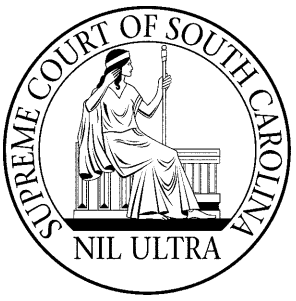

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 14, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Rose Marie Cooper, Respondent.

Appellate Case No. 2017-001452

Opinion No. 27777
Submitted February 23, 2018 – Filed March 14, 2018

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Rose Marie Cooper, of Anderson, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a confidential admonition or public reprimand. As a condition of discipline, respondent agrees to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School within one year of being disciplined. She also agrees to pay the costs incurred in the investigation of this matter by ODC and the Commission on Lawyer Conduct within thirty days of being disciplined. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts and Law

Matter A

Respondent withdrew $70,000 in retainer fees for three Chapter 11 bankruptcy cases post-petition without seeking or receiving approval from the bankruptcy court in violation of South Carolina Local Bankruptcy Rule 2016-1 and Rule 3.4(c), of the Rules of Professional Conduct, Rule 407, SCACR. Citing this violation, as well as other grounds, the bankruptcy court denied respondent's *nunc pro tunc* applications for approval of fees and ordered her to disgorge all fees she collected in the three cases. The court permitted respondent to repay the fees over a forty-five month period.

Several months later, the bankruptcy trustee sought to have respondent sanctioned and held in civil contempt for failing to comply with terms of the repayment plan. Instead, the bankruptcy court issued a new order relieving respondent from making further disgorgement payments for eighteen months in exchange for her agreement not to file any new bankruptcy cases during the same period. If respondent wished to resume a bankruptcy practice after eighteen months, she would be required to file a pleading stating her intent to resume practice and reaffirming the disgorgement payment plan. The affected clients were given notice of the revised order and did not object. Respondent has not sought to resume her bankruptcy practice.

The investigation into this matter revealed respondent did not maintain a receipt and disbursement journal, client ledgers, or reconciliation reports for her trust account as required by Rule 1 of Rule 417, SCACR, and that she commingled personal funds with funds belonging to her clients in violation of Rule 1.15(a), RPC. However, ODC found no evidence respondent misappropriated client funds. Respondent has ceased operating a trust account and the firm where she works as a contract attorney handles all transactions requiring funds to be held in trust.

Respondent's conduct in this matter also violated Rules 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of the tribunal) and 1.15(a) (a lawyer must hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property; funds must be kept in a separate account; complete records of such account funds must be kept by the lawyer in compliance with Rule 417, SCACR).

Matter B

This matter arises from a complaint filed by respondent's now-deceased ex-husband concerning respondent's involvement in criminal charges against her two former stepdaughters, Michelle and Sherry. Numerous fraudulent check warrants were issued against Michelle in five counties in South Carolina in 2001. She was arrested in 2014, while living in another state. Sherry called respondent seeking her assistance and admitting she, not Michelle, was responsible for the fraudulent checks. Sherry confessed that in 2001, she wrote nearly 100 bad checks on two checking accounts she fraudulently opened in Michelle's name. Respondent took a number of steps to advocate for Michelle, but never entered into a representation agreement nor made an official court or written appearance on Michelle's behalf. Respondent secured Sherry's on-the-record statement to persuade law enforcement and prosecutors of Michelle's innocence and negotiated the dismissal of warrants against Michelle in one county in exchange for payment of the face value of the checks. Once Michelle was released from jail, respondent continued to work on her behalf, researching and seeking expungement of her charges, searching for additional charges, and discussing her situation with prosecutors to prevent her from being arrested again.

Soon after Michelle was released, Sherry was arrested. Although respondent maintains she never agreed to represent Sherry, she did communicate with one circuit solicitor's office on Sherry's behalf and did accept funds from her ex-husband which he characterized as payment for Sherry's representation. Sherry wrote to respondent from jail, noting her father hired respondent to represent her. Respondent also wrote to Sherry twice while she was in jail, updating Sherry on her efforts to discover and resolve all warrants against Michelle and her communications with prosecutors on Michelle's behalf. Respondent did not dispute the claim that she was representing Sherry and instead offered her information and advice an attorney might offer her client. Respondent mentioned the details of her communications with one solicitor about Sherry's pending charges and numerous mitigating circumstances. Respondent told Sherry the solicitor was going to try to aggregate her charges from the various counties, but that Sherry needed "to settle in and make the best of the situation" in the jail where she was incarcerated. In both letters, respondent promised to provide Sherry with future updates. In the second letter, respondent addressed Sherry's complaints about the length of her incarceration and encouraged her to be realistic, warning her that she was facing a large number of felony charges without the ability to

make restitution. Respondent explained while she could not predict how a judge would view the case, she assured Sherry she was making sure all of the warrants were accounted for and kept talking to the solicitor in an effort to move the case through the system. Further, two of the prosecutors with whom respondent dealt believed respondent was representing Sherry and Michelle. Shortly after the second letter, respondent's ex-husband wrote respondent a letter terminating her representation of Sherry.

While Sherry was incarcerated, Michelle agreed to care for Sherry's minor daughter, but later left the child at the home of respondent's daughter, Erica. Erica and her husband decided to seek temporary custody of the child and hired Attorney A, who also worked as an independent contractor at the firm where respondent performs freelance work. Attorney A was unaware of respondent's involvement in Sherry's criminal charges and appeared in court on behalf of Erica and her husband. The court disqualified Attorney A at the request of respondent's ex-husband and Sherry based on respondent's representation of Sherry on the criminal charges.

Through her actions and communications, respondent represented Michelle and Sherry simultaneously even though she did not make a formal appearance on behalf of either woman and did not consider herself Sherry's attorney. There was a significant risk that her representation of either woman would be materially limited by her representation of the other and therefore her representations constituted a concurrent conflict of interest under Rule 1.7(a), RPC. Respondent did not attempt to secure Sherry's informed consent to the conflict but now recognizes that because of the nature of the criminal allegations, the women were legally at odds with one another and the conflict was not permissible even with consent. *See* Rule 1.7(b), RPC (permitting affected clients to give informed consent to some conflicts of interest but not where the representation involves an assertion of a claim by one client against another client represented by the lawyer in the same matter). Respondent also did not have her representation of Sherry or Michelle noted in the firm's computerized conflicts system and therefore deprived Attorney A of the opportunity to realize the potential conflict of interest before he accepted Erica as a client.

In addition to violating Rule 1.7, RPC, as set forth above, respondent has violated Rule 8.4(e), RPC, which states "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

Respondent admits her conduct in both matters constitutes grounds for discipline under Rule 7(a)(1), RLDE (it shall be a ground for discipline for a lawyer to violate or attempt to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for her misconduct. Within thirty days of the date of this opinion, respondent shall pay the costs incurred in the investigation of this matter by ODC and the Commission on Lawyer Conduct. Respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School within one year of the date of this opinion.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter John W. Bledsoe, III, Respondent.

Appellate Case No. 2017-002322

Opinion No. 27778
Submitted February 21, 2018 – Filed March 14, 2018

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

John W. Bledsoe, III, of Darlington, *pro Se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a confidential admonition or public reprimand.[1] As a condition of discipline, respondent agrees to complete the Legal Ethics and Practice Program Ethics

[1] Respondent previously received an Admonition on December 19, 2003, citing Rules 1.3 (Diligence), 1.4 (Communication), 1.15 (Safekeeping Property), 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 8.1 (Bar Admission and Disciplinary Matters), and 8.4(e) (Misconduct) of the Rules of Professional Conduct (RPC), Rule 407, SCACR.

School within one year of being sanctioned. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

In early 2016, respondent was retained to represent Client A in a divorce and custody action. Following a temporary hearing, the judge awarded custody of one child to Client A and custody of the other child, as well as child support, to Client A's spouse. Despite the fact child support was to be paid monthly, respondent prepared a temporary order requiring Client A to pay child support weekly. Although respondent submitted an amended temporary order to the judge which stated child support payments were to be made monthly, funds were garnished from Client A's payroll checks on four occasions for weekly payments as a result of the original order, causing Client A to experience financial difficulties, including difficulties paying for rent, utilities, and food.

Matter B

Respondent was retained to represent Client B in a divorce and custody action after Client B, while being represented by another attorney, lost custody of her child at a temporary hearing. Client B's spouse died before the final hearing could be held. Subsequently, the family court awarded temporary custody of Client B's child to the sister of Client B's spouse (Aunt) and the sister's husband (Uncle). Shortly after the temporary hearing in which custody was awarded to Aunt and Uncle, Client B released respondent and retained a new attorney.

At some point during his representation of Client B, respondent expressed to Client B that he was interested in a sexual relationship with her. Respondent asked Client B to show him her breasts. Client B showed respondent her breasts, but felt ashamed and humiliated. Respondent and Client B did not engage in a sexual relationship.

Law

Respondent admits that, in Matter A, his mistake in drafting the original order and his delay in recognizing the mistake and submitting an amended order violated

Rule 1.3, RPC, Rule 407, SCACR ("A lawyer shall act with reasonable diligence and promptness in representing a client."). With regard to Matter B, respondent admits that in requesting to see Client B's breasts, he violated Rule 1.7(a)(2), RPC, Rule 407, SCACR ("Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.") and Rule 8.4(e), RPC, Rule 407, SCACR ("It is professional misconduct for a lawyer to: . . . (e) engage in conduct that is prejudicial to the administration of justice[.]"). Finally, respondent admits the allegations contained in the Agreement constitute grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR ("It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers[.]").

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Respondent shall complete the Legal Ethics and Practice Program Ethics School within one year of the date of this opinion.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Stephen A. Yacobi, Respondent.

Appellate Case No. 2017-002324

Opinion No. 27779
Submitted February 21, 2018 – Filed March 14, 2018

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Kelly B. Arnold, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harvey M. Watson, III, of Ballard & Watson, Attorneys at Law, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a public reprimand or a definite suspension not to exceed nine months.[1] As a

[1] In 2002, respondent received a Letter of Caution, with a finding of misconduct, citing the following Rules of Professional Conduct (RPC), Rule 407, SCACR: Rule 1.3 (Diligence); Rule 1.4 (Communication); and Rule 1.16 (Declining or Terminating Representation). In 2007, he received an Admonition citing the following Rules of Professional Conduct: Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 5.3 (Responsibilities Regarding Nonlawyer

condition of discipline, respondent agrees to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School within nine months of being disciplined. Respondent also agrees to submit his monthly bank statements, reconciliation reports, and trial balance reports for his trust accounts to the Commission on Lawyer Conduct for a period of two years after being disciplined. Finally, respondent agrees to pay the costs incurred in the investigation of this matter by ODC and the Commission on Lawyer Conduct within thirty days of being disciplined. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

On December 6, 2011, respondent was retained to represent Client A in a workers' compensation matter. Respondent maintains that on December 7, 2011, his paralegal mailed a Form 50 to the Workers' Compensation Commission; however, the Commission never received the form. Respondent further maintains his paralegal mailed a copy of the form to the Commission in February 2012. The paralegal used a certificate of mailing dated December 7, 2011 for the February 2012 mailing.

On November 6, 2012, Client A signed a settlement statement prepared by respondent which set forth gross settlement proceeds of $75,000 and deductions for attorney fees and litigation costs in the amounts of $25,000 and $197, respectively. However, respondent had waived his claim to recover the latter. The settlement statement did not include a deduction for Client A's existing debt of $4,671.63 to a litigation loan company or a deduction of $15,453.50 Client A had directed respondent pay to a car dealer for a new vehicle. Respondent did not revise the settlement statement to reflect an accurate accounting of respondent's actual disbursements from Client A's proceeds.

Assistants); and Rule 8.1 (Bar Admission and Disciplinary Matters). Finally, respondent received a Letter of Caution in 2012 citing Rules 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(e) (Misconduct) of the Rules of Professional Conduct.

On November 6, 2012, respondent deposited the settlement check in the amount of $75,000 into respondent's trust account. Between November 7, 2012 and November 15, 2012, respondent wrote checks on the trust account to pay attorney fees, Client A, the car dealer, and the litigation loan company. All of the checks had cleared the trust account by November 19, 2012. However, at the time the disbursements were made, the settlement funds were neither collected funds pursuant to Rule 1.15(f)(1), RPC, nor "good funds" pursuant to Rule 1.15(f)(2), RPC.

Respondent did not respond to a Notice of Investigation from ODC nor a subsequent *Treacy* letter,[2] and he did not appear for an interview with ODC as required by a Notice to Appear. When contacted by ODC, respondent indicated his non-lawyer staff had not made him aware of mail or notices sent by ODC.

Respondent acknowledges he failed to supervise his non-lawyer staff and failed to make reasonable efforts to ensure the conduct of his non-lawyer staff was compatible with respondent's professional obligations.

Matter B

In October 2013, Clients B retained respondent to represent them in a family court matter. Clients B executed a fee agreement which provided for an attorney fee of $4,310, and which they believed covered certain legal services, including preparing, filing, and serving a complaint to initiate proceedings on their behalf. Having heard nothing from respondent thereafter, Clients B attempted to contact respondent by telephone, email, letter, and respondent's website between November 2013 and January 2014, to no avail.

On January 7, 2014, Clients B learned nothing had been filed on their behalf with the family court; therefore, they fired respondent. In their letter to respondent terminating his services, which was accepted by his receptionist, Clients B requested the return of the $4,310 previously paid to respondent. Clients B retained new counsel who also tried to contact respondent without success. Respondent recalls speaking with Mr. B in October 2013, but acknowledges there

[2] *See In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

was no further contact with Clients B. Respondent maintains his paralegal and the paralegal's daughter, who was the receptionist, intentionally deflected attempts at communication by Clients B and their successor counsel that were intended for respondent, including the deletion of emails sent directly to respondent. Respondent has terminated those staff members. Upon receipt of the complaint filed by Clients B, respondent contacted their new counsel and hand-delivered a full refund check on May 5, 2014.

Respondent admits he failed to prepare, file, or serve pleadings on behalf of Clients B in a timely manner. He also admits not initiating communication with Clients B to keep them reasonably informed as to the status of their case. Finally, he admits he failed to make reasonable efforts to ensure the conduct of his non-lawyer staff was compatible with respondent's professional obligations.

