in Greenville County on the night of May 6, 1990. To gain entry to the home, Finley and his co-defendant asked Victim if they could use his phone because they were experiencing car trouble. Once inside, the pair robbed Victim at gunpoint, ransacking the home in the process. Before fleeing the scene, Finley bound Victim's legs and arms with electrical wire and laid him on his bed. Finley then gagged Victim, placing a handkerchief in his mouth and securing it with a necktie. Once Victim was sufficiently secured, Finley and his co-defendant placed a pillowcase over Victim's head and proceeded to strangle him with another necktie until he lost consciousness. The pair then used the barrel of a shotgun to repeatedly bludgeon Victim's head.[1] Believing Victim was dead, Finley and his co-defendant poured gasoline around the house and set multiple fires before leaving the scene in Victim's car. Police apprehended Finley and his co-defendant a few days later. Finley ultimately confessed to the crimes and provided a written statement to police. Victim's autopsy showed extreme blunt force trauma to the head and neck, first and second degree burns, and asphyxiation due to smoke inhalation as the cause of death, which suggested Victim was still alive during the fire.

[1] Victim's autopsy revealed the beating was so severe that "the stock of the gun broke off and splinters of the stock were found."

On April 22, 1993, the circuit court sentenced Finley to concurrent life sentences for murder and first-degree burglary with parole eligibility after the service of thirty years' imprisonment.[2] The court additionally sentenced Finley to twenty-five years' imprisonment for the charges of first-degree arson and armed robbery, each sentence to be served consecutively to Finley's sentence for murder.

On March 17, 2016, Finley filed a pro se motion for resentencing pursuant to *Byars*.[3] The circuit court held a hearing on the motion on October 14, 2016. At the hearing, Finley argued his sentence constituted a de facto life sentence and, therefore, violated the Eighth Amendment. Specifically, Finley asserted that even though his sentence afforded him parole eligibility after the service of thirty years' imprisonment, the South Carolina parole process did not provide a meaningful opportunity for release because he would not have counsel at the parole hearings. The State argued Finley was not within the class of offenders entitled to reconsideration pursuant to *Byars* and *Miller v. Alabama*[4] because he did not receive a juvenile LWOP sentence. The State maintained Finley would have a meaningful opportunity for release and to present mitigating evidence, such as relevant factors of youth, at his first parole hearing in 2022 and at any potential

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[2] At the time of Finley's sentencing, section 16-3-20 of the South Carolina Code (1992) provided that a person who was convicted of or pled guilty to murder was required to be sentenced to (1) death; (2) life imprisonment with the possibility of parole after twenty years' imprisonment; or (3) life imprisonment with the possibility of parole after thirty years' imprisonment if the State sought the death penalty and an aggravating circumstance was found but a recommendation of death was not made. In exchange for Finley's plea and the stipulation that Finley would not be eligible for parole for thirty years, the State agreed to withdraw the notice of intent to seek the death penalty filed on January 22, 1991.

[3] 410 S.C. at 545, 765 S.E.2d at 578 (holding a juvenile offender serving an LWOP sentence could file a motion for resentencing when the sentencing court issued the sentence without considering various mitigating factors of the offender's youth).

[4] 567 U.S. 460, 479–80 (2012) (holding mandatory LWOP sentences for juvenile offenders violate the Eighth Amendment and for a sentencing court to issue an LWOP sentence for homicide to a juvenile offender, the court must conduct an individualized hearing in which it considers various factors, such as the offender's age and maturity and the circumstances surrounding the homicide offense, noting life imprisonment is a disproportionate sentence for all but the rarest of children whose crimes reflect "irreparable corruption").

future parole hearings.[5] The State further asserted Finley could be appointed counsel for his parole hearings upon request.

