The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

Act No. 27 of 2005 amended S.C. Code Ann. § 34-31-20 (B) to provide that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 3, 2006, the first edition after January 1, 2006, listed the prime rate as 7.25%. Therefore, for judgments entered between January 15, 2006 and January 14, 2007, the legal rate is 11.25% compounded annually.

s/Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina
January 4, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2

January 9, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stephen Ray Ellenburg, Respondent,

v.

State of South Carolina, Petitioner,

Appeal from Oconee County
J. Cordell Maddox, Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 26091
Submitted November 16, 2005 - Filed January 9, 2006

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Christopher L. Newton, all of Columbia, for petitioner.

Tara Dawn Shurling, of Columbia, for respondent.

JUSTICE MOORE: This case is before us on a writ of certiorari to review the lower court's order granting post-conviction relief (PCR). We reverse.

FACTS

Respondent was convicted of safecracking, second degree burglary, and petit larceny for robbing a Subway Sandwich Shop where he was formerly employed. The robbery occurred on April 29, 1997, after the store closed and the last employee had left at 1:15 a.m. The store alarm set automatically at 2:00 a.m. and there was no sign of a break-in. The cash register indicated that it had been opened at 1:44 a.m. More than $400 was taken from the cash register, another $250 was taken from a file cabinet, and the dial on the store's safe was destroyed.

The store manager testified that all employees knew the code for the cash register, and employees who worked the closing shift, including respondent, knew the alarm set automatically at 2:00 a.m.

The only evidence linking respondent to the crime was the testimony of Jeremy Littleton. Littleton testified he planned the robbery with respondent and another man. Littleton, who was an employee at the time and had a key, unlocked the back door and waited while the other two went in and robbed the store. The three of them split the money.

During direct examination by the solicitor, Littleton testified as follows:

> Q: Okay. How did you come about to get arrested?
>
> A: I was sent to go do a polygraph test for everyone who had a key, and I gave Sergeant Moss my oral

statement about what had went on and how I was involved.

Q: How did you feel about -----

A: I knew it was wrong. I felt my conscience had made me do what I had done. It made me come out and tell them what I had done.

Counsel moved for a mistrial based on Littleton's reference to a polygraph. The motion was denied.

In closing, counsel attempted to undermine Littleton's testimony:

> But what did Jeremy testify to? He said, Yes. When I first went up to the law enforcement folks I denied that I was involved, and then the reason that he changed his story, they were getting ready to put him on a lie detector. So he changes his story and says he was involved and doesn't have to take a lie detector. . . .
>
> He's getting ready to go see Sergeant Moss, and he's been denying that he's been involved in this crime. Then they're getting ready to put him on a lie detector, and what does he do? He says, Let me tell you what happened. Does he tell them the truth? No. He doesn't tell them the truth. He gives them partial truth. He admits part of it, but what doesn't he do? He never puts himself inside the building.

In response, the solicitor argued:

> Why would he (Jeremy Littleton) lie? How was he being helped by making up this story? He has no deal with me. He is charged with the exact same crimes as the other two defendants. He came up here, got on this stand, swore on the Bible, put his hands behind his back and stuck his chin out, and said, Solicitor, take your best shot at me. . . . Never

> mind that he had no deal with me, ladies and gentlemen, he had no deal with [Sergeant] Moss when he went in and talked to him. When he came in, knowing that he was going to be put on the polygraph and confess because he knew that polygraph would catch him lying.

After respondent's conviction was affirmed on appeal, he commenced this PCR action. The PCR judge found counsel was ineffective for failing to object to the solicitor's closing argument regarding the polygraph.

ISSUE

> Was counsel ineffective for failing to object to the solicitor's closing?

DISCUSSION

First, the mere mention of a polygraph during testimony is not prejudicial where, as here, no results are introduced into evidence. Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001). Further, counsel testified he mentioned the polygraph during closing to give the jury an explanation that would exonerate his client *i.e.*, Littleton told a "partial truth" to avoid having to take a polygraph, which would have revealed that he committed the robbery himself. Counsel's strategy was a reasonable way to cast doubt on Littleton's testimony implicating respondent. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel).

We find the solicitor's argument was in fair response to counsel's argument regarding the polygraph. Once the defendant opens the door, the solicitor's invited response is appropriate so long as it is does not unfairly prejudice the defendant. *Cf.* Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004) (solicitor's comments not proper under invited response doctrine where there was no evidence to support them). Since the evidence was that Littleton did not actually take the polygraph, it

was arguable that either he told only a partial truth, as counsel argued, or he told the whole truth, implicating respondent as the solicitor argued. Accordingly, the solicitor's argument was not unfair and counsel was not ineffective for failing to object.

CONCLUSION

Since the PCR judge's ruling finding counsel ineffective is not supported by the evidence, the order granting relief is reversed. *See* Bright v. State, 365 S.C. 355, 618 S.E.2d 296 (2005) (grant of PCR reversed where not supported by the record).

REVERSED.

TOAL, C.J., BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex parte: Amelia Beth Morris, Appellant.

In Re: South Carolina Department of Social Services, Respondent,

v.

Paula Lynn Monceaux and John Doe, whose true identity is unknown, Defendants.

In the Interest of Trae Steven Monceaux, a minor under the age of eighteen years.

Appeal From Berkeley County
Frances P. Segars-Andrews, Family Court Judge

Opinion No. 26092
Submitted December 1, 2005 - Filed January 9, 2006

AFFIRMED IN RESULT

John S. Wilkerson, III, and Patrick W. Carr, both of Turner, Padget, Graham, and Laney, of Charleston, for Appellant.

Thomas P. Stoney, of the South Carolina Department of Social Services, Berkeley County, for Respondent.

Wolfgang L. Kelly, of Summerville, for the guardian ad litem for Trae Steven Monceaux.

JUSTICE BURNETT: This appeal raises the issue of whether the family court judge erred in a child custody case by issuing a permanency planning order without allowing the presentation of testimony and evidence at a hearing. We affirm in result.

FACTUAL AND PROCEDURAL BACKGROUND

Trae Steven Monceaux (Child) was born in 2001 and abandoned by his mother, who left him with a friend, Amelia Beth Morris (Custodian). The mother's present whereabouts and the father's identity are unknown. Custodian is not related by blood or marriage to Child. Custodian apparently filed an action at an unspecified time to adopt Child, but did not pursue the action.

The state Department of Social Services in Berkeley County (DSS) took Child into emergency protective custody in May 2003 pursuant to S.C. Code Ann. § 20-7-610 (Supp. 2004). DSS in a removal complaint filed pursuant to S.C. Code Ann. § 20-7-736 (Supp. 2004) alleged that Child, then two years old, was harmed or threatened with harm because Custodian physically neglected him. A family court judge ruled probable cause existed to remove Child from the home and ordered DSS retain custody of Child. See S.C. Code Ann. § 20-7-610(M) (Supp. 2004).