Matter C

Respondent's bank reported he had an NSF - a check presented against insufficient funds - on his real estate trust account on June 13, 2014. Respondent maintains the check in question had been properly issued; however, there were insufficient funds in the account because a $495 deposit for the same transaction was accidentally deposited into respondent's general trust account. ODC's examination of the daily balances provided by the bank and client ledger balances indicated the real estate account was short by more than the amount of the one misdirected deposit at the time of the NSF and respondent also had multiple negative client subaccount ledgers.

On June 13, 2014, respondent deposited $468 of personal funds into the real estate account to cover the shortage created by the presented check, and any possible bank fees associated with the NSF, while respondent investigated the cause of the NSF. On July 1, 2014, he deposited $700 of personal funds to rectify the other negative client subaccount ledgers. On July 3, 2014, respondent also transferred funds from his general trust account to the real estate account to correct the misdirected deposit of $495. Respondent elected to leave any remaining personal funds in the real estate account, resulting in an impermissible commingling of respondent's personal funds with client funds.

Respondent employed a bookkeeping service to prepare monthly trust account

reconciliations; however, reconciliations were not being performed each month. Respondent admits he failed to supervise his bookkeeper to ensure monthly reconciliations of his trust accounts were being performed. Respondent also admits he did not disburse checks related to real estate transactions in a timely manner, on one occasion waiting six months.

ODC has determined respondent's negative client subaccount ledgers were a result of carelessness in accounting for disbursements. Despite there being no indication of misappropriation, respondent was not reconciling the real estate trust account as required by Rule 1.15, RPC, and was not maintaining adequate records as required by Rule 417, SCACR.

Law

Respondent admits he violated the following Rules of Professional Conduct: Rule 1.2 (A lawyer shall consult with a client as to the means by which the objectives of representation are to be pursued.); Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); Rule 1.4(a) ("A lawyer shall: . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; [and] (4) promptly comply with reasonable requests for information[.]"); Rule 1.15(a) ("A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person . . . . Complete records of such account funds . . . shall be kept by the lawyer . . . . A lawyer shall comply with Rule 417, SCACR (Financial Recordkeeping)."); Rule 1.15(f)(1) ("A lawyer shall not disburse funds from an account containing the funds of more than one client or third person ('trust account') unless the funds to be disbursed have been deposited in the account and are collected funds."); Rule 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred."); Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); Rule 5.3(b) ("[A] lawyer having direct

supervisory authority over [a] nonlawyer . . . shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]"); Rule 8.1(b) ("[A] lawyer in connection with . . . a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from [a] . . . disciplinary authority[.]"); and Rule 8.4(e) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice[.]"). Respondent also admits he violated Rule 1 of Rule 417, SCACR, by failing to maintain adequate financial records. Finally, respondent admits the allegations contained in the Agreement constitute grounds for discipline under Rule 7(a)(1), RLDE ("It shall be a ground for discipline for a lawyer to . . . violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers[.]").

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Within thirty days of the date of this opinion, respondent shall pay the costs incurred in the investigation of this matter by ODC and the Commission on Lawyer Conduct. Respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School within nine months of the date of this opinion. Finally, respondent shall submit his monthly bank statements, reconciliation reports, and trial balance reports for his trust accounts to the Commission on Lawyer Conduct for a period of two years from the date of this opinion.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN and JAMES, JJ., concur. FEW, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John W. Swan, Respondent.

Appellate Case No. 2017-002129

Opinion No. 27780
Submitted February 22, 2018 – Filed March 14, 2018

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and C. Tex Davis Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Joseph C. Wilson, IV and Carl Everette Pierce, II, both of Pierce, Herns, Sloan & Wilson, LLC, of Charleston, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

Respondent represented Client in a criminal matter. Concerned that Client was suffering from a medical emergency and that the medical treatment Client was receiving in jail was inadequate, respondent paid Client's bond. When Client ran out of money to pay for the motel room where she was living, and was at risk of having to live on the street, respondent, with his wife's permission, allowed Client to stay at respondent's house with respondent and his wife for two to three nights. Respondent's wife provided Client with clothing. Respondent provided assistance to Client, including monetary assistance, in obtaining a driver's license, car insurance, and a new cell phone. Respondent also aided Client in signing up for inpatient drug rehabilitation. Respondent briefly employed Client in his law office. Respondent represents that he had negotiated a tentative plea agreement with the solicitor and believed the matter would be concluded based on that agreement at the time he began providing financial assistance to Client.

All of the funds advanced to Client came from respondent's operating account or personal funds, and respondent expected to be repaid from Client's anticipated tax refund. Client gave respondent a power of attorney so that respondent could receive the tax refund and secure repayment of the funds advanced. Respondent maintains the funds provided to Client did not encourage Client to pursue any litigation and did not provide respondent with a financial stake in any litigation. *See* Rule 1.8, cmt. 10, RPC, Rule 407, SCACR.

Matter B

On several occasions, respondent made sexually inappropriate comments to Client on the telephone while she was in jail, and on one occasion did the same with another client who was in jail. There is no evidence, nor have the clients claimed, respondent had sexual relations or engaged in any other inappropriate or unwarranted touching with either client, including with Client while she was staying in his home. There is also no evidence respondent requested sexual services in exchange for anything.

Respondent asserts he believed at the time the comments were made that they "were merely 'raunchy' banter or jokes between jailed clients with a difficult past and their attorney" and that they were part of private conversations that he never imagined would become public. Respondent now acknowledges the inappropriate nature of the comments. Indeed, our review of the portions of the telephone conversations at issue revealed respondent's comments to be sexually explicit and

highly offensive in nature. We find such comments made to a client by a member of the legal profession are entirely inappropriate and they will not be tolerated.

Matter C

On one occasion, respondent delivered electronic cigarettes to two clients in jail. He deliberately concealed the transfer by positioning his body in order to block the surveillance camera. A second delivery to one of the clients was foiled when an officer monitoring the surveillance camera in the visitation room witnessed respondent physically embracing the client and subsequently confiscated the electronic cigarette from the client. Electronic cigarettes were sold at the jail's commissary, and, under South Carolina law, are not considered contraband or a form of tobacco products, which are banned at the jail. *See* S.C. Code Ann. § 16-17-501 (2015) (defining electronic cigarette); S.C. Code Ann. § 24-7-155 (Supp. 2017) (matters considered contraband); S.C. Code Reg. 33-1 (2011) (list of articles considered contraband). However, as an attorney, respondent was afforded special privileges by the jail facility and his delivery of the electronic cigarettes to his clients violated the trust the jail had in him as a member of the Bar.

Law

Respondent admits his conduct violated the following provisions of the Rules of Professional Conduct: Rule 1.2(d) (a lawyer shall not assist a client in conduct which is criminal or fraudulent); Rule 1.7(a)(2) (a lawyer shall not represent a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer); Rule 1.8(e) (a lawyer shall not provide financial assistance to a client in connection with pending litigation except for court costs and litigation expenses in certain circumstances); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent also admits his conduct violated portions of the Lawyer's Oath, Rule 402(h)(3), SCACR (use good judgment; employ only such means in representing a client as are consistent with honor and the principles of professionalism; maintain the dignity of the legal system). Finally, respondent admits his conduct constitutes grounds for discipline pursuant to the following Rules for Lawyer Disciplinary Enforcement: Rule 7(a)(1) (it is a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(5) RLDE (it is a ground for discipline for a lawyer to engage in conduct tending to

bring the legal profession into disrepute); and Rule 7(a)(6) (it is a ground for discipline for a lawyer to violate the oath of office).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Within thirty days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of J. Marcus Whitlark, Respondent.

Appellate Case No. 2017-002323

Opinion No. 27781
Submitted February 21, 2018 – Filed March 14, 2018

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Ericka M. Williams, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Joshua Snow Kendrick, of Kendrick & Leonard, P.C., of Greenville, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a public reprimand or a definite suspension not to exceed six months.[1] As a condition of discipline, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct within thirty days of imposition of sanction. Respondent also agrees to enter into a payment agreement with the Commission within thirty days of the acceptance of the Agreement for payment of restitution to the court reporter

[1] In 2009, petitioner received an admonition citing Rules 1.15 and 8.4 of the Rules of Professional Conduct (RPC), Rule 407, SCACR, and Rule 417, SCACR.

referenced below in the amount of $3,239.11. We accept the Agreement and suspend respondent from the practice of law in this state for six months. The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

On approximately seven occasions during February 2005 and October 2007, respondent and his previous law partner retained the services of a court reporter for appearances and depositions. Transcripts of the depositions were ordered by respondent and his law partner and delivered to their law offices, along with an invoice for each transcript. The total amount of the outstanding invoices was approximately $4,040.69. When the invoices remained unpaid, the court reporter filed an action in magistrate's court and obtained a default judgment against respondent and his law partner for the amount of the unpaid invoices plus court costs, for a total of $4,120.69. Respondent failed to pay his portion of the unpaid invoices — $3,279.11. Respondent represents he was initially unaware of the outstanding invoices or of the court reporter's lawsuit and judgment. However, respondent was put on notice of the allegations by ODC on or about March 29, 2012, and he has still failed to pay the outstanding invoices.

Matter B

Respondent represented Client B in a personal injury action. Client B was treated by a neurologist for injuries sustained in an automobile accident which formed the basis for the action. In May 2000, respondent and Client B executed an authorization and agreement to pay the neurologist's fees. The total amount of the neurologist's bill after treatment was approximately $71,000. During trial, respondent presented the neurologist's bill and presented testimony from the neurologist regarding Client B's injuries. Client B was successful at trial and ultimately obtained a monetary award for injuries in the amount of $800,000.

After trial, respondent attempted to negotiate the amount of the neurologist's bill. After closely scrutinizing the neurologist's charges, respondent believed some of the charges had been inflated and some charges were fraudulent. The neurologist

eventually filed a lawsuit against respondent and Client B to recover the full amount of his bill. The jury awarded the neurologist $9,054.81.

Respondent failed to disclose to the trial judge in the personal injury action that he had offered material evidence and testimony at trial — in the form of the neurologist's bill and testimony — that he later learned was partially false. In addition, by the time the neurologist's action against respondent and Client B was resolved, respondent had distributed all remaining settlement funds to Client B. Respondent failed to hold the disputed $71,000 in trust pending resolution of the dispute.

Law

With regard to Matter A, respondent admits he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.") and Rule 8.4(e) ("It is professional misconduct for a lawyer to: . . . (e) engage in conduct that is prejudicial to the administration of justice[.]").

With regard to Matter B, respondent admits he has violated the following Rules of Professional Conduct: Rule 1.15(e) ("When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."); Rule 3.3(a)(1) ("A lawyer shall not knowingly: (1) . . . *fail to correct* a false statement of material fact or law previously made to the tribunal by the lawyer[.]") (emphasis added); Rule 3.3(a)(3) ("If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and *the lawyer comes to know of its falsity*, the lawyer shall take reasonable remedial measures, including, if necessary, *disclosure to the tribunal*.") (emphasis added); Rule 8.4(a) ("It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct . . . .").

Finally, respondent admits the allegations contained in the Agreement constitute grounds for discipline under Rule 7(a)(1), RLDE ("It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers[.]").

Conclusion

We find respondent's misconduct warrants a definite suspension from the practice of law in this state for six months. Within thirty days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct and enter into a payment agreement with the Commission for payment of restitution to the court reporter referenced in Matter A in the amount of $3,239.11. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David R. Gooldy, Petitioner,

v.

The Storage Center-Platt Springs, LLC, Respondent.

Appellate Case No. 2016-000588

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
James O. Spence, Master-in-Equity

Opinion No. 27782
Heard November 14, 2017 – Filed March 14, 2018

REVERSED

James Randall Davis, of Davis Frawley Anderson McCauley Ayer Fisher & Smith, LLC, of Lexington, for Petitioner.

Bess Jones DuRant and Robert E. Stepp, both of Sowell Gray Robinson Stepp & Laffitte, LLC, of Columbia, for Respondent.

JUSTICE HEARN: In this case we decide whether Petitioner David Gooldy is entitled to an implied easement where his deed incorporated by reference a plat that indicated a road, marked "50' Road," bordered the adjoining property owned by Respondent Storage Center-Platt Springs, LLC (Storage Center). The master-in-equity held Gooldy was entitled to the presumption of an implied easement, which the Storage Center failed to rebut, but the court of appeals reversed, holding the presumption did not apply and that no evidence supported the master's order. We now reverse and reinstate the master's order.

FACTUAL BACKGROUND

Gooldy owns a 0.68 acre parcel of land that fronts S.C. Highway 6 in Lexington County. The adjoining 7.35 acre lot, owned by the Storage Center, borders Gooldy's property on three sides in the shape of a horseshoe. Gooldy's deed referenced a plat prepared for James Loflin, Gooldy's predecessor in title. That plat (Loflin Plat) included the inscription "50' Road" along the southern boundary of Gooldy's property. There is no dispute the Loflin Plat is within the Storage Center's chain of title. After Gooldy acquired the property in 2002, he used the road[1] to access the property and to allow customers of his chiropractor business to do so. The Storage Center purchased its parcel five years later, and thereafter, its representatives informed Gooldy that he could no longer use the road.

Although the parties acquired their respective properties in the early 2000s, our focus must begin two decades prior thereto when Congaree Associates (Congaree) owned 500 acres of land in Lexington County, part of which encompassed the parcels at issue today. In the early 1980s, Congaree pursued a residential development project to convert the land into a subdivision and hired Robert Collingwood to survey and create plats for the proposed subdivision. In August of 1983, Collingwood surveyed the property and created a plat containing thirteen subdivided lots. Congaree labeled the first phase of the development project Westchester Phase I and duly recorded the plat. The northernmost lot within the proposed subdivision, Lot 13, bordered the parcel of land presently owned by Gooldy. The plat was silent as to whether any road crossed Lot 13.

[1] The plat indicated the strip of land at issue was in fact a road; however, testimony at trial indicated it was more akin to a gravel driveway. For ease of reference, the term "road" is used throughout this opinion.