On November 28, 2016, the circuit court issued an order denying Finley's motion for resentencing, finding Finley was "not a member of the class of offenders entitled to resentencing." The court explained, *Miller* and *Byars* "rest on the principle that life without the possibility of parole is the harshest of all penalties for a juvenile offender" and are "unequivocal in that the remedy they provide is only available to juveniles sentenced to life without the possibility of parole for homicide." The court found Finley's sentence did not amount to a de facto LWOP sentence because he would become parole eligible upon the service of thirty years' imprisonment.[6] Therefore, the circuit court concluded Finley did have a meaningful opportunity for release that was not available to the class of juvenile offenders comprehended in *Miller* and *Byars*. This appeal followed.

STANDARD OF REVIEW

When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law. *See State v. Perez*, 423 S.C. 491, 496, 816 S.E.2d 550, 553 (2018). Therefore, this court will not disturb the circuit court's findings absent a manifest abuse of discretion. *Id.* An abuse of discretion occurs when the circuit court's finding is based on an error of law or grounded in factual conclusions without evidentiary support. *Id.* at 496–97, 816 S.E.2d at 553; *State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015).

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[5] Finley will become eligible for parole on August 11, 2022.

[6] At the *Byars* hearing, Finley also raised the question of whether a prisoner who received a consecutive sentence following a life sentence could be granted parole. In its order denying Finley's motion for resentencing, the circuit court found Finley would still be eligible for parole in 2022 despite his consecutive sentences. The court based this finding on an affidavit submitted by the General Counsel of the Department of Probation, Parole, and Pardon Services, which stated Finley's consecutive sentences would not preclude him from receiving parole hearings beginning in 2022 and should the parole board grant Finley parole, the consecutive sentences would not prevent his release.

LAW/ANALYSIS

Finley argues his life sentence *with* the possibility of parole upon the service of thirty years' imprisonment constitutes a de facto LWOP sentence in violation of the Eighth Amendment, and therefore, he is entitled to resentencing pursuant to *Byars*. Finley further contends the mandatory sentencing scheme rendered his life sentence unconstitutional because it prevented consideration of his juvenile status as required by *Miller* and *Byars*.[7] We disagree.

The Eighth Amendment to the United States Constitution mandates: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." U.S. Const. amend. VIII (emphasis added). The incorporated prohibition against "cruel and unusual punishments" safeguards an individual's right to protection from excessive sanctions, highlighting the essential principle that courts must consider "the human attributes even of those who have committed serious crimes." *Graham v. Florida*, 560 U.S. 48, 59 (2010). In this vein, sentences that are grossly out of proportion to the severity of the crime are unconstitutional. *See id.* In applying this principle to juvenile offenders, the United States Supreme Court has incrementally established parameters to ensure proportional juvenile sentences.

In *Roper v. Simmons*, the Supreme Court addressed whether the Eighth Amendment permitted capital punishment of juvenile offenders. 543 U.S. 551 (2005). The Court found the death penalty was a disproportionate punishment for an offender who was under the age of eighteen at the time of the crime, reasoning

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[7] Finley additionally contends his parole eligibility does not alleviate any constitutional violations because the South Carolina parole process does not provide a meaningful opportunity for release. Specifically, Finley asserts the South Carolina parole system does not provide appointed counsel and does not mandate consideration of the mitigating factors of youth comprehended in *Miller* and *Byars*. We find Finley's argument regarding the parole process is not ripe for appellate review as a parole board has not yet had the opportunity to consider his case and will not have the opportunity until 2022. *See State v. Tucker*, 376 S.C. 412, 420–21, 656 S.E.2d 403, 407–08 (Ct. App. 2008) (finding appellant's claim that the circuit court erred in accepting a plea agreement that waived the right to future post-conviction relief was not ripe for appellate review on direct appeal because appellant had not yet sought post-conviction relief).

developmental differences between juveniles and adults resulted in diminished culpability. *Id.* at 569–75, 578. Specifically, the Court noted the predeveloped nature of a juvenile's character often resulted in impetuous decisions due to an underdeveloped sense of responsibility, a lack of maturity, and a greater susceptibility to negative influences and outside pressures. *Id.* at 569–70.