A two-day hearing on the merits of the removal action was held in July 2003. See S.C. Code Ann. § 20-7-736(E) (Supp. 2004). A family court judge ruled that "removal is justified in this case based upon a *threat* of physical harm to the child because of the instability of the home maintained by [Custodian]," and ordered DSS continue to retain custody of Child (emphasis in original). The judge further ordered a treatment and placement plan pursuant to S.C. Code Ann. § 20-7-762 (Supp. 2004) in which Custodian was required to undergo assessments for mental health, anger management, alcohol and drug use, and financial matters, and follow all recommendations

for counseling. Custodian was required to take a parenting skills course, and maintain a safe and stable home and suitable employment.

An initial permanency planning hearing was held in May 2004 pursuant to S.C. Code Ann. § 20-7-766 (Supp. 2004). DSS's attorney explained the status and history of the case to the court, repeating the allegations of physical neglect and describing testimony and evidence presented at the removal hearing. DSS's attorney briefly described alleged evidence in the case, including Custodian's purported use of illegal drugs and noncompliance with the treatment and placement plan, and Child's current placement with foster parents who wish to adopt him. DSS's attorney asked the court to dismiss Custodian from the case and allow an action to terminate the rights of Child's parents to proceed so that Child may be adopted.

The DSS case manager's affidavit and written case evaluation supporting the agency's position apparently were submitted to the court. A report from the area Children's Foster Care Review Board which supported DSS's conclusions and recommendations apparently was submitted to the court.[1]

Custodian's attorney stated that Custodian contested DSS's position and requested an evidentiary hearing to respond to the agency's inaccurate and distorted description of her case. Custodian's attorney briefly described facts and evidence supporting Custodian's effort to regain custody of Child, including the fact she had recently begun complying with the treatment and placement plan, and had obtained an apartment and stable job.

Counsel for the GAL told the judge the GAL concurred with DSS's position and recommendations, and briefly described facts and evidence supporting DSS's position.

---

[1] None of the attorneys moved to submit any written documents into evidence during their descriptions of the case, although they mentioned some documents. No party has objected to inclusion of the documents in the record on appeal. See Rule 210(c), SCACR.

No party or witnesses offered live, sworn testimony at the hearing. After listening to the attorneys' presentations, the family court judge rejected Custodian's request for an evidentiary hearing and ruled from the bench in favor of DSS. The judge in a subsequent written order ruled Custodian lacked standing to participate in the case because she had failed to comply with the treatment and placement plan, and dismissed her from the case. The judge directed DSS to initiate an action for termination of the rights of Child's parents so that he may be adopted.

Custodian appealed. We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR.

ISSUE

Did the family court judge err in basing her decision in a permanency planning order on the arguments of counsel, the GAL's report, and an examination of the case file and pleadings, but without considering testimony and evidence at a hearing where witnesses are subject to direct and cross-examination?

STANDARD OF REVIEW

In appeals from the family court, the appellate court has the authority to find the facts in accordance with its view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require the appellate court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). This degree of deference is especially true in cases involving the welfare and best interests of a minor child. Latimer v. Farmer, 360 S.C. 375, 380, 602 S.E.2d 32, 34 (2004); Dixon v. Dixon, 336 S.C. 260, 263, 519 S.E.2d 357, 359 (Ct. App. 1999). Moreover, the appellate court's broad scope of review does not relieve the appellant of the burden of showing that the family court committed error. Skinner v. King, 272 S.C. 520, 523, 252 S.E.2d 891, 892 (1979).

LAW AND ANALYSIS

As an initial matter, we take this opportunity to clarify the issue of Custodian's standing in this matter. The family court judge ruled Custodian had no standing to participate in the proceeding because she had failed to rehabilitate herself and complete the treatment and placement plan. DSS in its brief repeatedly mentions that Custodian is not related to Child by blood or marriage, as if that fact alone somehow negates any standing or right to appear before the family court and assert which plan is best for Child.

As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation. Glaze v. Grooms, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996). One must be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action. *Id.*; Charleston County School Dist. v. Charleston County Elec. Commn., 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999).

While Custodian may not stand on precisely the same footing as a parent or close relative, it is apparent from a reading of various statutes touching on the issue that the Legislature contemplated nonrelatives often may play a crucial and important role in the life and well-being of a child, particularly when parents or relatives turn away from the child. See *e.g.* S.C. Code Ann. § 20-7-490(3) (Supp. 2004) (defining "a person responsible for a child's welfare" to include a parent, guardian, foster parent, caregiver, "or an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child"); S.C. Code Ann. § 20-7-766(G) (Supp. 2004) (family court at the permanency planning stage for a child removed from his home may award custody or legal guardianship to a "suitable, fit, and willing relative or nonrelative"); S.C. Code Ann. § 20-7-766(K) (Supp. 2004) ("Any other party in interest may move to intervene in the case pursuant to the rules of civil procedure and if the motion is granted, may move for review. Parties in interest include, but are not limited to, the individual or agency with legal custody or placement of the child and the foster parent."); S.C. Code Ann. § 20-7-610 (Supp. 2004)

(emergency protective custody statute which repeatedly uses the terms "other person" or "custodian" in addition to "parent" or "guardian"); S.C. Code Ann. § 20-7-435 (1985) (listing "custodian" among persons who may institute proceedings regarding a neglected or delinquent child); S.C. Code Ann. § 20-7-480 (Supp. 2004) (expressing legislative philosophy that, while parents have primary responsibility for their children, the welfare of neglected or abused children is a concern of the entire community); S.C. Code Ann. § 20-7-50 and -70 (Supp. 2004) (establishing criminal penalties for any person who "has charge or custody of a child" or who "is responsible for the welfare of a child" and is convicted of committing certain unlawful conduct towards a child).

A nonrelative such as Custodian who has a real, material, or substantial interest in the long-term custody and potential adoption of a child has standing to participate in a family court proceeding addressing those issues. Accordingly, we reject the notion Custodian somehow lacks standing to appear in this case or argue on behalf of Child simply because she is not related to Child by blood or marriage, or because she failed to comply with a treatment and placement plan.[2]

Turning to the issue of an evidentiary hearing, Custodian argues the family court is required by S.C. Code Ann. § 20-7-766(C) (Supp. 2004) to find compelling reasons for approval of a permanency plan which does not involve reunification of the child with the parent or custody or guardianship with a fit and willing relative. Custodian contends an appropriate decision in the important matters of long-term custody and potential adoption may not be reached when the family court considers only the arguments of counsel and a GAL's report, but refuses to consider testimony and evidence at a hearing where parties and witnesses are subject to direct and cross-examination. We agree.