Six months later, in January of 1984, Collingwood prepared a survey for the second phase of the subdivision plan, denominated Westchester Phase II, and the plat included the disputed road, marked "50' Road." Congaree submitted the plat to the Lexington County Planning Commission (Planning Commission) for approval, and in July of 1985, Westchester Phase II was conditionally approved. The Planning Commission withheld final approval until a retention pond and drainage ditches were designed and added to the plat. At some point after the conditional approval for Westchester Phase II, Congaree abandoned its plan to develop the subdivision due to the cost to comply with the Planning Commission's requirements for final approval.

In December of 1985, Collingwood prepared the Loflin Plat for James Loflin, who sought to purchase a lot from Congaree. The parcel abutted the proposed subdivision, and Collingwood included the disputed road in the Loflin Plat. Collingwood subsequently revised the plat twice, in April and August of 1986, but each revision identified the road.

In September of 1986, Congaree conveyed 0.68 acres to Loflin by a deed that incorporated the Loflin Plat. In relevant part, the deed stated,

> All that certain piece, parcel, or lot of land, with improvements thereon, if any, situate, lying and being on the western side of S.C. Highway No. 6, approximately 580 feet south of the intersection of Platt Springs Road and S.C. Highway No. 6, near the Town of Lexington, in the County of Lexington, State of South Carolina, *and being shown and designated on a plat* prepared for James T. Loflin by Robert E. Collingwood, Jr., Reg. Surveyor, dated December 10, 1985, revised August 12, 1986, and recorded in the Lexington County RMC office in Plat Book 212G at Page 204. The within described property contains 0.68 acre. (emphasis added).

Over the course of the next sixteen years, the 0.68 acre parcel was conveyed four more times, each by deed incorporating the Loflin Plat, with the final conveyance to Gooldy in January of 2002. In 2007, Congaree conveyed the neighboring lot to the Storage Center by deed that referenced a different plat that did not include the road. Shortly after the Storage Center purchased the adjacent lot and its representatives informed Gooldy that he was no longer entitled to use the road, the parties attempted to reach a shared access agreement by way of settlement. After disagreements failed to yield a workable resolution, the Storage Center erected a chain to block off access

to the road, and thereafter, Gooldy filed this declaratory judgment action seeking a determination that he was entitled to easement rights in the Storage Center's property. Before the master-in-equity, Gooldy asserted claims for easement by implication or estoppel, easement by prescription, and negligence. The Storage Center contended Gooldy did not possess any easement rights.

At trial, the fact Congaree never built the subdivision was a central issue as the Storage Center stressed that Congaree's decision to abandon the subdivision demonstrated it never intended to convey an easement. Carroll McGee, a partner of Congaree, testified Congaree decided to forego plans to develop a subdivision due to cost concerns; however, he failed to state when the decision was made to abandon the project. McGee also noted the parties to the 1986 conveyance never mentioned a road or any easement rights for ingress and egress on the adjoining parcel. After a one-day trial, the master held the deed incorporated the Loflin Plat, which under law established a presumption of an implied easement that the Storage Center failed to rebut.[2] In reaching his conclusion, the master found because Collingwood surveyed Westchester Phase I and II, he knew Congaree intended to build a road. Armed with that knowledge, Collingwood included the road on the Loflin Plat. According to the master, the absence of any evidence to demonstrate when Congaree decided to abandon its subdivision plan suggested the intent to build a road existed at the time of the 1986 conveyance.

The court of appeals reversed, holding the presumption did not arise because the deed only incorporated the plat to describe the metes and bounds of the 0.68 acre parcel rather than to demonstrate the parties intended to convey an easement. Additionally, the court held no evidence supported the master's conclusion that Congaree and Loflin intended to create an easement in the 1986 conveyance. We granted Gooldy's petition for certiorari.

STANDARD OF REVIEW

The question of whether an easement exists is a factual question in an action at law. *Bundy v. Shirley*, 412 S.C. 292, 302, 772 S.E.2d 163, 168 (2015). Appellate

[2] During the trial, the Storage Center moved for a directed verdict, but the master only granted it on the prescriptive easement claim based on Gooldy's failure to present evidence satisfying the statutory time period.

courts will uphold a master's factual findings if there is any evidence to support the decision. *Jowers v. Hornsby*, 292 S.C. 549, 552, 357 S.E.2d 710, 711 (1987).

DISCUSSION

Gooldy advances two arguments as to why the court of appeals erred in reversing the master's order: first, it was error to hold the deed's reference to the Loflin Plat did not raise the presumption of an implied easement, and second, evidence in the record supported the master's decision that the 1986 conveyance was subject to an implied easement. We agree.

I. Presumption of an Implied Easement

Generally, when a deed references a plat that contains an easement, an implied easement arises even though the deed itself is silent. *McAllister v. Smiley*, 301 S.C. 10, 12, 389 S.E.2d 857, 859 (1990). Stated differently, a presumption of an implied easement arises unless rebutted by a specific, contrary intention by the grantor. *Newington Plantation Estates Ass'n v. Newington Plantation Estates*, 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995) ("Absent evidence of the seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use."). Furthermore, "'[A]ccording to the great weight of judicial opinion, the lot purchaser is entitled to the use of all the streets and ways, near or remote, as laid down on the plat by which he purchases.'" *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 120, 145 S.E.2d 922, 925 (1965) (quoting *Billings v. McDaniel*, 217 S.C. 261, 265, 60 S.E.2d 592, 593–94 (1950)).

This presumption endures even where the general policy is to disfavor implied easements "because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself." *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91–92, 659 S.E.2d 151, 154 (2008). Importantly, "Whatever easements are created by implication must be determined as of the time of the severance of the ownership of the tracts involved." *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006).

This presumption is entrenched in South Carolina property law. In *Blue Ridge*, the Court addressed whether an easement existed in a cul-de-sac. 247 S.C. at 116, 145 S.E.2d at 923. A realty company subdivided lots, recorded a plat containing the

cul-de-sac, and sold the parcels by deed referencing the plat. *Id.* However, the realty company maintained ownership over a few of the lots abutting the cul-de-sac. *Id.* at 117, 145 S.E.2d at 924. After a neighboring resident blocked access to the cul-de-sac, claiming he owned that portion of the road in fee simple, the realty company brought suit, arguing the resident did not own the street because it was instead an easement. *Id.* at 121, 145 S.E.2d at 926. The Court agreed with the realty company under the general rule "that where a deed describes land as is shown on a certain plat, such plat becomes a part of the deed." *Id.* at 247 S.C. 118, 145 S.E.2d at 924. This Court has since repeated the rule from *Blue Ridge* on numerous occasions. *See, e.g., Newington Plantation Estates Ass'n v. Newington Plantation Estates*, 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995) (stating that a private easement existed in an unpaved portion of a traffic circle where the deed referenced a recorded plat that contained the street and no evidence existed of a contrary intent to convey the easement); *McAllister v. Smiley*, 301 S.C. 10, 12, 389 S.E.2d 857, 859 (1990) (concluding that an implied easement arose where the deed referred to a plat that contained a road and no evidence existed that the parties intended to negate the grant of the easement); *Carolina Land Co. v. Bland*, 265 S.C. 98, 106, 217 S.E.2d 16, 20 (1975) (holding that purchasers of subdivided lots platted into streets and sold by reference to the plat acquired an appurtenant easement in a road that was never opened or used).

Based on the well-established rule articulated in *Blue Ridge*, the court of appeals erred in reversing the master and holding Gooldy was not entitled to the presumption of an implied easement. The Loflin Plat depicted a road as the southern boundary of Gooldy's property, and the lot portrayed two subdivided parcels of land originally owned by Congaree. While the Loflin Plat does not include the metes and bounds of the Storage Center's parcel, it still contains a portion of the property and clearly indicates the other parcel. Most significantly, Congaree originally owned both parcels and subdivided the property when it conveyed the 0.68 acre portion to Loflin. As the master correctly concluded, the Loflin Plat created the presumption of an implied easement as established by *Blue Ridge* and its progeny.

The Storage Center attempts to avoid this rule by contending the deed only incorporated the plat to describe the metes and bounds of the 0.68 acre tract. It asserts the deed's language—"[t]he within described property contains 0.68 acre"—aligns this case with *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 144 S.E.2d 209 (1965), and *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006). In *Lancaster*, the defendant sold property under a deed that stated the seller conveyed

the property "as shown" by a recorded plat, which clearly indicated a gas pipeline company possessed easement rights on a portion of the property. 246 S.C. at 466, 144 S.E.2d at 210. The question before the Court was whether reference to a plat containing an easement held by a third party allowed the seller to escape liability for breach of the covenant against encumbrances. *Id.* at 468, 144 S.E.2d at 211. If the conveyance was subject to the easement, then it would not fall under the covenant. However, the Court rejected that contention and stated,

> A plat, however, is not an index to encumbrances, and the mere reference in a deed, as in this case, to a plat for descriptive purposes does not incorporate a notation thereon as to an easement held by a third party so as to exclude such easement from the covenant against encumbrances in the absence of a clear intention that it so operate. *Id.* at 469, 144 S.E.2d at 211.

Significantly, the Court noted the fact-specific nature of the inquiry, highlighted by the point that neither party presented any facts other than the deed's reference to the plat to demonstrate the parties intended to convey the property subject to the easement. *Id.* Therefore, not only does *Lancaster* address whether a plat incorporated an easement for the purpose of an exclusion from the covenant against encumbrances—an issue not present here—neither party in that case presented facts to demonstrate the parties intended to convey the property subject to the easement.

In *Bennett*, the court of appeals relied upon the principle in *Lancaster* that a deed may incorporate a plat merely for descriptive purposes if the parties' intent to do so is clear. *Bennett*, 370 S.C. 578, 635 S.E.2d 649. In that case, the seller conveyed property pursuant to a deed that incorporated a plat containing a sixty-six foot right-of-way. *Id.* at 585–86, 635 S.E.2d at 652. The plat, however, was based on an erroneous survey, so the precise location and dimensions of the easement as represented conflicted with an easement held by the South Carolina Department of Transportation. *Id.* After the buyer constructed a wall inside SCDOT's easement but outside the easement as indicated on the plat, the buyer sued his title insurance carrier which in turn sued the seller and asserted the plat represented the width of the easement. *Id.* This Court rejected that contention, instead holding the parties intended to incorporate the plat merely to describe "the boundaries, metes, courses, and distances of the property conveyed." *Id.* at 595, 635 S.E.2d at 658.

Unlike the deed in question here, the deed in *Bennett* expressly stated the seller did *not* grant "'matters affecting title to the Property as shown on the Plat,' matters

'which would be shown on a current and accurate survey of the Property,' and rights-of-way of public streets and roads." *Id.* at 595, 635 S.E.2d at 658 (quoting the deed at issue). This language demonstrated an intent *not* to convey the easement indicated on the plat, which makes it inapposite to the facts before us. Accordingly, the court of appeals erred in holding *Lancaster* and *Bennet* are controlling. Instead, under *Blue Ridge*, Gooldy was entitled to the rebuttable presumption of an implied easement.

II. Any Evidence to Support the Master's Decision

Gooldy asserts the court of appeals misapplied the "any evidence" standard of review to conclude no evidence supported the master's conclusion that the parties to the 1986 conveyance intended to create an easement.[3] Finding ample evidence exists to support the master's conclusion, we agree.

Initially, we note the relevant inquiry regarding the parties' intent is limited to the facts and circumstances *at the time of the 1986 conveyance*. The master clearly recognized this, stating on the record that this was the pertinent date. *See Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006) ("Whatever easements are created by implication must be determined *as of the time of the severance* of the ownership of the tracts involved.") (emphasis added).

During the time Congaree planned to develop a subdivision, Collingwood surveyed and created plats for both Westchester Phase I and II. While Congaree never recorded the plat for Westchester Phase II, it nevertheless took action consistent with the intent to build a road by submitting a plat containing the road to the Planning Commission for approval. Therefore, it is entirely reasonable to find, as the master did, that Collingwood carried out Congaree's intent at that time to build a road by marking it on the Loflin Plat. The fact that Congaree eventually abandoned its plans to build the subdivision at some later date is of little import to the determination of its intent at the time of the 1986 conveyance to Loflin. As McGee

[3] An appellate court's review of the existence of an easement is a question of fact in an action at law. We note this case does not involve the scope of an easement, which is an action in equity where an appellate court views the evidence under its view of the preponderance of the evidence. *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008) ("In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence.").

testified, "If we had developed…Westchester, there would have been a road there." With evidence to demonstrate Congaree, at the time of preparation of the Loflin Plat, intended to build the road and no evidence as to when the plan was abandoned, we find the record supports the master's decision that Congaree intended to convey an easement in the 1986 conveyance.

In reversing the master, the court of appeals appeared to have weighed the evidence rather than to have applied the highly deferential "any evidence" standard. *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 153 (2008) ("[T]his Court reviews factual issues relating to the existence of an easement under a highly deferential standard."). For example, the court of appeals noted McGee testified the parties to the 1986 conveyance did not intend to create an easement, Congaree never gave permission to Loflin to use the land at issue, and Loflin did not own the land or have any rights to it. While this may be reflected in the record, the court should have limited its analysis to determining, consistent with our appellate standard of review, whether any evidence exists to support the master's decision. The master was entitled to weigh the testimony, and the record supports his findings that McGee never actually discussed the issue with Loflin. Furthermore, the master concluded evidence of the intent to create an easement was more compelling, mainly the plan to develop a subdivision and the road. Ultimately, these issues are factual determinations relegated to the master as fact-finder which must be upheld under our standard of review if there is any evidence to support them.

CONCLUSION

We find the record supports the master's decision that the parties to the 1986 conveyance intended to create an easement. The implied easement encumbers the Storage Center's property as the Loflin Plat was duly recorded in its chain of title. Accordingly, we reverse the court of appeals and reinstate the master's order.

REVERSED.

KITTREDGE, Acting Chief Justice, FEW, JAMES, JJ., and Acting Justice Arthur Eugene Morehead, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Travis A. Roddey, Individually and as the Personal Representative of the Estate of Alice Monique Beckham Hancock, deceased, Appellant,

v.