Five years later in *Graham v. Florida*, the Supreme Court held the Eighth Amendment prohibited the imposition of an LWOP sentence on a juvenile offender for a nonhomicidal crime, finding "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender" and such a sentence deprives a juvenile offender "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." 560 U.S. at 70, 79, 82. The Court expanded upon this rationale in *Miller v. Alabama*, holding mandatory LWOP sentences for juvenile offenders violate the Eighth Amendment. 567 U.S. at 479. Explaining its reasoning, the Court reiterated its belief that a juvenile offender's greater potential for reform mandates that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty." *Id.* at 471, 489. Therefore, the Court held that for a sentencing court to issue an LWOP sentence for homicide to a juvenile offender, the court must conduct an individualized hearing in which it considers various factors, such as the offender's age and maturity and the circumstances surrounding the homicide offense, noting life imprisonment is a disproportionate sentence for all but the rarest of children whose crimes reflect "irreparable corruption." *Id.* at 477–80.

The Supreme Court further defined the scope of the Eighth Amendment's protection regarding juvenile sentencing in *Montgomery v. Louisiana*, holding *Miller* retroactively applied to "juvenile offenders whose convictions and sentences were final when *Miller* was decided." 136 S. Ct. 718, 725, 732–36 (2016). The Court further stated,

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to

> be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Id. at 736 (citation omitted).

In turn, our supreme court applied these parameters in recent precedent. *See Byars*, 410 S.C. 534, 765 S.E.2d 572; *State v. Slocumb*, 426 S.C. 297, 827 S.E.2d 148 (2019). In *Byars*, the court considered whether the holding of *Miller* extends to juvenile offenders who received an LWOP sentence under a nonmandatory scheme.[8] 410 S.C. at 541, 765 S.E.2d at 576. Although the court found *Miller* did not expressly prohibit an LWOP sentence for a juvenile offender under a nonmandatory scheme, it held *Miller* established "an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* at 543, 765 S.E.2d at 577. Specifically, the court held a sentencing court considering an LWOP sentence for a juvenile offender must consider:

> (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence"; (2) the "family and home environment" that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and (5) the "possibility of rehabilitation."

[8] The *Byars* court also held the *Miller* holding applied retroactively in South Carolina. *Id*. at 540–41, 765 S.E.2d at 575–76.

Id. at 544, 765 S.E.2d at 577 (alterations in original) (quoting *Miller*, 567 U.S. at 477–78).

In *Slocumb*, our supreme court considered whether de facto life sentences violate the Eighth Amendment pursuant to the principles established in *Roper*, *Graham*, and *Miller*. 426 S.C. 297, 827 S.E.2d 148. Although the court acknowledged Slocumb's 130-year sentence constituted a de facto life sentence, it declined to extend the holdings of *Graham* and *Miller*, stating "a long line of Supreme Court precedent prohibits us from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set." *Id.* at 306, 827 S.E.2d at 153. Noting *Graham's* holding only applied to de jure life sentences, the *Slocumb* court stated, "Neither *Graham* nor the Eighth Amendment, as interpreted by the Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life sentence on a juvenile nonhomicide offender." *Id.* at 314–15, 827 S.E.2d at 157.