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[2] The family court judge properly may reject a temporary custodian's effort to obtain or retain custody of a child due to the custodian's failure to comply with a treatment and placement plan, but the custodian retains standing to challenge that decision in the family court and on appeal.

It is error, in the face of a request by a party for an evidentiary hearing, for the family court to issue a permanency planning order based on an examination of the file and pleadings, the arguments of counsel, and the GAL's report, but without considering testimony and evidence at a hearing where witnesses are subject to direct and cross-examination.

It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence. *E.g.* McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (appellate courts repeatedly have held "that statements of fact appearing only in arguments of counsel will not be considered"); S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("[a]rguments made by counsel are not evidence"). Consequently, the family court may not base necessary findings of fact and conclusions of law solely on counsel's statements of fact or arguments. See Section 20-7-766(A) (requiring family court to make specific findings in a permanency planning order).

In addition, written affidavits and reports generally constitute inadmissible hearsay, with some exceptions, although they may become admissible in whole or part when a proper foundation is laid by a witness's testimony. See Rules 801-804, SCRE; Rule 7, SCRFC. The family court properly may review and rely on previous orders and pleadings contained in a particular case in resolving the issues at hand, but should not rely solely on these documents in issuing a permanency planning order.

Finally, and perhaps most importantly, it is apparent from a plain reading of Section 20-7-766 that the Legislature intended the family court hold an evidentiary hearing before issuing a permanency planning order when a hearing is necessitated by the facts of a case, the material facts are contested by the parties, or a hearing is requested by a party. The Legislature repeatedly used the term "hearing" throughout the statute, indicating a proceeding at which parties are allowed to present evidence and sworn testimony bearing on issues before the family court. Furthermore, the permanency planning process set forth in Section 20-7-766 and related

statutes involves the long-term custody of a child, the potential termination of parental rights, and the possible adoption of the child in the future. Decisions regarding matters of such import must be made after careful, deliberate consideration of admissible evidence and sworn testimony presented by interested parties and witnesses at an evidentiary hearing.

Although the family court judge erred in rejecting Custodian's request for an evidentiary hearing, we affirm the result in this case. The family court judge ordered, among other things, that Custodian "is dismissed as a party to this action." Custodian has appealed only the issue of whether an evidentiary hearing was required, not her dismissal from the case. This unappealed ruling is the law of the case and requires affirmance. See *e.g.* Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (unappealed ruling, right or wrong, is the law of the case and requires affirmance); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) (same); Rule 220(c), SCACR (appellate court may affirm for any reason appearing in the record). Accordingly, we affirm. We decline to exercise our discretion to avoid application of the procedural bar. See Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000) ("procedural rules are subservient to the court's duty to zealously guard the rights of minors"); Ex parte Roper, 254 S.C. 558, 563, 176 S.E.2d 175, 177 (1970) (duty to protect rights of minors has precedence over procedural rules otherwise limiting the scope of review and matters affecting the rights of minors may be considered by an appellate court for the first time on appeal or even on its own motion); Galloway v. Galloway, 249 S.C. 157, 160, 153 S.E.2d 326, 327 (1967) (same).

CONCLUSION

It is error, in the face of a request by a party for an evidentiary hearing, for the family court to issue a permanency planning order based on an examination of the file and pleadings, the arguments of counsel, and the GAL's report, but without considering testimony and evidence at a hearing where witnesses are subject to direct and cross-examination. Although we find error, we affirm the order of the family court because Custodian failed to appeal the ruling which dismissed her from the case.

AFFIRMED IN RESULT.

TOAL, C.J., and MOORE, J., concur. PLEICONES, J., concurring in result only. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Alicia Jeanette Haase, Respondent.

Appeal From Greenwood County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 26093
Heard November 30, 2005 - Filed January 9, 2006

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia, and Jerry W. Peace, of Greenwood, for Appellant.

John W. Carrigg, Jr., of Columbia, for Respondent.

PER CURIAM: Appellant, Alicia Jeanette Haase, was convicted of driving under the influence (DUI) in municipal court in Greenwood County. On appeal, the circuit court reversed her conviction, holding the state had

failed to comply with S.C. Code Ann. § 56-5-2934 (Supp. 2004) at the time of her arrest. We reverse and reinstate the conviction.[1]

FACTS

Haase's vehicle was observed speeding and jumping a curb at 3:00 a.m. on September 28, 2001, in Greenwood. Nearby police heard her car jump the curb and proceeded to the parking lot where Haase's vehicle had stopped. Haase smelled of alcohol, had slurred speech, and was unsteady on her feet. After failing several sobriety tests, she was arrested for DUI and taken to the detention center for a Data Master test. Haase was read her Miranda[2] rights and given Implied Consent warnings,[3] but refused the Data Master test.

Haase was tried in municipal court in January 2004. She moved to exclude evidence of her refusal to take the Data Master test, claiming the arresting officer failed to comply with S.C. Code Ann. § 56-5-2934. The motion was denied, and the jury convicted Haase of DUI. Haase appealed, and the circuit court ruled the state's failure to comply with S.C. Code Ann. § 56-5-2934 required exclusion of all evidence against Haase which arose after her arrest, thereby requiring reversal of her conviction.[4]

ISSUE

Did the circuit court err in reversing Haase's conviction due to the failure to follow the procedures mandated by S.C. Code Ann. § 56-5-2934?

DISCUSSION

S.C. Code Ann. § 56-5-2934, which became effective March 1, 2002, is entitled "Right to Compulsory Process," and provides for the right to

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[1] We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

[3] S.C. Code Ann. § 56-5-2950 (a).

[4] This evidence includes all statements made by Haase after her arrest, all observations by police officers made after the arrest, and the videotape made in preparation for administration of the Data Master test.

compulsory process for obtaining witnesses and documents. In addition, § 56-5-2934 provides, in pertinent part:

> In addition, at the time of arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945, the arresting officer, in addition to other notice requirements, must inform the defendant of his right to all hearings provided by law to include those if a breath test is refused or taken with a result that would require license suspension. The arresting officer, if the defendant wishes to avail himself of any such hearings, depending on the choices made or the breath test results obtained, must provide the defendant with the appropriate form to request the hearing or hearings. The defendant must acknowledge receipt of the notice requirements and receipt of the hearing form if such a hearing or hearings are desired.

2000 Act No. 390, § 9, (emphasis supplied). This section became effective March 1, 2002. However, Section 34 of Act 390 made § 56-5-2934 applicable to all pending cases that have not been adjudicated on that date. Although Haase was arrested six months prior to the effective date of § 56-5-2934, her case was not adjudicated until January 2004, such that it was pending on March 1, 2002.