Wal-Mart Stores East, L.P., U.S. Security Associates, Inc., and Derrick L. Jones, Respondents.

Appellate Case No. 2016-002248

Appeal From Lancaster County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27783
Heard February 14, 2018 – Filed March 14, 2018

AFFIRMED

Whitney B. Harrison and Shawn Deery, both of Columbia, and S. Randall Hood, of Rock Hill, all of McGowan Hood & Felder, LLC, for Appellant.

Stephanie G. Flynn, of Smith Moore Leatherwood, LLP, and W. Howard Boyd, Jr., of Gallivan, White & Boyd, PA, both of Greenville, for Respondents.

CHIEF JUSTICE BEATTY: This appeal presents us with the opportunity to revisit our decision in *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 784 S.E.2d

670 (2016), wherein we reversed and remanded for a new trial after determining the Court of Appeals erred in affirming the circuit court's decision granting Wal-Mart's motion for a directed verdict on the appellant's negligence action. On remand, the circuit court, believing the new trial to be limited to the negligence action, issued an order striking the negligent hiring, training, supervision, and entrustment action and barring any evidence in support of the action on the basis of *res judicata*. Travis Roddey, individually and as the personal representative of Alice Hancock's estate, ("Appellant") appealed the order and we certified the appeal pursuant to Rule 204(b), SCACR. We affirm.

I. Factual and Procedural History

Wal-Mart suspected Alice Hancock's sister, Donna Beckham, of shoplifting. As Beckham was exiting the store and heading for Hancock's car, Wal-Mart's employees told Derrick Jones, an on-duty Wal-Mart security guard employed with U.S. Security Associates, Inc. ("USSA"), to delay Beckham from leaving its premises. Beckham, however, got into Hancock's car and Hancock exited the parking lot and entered the highway. Jones pursued Hancock onto the highway in contravention of Wal-Mart's policies after Wal-Mart's employees repeatedly asked him to obtain Hancock's license tag. Hancock died in a single-car accident shortly thereafter.

Appellant filed suit against Wal-Mart Stores East, LP, USSA, and Jones (collectively "Respondents"), alleging negligence and negligent hiring, training, supervision, and entrustment. At the conclusion of Appellant's case, Wal-Mart moved for a directed verdict on both causes of action, submitting: (1) Appellant failed to present evidence showing Wal-Mart breached its duty of care; (2) Appellant failed to present evidence showing Wal-Mart's actions were the proximate cause of Appellant's injuries; and (3) Hancock was more than 50% negligent for the injuries in this case. The circuit court granted Wal-Mart's motion and dismissed it from the case, concluding "there is insufficient evidence that Wal-Mart was negligent, or even if they were there is [a] lack of proximate cause that the events were not foreseeable."

USSA subsequently moved for a directed verdict on the negligent hiring cause of action. USSA argued the fact that Jones had a suspended driver's license and a criminal record did not make it foreseeable that "Jones would engage in a high speed pursuit down the highway off [Wal-Mart's] premises." The court denied the motion and both the negligence action and the negligent hiring action were sent to the jury.

On Appellant's negligence action, the jury found Jones and USSA 35% negligent and Hancock 65% negligent. On Appellant's negligent hiring action, the jury found USSA was negligent for hiring Jones, but determined its negligence did not proximately cause Appellant's injuries. Appellant filed a Rule 59, SCRCP motion seeking a new trial based, in part, on the circuit court's decision to direct a verdict in favor of Wal-Mart on the negligence cause of action, arguing he presented enough evidence from which a jury could find Wal-Mart breached its duty and that its breach proximately caused the injuries in this case. The circuit court denied the motion and Appellant appealed to the Court of Appeals.

In a split decision, the Court of Appeals affirmed the circuit court's ruling granting Wal-Mart's motion for a directed verdict on the negligence action. *Roddey v. Wal-Mart Stores E., LP*, 400 S.C. 59, 732 S.E.2d 635 (Ct. App. 2012). We granted certiorari to review the Court of Appeals' decision and reversed in a 3-2 decision. *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 784 S.E.2d 670 (2016). We found "there is evidence from which a jury could determine that Wal-Mart was negligent, and that its negligence proximately caused the injuries in this case." *Id*. at 589, 784 S.E.2d at 675. Accordingly, we remanded "for a new trial as to all of the [Respondents]." *Id*.

On remand, prior to the new trial, Respondents filed a motion to exclude the negligent hiring action from retrial on the basis of *res judicata*. Respondents submitted: (1) Appellant could not pursue the action against USSA and Jones because it was tried and decided by a jury during the first trial and Appellant did not appeal the verdict; and (2) Appellant could not pursue the action against Wal-Mart because USSA hired Jones and because Appellant only appealed the circuit court's grant of Wal-Mart's motion for a directed verdict on the cause of action for negligence and not negligent hiring.

The circuit court agreed with Respondents and issued an order striking the negligent hiring cause of action and barring any evidence concerning that action from retrial. Appellant appealed the circuit court's ruling to the Court of Appeals and we certified the appeal pursuant to Rule 204(b), SCACR.

II. Discussion

1. Whether the circuit court erred in striking Appellant's negligent hiring cause of action.

Appellant contends the circuit court erred in striking the negligent hiring action. We disagree.

In his Rule 59, SCRCP motion, Appellant did not challenge the circuit court's grant of a directed verdict in favor of Wal-Mart on the negligent hiring action or allege any error regarding the jury's verdict in favor of USSA on the negligent hiring action. Moreover, the only issue Appellant appealed was the circuit court's grant of a directed verdict in favor of Wal-Mart on the negligence action, which was the only issue addressed by this Court and the Court of Appeals. Therefore, our decision to grant a new trial only encompassed the negligence action since the negligent hiring action was not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."); *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) (stating "where an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review"); *Hendrix v. E. Distrib., Inc.*, 320 S.C. 218, 219, 464 S.E.2d 112, 113 (1995) (providing that an issue should not be addressed by an appellate court if it is not preserved for the court's review).

Accordingly, we affirm the circuit court's decision to strike the negligent hiring action on the basis of *res judicata*. *See Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties."); *id.* ("Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" (quoting *Hilton Head Ctr. of S. Carolina, Inc. v. Pub. Serv. Comm'n of S. Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987))).

2. Whether the circuit court erred in barring evidence of the negligent hiring cause of action.

Appellant next contends this Court should reverse the circuit court's order barring evidence of the negligent hiring claim. We disagree.

Appellant interprets the circuit court's order barring evidence concerning the negligent hiring action as also barring evidence of his negligence action if that evidence overlaps with the negligent hiring cause of action. Accordingly, Appellant asserts that excluding evidence of Respondents' negligence because the evidence may also support the negligent hiring cause of action "strip[s] Appellant from his means of proving his case" and is in "direct contradiction" to our decision in *Roddey*, which relied on the evidence now barred by the circuit court's ruling.

We do not interpret the circuit court's decision to be as limiting as Appellant proclaims. Significantly, neither do Respondents. According to Respondents,

> Appellant's fear that the ruling of the trial court will somehow result in the exclusion of evidence shown to be relevant and not unfairly prejudicial in the negligence action simply because it may have also been relevant to another cause of action that is no longer before the jury is nonsensical and should be disregarded.

Respondents acknowledge that:

> The trial court's order in no way prevents Appellant from presenting evidence to a jury that Wal-Mart improperly instructed Derrick Jones to get the license tag number and never told him to stop, nor in showing that Wal-Mart's own internal policies and procedures prohibited them from doing what Jones did in pursuing Hancock.

Therefore, it is undisputed that Appellant may present relevant and otherwise admissible evidence of Respondents' negligence in the retrial regardless of whether the evidence could also support the negligent hiring action. While there may be some disagreement as to what specific evidence may be admitted to show Respondents' negligence, the decision to admit that evidence is properly left to the trial court as it is in a better position to review the evidence and determine its

admissibility. *See Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 567, 658 S.E.2d 80, 92 (2008) (recognizing "[t]he admission or exclusion of evidence is left to the sound discretion of the trial court").

Thus, we affirm the circuit court's decision barring evidence in support of the negligent hiring cause of action unless the evidence is relevant to the negligence action and is otherwise admissible.

III. Conclusion

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

AFFIRMED.

KITTREDGE, HEARN, JJ., and Acting Justices Daniel Dewitt Hall and James Otto Spence, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Milledge, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2014-002386

ON WRIT OF CERTIORARI

Appeal from Greenville County
James R. Barber, III, Circuit Court Judge

Opinion No. 27784
Submitted September 21, 2016 – Filed March 14, 2018

REVERSED

Attorney General Alan M. Wilson and Senior Assistant Attorney General DeShawn Herman Mitchell, both of Columbia, for Petitioner.

Appellate Defender Susan B. Hackett, of Columbia, for Respondent.

JUSTICE HEARN: Respondent Michael Milledge was arrested and convicted of multiple drug-related offenses in Greenville County following a traffic stop.

Milledge applied for post-conviction relief (PCR), arguing his defense counsel was deficient for failing to object at trial to the introduction of contraband found pursuant to an illegal search. The PCR court agreed and granted Milledge a new trial. We reverse.

FACTUAL BACKGROUND

Deputies John Lanning, Patrick Swift, and Fred Miller were on patrol in a high-crime area[1] of Greenville County when they initiated a traffic stop after observing Milledge driving with a cracked windshield and missing rearview mirror. Upon making contact with Milledge, the deputies observed him exhibiting extreme nervousness. Swift noted Milledge was attempting to make a call on his cellphone, but his hands were shaking so much he could not dial the right number.[2] Swift asked Milledge why his hands were shaking and he responded it was because he was hot. After Swift stated he too was hot but his hands were not shaking, Milledge stared straight ahead, refused to respond to any further questions, and "acted like [Swift] wasn't even there." This behavior, coupled with the high-crime area where the stop occurred, caused Swift to fear for his safety so he asked Milledge to step out of the vehicle.[3]

After Lanning returned to the patrol vehicle but before he could perform a check on the driver's license and registration, Milledge complied with Swift's request

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[1] Several SWAT narcotics search warrants had recently been executed within a half-mile of their location in the weeks prior to the traffic stop, and the deputies testified to a history of "issues" in the area to which they had responded.

[2] The deputies testified they were taught in training to be alert when motorists attempted to make phone calls during traffic stops because such calls are often made to summon backup against law enforcement or for other nefarious purposes.

[3] Swift testified, "A lot of times when people are avoiding eye contact they are looking for a way out of the situation. They're already going over in their mind, I'm going to run, I'm going to fight, I'm going to do this. . . . They're thinking about something else in their mind about what they would rather be going [sic] or what they're about to do. That's what I was thinking of when I asked [Milledge] to step out of the vehicle . . . ."

to exit and walk towards the rear of his vehicle. Seeing that his partner had asked Milledge to exit the vehicle, Lanning ceased running the information check and approached Milledge. Noticing Milledge would not look at him and only stared straight ahead, Lanning asked him if he had any weapons on him, using specific language meant to elicit some sort of response from persons being questioned.[4] Failing to get any response or reaction, Lanning decided it was necessary for the deputies' safety to conduct a pat-down search for weapons. As he began the frisk, Lanning felt what he recognized as a revolver in Milledge's shorts pocket. As Deputy Miller reached in to remove the revolver, a baggie containing pills and crack cocaine also emerged from the same pocket. The deputies then placed Milledge under arrest.

Milledge was indicted on charges of trafficking in crack cocaine; possession of a gun during the commission of a violent crime; possession of cocaine with intent to distribute; and possession of ecstasy. Prior to trial, Milledge's defense counsel made a motion *in limine* to suppress the drugs, arguing they were found as a result of an unlawful search. Defense counsel conceded the deputies had probable cause to conduct the traffic stop, but asserted the deputies lacked justification for the subsequent frisk, arguing the deputies' sole reason for conducting the frisk was because Milledge "acted nervous."

The trial court[5] denied Milledge's motion *in limine* and found the frisk was based on a reasonably articulable suspicion. The trial court held that standing alone, the individual characteristics relied on by the deputies would not support a reasonably articulable suspicion to conduct a frisk, but when considered in the aggregate, the circumstances and Milledge's conduct justified the frisk. Specifically, the trial court stated:

> Extreme nervousness, not nervousness as is customarily incident to a traffic stop but extreme nervousness to the extent that the phone couldn't be dialed. The fact that there was a phone called [sic] that being [sic] attempted at the time. The fact that it was a high drug use area, the reluctance or recalcitrance of the defendant to respond to any

[4] Lanning asked Milledge if he had "any guns, knives, bazookas, anything that's going to hurt me, beat me, make me bleed."

[5] The Honorable Robin B. Stilwell presided over the trial.

> questions. And the dubiousness of the explanation for the shaking that the officer received when he asked for or posed the first question. All of those things in the aggregate give me cause to believe that there was probable cause for the search.

Later, at trial, defense counsel did not contemporaneously object when the drugs were introduced into evidence. The jury found Milledge guilty of all charges.

The court of appeals affirmed the trial court's findings in an unpublished opinion, holding the issue of the admissibility of the drugs was not preserved for appellate review because defense counsel failed to contemporaneously object.

Milledge then filed an application for PCR. Milledge argued his defense counsel was deficient by failing to renew his objection to the contraband when the State entered it into evidence at trial, and Milledge suffered prejudice as a result of this failure.

The PCR court granted Milledge's application for a new trial, finding defense counsel was deficient in failing to renew his objection to the evidence at trial. Furthermore, the PCR court held the factors asserted by the officers did not give rise to the level of reasonable and articulable suspicion required by the Fourth Amendment to conduct a frisk. Thus, the PCR court determined Milledge suffered prejudice because there was a reasonable probability an appellate court would have found the search unreasonable. Therefore, the PCR court concluded Milledge satisfied both prongs of the *Strickland*[6] test and granted a new trial. The State appealed and this Court granted certiorari.

ISSUE PRESENTED

Did the PCR court err in finding a new trial was warranted in this case because defense counsel failed to object to the admission of evidence of contraband at trial on the grounds the evidence was the result of an unreasonable search in violation of the Fourth Amendment?

[6] 466 U.S. 668 (1984).