Applying the aforementioned principles to the present case, we find Finley is not entitled to resentencing pursuant to *Miller* and *Byars*. Although Finley received a mandatory life sentence for murder as a juvenile offender, the circuit court's sentence afforded Finley parole eligibility after the service of thirty years' imprisonment. *See* S.C. Code Ann. § 16-3-20(A) (1992) (providing that a person who is convicted of or pleads guilty to murder must be punished by (1) death; (2) life imprisonment with the possibility of parole after twenty years; or (3) life imprisonment with the possibility of parole after thirty years if the State sought the death penalty and an aggravating circumstance was found but a recommendation of death was not made). This sentence differs significantly from those at issue in *Graham*, *Miller*, and *Byars* in which the juvenile offenders received sentences of life imprisonment *without* the possibility for parole. *See Graham*, 560 U.S. at 82 ("The Constitution prohibits the imposition of a life *without parole* sentence on a juvenile offender who did not commit homicide." (emphasis added)); *Miller*, 567 U.S. at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison *without possibility of parole* for juvenile offenders." (emphasis added)); *Byars*, 410 S.C. at 545, 765 S.E.2d at 578 ("We hold the principles enunciated in *Miller* . . . apply . . . to all juvenile offenders who may be subject to a sentence of life imprisonment *without the possibility of parole*." (emphasis added)). As our supreme court recently noted in *Slocumb*, this court's review is confined by the parameters established by the United States Supreme Court. *See* 426 S.C. at 306, 827 S.E.2d at 153. Therefore, as it stands,

Finley is not a member of the class of offenders contemplated by our precedent. Furthermore, the Supreme Court indicated in *Graham* and *Montgomery* that a sentencing court may remedy any potential Eighth Amendment violations by permitting a juvenile offender to be considered for parole. *See Graham*, 560 U.S. at 82 ("A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."); *Montgomery*, 136 S. Ct. at 736 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."). As Finley's sentence afforded him parole eligibility, we find any potential Eighth Amendment violation was cured. Accordingly, we find the circuit court did not err in denying Finley's motion for resentencing.

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.

GEATHERS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex parte: The Travelers Home and Marine Insurance Company, Appellant,

In Re: William Gresham as Personal Representative of the Estate of John Corey Stringfellow, Respondent,

v.

Cameron Thomas Stringfellow, Defendant.

Appellate Case No. 2017-001083

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5666
Submitted June 3, 2019 – Filed July 17, 2019

AFFIRMED

William Pearce Davis and Susan Drake DuBose, both of Baker Ravenel & Bender, LLP, of Columbia, and Carrie Hailman O'Brien, of Walker Allen Grice Ammons & Foy, LLP, of Charlotte, North Carolina, all for Appellant.

Margaret Nicole Fox and James Mixon Griffin, both of Griffin Davis, of Columbia, for Respondent.

HILL, J.: This appeal follows the trial of a wrongful death and survival action. Sixteen-year-old John Corey Stringfellow (Corey) died from injuries sustained as a passenger in a family car being driven by his older brother, Cameron. Evidence at trial indicated that, while their parents were out of town, Corey and Cameron left home around 1:00 a.m. to obtain marijuana from a friend's house. Both had smoked marijuana earlier, and Cameron—set to graduate from high school the next week—had been drinking alcohol and had taken Xanax. On the way back home, Cameron began speeding through their residential neighborhood, struck a parked car, and then a tree, resulting in Corey's death. It was estimated they had been traveling in excess of ninety miles-per-hour. Toxicology reports revealed Cameron's blood alcohol level to be 0.186. Corey had no trace of alcohol in his system, but both brothers had significant levels of tetrahydrocannabinol (THC)—the active ingredient in marijuana.

Cameron later pled guilty to manslaughter and driving under the influence. Corey's Estate brought this action against Cameron. At trial, the Stringfellow's underinsured motorist carrier, The Travelers Home and Marine Insurance Company (Travelers), assumed Cameron's defense, alleging Corey was comparatively negligent and engaged in a joint enterprise with Cameron.

The trial court granted the Estate's motion for a directed verdict on the ground that Cameron's conduct was reckless and a proximate cause of Corey's death. The only issue left for the jury was whether Corey had been comparatively negligent.

The jury found Corey 51% negligent, barring his Estate from any recovery. Immediately after the verdict was published—and while the jury was still in the jury box—the trial court asked for any post-trial motions. The Estate moved for, among other things, a new trial under the thirteenth juror doctrine. The trial court took the motion under advisement and released the jury. After a hearing several weeks later on the Estate's motion, the trial court invoked the thirteenth juror doctrine and granted the motion for a new trial on the wrongful death portion of the Estate's claim. Travelers now appeals.