The circuit court ruled the state was required to comply with § 56-5-2934 and, finding the state failed to do so, the court held all evidence against Haase which arose or was collected at or after her arrest must be excluded; accordingly, her conviction was reversed. This was error. We find Haase was adequately advised pursuant to § 56-5-2934.

Haase was given Implied Consent warnings while at the Data Master site, prior to refusing the test. Pursuant to S.C. Code Ann. § 56-5-2950 (a) (the Implied Consent statute), these warnings would have advised Haase that her license would be suspended if she refused the test, and that she had the right to request an administrative hearing. The purpose of the warnings under § 56-5-2934 are to advise the defendant of the consequences of refusing or failing the breathalyzer, i.e., license suspension, and to advise the defendant

of the right to a hearing concerning a suspension and provide the necessary forms to request such a hearing.

Haase makes no claim that the warnings given were inadequate or improper. Rather, she contends only that the failure to give the warnings at the arrest site mandates exclusion of all post-arrest evidence of her intoxication. We disagree.

In State v. Dowd, 306 S.C. 268, 269, 411 S.E.2d 428, 429 (1991), we held that "[a]n arrest does not necessarily terminate the instant a person is taken into custody; arrest also includes bringing the person personally within the custody and control of the law." We find police, by giving Haase warnings prior to her refusal of the Data Master test, sufficiently complied with the requirements of § 56-5-2934. Accordingly, the circuit court erred in reversing Haase's conviction. The judgment below is reversed.

REVERSED.

TOAL, C.J., MOORE, BURNETT, PLEICONES, JJ., and Acting Justice J. Ernst Kinard, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John Roosevelt Baccus, Appellant.

Appeal From Marion County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 26094
Heard November 30, 2005 - Filed January 9, 2006

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellant Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J. Zelenka,
Assistant Attorney General Derrick K. McFarland, all of Columbia;
and Solicitor Edgar L. Clements, III, of Florence, for Respondent.

JUSTICE BURNETT: John Roosevelt Baccus (Appellant) was convicted of murder and burglary in the first degree in connection with the shooting death of Brenda Kay Godbolt (victim), his former girlfriend. Appellant was sentenced to life imprisonment without parole on the murder charge and life imprisonment for the burglary charge, to be served

concurrently. We certified his appeal from the Court of Appeals, pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On November 14, 1999, the victim and her four-year old son were at her residence in Marion County. Victim and her friend, Priscilla Ham, talked at length during two telephone conversations. During the second conversation the victim began screaming. Ham testified the victim screamed, "John was here." Ham further testified she heard Appellant say, "I'm gonna kill your ass." She then heard a pop and clicking sound. Ham reported the incident to 911.

At trial, Dr. Erin Presnell, an expert in forensic pathology, testified the victim received two gunshot wounds to her body, one on her left cheek and one on her neck. Death resulted from the gunshot wound to the cheek.

At a pretrial suppression hearing and at trial, Officer Von Turbeville testified he arrived on the scene in the early morning hours of November 15, 1999, where he met with other officers and called Ham. Ham relayed to Turbeville her phone conversation with the victim and what she had overheard. Ham told him the victim said Appellant was coming through the window. She also gave him Appellant's name, his address in Florence County, and the type of car he had been driving. Turbeville relayed this information to Officer Barry Prosser of the Florence County Sheriff's Department.

Prosser testified at trial and at the suppression hearing that he went to Appellant's residence, where he knocked on the door but received no response. Prosser observed a car parked at a convenience store about one-fourth of a mile from Appellant's house that matched the description of the car Appellant had been driving. He noticed a "red substance" on the car and inside it. He also observed a smoldering burn pile containing clothing and shoes in Appellant's back yard. He testified he knocked on the door again

and Appellant answered. Prosser advised Appellant he was investigating an incident in Marion County, and Appellant was arrested.

At the pretrial suppression hearing, Turbeville testified he gave Officer Amber McDaniel of the Florence County Sheriff's Department information to obtain a search warrant for Appellant's residence. At a subsequent pretrial suppression hearing, McDaniel testified Turbeville told her about a homicide in Marion County; that Prosser had arrested Appellant, a suspect, in Florence County; that there was a burn pile with clothing outside Appellant's residence and that a vehicle Appellant was allegedly driving appeared to have blood stains in it.

McDaniel completed an affidavit for a search warrant with the information Turbeville supplied. She testified she did not know any particulars regarding the homicide at the time she requested a search warrant; specifically, she did not know why Appellant was a suspect. Additionally, she told the magistrate she had received a phone call from Turbeville regarding a homicide and Appellant had been arrested. She did not remember telling the magistrate anything not contained in the affidavit for the search warrant. Upon executing the search warrant, clothing, shoes, and a key to a vehicle were seized from Appellant's residence.

Prior to trial, the State petitioned the circuit court and the court issued an order directing Appellant to provide a blood sample for testing and comparison purposes. Blood was drawn from Appellant pursuant to the order.

The State presented the testimony of Michelle Dixon, who was qualified as an expert in latent prints, blood spatter, and crime scene reconstruction. During her initial walk-through of the victim's house, Dixon testified she found the victim in the rear bedroom where a window had been broken. She observed bloody footwear impressions from the bedroom to the side door of the residence. She testified during the process of entering the window the suspect was cut. She also testified fingerprints found in the window sill matched Appellant's fingerprints.

John Black testified as an expert in crime scene analysis, fingerprints, blood, and footwear impressions. He testified the shoes seized from Appellant's house matched the bloody shoeprints in the victim's house.

Dr. Steve Lambert testified at trial as an expert in DNA and serological analysis. Lambert testified he compared Appellant's blood, drawn pursuant to a court order, with evidence found in the victim's home. Lambert testified DNA testing and blood comparison revealed Appellant's blood matched blood found on the kitchen door, a bed sheet, and a blind in the bedroom where the victim was found. He also testified that on the night of Appellant's arrest a blood swab was taken from a cut on Appellant's left palm. The blood from that swabbing also matched the blood on the door, sheet, and blind.

During the suppression hearing and again during trial, Appellant moved to suppress evidence on the following grounds: (1) any evidence obtained by the State as a result of Appellant's warrantless arrest because the arresting officer lacked probable cause; (2) any evidence obtained by the search warrant because the affidavit accompanying the search warrant lacked probable cause; and (3) blood evidence drawn pursuant to a court order and implicating Appellant in the crime because the bodily intrusion was an unlawful search and seizure. The trial judge denied the motions.

ISSUES

I. Did the trial court err in admitting evidence emanating from Appellant's arrest because the police officer did not have probable cause to arrest him?

II. Did the trial court err in admitting evidence seized from Appellant's residence because the police affidavit which accompanied the search warrant did not support a finding of probable cause?

III. Did the trial court err in refusing to suppress blood evidence implicating Appellant in the crimes which was obtained in violation of his constitutional and statutory rights?