STANDARD OF REVIEW

In PCR actions, this Court will uphold the lower court's findings if there is any evidence of probative value to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, the Court will reverse the lower court's decision if it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). The PCR applicant bears the burden of proving his allegations by a preponderance of the evidence. *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

Generally, in supporting his allegations of ineffective assistance of counsel, the applicant must satisfy a two-prong test. *See Strickland*, 466 U.S. at 687. First, the applicant must demonstrate trial counsel's performance was deficient. *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625. Second, the applicant must demonstrate trial counsel's "deficient performance prejudiced the [applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010).

LAW/ANALYSIS

The State argues the PCR court erred in finding Milledge's defense counsel was ineffective because regardless of whether counsel's performance was deficient, there was no resulting prejudice. In particular, the State contends that, even if defense counsel had renewed his objection when the evidence was presented, the trial court would have denied it, and an appellate court would have upheld the ruling on appeal. Thus, while the State does not contest the PCR court's findings regarding the first prong of *Strickland*—that Milledge's defense counsel was deficient in failing to object to the evidence when it was entered—the State contends Milledge suffered no prejudice because the search conducted by the deputies was lawful under the Fourth Amendment. We agree the appropriate inquiry is whether the search conducted by the deputies was lawful under the Fourth Amendment, as that issue would have controlled the outcome on direct appeal. We further agree with the State that the search was supported by the deputies' reasonable, articulable suspicion, and thus Milledge was not prejudiced by counsel's failure to contemporaneously object.

"[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996). Upon initiating the traffic stop, a police officer may order the driver out of the vehicle in the interest of officer safety. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). In conjunction with a valid automobile stop for a traffic violation, an officer may conduct a *Terry*[7] frisk for his own safety after forming a reasonable conclusion "that the person whom he ha[s] legitimately stopped might be armed and presently dangerous." *Id.* at 112; *State v. Banda*, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006).

Pursuant to the doctrine established in *Terry*, an officer that has initiated a legitimate stop of an individual may conduct

> a reasonable search for weapons for the protection of the police officer . . . . The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry, 392 U.S. at 27. The reasonableness of the officer's actions under the circumstances must be determined based on "the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*

One of the touchstones of *Terry* is the immediate interest of police officers in assuring themselves the person with whom they are dealing "is not armed with a weapon that could unexpectedly and fatally be used against [them]." 392 U.S. at 23. The Supreme Court warned against placing unreasonable restrictions on police officers that would require them to take "unnecessary risks" in carrying out their law enforcement duties. *Id.* After initiating a lawful traffic stop, the additional intrusion of ordering the driver to exit the vehicle is *de minimis* and can only be characterized as a "mere inconvenience . . . when balanced against legitimate concerns for the officer's safety." *Mimms*, 434 U.S. at 111 (noting a "significant percentage" of murders of police officers occur during traffic stops). Thus, the prevailing justification for conducting a *Terry* frisk is not simply crime prevention, but the more immediate need of assuring officer safety. *Terry*, 392 U.S. at 23.

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[7] 392 U.S. 1 (1968).

In determining whether reasonable suspicion exists to perform an investigative stop and frisk without infringing upon an individual's Fourth Amendment rights, courts must consider the totality of the circumstances. *United States v. Sokolow*, 490 U.S. 1, 8 (1989). While the officer must be able to point to articulable facts beyond a mere unparticularized suspicion, due weight must be given to the officer's experience, training, and common-sense conclusions. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). A police officer's assessment of the circumstances may include "various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person." *Id.* at 418. In reviewing the totality of the circumstances, the individual factors of the stop must not be considered in isolation or piecemeal. *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008). Factors which alone may not serve as proof of any illegal conduct and may appear innocent on their face can, when taken in the aggregate, give rise to reasonable suspicion. *Sokolow*, 490 U.S. at 9.

A person's presence in a known high-crime area is one relevant consideration in analyzing reasonable suspicion to conduct a *Terry* frisk. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Additionally, officers may also draw inferences and conclusions from the "extreme nervousness" of motorists during traffic stops, particularly where, in the officers' experience, the nervousness is excessive when compared to other motorists who are not engaged in criminal activity. *See State v. Provet*, 405 S.C. 101, 111–12, 747 S.E.2d 453, 459 (2013). Furthermore, an officer need not have a reason to suspect criminal activity sufficient to justify a *Terry* frisk at the outset of a traffic stop, but may develop such reasonable suspicion based on his observations while conducting the stop. *See Arizona v. Johnson*, 555 U.S. 323, 327–28 (2009).

In a case factually similar to the case at hand, the court of appeals held officers had reasonable suspicion to conduct a protective frisk of a motorist. *State v. Smith*, 329 S.C. 550, 495 S.E.2d 798 (Ct. App. 1998). In that case, police officers lawfully stopped Smith for speeding. *Id.* at 557, 495 S.E.2d at 801. As an officer approached Smith's vehicle, he noticed Smith was acting in an "edgy" manner and was looking around. *Id.* at 557, 495 S.E.2d at 802. For the sake of officer safety, the officer ordered Smith out of the vehicle and asked him whether he had any weapons on him, but Smith did not respond. *Id.* at 554, 495 S.E.2d at 800. Accordingly, the officer

conducted a pat down for weapons which yielded narcotics. *Id.* Under a *Terry* analysis, the court of appeals found when the facts of that case were considered as a whole and from the viewpoint of a reasonably prudent officer, the officer had reasonable suspicion to perform the frisk. *Id.* at 557, 495 S.E.2d at 801–02.

In this case, the PCR court found the factors asserted by the deputies were not sufficient to give reasonable suspicion to conduct a protective frisk on Milledge. The PCR court cited to *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010), and *State v. Moore*, 404 S.C. 634, 746 S.E.2d 352 (Ct. App. 2013), *rev'd*, 415 S.C. 245, 781 S.E.2d 897 (2016), to support its conclusion. We find the PCR court's decision to grant a new trial is an error of law because Milledge did not meet his burden of proof to establish prejudice,[8] and the PCR court's conclusions are not supported by existing case law.

As an initial matter, the court of appeals opinion relied on by the PCR court has since been reversed by this Court. *See Moore*, 415 S.C. 245, 781 S.E.2d 897. In reversing the court of appeals, this Court found that while many of the factors asserted by the State were innocent when viewed in isolation, the totality of the surrounding circumstances supported a finding of reasonable suspicion to prolong the traffic stop. *Id.* at 253, 781 S.E.2d at 901. The Court also noted how a motorist's nervousness may impact a police officer's reasonable suspicion, cautioning law enforcement against relying on nervousness *alone* to support reasonable suspicion. Nonetheless, the Court concluded when considered in the aggregate with other circumstances, nervousness is a factor that can support a finding of reasonable suspicion. *Id.* at 254–55, 781 S.E.2d at 902.

In *Tindall*, this Court found a police officer's conduct violated the Fourth Amendment when the officer continued to question a motorist for an additional six to seven minutes *after* the purpose of the traffic stop had been accomplished, aside from issuing the ticket itself. 388 S.C. at 522–23, 698 S.E.2d at 205. The Court held after the purpose of the stop was complete, the officer did not have reasonable suspicion to continue to detain the motorist and conduct a search of his vehicle based

[8] At the PCR hearing, Milledge relied entirely on this Court's opinion in *Tindall* to establish prejudice. As discussed, *infra*, the *Tindall* decision is not persuasive here because it deals with a prolonged traffic stop and search of the suspect's vehicle, not with a limited protective frisk for officer safety.

on the information available to the officer. *Id.* at 523, 698 S.E.2d at 206. Tellingly, earlier in the stop, the officer ordered the driver out of the car and conducted a protective frisk, revealing no weapons. *Id.* at 522, 698 S.E.2d at 205. Thus it was not the protective frisk which the Court found unreasonable, but the prolonged detention of the motorist and search of his vehicle for contraband. *Id.* at 522–23, 698 S.E.2d at 205–06.

Several factors distinguish the deputies' frisk of Milledge from the search at issue in *Tindall*. The search in this case was not conducted for the purpose of discovering possible evidence of illegal activities. The motivation for the search was to ensure the safety of the deputies, and Lanning limited the search to the outer layer of Milledge's clothing. The deputies did not unduly prolong the traffic stop or detain Milledge longer than necessary to address the traffic violation. Likewise, the deputies did not detain Milledge for an excessive period in an attempt to question him and possibly gain probable cause to search his vehicle for contraband. Rather, Lanning conducted the *Terry* frisk *before* he had an opportunity to check Milledge's information, issue a traffic citation, and send him on his way.[9]

When due weight is given to the deputies' training and experience, the record indicates reasonable suspicion to conduct the search existed. Both Deputy Lanning and Deputy Swift were experienced law enforcement officers[10] and possessed a

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[9] Milledge had a history of prior convictions involving weapons and controlled substances, including 1991 convictions for carrying a concealed weapon and possession of controlled substance; a 1994 conviction for possession of a weapon during a crime; a 2001 conviction for possession with intent to distribute marijuana; a 2003 conviction for attempted trafficking in marijuana; and a 2006 conviction for possession of marijuana up to a half ounce. Had Deputy Lanning completed an information check on Milledge, it would have revealed his history of carrying weapons illegally. Inevitably, this information would have further affirmed the deputies' reasonable suspicion to conduct a pat down.

[10] Deputy Lanning had over 10 years of law enforcement experience at the time of the stop, including over two years working with the DEA violent traffic program. Deputy Swift testified about his specialized training, including narcotics schools, gang recognition classes, interview and interrogation classes, and position on the SWAT team.

familiarity with the high-crime area where the traffic stop occurred. Milledge's nervousness during the traffic stop was not the routine nervousness to be expected with every traffic stop, but was so extreme that his hands were visibly shaking and he could not dial his cellphone. Based on the deputies' training and experience, Milledge's attempt to make a phone call during the traffic stop was a relevant consideration in determining whether he posed a threat to officer safety.

After Milledge's seemingly dubious explanation for his shaking hands and subsequent refusal to respond to any further questions, Swift was entitled to take the lack of response and avoidance of eye contact into consideration in determining whether Milledge might be a danger to the deputies. In Deputy Swift's experience, a lack of response or a blank stare are indicative of an individual debating whether to "fight or flight."

Lastly, after Milledge exited the vehicle, Deputy Lanning inquired whether he had any weapons on him in a manner specifically designed to sound outrageous so as to evoke a response. While Milledge had no obligation to answer the inquiry, his lack of any response whatsoever did nothing to alleviate any apprehension the deputies had, given the high-crime area where the stop occurred. Thus, when the mosaic is considered as a whole in light of the deputies' training and experience, the deputies had reasonable suspicion Milledge was armed and dangerous sufficient to justify a frisk.

In determining whether a PCR applicant has established prejudice, the PCR court does not act as a finder of fact and substitute its judgment for that of the trial court. Rather, in instances like the case before us, the PCR court must view the trial court's ruling through the same lens that would be applied on appeal, which here requires giving appropriate deference to the trial court's findings. *See State v. Khingratsaiphon*, 352 S.C. 62, 70, 572 S.E.2d 456, 459–60 (2002) (explaining that on appeal from a Fourth Amendment motion to suppress, an appellate court will only reverse the trial court if there is clear error, and will affirm if there is any evidence to support the ruling). Based on our analysis of the cases above, we hold the proper inquiry for determining prejudice in this case is whether there is evidence in the record to support the trial court's finding the officer had reasonable suspicion. If so, an appellate court would necessarily have affirmed the trial court's denial of the motion to suppress. Thus, because there is evidence in the record to support the trial court's ruling, the PCR court erred in finding Milledge proved prejudice.

CONCLUSION

For the foregoing reasons, we hold the PCR court erred in finding Milledge met his burden of proof to establish prejudice. The motivation of the deputies in this case is highly probative. While the protections of the Fourth Amendment may have been triggered had the deputies prolonged the detention and engaged in a search of Milledge and his vehicle for the purpose of finding evidence, the limited pat down performed by Deputy Lanning was solely for officer safety. To reach a different conclusion would prevent officers operating in similar high-crime areas from conducting a protective frisk when their specialized training indicates the person may be armed and would subject officers to the "unnecessary risks" in performing their duties the *Terry* court warned against. The decision of the PCR court is **REVERSED**.

KITTREDGE, J., concurs. FEW, J., concurring in a separate opinion in which KITTREDGE, J., concurs. Acting Justice Pleicones, dissenting in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE FEW: I concur in the majority opinion. I write separately to address the manner in which an applicant may prove prejudice—and our standard for reviewing the PCR court's ruling on prejudice—under the second prong of *Strickland* on the facts and in the procedural posture of this case.

The standard of review an appellate court applies can vary depending on the facts and procedural posture of the individual PCR case. In this case, the PCR court's finding on the first prong of *Strickland* that trial counsel's performance did not meet an objective standard of reasonableness is a primarily factual determination, to which we apply the deferential standard of review applicable to a PCR court's factual findings. *See generally Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) ("This Court gives deference to the PCR judge's findings of fact, and 'will uphold the findings of the PCR court when there is any evidence of probative value to support them.'" (quoting *Miller v. State,* 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008))). Because there is evidence to support the PCR court's ruling on the first prong, I agree with the majority's decision to allow that ruling to stand.

As the majority explains, however, the PCR court's determination in this case as to the second prong of *Strickland* was the determination of a question of law, which we review de novo—without any deference. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). I agree with the majority's analysis of the second prong—"the search was supported by the deputies' reasonable, articulable suspicion." However, I would add to that analysis that if the issue had been preserved for direct appeal, the court of appeals would have been required by law to affirm the trial court because there was ample evidence in the record to support the trial court's finding the officers had reasonable suspicion. *See State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error.").

The manner in which an applicant may prove prejudice also varies depending on the facts and procedural posture of the individual PCR case. To demonstrate prejudice in this case from trial counsel's deficient failure to preserve the suppression issue for appeal, Milledge was required to show a reasonable probability the court of appeals would have reversed his conviction and remanded

for a new trial if trial counsel contemporaneously objected.[11] Instead of analyzing this question, the PCR court studied the record of the suppression hearing and made its own determination as to whether the officers had reasonable suspicion. To state it differently, the PCR court made the determination of how the PCR court would have ruled if the PCR court had been the trial court. This was an error of law.