I.

Travelers first asks us to deem the Estate's new trial motion void because it was made before the jury was discharged. Travelers focuses on the following language of Rule 59(b) of the South Carolina Rules of Civil Procedure (SCRCP): "The motion for a

new trial shall be made *promptly after the jury is discharged*, or in the discretion of the court not later than 10 days thereafter." Rule 59(b), SCRCP (emphasis added). Travelers insists the Estate's motion was untimely because it was made before the jury's discharge and no motion was made after the jury was discharged. The trial court rejected Travelers' interpretation, and so do we.

Interpretation of a rule is a question of law we review de novo. Our role in interpreting a statute or court rule is to determine what the legislature intended to accomplish. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The best evidence of this intent is the words used, and often what the legislature meant is readily revealed by the plain meaning of those words. *See Smith v. Tiffany*, 419 S.C. 548, 555–56, 799 S.E.2d 479, 483 (2017). But meaning can be obscured rather than revealed if words are isolated and cut off from context. We are interpreting a rule, not a dictionary entry, and how words are arranged often determines meaning; as Mark Twain explained, it's "the difference between the lightning-bug and the lightning."

According to Travelers, the meaning of Rule 59 is plain: a motion for new trial is a nullity unless it is made promptly after the jury is discharged or—if the judge allows—not later than ten days after the jury is discharged. In Travelers' view, any motion made outside these points has no effect. *See Boone v. Goodwin*, 314 S.C. 374, 376, 444 S.E.2d 524, 525 (1994) ("We hold a party must make a motion for a new trial promptly after the jury is discharged or request ten days within which to make the motion.").

We decline to parse the language of Rule 59 in the manner Travelers requests. The purpose of the rule is to promote finality of judgments by requiring parties to move for a new trial promptly after they learn of an adverse verdict. Counting a party's new trial motion made in the brief period between return of the verdict and the jury's discharge as timely prejudices no one and advances the interests served by Rule 59.

Some post-trial motions—such as those seeking to correct or clarify an inconsistent verdict—must for practical reasons be made before the jury is discharged, or they are forever lost. Nothing in Rule 59(b) states or implies that a new trial motion is barred if it is made before the jury is discharged. The drafters understood it was the end of the trial that started the clock. *See* Note to 1986 amendment to Rule 59(b), SCRCP ("In jury trials, post-trial motions are made promptly *at the end of trial*, or at the time the court, upon motion, may grant an additional ten days to make them.")

(emphasis added). They did not dwell on the nuances of when the jury is officially discharged (nuances that might cause quibbles over, for example, whether jurors whose service in one case has ended but remain in the jury pool for selection in other cases have been "discharged" within the meaning of Rule 59). This understanding was informed by what practicing lawyers know: once the verdict is in, the bell has rung, and the reflex rises in losing counsel to move for a new trial, an instinct confirmed here by the trial court's invitation. We are reminded that a rule, like a statute, is not to be read "in an atmosphere of sterility, but in the context of what actually happens when human beings go about the fulfillment of its purposes." *Bolton v. Doe*, 266 S.C. 344, 349, 223 S.E.2d 187, 189 (1976).

We must reject literal interpretations that are literally absurd. Our courts have read rules setting time limits in the light of common sense. *See, e.g.*, *Hamm v. S.C. Pub. Serv. Comm'n.*, 287 S.C. 180, 181–82, 336 S.E.2d 470, 471 (1985) (rejecting construction of statute providing that appeals of agency rulings must be commenced within thirty days after decision that would preclude consideration of when ruling was actually received: "While a literal reading [of the statute] suggests the thirty days to appeal runs from the time the decision is made, we believe the statute must be read to allow a party thirty days after notice of a decision to bring an appeal. However clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature").