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. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 665-66 (2000) (a private search is a question of fact and the trial court's ruling will be reversed only if there is clear error).

LAW/ANALYSIS

I. Arrest

Appellant argues the trial court erred by refusing to suppress evidence seized emanating from his arrest. Appellant contends his arrest was illegal because officers arrested him without a warrant and without probable cause. Appellant argues his fingerprints and blood, which were taken at the jail after his allegedly illegal arrest, should be suppressed as the fruit of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). We disagree.

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest for murder). Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal. *Id.*; see also Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225 (1964) (a court must consider "whether, at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonably

trustworthy information were sufficient to warrant a prudent man in believing that the [Appellant] had committed. . .an offense.").

We conclude Prosser had probable cause to make the warrantless arrest based on the information he received from Turbeville and his own observations at Appellant's residence. Turbeville testified he relayed to Prosser information he received from Ham. Prosser testified Turbeville informed him of a homicide and information related to that homicide. He knew Appellant was a suspect in the homicide. He also observed a red substance on the inside and outside of a car matching the description of the car Appellant had been driving. He saw a burn pile containing shoes and clothing in Appellant's backyard. The trial judge properly admitted evidence emanating from Appellant's warrantless arrest.

II. Search Warrant

Appellant argues the trial court erred by refusing to suppress evidence seized from his residence pursuant to a search warrant. Appellant contends the search warrant was not supported by probable cause, and the shoes, clothing, and key seized should have been excluded from trial.[1] We agree.

A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). In Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983), the United States Supreme Court

[1] At trial, Appellant also argued the search warrant should be suppressed because the warrant predated the crime and the warrant did not have the exact date and time of issuance and return. The trial judge denied the motion to suppress on this ground. Appellant has abandoned this argument on appeal. See State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981); Rule 208(b)(1)(B), (D), SCACR (issue not argued in brief is deemed abandoned and precludes consideration on appeal).

adopted a "totality-of-the-circumstances" test for probable cause determinations:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

In South Carolina, search warrants may be issued "only upon affidavit sworn to before the magistrate. . .establishing the grounds for the warrant." S.C.Code Ann. § 17-13-140 (2003); see also State v. McKnight, 291 S.C.110, 352 S.E.2d 471 (1987). The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978).

In State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990), Smith moved to suppress a knife, allegedly used in a robbery, which was seized from his motel room pursuant to a search warrant. In determining whether the issuing magistrate had a substantial basis to conclude probable cause existed, this Court considered the following affidavit accompanying a search warrant:

> That on May 12th at approximately 11:45 p.m. Reginald Jerome Smith went into the Master Inn located at 1468 Savannah Hwy., Charleston, S.C. and he then robbed the manager at knife point. Smith has been staying at the Host of America Room 216 since Jan. 1, 1988 and there is every reason to believe the weapon and clothes used in the robbery will be located in the room. This information was confirmed in person by Sgt. Sherman on 05/13/88.

Id. at 372, 392 S.E.2d at 183. We held that the affidavit was defective because it "set[] forth no facts as to *why* police believed Smith robbed the Master Host Inn." *Id.* at 373, 392 S.E.2d at 183. We further found, "Mere

conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." *Id.* See also State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997) (an affidavit supporting a search warrant could not have provided a substantial basis for finding probable cause to search Weston's car when the affidavit failed to set forth any facts as to why police believed Weston committed the crime and the first three sentences of the affidavit contained conclusory statements).

In the present case, the affidavit in support of the search warrant for Appellant's residence read:

> DESCRIPTION OF PROPERTY SOUGHT
> Any evidence such as: clothing, shoes, weapons, or forensics evidence such as blood. Which maybe connected with the Homicide of Brenda K. Godbolt which occurred in Marion County. . . .
>
> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES
> At the time of the suspects (sic) arrest at 2616 Alligator Rd. in Florence County, by Investigators Barry Prosser and Von Dean Turbeville with Florence and Marion County Sheriff's Office. A pile of what appeared to be clothing was lying on the ground beside the residence smoldering in plain view, and a vehicle the suspect was apparently driving was located approximately ¼ of a mile from this residence with blood stains on the inside and outside of the vehicle.

This affidavit fails to set forth any facts as to why police believed Appellant committed the crime. The language in the affidavit lacks specifity and contains conclusory statements. Given the totality of the circumstances, we conclude the issuing magistrate did not have a substantial basis to find probable cause for a search of Appellant's residence, and the trial court erred in admitting evidence seized pursuant to the search warrant.

III. Bodily Intrusion

Appellant argues the trial court erred by refusing to suppress blood evidence implicating him in the crime. Specifically, Appellant contends the court order compelling a blood sample violated the Fourth Amendment of the United States Constitution, S.C. Code Ann. § 17-13-140, and Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966). We agree.

Appellant argues the petition and order do not meet constitutional or statutory requirements because there was no sworn testimony, warrant, or affidavit showing probable cause that a search of Appellant's body would produce admissible evidence. The State asserts Appellant consented to have his blood drawn and tested by filing a motion to compel evidence under a previously filed Brady[2] motion. The State further contends if the search is deemed nonconsensual, then the search was valid because the petition and order were the functional equivalent of a search warrant.

The State's assertion that Appellant consented to a search is without merit. A defendant does not consent to a search and seizure by filing a Brady motion.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. An order issued pursuant to § 17-13-140 that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment. Schmerber, 384 U.S. at 767-70, 86 S.Ct. at 1834-35; State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992). The Fourth Amendment protects against intrusions into the human body for the taking of evidence absent a warrant unless there are exigent circumstances, such as the imminent destruction of evidence. Schmerber, 384 U.S. at 770, 86 S.Ct. at 1835; see also State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) (applying Schmerber analysis to search of suspect's mouth). Where blood is needed only to determine blood type to match existing evidence, a warrant must be obtained even

[2] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

though there has been a lawful arrest. Gantt v. State, 354 S.C. 183, 580 S.E.2d 133 (2003).