If trial counsel had preserved the issue for direct appeal, the court of appeals would have applied the *Brown* "clear error" standard to the primarily factual ruling of the trial court that reasonable suspicion existed. 401 S.C. at 87, 736 S.E.2d at 265; *see also State v. Khingratsaiphon*, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002) (stating the standard of review "on appeal from a motion to suppress based on Fourth Amendment Grounds" is "like any other factual finding" and an appellate court should "reverse if there is clear error" and "affirm if there is any evidence to support the ruling" (quoting *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000))). Therefore, although I agree with the majority that the facts and circumstances recited by the officers in this case support the existence of reasonable suspicion, the precise inquiry upon which the PCR court—and this Court—should focus is whether there is evidence in the record to support the trial court's finding of reasonable suspicion. If the PCR court had properly analyzed the court of appeals' application of its standard of review to the trial court's determination that reasonable suspicion existed, the PCR court would necessarily have found Milledge failed to prove prejudice, and thus the PCR court would necessarily have denied PCR. *See Gibbs v. State*, 403 S.C. 484, 495, 744 S.E.2d 170, 175–76 (2013) (affirming the denial of PCR on the allegation trial counsel failed to contemporaneously object to evidence discussed in a pre-trial suppression hearing where the PCR court found no prejudice because the trial court's pre-trial ruling to deny suppression was not an abuse of discretion and stating, "Thus, a contemporaneous objection by trial counsel would not have changed the outcome of Petitioner's case on appeal").

I recognize there is a potential flaw in my reasoning. I believe, however, that *Gibbs* and the following discussion demonstrate my reasoning is sound, and

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[11] A PCR applicant in this posture may also demonstrate prejudice by showing a reasonable probability the trial court would have sustained a contemporaneous objection, which in turn was reasonably likely to result in a not guilty verdict, but Milledge does not make that argument.

expose flaws in the dissent's suggestion that we should defer to the PCR court's suppression analysis instead of the analysis conducted by the trial court. The potential flaw in my reasoning is that the ruling trial counsel failed to preserve was not the trial court's pre-trial ruling that the officers had reasonable suspicion, but the mid-trial ruling the trial court would have made if trial counsel contemporaneously objected. Because the mid-trial ruling was never actually made, one may argue, there is no trial court ruling to which the court of appeals would have been required to defer. Under this circumstance, the argument continues, the PCR court was free to make a new ruling as to suppression according to its own view of the evidence.

The dissent, in apparent agreement with such an argument, would give Milledge and all future defendants a second chance to win a suppression hearing. Then, after allowing the PCR judge to separately consider the evidence presented at the suppression hearing and make its own de novo ruling as to whether the State violated the defendant's constitutional rights, the dissent would require that this Court defer to the PCR court, not to the trial court.

I find two flaws in the dissent's approach. First, the trial court had the benefit of watching and listening to the officers' live testimony, while the PCR court necessarily conducted its analysis on the cold record of the suppression hearing. Deferring to the PCR court instead of the trial court in this situation is counterintuitive, because a primary reason an appellate court would give such deference in the first place is the trial court's opportunity to assess witness credibility firsthand. *See Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating the reason appellate courts give "great deference to a [PCR] judge's findings" is because the judge has "the opportunity to directly observe the witnesses"). Second, and more importantly, under the dissent's reasoning, wise trial counsel who loses a suppression hearing would never make a contemporaneous objection, because not doing so enables the defendant to get a second chance to convince another judge to suppress the evidence in a PCR trial. If that were the law, I would change my vote on the first prong of *Strickland*, and I would argue that counsel's failure to make a contemporaneous objection was the very reason Milledge gets a new trial, and thus counsel's decision not to object was strategic—not deficient—as a matter of law.

To avoid this flawed result, the PCR court—and this Court on certiorari—must focus on the trial court's pre-trial ruling, *see Gibbs*, 403 S.C. at 495, 744 S.E.2d at

175–76, unless the evidence in the trial itself includes a substantial reason to believe the trial court would have changed its mind when ruling on a contemporaneous objection. If there is such a reason, the PCR court's analysis should focus on the probability the trial court would have changed its ruling; the PCR court should not conduct its own suppression analysis. In this case, nothing changed regarding the existence of reasonable suspicion from the time of the trial court's pre-trial ruling to the point during trial when the State offered the evidence. Thus, there is no basis on which the PCR court might suppose the trial court would have changed its ruling. Therefore, the trial court's pre-trial ruling governs, and in determining whether Milledge demonstrated prejudice, the PCR court—and this Court—may do no more than ascertain whether there is evidence in the record to support the trial court's determination that the officers' suspicion was reasonable.

KITTREDGE, J., concurs.

Acting Justice Pleicones: I respectfully dissent, and would dismiss the writ of certiorari as improvidently granted as I find there is evidence of probative value in the record to support the post-conviction relief (PCR) judge's findings. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Because it misstates the prejudice question, the concurring opinion challenges my conclusion that our scope of review requires we affirm the PCR judge's finding of prejudice. The PCR judge was not asked whether counsel's deficient performance failed to preserve the ruling *in limine* for appellate review, but rather was he deficient in failing to object to the admission of the drug evidence at trial. The prejudice question, then, is whether there is any evidence to support the PCR judge's finding that there is a reasonable probability that such a motion would have been granted and that without the drug evidence respondent would not have been convicted. This is the issue decided by the PCR court and presented to this Court by the State on certiorari.[12] The concurring opinion evinces its misapprehension when it analyzes the prejudice issue as whether an appellate court would have reversed and remanded had the issue been preserved. The correct prejudice question is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Further, since we are reviewing the PCR judge's decision, it is axiomatic that it is to that decision that we "defer" if there is any evidence to support it. Despite the concurring opinion's expressions of concern about "cold records" and attorney

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[12] It appears that the concurring opinion believes that an appellate court may revisit the arguments made by respondent at the hearing, and criticizes the PCR judge's "erroneous as a matter of law" ruling which it finds not apt. In my view, we must take the case as the petitioner chose to preserve and present it. If the State were concerned with the manner in which the PCR judge decided the issue, the burden was on it to raise that concern to the PCR judge by a timely post-order motion. And if such a motion were made and denied, then the proper issue for certiorari would have been "Did the PCR judge err in failing to grant the State's motion and issue an amended order addressing the issue raised by Milledge at the PCR hearing?" The State instead chose to seek certiorari to review the PCR's ruling on its merits, and while we may affirm for any reason appearing in the record, an appellate court may not ignore the issue before it in order to make the arguments it wishes had been made either at trial or by the petitioner on certiorari.

"sandbagging," PCR judges are routinely asked to "put themselves in the shoes" of the trial judge and, exercising their own discretion, decide whether evidence would have been excluded had an objection been made.[13] *E.g., McHam v. State,* 404 S.C. 465, 746 S.E.2d 41 (2013); *Sikes v.* State, 323 S.C. 28, 448 S.E.2d 560 (1994). In this case, despite efforts to turn the question of this traffic stop into a pure question of law, it is a mixed question where the judge must view the facts in light of the law, and make a judgment call. Although I may not have reached the same conclusion, I find there is "any evidence" (i.e. facts) to support his conclusion and would therefore affirm.

BEATTY, C.J., concurs.

[13] I note that in other circumstances the PCR judge is asked to revisit a trial judge's ruling where, for example, the claim of trial counsel's deficiency is failure to state the proper grounds for a motion. *E.g., Stone v. State*, 419 S.C. 370, 798 S.E.2d 561 (2017).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Hank Eric Hawes, Appellant.

Appellate Case No. 2014-002288

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5543
Heard April 11, 2017 – Filed March 14, 2018

AFFIRMED

Chief Appellate Defender Robert Michael Dudek; and Allen Mattison Bogan and Nicholas Andrew Charles, both of Nelson Mullins Riley & Scarborough, LLP; all of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown; and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

MCDONALD, J.: Hank Eric Hawes appeals his murder conviction, arguing the circuit court erred in (1) admitting unnecessary and prejudicial photographic evidence, (2) allowing the State to recall Hawes to ask a single question intended to elicit testimony that would permit the State to call impeachment witnesses, (3) admitting testimony regarding a prior argument between Hawes and Jennifer Wilson (Victim), and (4) refusing to disqualify the Fifth Circuit Solicitor's Office from prosecuting the case. We affirm.

Facts and Procedural History

Hawes and Victim met online in February 2011 and began dating shortly thereafter, though neither behaved as though the relationship was exclusive. In June 2011, Hawes moved from Simpsonville to Columbia to be closer to Victim, who was a professor at the University of South Carolina (USC).

On August 27, 2011, Victim texted Hawes and offered to bring him breakfast on her way to yoga. Following her yoga class, Victim invited Hawes to her home for lunch. Hawes accepted and the two spent the afternoon together. Around 5:30 p.m., they departed for their respective evening plans.

Hawes went to dinner with a friend at Cantina 76 on Devine Street. He believed Victim planned to attend a coworker's birthday party and then join him around 8:00 p.m. Over the course of the evening, however, Victim's itinerary kept "getting later and later." Hawes left Cantina 76 at approximately 10:30 p.m.

Meanwhile, Victim and a former boyfriend (Friend) attended a surprise birthday party at Cowboy Steakhouse on Main Street. Shortly after 10:00 p.m., Victim and Friend traveled from the restaurant to another friend's house where the birthday celebration continued. They stopped at Friend's house around 12:30 a.m.; Victim then attended a party at a fellow USC professor's house, where she stayed until approximately 1:30 a.m.

Hawes last texted and called Victim shortly after 2:00 a.m. on the morning of August 28, and then drove to her duplex. According to Hawes, he told Victim he wanted to end their relationship and an argument ensued. Ultimately, Hawes

stabbed Victim twelve times,[1] unclothed her, washed her body, and placed her on a couch in the living room area.[2] Hawes then cut his own wrists and collected his blood in a cooler bag.

Victim's next-door neighbor at the duplex, Kelly Smith, was awakened at 2:29 a.m. by sounds of "screaming and physical violence" and called 911. Two officers from the City of Columbia Police Department (CPD) arrived at the duplex at 2:47 a.m., but did not enter because they did not observe any lights, sounds of distress, or signs of a struggle.

Over the next few hours, Hawes remained in Victim's home and placed several calls to two former girlfriends (Female 1 and Female 2, respectively). He also searched the internet for "criminal attorney[s] in Columbia, South Carolina." At 5:22 a.m., Hawes sent Female 1 an email with the subject line "Last Will," in which he purported to leave her all of his assets. Around 9:00 a.m., Hawes called a local attorney and authorized him to report Victim's death. Thereafter, Hawes called Female 2 and confided he might be charged with murder and needed $25,000 for legal representation. He also claimed he had attempted suicide. Female 2 told Hawes she did not have $25,000 and encouraged him to seek medical attention. EMS subsequently transported Hawes to Baptist Hospital.

CPD responded to Victim's home at approximately 11:30 a.m., where officers found her body on the living room couch.[3] Although they found blood at the rear entry to the duplex and in the kitchen, there was very little blood on Victim or the comforter covering her. Later that day, CPD officers arrested Hawes at Baptist

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[1] Victim sustained multiple defense wounds, blunt force trauma ("at least[] three blows to the head"), abrasions, contusions, eleven incised wounds, and one bite mark.

[2] The cause of death was blood loss due to a stab wound to the right side of Victim's neck. However, six of the twelve stab wounds could have been individually fatal. Even if the neck injury had been Victim's only wound, the pathologist opined she would have died within approximately two minutes.

[3] EMS arrived at 11:51 a.m. and pronounced Victim dead at the scene.

Hospital and charged him with murder. On October 5, 2011, the Richland County Grand Jury indicted Hawes for murder.

On December 12, 2012, Hawes moved to disqualify the Fifth Circuit Solicitor's Office from prosecuting the case because an assistant solicitor and her husband were fact witnesses. Following a hearing, the circuit court denied the motion.

The case went to trial on October 6, 2014. The circuit court denied Hawes's motions for directed verdict and instructed the jury on the elements of murder, voluntary manslaughter, and self-defense. On October 16, 2014, after two days of deliberation, the jury returned a verdict finding Hawes guilty of murder. The circuit court sentenced Hawes to life in prison.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829. As to evidentiary issues, "we are limited to determining whether the trial judge abused his discretion." *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011)). "To warrant reversal, an error must result in prejudice to the appealing party." *Id.* at 16–17, 732 S.E.2d at 884.

Law and Analysis

I. Photographs

Hawes argues the circuit court erred in allowing the State to use "unnecessary and prejudicial photographic evidence" during closing argument to arouse the passions and prejudices of the jury. He asserts the crime scene photographs of Victim's unclothed body were unfairly prejudicial because the State juxtaposed them with an irrelevant smiling photograph of the Victim. Hawes contends the erroneous admission of State's Exhibits 46 (right neck and breast wounds), 202 (close-up of neck wound), and 322 (birthday party photograph) suggested an improper, emotional basis for the jury to consider, resulting in his conviction.

Hawes objected under Rule 401, SCRE, to the introduction of two photographs of Victim and other guests at the birthday party Victim attended on the night she was murdered. The circuit court overruled the objection and admitted the photographs as State's Exhibits 322 and 325. Hawes later lodged a Rule 403, SCRE, objection to all of the crime scene photographs. The circuit court excluded several of the photographs and marked them as "Court's Exhibit 3" to ensure they would not be submitted to the jury in error. Thereafter, Hawes again objected to the introduction of the following photographs from the crime scene: State's Exhibits 31 (the body on the couch), 33 (the body on the couch and cooler on the floor), 38 (a bite mark), 41 (neck and breast wounds), 42 (breast wound), 45 (left neck wound), 46 (right neck wound), 54 (left leg bruise), 60 (close-up of a back wound), and 62 (three back wounds). Hawes argued the crime scene photographs were "gruesome" and would serve only to "elicit an emotional response from the jury" because he did not contest how the body was found.