Courts elsewhere have rejected the version of "gotcha" Travelers promotes. Federal Rule 59(b) starts the clock for a new trial motion upon "entry of judgment" rather than the discharge of the jury, and in 2009 was amended to give parties 28 days rather than 10 to move for a new trial. Nevertheless, the principle in play is the same: whether a premature motion for new trial counts. Most courts agree it does. *See, e.g.*, *Dunn v. Truck World, Inc.*, 929 F.2d 311, 312–13 (7th Cir. 1991) ("[W]e must decide whether the loser may file a motion for a new trial before the entry of judgment. If this is the question, then the answer is easy. It may. Rule 59 says that the motion must come 'not later than 10 days after entry of the judgment.' A pre-judgment motion satisfies this requirement."); *Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989) ("Although Rule 59 motions are to be served not later than ten days after entry of judgment, courts and commentators generally agree that this ten-day limit sets only a maximum period and does not preclude a party from making a Rule 59 motion before a formal judgment has been entered"); *Douglas v. Union Carbide Corp.*, 311 F.2d 182, 184 (4th Cir. 1962) ("The wording of Rule 59(b) was designed to be broad enough to permit the motion to be made both before and after the entry

of judgment."); *Southall v. State*, 796 S.E.2d 261, 267 (Ga. 2017) ("[W]e conclude that a prematurely filed motion for new trial that sufficiently identifies the judgment involved becomes fully effective upon entry of that judgment."); *Kor Xiong v. Marks*, 668 S.E.2d 594, 600 (N.C. Ct. App. 2008) (Rule 59 motion may be made before entry of judgment); *Shamrock, Inc. v. Fed. Deposit Ins. Corp.*, 629 N.E.2d 344, 348 (Mass. Ct. App. 1994) (same); *see also* 11 Wright & Miller, *Federal Practice & Procedure*, § 2812 (3d ed. 2019) ("[T]here is nothing to prevent making a motion for a new trial before judgment has been entered.").

We join these authorities and hold a Rule 59(b), SCRCP, new trial motion made after the verdict has been returned but before the jury has been discharged is timely.

II.

Travelers' next argument—that the trial court erred in invoking the thirteenth juror doctrine—fares no better. The thirteenth juror doctrine empowers a trial court who believes the verdict is contrary to the evidence to "hang" the jury, thus necessitating a new trial. *Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004) ("The effect is the same as if the jury failed to reach a verdict, and thus, the circuit court is not required to give any reason for granting the new trial."). The doctrine arms the trial court with "the veto power to the Nth degree." *Worrell v. S.C. Power Co.*, 186 S.C. 306, 313, 195 S.E. 638, 641 (1938). The trial court is not required to explain or justify its decision to invoke the doctrine, and—because it is obligated to see that justice is done—it is duty-bound to grant a new trial if the evidence does not support the verdict. *Folkens v. Hunt*, 300 S.C. 251, 254–55, 387 S.E.2d 265, 267 (1990). We must uphold a trial court's thirteenth juror decision unless it is "wholly unsupported by the evidence." *Worrell*, 186 S.C. at 314, 195 S.E. at 641.

The trial court found the jury's verdict that Corey was 51% negligent was "against the fair preponderance of the evidence." Plenty in the record backs up the trial court's conclusion. Cameron admitted he was at fault and reckless, and his guilty pleas corroborated his fault. He also testified he had been driving safely before he alone made the decision to race through a twenty-five mile-per-hour zone, admitting he was "gunning it."

Travelers argues the evidence about Corey's involvement was conflicting. Of course it was; had it not been, the jury would not have been needed. And "where, as here,

the circuit court applied the correct legal standard for granting a new trial, and conflicting evidence exists on the contested issues, a circuit court's decision to sit as a thirteenth juror and grant a new trial absolute is inviolable." *Trivelas*, 357 S.C. at 553, 593 S.E.2d at 508.

We therefore affirm the well-reasoned rulings of the experienced trial judge.

AFFIRMED.[1]

WILLIAMS and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.