A court order issued pursuant to § 17-13-140 that allows the government to procure evidence from a person's body must comply with constitutional and statutory guidelines. Schmerber, 384 U.S. at 769-70, 86 S.Ct. at 1835; In re Snyder, 308 S.C. 192, 417 S.E.2d 572, (1992); Register, 308 S.C. at 537, 419 S.E.2d at 772. In Snyder, we stated:

> Section 17-13-140 covers "the issuance, execution and return of search warrants for property connected with the commission of crime. . ." Subsection (4) provides for the issuance of a search warrant for "*property* constituting evidence of crime or *tending to show that a particular person committed a criminal offense.*" Under this court's construction, "property" as used in Section 17-13-140, encompasses nontestimonial identification evidence.
>
> Respondents next assert that Section 17-13-140 contains no guidelines and procedures for obtaining nontestimonial identification evidence. However, guidelines and procedures for acquiring such evidence were promulgated in the case of In re: An Investigation into the Death of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6, 7, 437 N.E.2d 265, 266 (1982). David M. v. Dwyer, 484 N.Y.S.2d 323, 107 A.D.2d 884 (1985) [citing Matter of Abe A., supra.] established considerations for determining whether or not there exists probable cause to permit the acquisition of such evidence. These elements are:
> (1) probable cause to believe the suspect has committed the crime,
> (2) a clear indication that relevant material evidence will be found, and
> (3) the method used to secure it is safe and reliable.
> Additional factors to be weighed are the seriousness of the crime and the importance of the evidence to the investigation. The judge is required to balance the necessity for acquiring involuntary nontestimonial identification evidence against

> constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures. Id. . . .
>
> We construe Section 17-13-140 to provide for the involuntary submission of nontestimonial identification evidence. Further, this Court holds that upon a sufficient showing of probable cause for the issuance of an order, a court may order that such evidence be obtained from unarrested suspects within guidelines mandated under the statutory provisions, case law, and Constitutional laws of this State and of the United States.

308 S.C. at 195-96, 417 S.E.2d at 573-74; see also Register, 308 S.C. at 537-38, 419 S.E.2d at 773 (setting forth essentially the same considerations for a warrant or order compelling a bodily intrusion into a potential witness).

The facts of the present case are similar to Snyder and Register because the Fourth Amendment protections apply even when an individual has been arrested and indicted. See Gantt, 354 S.C. at 187, 580 S.E.2d at 135 ("A lawful arrest does not in itself justify a warrantless search that requires bodily intrusion."). Therefore, a court order allowing the State to procure evidence from an arrested and indicted suspect must meet statutory and constitutional guidelines.

Under both the United States and South Carolina constitutions, search warrants may not be issued except "upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV; S.C. Const. art. I, § 10. Following these constitutional requirements, § 17-13-140 requires a sworn affidavit for a search warrant to be issued. A court order issued pursuant to § 17-13-140, which stands in place of a search warrant, should only be issued upon a finding of probable cause, which is supported by oath or affirmation.[3] Nothing in the record suggests the court order was issued upon a finding of probable cause supported by oath or affirmation. Furthermore, exigent

[3] Appellant argues a search warrant must also be issued, but in Snyder and Register we recognized a court order may be issued under § 17-13-140 instead of a search warrant.

circumstances did not exist to justify a bodily intrusion without a warrant or order issued under § 17-13-140. Compare Schmerber, 384 U.S. at 770-71, 86 S.Ct. at 1826 (exigent circumstances existed when testing for blood alcohol level, which is considered subject to imminent destruction). We conclude the trial judge erred in refusing to suppress evidence of Appellant's blood because the order fails to comply with constitutional and statutory requirements. See State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) ("Evidence seized in violation of the Fourth Amendment must be excluded from trial.").

Having found error, we must ask what other evidence was considered besides the evidence entered in error. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993); see also Rule 220(c), SCACR (on appeal this court may affirm on any ground contained in the record). When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result. State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984).

The State presented the testimony of Ham who overheard Appellant tell the victim he was going to kill her and who overheard a pop and clicking sound. Additionally, the State presented evidence that Appellant's fingerprints matched fingerprints on the window sill of the broken window in the victim's bedroom. Also, Dr. Lambert testified the blood sample collected from Appellant on the night of his arrest matched the blood found on the swabs and cuttings from the door, blind, and sheet in the victim's house. Therefore, the blood evidence drawn pursuant to the court order which should have been excluded was cumulative. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless). After reviewing the entire record, we find the errors in admitting evidence from the search warrant and the court order were harmless. See State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) ("[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.").

CONCLUSION

The trial judge properly admitted evidence emanating from Appellant's warrantless arrest. However, the trial judge erred in admitting evidence seized from Appellant's residence pursuant to the search warrant and in admitting blood evidence drawn by court order. However, we conclude these errors were harmless and we affirm Appellant's convictions.

AFFIRMED.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justice J. Ernest Kinard, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dan A. Dearybury, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
Donald W. Beatty, Post-Conviction Relief Judge

Opinion No. 26095
Submitted December 1, 2005 - Filed January 9, 2006

REMANDED

Gloria Y. Leevy, of Leevy Law Firm, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Molly Crum, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Petitioner was convicted of criminal domestic violence (CDV) in municipal court. No direct appeal was taken. Almost four years later, Petitioner filed an application for post-conviction relief (PCR). The PCR court denied Petitioner relief. We remand for a hearing to determine whether Petitioner knowingly and voluntarily proceeded pro se at trial.

FACTUAL / PROCEDURAL BACKGROUND

In August 1996, Petitioner and his wife were separated and had filed for divorce. Petitioner retained an attorney to represent him in the divorce action. Shortly thereafter, on September 10, 1996, Petitioner was arrested for CDV for an incident involving his wife.[1] After being arrested, Petitioner testified, he called his divorce attorney from the city jail. Petitioner testified that his divorce attorney told him to plead not guilty and request a jury trial at the bond hearing, which he did.

He testified that two days before a roll call, his divorce attorney told Petitioner that he would not be present. Petitioner testified he appeared at the roll call and the trial judge asked him if he was ready to get started. After Petitioner responded that he was, the trial began. Petitioner was found guilty and sentenced. Petitioner testified he did not object to going forward with the trial without counsel because he did not know what to say or do.

Petitioner testified that afterwards he believed that his divorce attorney was taking steps to relieve him of the CDV conviction. In December 2000, his divorce attorney withdrew as Petitioner's counsel in the divorce action. In April 2001, Petitioner filed this action seeking relief from the CDV conviction.

Petitioner's divorce attorney testified at the PCR hearing that he never represented Petitioner in the CDV case. He testified he was handling only Petitioner's divorce action. He testified he did not remember Petitioner calling him from jail or advising Petitioner to plead not guilty and request a

[1]The specific facts surrounding the CDV offense are not included in the record.

jury trial. Petitioner's divorce attorney testified he received a faxed copy of a letter from the clerk of court which stated Petitioner had requested a jury trial. Several months later, he testified, he received a notice of a hearing in the CDV case. Petitioner's divorce attorney testified he called the city prosecutor and advised her that he represented Petitioner only in the divorce action. However, he asked that the CDV be continued because he hoped for a settlement in the divorce action. The city prosecutor agreed and the CDV case was continued.

Six months later, Petitioner's divorce attorney received a roster of cases from the city attorney indicating he represented Petitioner. He testified he contacted Petitioner and advised him to obtain another attorney for the CDV case. Petitioner's divorce attorney sent a letter to the city attorney advising that he was not representing Petitioner on the CDV charge. He testified he did not discuss the matter any more with Petitioner until sometime in 2000.