Citing *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), and *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014), the State argued the crime scene photographs were "necessary to substantiate material facts" regarding the "nature of the crime" and to show evidence of malice. Hawes responded that *Collins* and *Gray* were distinguishable because those cases addressed only autopsy-related photographs, which were necessary to corroborate testimony and rebut opposing testimony, whereas here, the crime scene photographs were unnecessary for corroboration. The circuit court ruled the probative value of the crime scene photographs outweighed their prejudicial effect because they depicted the scene and location of the body. Further, the wound photographs were relevant to the issue of malice.

Hawes subsequently objected to the introduction of State's Exhibit 398 (the crime scene video), which was filmed by CPD crime scene investigator (CSI) George Wise. Specifically, Hawes objected to the portion of the video showing Victim's body, just as he had previously objected to the admission of similar photographs. Lastly, Hawes objected to the introduction of the autopsy photographs. The circuit court overruled these objections and allowed the introduction of the crime scene video and eighteen photographs from Victim's autopsy.

Initially, we find Hawes's abandoned his argument regarding State's Exhibit 398 (the crime scene video) and the autopsy photographs. Hawes briefly argued in his

opening appellate brief that all of the crime scene photographs, the crime scene video, and the autopsy photographs should have been excluded because they were unfairly prejudicial. In his reply brief, Hawes argues his appellate brief clearly indicates his appeal includes "all the still photographs from the scene admitted over trial counsel's objection" and "the still photographs from the autopsy." He contends the "outline headings" and "argument text" in his opening brief establish that his appeal includes State's Exhibit 398. However, the "outline heading" simply states, "[t]he [circuit] [c]ourt wrongly allowed the introduction of unnecessary, gruesome photographs and video." And the argument text mentions only that the circuit court admitted the crime scene video over Hawes's objection. *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (noting a one sentence argument is too conclusory to present any issue on appeal). Hawes failed to include the challenged exhibits in his designation of matter to be included in the record on appeal, and neither the crime scene video nor the autopsy photographs appear in the record. *See* Rule 209 (b), SCACR ("The Designation must clearly identify what the party desires to have included in the Record on Appeal . . . ."); Rule 210(h), SCACR ("[T]he appellate court will not consider any fact that does not appear in the Record on Appeal."); *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 488 (2005) (explaining the appellant has the burden of providing a sufficient record).

After careful review, we find Hawes abandoned some—but certainly not all—of his arguments regarding the photographic evidence introduced at trial. Although his arguments focus on State's Exhibits 46 (right neck wound), 202 (close-up of neck wound), and 322 (birthday party photograph), we find Hawes also preserved his arguments addressing State's Exhibits 31 (the body on the couch), 33 (the body on the couch and cooler on the floor), 38 (a bite mark), 41 (neck and breast wounds), 42 (breast wound), 45 (neck wound), 54 (left leg bruise), 60 (close-up of a back wound), and 62 (three back wounds).

Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "Relevant evidence" is defined as "evidence having 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. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis."

State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) (quoting *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)).

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *Id.* '"To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *Collins*, 409 S.C. at 534, 763 S.E.2d at 28 (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

In *Collins*, the circuit court admitted into evidence seven pre-autopsy photographs of a child who died of "extensive traumatic injury" after being severely mauled by dogs. *Id.* at 528–33, 763 S.E.2d at 25–27. This court reversed, finding the circuit court erroneously admitted the photographs, and the error was not harmless. *Id.* at 533, 763 S.E.2d at 27. However, our supreme court reversed, finding the photographs were "highly probative, corroborative, and material in establishing the elements of the offenses charged; [their] probative value outweighed [their] potential prejudice; and the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.* at 534–35, 763 S.E.2d at 28.

In *Gray*, the circuit court admitted into evidence eleven photographs of a victim—taken before and during autopsy—who died after being severely beaten during two separate fights on the same day. 408 S.C. at 604–07, 609, 759 S.E.2d at 162, 163–65. This court determined it was within the circuit court's discretion to admit eight of the photographs of high probative value presenting minimal danger of unfair prejudice, noting the photographs "contain no blood or gory anatomical details, and thus pose little, if any, danger of unfair prejudice." *Id.* at 609, 759 S.E.2d at 164. As for the remaining three photographs, which were taken during autopsy and showed the victim's exposed skull and brain, we concluded they too had probative value; they corroborated the pathologist's findings concerning the extent and

location of the victim's head injuries and cause of death and were important to the State's ability to prove malice. *Id.* at 612–16, 759 S.E.2d at 166–68.

Here, the crime scene photographs established the circumstances of the crime scene and corroborated the testimony of Smith and CSI Wise. *See e.g., State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370 (1995) (finding photographs of the murder victim's nude body lying on the floor, with her face and body visibly swollen from being beaten, and of the blood-smeared walls and floor were relevant to establish the crime scene). Smith, who lived next door to Victim, woke to sounds of "screaming and physical violence" and called 911. He heard the first wave of violence in Victim's bedroom; it then progressed toward the kitchen area where "there was a second wave of more aggressive, just brutal, carnal[,] instant violence." Smith described "physically feel[ing] the vibration in [his] bedroom from what was coming from [Victim's side of the duplex]. . . . [and he] could hear what sounded like a table slamming against the wall, like her body being thrown against the wall." The last thing Smith heard was Victim yelling "no, no, no" and "pleading for her life." The next morning, CSI Wise photographed and recorded the crime scene. He testified in detail regarding the state of Victim's home as well as the items collected as evidence.

We find the circuit court did not abuse its discretion in admitting the crime scene photographs. *See e.g., Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (explaining it is not an abuse of discretion for a trial court to admit photographic evidence if it is offered to corroborate testimony). Specifically, we find the circuit court correctly applied Rule 403's balancing analysis in ruling the probative value of the crime scene photographs outweighed their prejudicial effect because these photos showed "the scene as it occurred" and "where the body was found in the house."

Further, the circuit court properly evaluated the probative value of the crime scene photographs with respect to the question of malice, explaining that they established "the wounds that were inflicted on the victim, which would go to the issue of malice." As in *Gray*, the crime scene photographs were relevant to the issue of malice because they showed how, where, and how many times Victim was attacked. *See* S.C. Code Ann. § 16-3-10 (2015) (defining "murder" as "the killing of any person with malice aforethought, either express or implied"); *State v. Kinard*, 373 S.C. 500, 503–04, 646 S.E.2d 168, 169 (Ct. App. 2007) ("'Malice aforethought' is defined as as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general

intent to commit the crime." (quoting *Malice Aforethought*, Black's Law Dictionary (7th ed. 1999))). The crime scene photographs illustrated the extreme nature of this killing as they show multiple wounds and abrasions on Victim's extremities, contusions all over her body, and a bite mark. *See Kelley*, 319 S.C. at 178, 460 S.E.2d at 371 (finding charts, photographs, and a video depicting the excess nature of the killing were both relevant and probative to the issue of malice).

In contrast to the crime scene photographs of Victim's neck wounds (State's Exhibits 46 and 202), the State presented two other photographs from the birthday party Victim attended during the evening before her murder.[4] State's Exhibit 322 shows Victim in sleeveless attire, arguably to demonstrate her arms and shoulders were devoid of wounds hours before her body was discovered. While the State argues this photograph was relevant to the issue of malice, Hawes cites *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), and *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987), for the proposition that "such photographs are irrelevant, inflammatory, and prejudicial."

In *Langley*, our supreme court found the circuit court erroneously admitted a photograph of the murder victim in his high school graduation regalia because the photograph was not relevant to proving defendant's guilt. 334 S.C. at 648, 515 S.E.2d at 100. The victim's identity was not at issue, and the court concluded that the only possible purpose of the photograph was to distance the victim from the drug dealing involved in the case. *Id.* at 648 n.3, 515 S.E.2d at 100 n.3. Similarly, in *Livingston*, the supreme court held a photograph of the victim and her husband taken shortly before she was involved in a fatal automobile accident was of no consequence to the determination of guilt at the defendant's felony DUI trial. 327 S.C. at 20, 488 S.E.2d at 314. In *Johnson*, the State sought to introduce photographs of another murder victim as evidence of other crimes to establish the defendant's motive and intent to kill. 293 S.C. at 325, 360 S.E.2d at 320. However, the court explained that the first victim "died from a gunshot wound to the head and that the body was concealed in the camper" whereas the defendant shot the second victim, a State Trooper, after he initiated a traffic stop and began

[4] Although Hawes's appellate brief does not specifically list State's Exhibit 325, it does reference "photographs of [Victim] smiling in happier times." State's Exhibits 322 and 325 are included in the record on appeal, and we have considered both for purposes of our analysis.

questioning the defendant. *Id.* at 325, 360 S.E.2d at 320. Thus, the photographs of the first victim's body were irrelevant and erroneously introduced. *Id.*

Here, State's Exhibit 322 was admitted neither to establish Victim's identity nor to demonstrate motive. Instead, the State argues, the photograph was admitted as evidence of malice. We reject this argument and find the admission of the birthday party photographs constituted error. *See e.g.*, *Langley*, 334 S.C. at 648, 515 S.E.2d at 100 (finding the victim's photograph was irrelevant to proving the guilt of the defendant). However, we find the error harmless as it could not reasonably have affected the outcome of Hawes's trial. *See e.g.*, *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971))); *Langley*, 334 S.C. at 647–48, 515 S.E.2d at 100 ("Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial.").

II. Reply Testimony

Hawes argues the circuit court erred in allowing the State to recall him the day after it had already concluded his cross-examination. The State sought to ask a single question intended to elicit testimony that would permit the State to call impeachment witnesses.

Hawes testified that he killed Victim in self-defense. At the conclusion of the State's cross-examination—during which Hawes claimed Victim was the aggressor—the State argued Hawes "opened the door" to his prior acts of domestic violence and sought to proffer testimony from four of his previous girlfriends regarding physical abuse, threats, and a previous conviction. The State then proposed a condensed proffer of the two most recent and similar events involving Female 1 and another former girlfriend (Female 3). The circuit court declined to hear the proffer at that time, stating it did not believe Hawes had opened the door, and such testimony would not be admissible under *State v. Lyle*.[5] The circuit court clarified, "Now I'm not saying that some other witnesses may not open the door."

[5] 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (explaining the permissible uses of evidence of prior bad acts).

The circuit court later determined it would allow the State to proffer the testimony the next day, and then revisit its ruling as to the admissibility of Hawes's prior acts.

The following morning, the State proffered the testimony of Female 1 and Female 3 regarding prior incidents of domestic violence by Hawes. Relying on *State v. Michau*, 355 S.C. 73, 583 S.E.2d 756 (2003) and *State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000), the State argued some of the proffered testimony should be admitted to rebut Hawes's self-defense claim. Specifically, the State sought to introduce evidence of a conversation in which Hawes told Female 1 that if she ever called law enforcement, he would make it look like their altercation was her fault. The State also sought to introduce evidence of an incident during which Hawes pulled a knife on Female 3. Hawes objected, arguing Rule 404(b), SCRE,[6] barred such testimony. The circuit court declined to allow the introduction of the proffered testimony because it was "too remote in time."

Thereafter, the State argued Hawes was still on the witness stand and it wished to ask him one question for impeachment purposes: Did Hawes tell Female 1 that if she ever called law enforcement, he would make it look like it was her fault? Despite Hawes's arguments and strenuous objection, the circuit court determined Hawes was still "technically on cross-examination." The court ruled, "I reopened it for the State and I said I [would] listen to the testimony this morning in camera and make a decision. So I revisited that issue at the hearing. . . . from that standpoint[,] the procedure was not concluded. . . . regardless of what's on the record."[7] The circuit court explained, "I'm not letting [the proffered testimony] come in [during the State's] case in chief. [The State] wants to ask [Hawes one] question, lay down the foundation for impeachment is the way I understand it. . . . [the State's] cross is not over." Hawes argued, "There is no way for them to put

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[6] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Such evidence "may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id*. "Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009).

[7] The record reflects that the previous afternoon, when the circuit court asked if the State had "any further cross," the State responded, "No, sir."

[Female 1] on the witness stand and her to offer testimony that doesn't go into the prior bad acts violence that she alleges took place between her and Mr. Hawes. That is absolutely [Rule] 404." The circuit court responded that Hawes could make his objection if and when the State recalled Female 1.

The State then recalled Hawes to the witness stand and asked, "In the fall of 2010, specifically in October, November, that area, do you remember making a statement to [Female 1] at her home . . . that if she ever called law enforcement, you would make it look like it was her fault?" Hawes answered, "No, I do not."

The State then proposed to recall Female 1 to testify. Hawes again objected under Rule 404. The circuit court explained "the only thing I'm going to allow her to testify to is the statement itself, not what led up to the statement. . . . Not going into threats or any violence or anything else. No pushing or shoving or anything." On direct examination, Female 1 testified, "He told me that if I were to call law enforcement . . . that I would be the one to go to jail."

Appellate courts "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." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). "Every witness under cross-examination may be asked whether he has made any former statement relative to the subject matter of the action and inconsistent with his present testimony." *Aakjer v. Spagnoli*, 291 S.C. 165, 170, 352 S.E.2d 503, 507 (Ct. App. 1987).

"When an accused takes the stand, he becomes subject to impeachment, like any other witness. Regardless of whether the accused offers evidence of his good character, an accused who takes the stand may be cross-examined about 'past transactions tending to affect his credibility.'" *State v. Major*, 301 S.C. 181, 183, 391 S.E.2d 235, 237 (1990) (quoting *State v. Allen*, 266 S.C. 468, 482, 224 S.E.2d 881, 886 (1976)). "First, the accused may be asked about prior bad acts, not the subject of a conviction, which go to his credibility." *Id.* at 184, 391 S.E.2d at 237. However, the cross-examiner must take the accused's answer and may not contradict the accused if he denies them. *Id.* "Second, the accused may be impeached by the introduction into evidence of convictions for crimes of moral turpitude, since they too are past transactions tending to affect credibility." *Id.*

In *Michau*, the appellant requested that the circuit court redact nine sentences from his written statement to the police because those portions of the statement constituted inadmissible propensity evidence under Rule 404(b), SCRE. 355 S.C. at 78, 583 S.E.2d at 759. The circuit court agreed to redact the last six sentences from the statement, but declined to redact three others. *Id.* Our supreme court held the circuit court properly overruled the appellant's Rule 404(b) objection to the three sentences. *Id.* at 79, 583 S.E.2d at 759. The court explained the three sentences did not constitute propensity evidence because they did not refer to any "crimes, wrongs, or acts" generally inadmissible under Rule 404(b). *Id.*

Similarly in *Beck*, our supreme court explained, "Testimony that [the a]ppellant had made a statement of his intent to perpetrate such crimes—albeit four months prior to this event—was highly probative as to a manifestation of that intent through the fatal attack upon [the v]ictim." 342 S.C. at 135, 536 S.E.2d at 682. In particular, the court found that a witness's statement that the appellant had asked him on a specific date "to participate in a plan to call escort services for dates and then rob and have sex with the employees" did not invoke *Lyle*, which concerns prior bad acts. *Id.* at 134–35, 536 S.E.2d at 682. The court held that as a general rule, statements made by the accused are admissible against him. *Id.*

Hawes argues the circuit court erred in admitting Female 1's testimony, as such "bad acts" evidence is barred under Rule 404(b), SCRE. Arguably, the circuit court could have admitted the statement at issue under Rule 404(b) to prove Hawes was not acting in self-defense. *See id.* (stating such evidence "may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent"). But a prior statement of bad intent is not a prior bad act. *See Anderson v. State*, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) (determining a threatening statement was not a bad act); *Beck* 342 S.C. at 134, 536 S.E.2d at 682 (explaining *Lyle* concerns bad acts and other crimes of a defendant, not statements of intent to commit crimes). Thus, we find the circuit court did not abuse its discretion in finding the State's final cross-examination inquiry concerned an impeachment issue, not a Rule 404(b) issue. Whether the State could then recall Female 1 to ask her about Hawes's statement depended on whether Hawes admitted telling her that if she ever called law enforcement, she

would be the one to go to jail. In fact, the State agreed that if Hawes admitted to the statement, it would not be able to offer extrinsic testimony.[8]

Female 1's testimony was relevant to Hawes's credibility regarding his claim that Victim was the aggressor, and thus, was significant evidence for the jury's consideration. Contrary to Hawes's testimony that he killed Victim in self-defense, Female 1's statement established that, in the past, Hawes had planned to make a girlfriend appear at fault in the event of a police investigation. Therefore, the testimony was properly admitted. *See State v. Alford*, 264 S.C. 26, 32, 212 S.E.2d 252, 254 (1975), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (where "connection with the offense sufficiently appears, evidence of prior difficulties between [the] accused and a third person is admissible to show malice, premeditation, or general state of mind . . . ." (quoting 40 C.J.S. *Homicide* § 209))); *United States v. Queen*, 132 F.3d 991, 996 (4th Cir. 1997) ("The more similar the extrinsic act or state of mind is to the act involved in committing the charged offense, the more relevance it acquires toward proving the element of intent.").

Our review of the record reveals the vast majority of the evidence undermines Hawes's testimony that he acted in self-defense, including, but not limited to: Smith's testimony regarding the attack; the blood evidence found in Victim's home; Victim's badly beaten, bruised, and stabbed body; the bite mark on Victim; Hawes's unresponsiveness to law enforcement's initial inquiry at Victim's home; Hawes's lack of non-self-inflicted injuries; his treatment of Victim's body following the attack; and the various contacts he made in the early morning hours following the attack. Simply put, other than his own self-serving testimony, Hawes failed to present any evidence that he acted in self-defense. Thus, even if the circuit court erred in admitting the final cross-examination inquiry and Female 1's testimony, such error would have been harmless due to the overwhelming evidence of Hawes's guilt. *See State v. Chavis*, 412 S.C. 101, 110 n.7, 771 S.E.2d 336, 340 n.7 (2015) (stating an error in admitting certain testimony could be

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[8] "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible." Rule 613(b), SCRE.

deemed harmless because of the existence of overwhelming evidence of guilt); *State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998) ("In determining harmless error regarding any issue of witness credibility, [appellate courts] consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case.").

III. Smith's Prior Argument Testimony and Statement to Law Enforcement

Hawes argues the circuit court erred in allowing Smith to testify regarding a prior argument between Hawes and Victim. Hawes further contends the circuit court's erroneous ruling was based on its belief that Hawes opened the door to this otherwise inadmissible evidence of an alleged prior bad act. According to Hawes, the circuit court's admission of this unduly prejudicial evidence inflamed the passions and prejudices of the jury against him. We disagree.

Prior to Smith's testimony, the State advised the circuit court it wanted to elicit testimony that Smith heard Victim and Hawes fighting a few months before Victim was killed. Specifically, Smith planned to testify he heard Victim "yell out 'no'" in fear. Although the circuit court allowed the State to question Smith regarding what he actually heard, it granted Hawes's motion to exclude Smith's characterization that Victim cried out 'like he was hurting her.'"

On direct examination, Smith testified their duplex residences were "mirrored" and he could "hear everything [Victim and Hawes] said in the living room" so long as it was "above speaking volume." He recalled hearing a prior argument between Victim and Hawes through the common wall of the duplex around the "end of May, beginning of June." In particular, he heard "mumbling and then it led to her saying 'no' very loudly. Like, 'No, No.'" When Victim later approached him in their shared backyard, Smith told her "sometimes relationships get heated" and advised Victim she could call on him "if she needed anything." Smith was alarmed to see Hawes at Victim's home in August 2011 because he believed they were "on the outs" at that point in time.

Thereafter, Smith testified he woke up on August 28, 2011, at approximately 2:29 a.m., to the sounds of "screaming and physical violence" and called 911. He explained the first wave of violence began in Victim's bedroom and progressed

towards the kitchen area where "there was a second wave of more aggressive, just brutal, carnal[,] instant violence." Smith described "physically feel[ing] the vibration in my bedroom from what was coming from [Victim's side of the duplex]. . . .I could hear what sounded like a table slamming against the wall, like her body [was] being thrown against the wall." The last thing Smith heard was Victim yelling "no, no, no" and pleading for her life.

On cross-examination, Smith admitted that his original statement to police did not mention any specific rooms where he believed the attack took place. Hawes inquired, "So when you describe prior difficulties between [Victim and Hawes] in that summer and you're asked whether you ever remember it, you mentioned yes, one time before." Smith confirmed and added, "[o]ne time that stood out."

On redirect, the State noted Smith's statement to law enforcement reflected that the last struggle occurred at the back door. The State asked Smith to continue his answer from cross-examination and explain what was in his statement about the prior altercation. Smith then testified he "heard [Victim] screaming like [Hawes] was hurting her and [Victim] saying 'no.'" Hawes objected and Smith confirmed the description of the prior difficulty was in his written statement.

Outside the presence of the jury, Hawes asserted his line of questioning did not open the door for the State to elaborate on inadmissible evidence and moved for a mistrial. Citing Rule 106, SCRE,[9] the State argued Hawes's questioning inferred Smith had given incomplete information in his statement and its admission of the remainder of the statement corrected this impression by providing the more complete and detailed account. The circuit court denied Hawes's motion for a mistrial and overruled his objection, finding he opened the door on cross-examination. The court stated, "It was insinuated directly towards [Smith that he] did not hear properly through the walls [but] he heard properly enough to realize, or at least, [think] that she was in danger of being hurt."

This court addressed a similar issue in *State v. Patterson*, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006). There, the circuit court admitted an entire police statement

[9] "When a . . . recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other . . . recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106, SCRE.

on redirect. *Id.* at 225, 625 S.E.2d at 242. After eliciting testimony from the victim's friend "regarding how careful she was in giving police a correct depiction of the events that led to [the victim]'s murder," the defendant insinuated that the victim's friend's statement was incomplete. *Id.* at 227, 625 S.E.2d at 243. This court found the defendant put the victim's friend's "statement to police at issue, and fundamental fairness required that the entire statement be admitted into evidence." *Id.* at 227–28, 625 S.E.2d at 243. This court continued:

> Patterson would have us construe Rule 106 in such a way that inquiries that probed at alleged omissions from a statement would not open the door to the admission of the statement. The purpose behind Rule 106 would be frustrated if the rule's application in a given case depended upon whether an alleged oral assertion was or was not in a written statement. We find the rule of completeness applies to insinuations, innuendos, and omissions. Thus, the trial judge properly admitted [the victim's friend]'s statement.

Id. at 228, 625 S.E.2d at 243.

Once Hawes posed questions challenging the sufficiency and accuracy of Smith's police statement, the State was free to question him regarding the previously excluded details in the written statement that supported Smith's testimony. *See State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004) (explaining Rule 106 is based on the rule of completeness and attempts to avoid the unfairness inherent in the misleading impression created by taking matters out of context); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("The scope of redirect rests in the discretion of the trial court."). Therefore, we find the circuit court correctly determined Hawes "opened the door" based on his "insinuations, innuendos, and omissions" during his examination of Smith regarding Smith's statement to law enforcement. *See State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) ("It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.").

IV. Disqualification

Hawes argues the circuit court erred in refusing to disqualify the Fifth Circuit Solicitor's Office from prosecuting his case because an assistant solicitor and her husband were two of the fact witnesses. We disagree.

On December 12, 2012, Hawes moved to disqualify the Solicitor's Office, arguing disqualification was necessary to avoid the appearance of impropriety and to allow for a fair trial. At the December 19, 2012 hearing, Hawes argued assistant solicitor Kathryn Ashton was "a material witness" because she was Victim's neighbor. Hawes also asserted Ashton and her husband were material witnesses because they claimed to see Hawes leaving the crime scene in a car they recognized. Hawes did not claim any bias or unfair treatment, but asserted "for appellate things down the road, it is really the appearance of impropriety."

The record establishes that Ms. Ashton immediately informed the Solicitor's Office when CPD identified her as a witness. From that moment on, there was no contact with Ms. Ashton within the Solicitor's Office regarding Hawes's prosecution; the Solicitor's Office built an ethical wall around her. The State explained her only participation in the case was providing law enforcement a statement of what she observed. The State indicated it might not even call Ms. Ashton as a witness at trial and offered for her testimony to be restricted or heard in limine to avoid any hint of impropriety.

By order dated February 1, 2013, the circuit court denied Hawes's motion, determining there was no right to disqualification and Hawes failed to show how Ms. Ashton's position prejudiced him or his right to a fair trial.

Ms. Ashton did not testify at trial. Her husband briefly testified that he saw Hawes leave Victim's home on the morning of August 28, 2011. He described the event as "odd" and "unique," and explained that Hawes "looked like he was driving with his forearms."

"[E]ven if a prosecutor is called as a witness by the defense, it is not always necessary for a trial judge to recuse the prosecutor or the prosecuting office in its entirety." *State v. Inman*, 395 S.C. 539, 558, 720 S.E.2d 31, 41 (2011). "In fact, '[t]here is no inherent right to disqualification when a member of the state

attorney's office is called as a witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown.'" *Id.* (quoting 81 Am. Jur. 2d *Witnesses* § 229 (2004 & Supp. 2011)).

South Carolina law "places upon the moving party the burden of showing actual prejudice from the failure to disqualify." *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). In *State v. Smart*, our supreme court addressed the standard for disqualification of a solicitor's office when a lawyer in that office was previously employed by the public defender's office during the pendency of charges against the defendant. 278 S.C. 515, 519, 299 S.E.2d 686, 688–89 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Adopting the requirement that a defendant must show actual prejudice, the court affirmed the denial of Smart's motion for disqualification. *Id.* at 518–21, 299 S.E.2d at 688–89. Thereafter, the court again articulated an actual prejudice standard in *State v. Chisolm*, 312 S.C. 235, 238, 439 S.E.2d 850, 852 (1994).

In *State v. Bell*, a criminal defendant contended the circuit court erred in refusing to disqualify the solicitor's office from prosecuting his case because a current investigator with the solicitor's office had previously interviewed the defendant when the investigator worked for the public defender's office. 374 S.C. 136, 139, 646 S.E.2d 888, 890 (Ct. App. 2007). The defendant argued the investigator's initial involvement with his defense and subsequent involvement in a request for bond reduction and service of subpoenas while employed by the solicitor's office adversely affected his trial and his efforts to plea bargain. *Id.* at 142, 646 at 891. This court found "[t]here simply is no evidence [the investigator] was involved with any substantive or strategic prosecution work suggestive of betrayal of any secrets or confidences." *Id.* at 142, 646 at 892. "Contrary to [his] assertion, . . . no breach of confidence occurred and there was no actual prejudice to [the defendant]." *Id.* at 143, 646 S.E.2d at 892.

Hawes relies heavily on *People v. Conner*, 666 P.2d 5 (Cal. 1983), arguing "this situation would, at minimum, give rise to an appearance of impropriety or partiality" and "at worst, result in the demonstrable unfairness or prejudice." In *Conner*, the prosecutor was both "a witness to, and a potential victim of, [the] defendant's alleged criminal conduct" regarding his escape charges. *Id.* at 6–9. Although the trial court denied the defendant's motion for disqualification of the judge and the prosecutor's office with respect to his original criminal charges for burglary and forgery, it granted the defendant's motion to recuse the entire

prosecutor's office as to his escape charges. *Id.* at 7. The appellate court upheld the trial court's determination that there was a conflict of interest in the escape case "[b]ecause of the dramatic and gripping nature of the circumstances, the pervasiveness of the communications regarding [the prosecutor]'s relationship to the incident, and the difficulty in gauging their cumulative effect." *Id.* at 9.

Here, the record reflects that Ms. Ashton neither formerly represented Hawes nor witnessed this attack. In her statement to law enforcement, Ms. Ashton merely stated she saw Hawes driving away from Victim's home on the morning of August 28, 2011. Further, she neither testified at Hawes's trial nor participated in any aspect of his prosecution. While Hawes cites cases from other jurisdictions to support his assertion that an ethical wall is ineffective, he cannot meet South Carolina's test for determining disqualification—the demonstration of actual prejudice. *See Smart*, 278 S.C. at 518–21, 299 S.E.2d at 688–89 (adopting the requirement that a criminal defendant must show actual prejudice from a failure to disqualify). Therefore, we affirm the circuit court's order denying Hawes's motion to disqualify the Fifth Circuit Solicitor's Office.

Conclusion

Hawes's conviction is

AFFIRMED.

GEATHERS and HILL, JJ., concur.