The PCR judge found Petitioner's divorce attorney was not Petitioner's trial counsel on the CDV offense and Petitioner was pro se at trial. The PCR judge also found Petitioner's application for PCR was barred by the statute of limitations because Petitioner waited almost four years to file it. The PCR judge additionally found that Petitioner was not entitled to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), because he held Petitioner was acting pro se and thus had waived any right to challenge the effectiveness of his counsel.

ISSUES

1) Did the PCR judge err in finding Petitioner acted pro se and was not entitled to a belated appeal pursuant to *White v. State*?

2) Did the PCR judge err in finding the statute of limitations barred Petitioner's PCR application?

3) Did the trial court err in failing to sua sponte grant Petitioner a continuance?

STANDARD OF REVIEW

The Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them. *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The Court will not uphold the findings when there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

LAW / ANALYSIS

1) Belated Appeal

The PCR judge found Petitioner was acting pro se below and his failure to file a direct appeal was due to his own inaction.[2] He also found Petitioner's divorce attorney was not Petitioner's trial counsel. Petitioner contends this was error.

Without a doubt, Petitioner appeared pro se at his trial. The term "pro se" is a term so familiar to lawyers that it hardly needs to be defined. It simply means to represent oneself. *See Black's Law Dictionary* 1237 (7th ed. 1999). Clearly, Petitioner represented himself at trial and thus was acting pro se. Further, there is plenty of evidence to support the PCR judge's finding that Petitioner's divorce attorney was not Petitioner's trial counsel on the CDV offense. *Cherry v. State, supra*. While the issue was not precisely raised by Petitioner in his PCR application, the threshold question in this case is not whether Petitioner proceeded pro se but whether he knowingly and voluntarily proceeded pro se.[3]

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[2]Petitioner argues the PCR judge erred in finding that he waived his right to counsel. However, the PCR judge merely found Petitioner was acting pro se. The PCR judge did not address the voluntariness of the waiver.

[3]In his PCR application, Petitioner raised only the issue of ineffective assistance of counsel. He contends trial counsel was ineffective in failing to appear at trial and in failing to advise him of his rights, particularly the right to appeal. In his PCR application, he raised only the issue of ineffective assistance of counsel. However, the issue of whether he voluntarily proceeded pro se was raised at the PCR hearing.

It is well-established that a defendant may waive the right to counsel and proceed pro se. *Faretta v. California*, 422 U.S. 806 (1975). Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." *Id*. at 834. The right to proceed pro se must be clearly asserted by the defendant prior to trial. *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991). The trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel. *Faretta*, *supra.*

Whether Petitioner knowingly and voluntarily waived his right to counsel still needs to be determined. If Petitioner did not knowingly and voluntarily waive his right to counsel, he is presumably entitled to a belated direct appeal.[4] Accordingly, this issue is remanded.

2) Statute of Limitations

The PCR judge found the statute of limitations barred Petitioner's PCR application. Petitioner contends the PCR judge erred.

A PCR application ordinarily "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27- 45(A) (2003). Petitioner contends his PCR application is governed by subsection (C) of § 17-27- 45 which provides for a one-year statute of limitations from the time of discovery of material facts not previously presented and heard that require vacation of the conviction. Petitioner contends that it was not until March 2001 that he discovered that his divorce attorney did not represent him on the

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[4]*But see Walker v. State*, 676 S.W.2d 460 (Ark. 1984)(fact that petitioner is proceeding pro se does not in itself constitute good cause for failure to conform to the prevailing rules of procedure).

CDV offense and he filed for PCR within one month.[5] Petitioner then argues that because he did not waive his right to appeal, the statute of limitations does not apply.

As noted above, we affirm the PCR court's finding that Petitioner's divorce attorney was not Petitioner's trial counsel on the CDV offense. However, because a defendant has the right to be informed of the right to an appeal, *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002), this issue also boils down to whether Petitioner voluntarily waived his right to counsel. If Petitioner did not voluntarily or knowingly waive his right to counsel, his PCR application would not be barred by the statute of limitations and he presumably would be entitled to relief.

The State also contends Petitioner's PCR application is barred by laches. However, laches is an affirmative defense that must be pleaded pursuant to Rule 8(c), SCRCP. *See also Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989). The State did not plead laches and accordingly is barred from asserting it now.

3) Continuance

Petitioner contends the trial judge should have sua sponte continued the case. This is the direct appeal issue and because Petitioner was not granted a belated review, this issue is not properly before the Court at this time.

CONCLUSION

For the foregoing reasons, we remand for the PCR judge to determine whether Petitioner knowingly and voluntarily waived his right to trial counsel.

[5]At the PCR hearing, Petitioner asserted that his divorce attorney represented him until sometime in 2000. While his divorce attorney may have represented Petitioner in the divorce action until 2000, the evidence supports the PCR judge's finding that his divorce attorney never represented Petitioner in the CDV action.

REMANDED.

MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Scott L. Hood, Respondent.

Opinion No. 26096
Submitted December 5, 2005 - Filed January 9, 2006

RECIPROCAL DEFINITE SUSPENSION
AND
INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Scott L. Hood, pro se, of Irmo.

PER CURIAM: This matter is before the Court on a Petition for Reciprocal Discipline[1] and an Agreement for Discipline by Consent (Agreement) entered into by the Office of Disciplinary Counsel (ODC) and respondent.[2] In the Agreement, respondent admits misconduct and consents to either a two year definite suspension or an indefinite suspension from the practice of law. We accept the agreement and indefinitely suspend respondent from the practice of law

[1] See Rule 29, RLDE, Rule 413, SCACR.

[2] See Rule 21, RLDE, Rule 413, SCACR.

in this state. Furthermore, we impose an eighteen (18) month suspension from the practice of law as reciprocal discipline. The suspensions shall be served concurrently and shall run retroactively from the date of respondent's interim suspension.[3] The facts, as set forth in the Agreement, are as follows.

FACTS

I.

In December 2004, respondent was retained to represent Client A's interest in a foreclosure action concerning property on which she held a judgment. Client A paid respondent $375.00 and gave him her original documents. Respondent sent her a filed copy of the Answer he had prepared but, subsequently, did not return any of her telephone calls and did not respond to the messages she left on his office door. Client A has not received a refund of her money or her original documents.

II.

Client B retained respondent to file an appeal from a magistrate's court ruling in a civil suit against a car dealership. Client B gave respondent $750.00 in fees and $100.00 in costs. Respondent did not return Client B's telephone calls for updates on her case. Respondent closed his office and has refused to communicate with Client B. Client B has since lost her car as well as the $850.00 she paid respondent.

III.

Client C retained respondent to represent her in a consumer matter wherein Client C was wrongly reported to have filed for bankruptcy. Client C's deposition was scheduled; without notice to

[3] See In the Matter of Hood, 365 S.C. 330, 618 S.E.2d 295 (2005).

her, respondent changed the deposition date. Client C was unable to locate respondent for some time. Client C's deposition was subsequently taken. Her legal matter has not been resolved.

IV.

The United States Bankruptcy Court suspended respondent from filing new bankruptcy cases for a period of at least eighteen months, with conditions. The Bankruptcy Court determined respondent had violated its rules regarding electronic filing and had perjured himself by attesting that his clients had signed the original documents when they had not. Additionally, the Bankruptcy Court determined that several of respondent's cases had administrative deficiencies which had not been corrected.[4]

V.

Respondent was paid $200.00 to update two (2) wills. Respondent repeatedly missed appointments with the clients and did not prepare the wills or refund the fee.

VI.

Clients retained respondent to represent them in a bankruptcy filing. Months later, respondent wrote and told the clients that their house might be foreclosed because they had not paid their mortgage. The clients were unable to locate respondent during this period of time and are now unable to produce the large cash payment necessary to avoid foreclosure. The clients are expecting to lose their home.

[4] The Petition for Reciprocal Discipline stems from the action by the Bankruptcy Court.

VII.

Respondent failed to comply with a final decision of the Resolution of Fee Disputes Board directing him to pay a construction company $700.00. The certificate of non-compliances is dated July 25, 2005.

VIII.

In November 2003, Client D retained respondent to handle a mortgage foreclosure. In August 2004, respondent told Client D that he was waiting for a court date. Client D received a letter from respondent dated June 30, 2005, in which respondent advised that the court had ruled on the foreclosure and his property would proceed to sale. Respondent told Client D that the hearing was "last minute" and he did not have time to contact Client D to advise him of the hearing. Client D later learned from the Clerk's Office that the hearing notice was sent on May 27, 2005 and that the hearing was on June 30, 2005. Client D hired another attorney and learned that respondent had agreed to the foreclosure sale without consulting with him.

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Respondent admits that, while undertaking a career change, he did not take the action necessary to protect his clients during the transition. Respondent asserts he does not believe he will ever desire to practice law again.

Respondent states he consented to the Court placing him on interim suspension and that he has assisted the attorney appointed to protect his clients' interests. He further notes he signed a consent order with the Bankruptcy Court in which he agreed not to accept any new cases for a period of at least eighteen (18) months.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule

407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing clients); Rule 1.4 (lawyer shall keep clients informed); Rule 1.5 (lawyer shall not charge excessive fee); Rule 1.15 (lawyer shall promptly deliver to client any funds or other property to which client is entitled); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of his client); Rule 3.3 (lawyer shall not knowingly make a false statement of material fact or law to a tribunal); Rule 3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).[5] In addition, respondent admits his misconduct constitutes grounds for discipline pursuant to Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(2) (lawyer shall not engage in conduct violating the applicable rules of professional conduct of another jurisdiction), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(10) (lawyer shall not willfully fail to comply with a final decision of the Resolution of Fee Disputes Board).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. In addition, we suspend respondent from the practice of law for eighteen (18)

[5] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

months. The suspensions shall be served concurrently and shall run retroactively from the date respondent was placed on interim suspension.

Within thirty (30) days of the date of this opinion, respondent shall pay restitution to all clients, other persons, and entities who have incurred losses as a result of respondent's misconduct in connection with this matter. Within thirty (30) days of the date of this opinion, respondent shall also reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of his misconduct in connection with this matter. ODC shall advise the Court that respondent has paid the restitution required by this order.

Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION; INDEFINITE SUSPENSION.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas G. Buist, Petitioner,

v.

Michael Huggins, in his capacity as Assessor for Charleston County, Peggy A. Moseley, in her capacity as Auditor for Charleston County, Andrew C. Smith, in his capacity as Treasurer for Charleston County, the Board of Assessment Appeals for Charleston County, and the County of Charleston, a political subdivision, Respondents.

Worsley Co. Inc., As Assignee and Edgar A. Buck and Margaret B. Buck as Assignor and in their own rights as they may appear, Petitioners,

v.

Dorchester County Assessor and Dorchester County Auditor, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 26097
Heard October 19, 2005 - Filed January 9, 2006

AFFIRMED AS MODIFIED

G. Trenholm Walker, Andrew K. Epting, Jr., and Amanda R. Maybank, all of Pratt-Thomas, Epting & Walker, PA, of Charleston, for Petitioners.

Bernard Eugene Ferrara, Jr., and Joseph Dawson, III, of N. Charleston, and John G. Frampton, of Chellis & Frampton, of Summerville, for Respondents.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' decision in Buist v. Huggins et. al., Op. No. 2003-UP-533 (S.C. Ct. App. filed Sept. 4, 2003), in which the Court of Appeals held the Administrative Law Judge (ALJ) lacked subject matter jurisdiction to review a county's assessment of interest for the redemption of property from a delinquent tax sale pursuant to S.C. Code Ann. § 12-51-90 (2000). We affirm in result, as modified.

FACTS

Petitioners' properties were sold at delinquent tax sales. Petitioners sought to redeem their properties pursuant to S.C. Code Ann. § 12-51-90 (2000).[1]

[1] The cases were consolidated for appeal and involve two separate properties; the Worsley property located in Dorchester County, and the Buist property located on Kiawah Island in Charleston County.

The Buist property was sold by Charleston County for $90,000.00 on October 7, 1996, as a result of $4520.88 in delinquent taxes owed.[2] Buist redeemed the property on January 21, 1997. To redeem the property, Buist was required to pay the back taxes owed, plus $678.00 late payment interest, a $100.00 levy fee, and $7200.00 "bidder interest" pursuant to S.C. Code Ann. § 12-51-90, calculated by County at 8% of the total amount of the successful bid on the property ($90,000 x 8%). Buist paid the $7200.00 bidder interest under protest, asserting that it should be calculated on a per diem basis, rather than assessed for an entire year. Buist filed a claim for a refund pursuant to S.C. Code Ann. § 12-60-2560 with the County Board of Assessment Control. The Charleston County Tax Refund Committee denied the request, and the Board of Assessment Appeals affirmed. Buist filed a notice of appeal and request for a contested case hearing with the Administrative Law Judge (ALJ) Division.

Petitioner Worsley owed $4728.98 in taxes, penalties and costs, and his property was sold by Dorchester County for $153,000.00 on November 3, 1997. Worsley redeemed the property on December 31, 1997. To redeem the property, Worsley paid $4728.98 back taxes, plus $12,240.00 bidder interest, calculated by County at 8% of the total amount of the successful bid on the property ($153,000 x 8%), pursuant to S.C. Code Ann. § 12-51-90. Worsley paid the $12,240.00 bidder interest under protest, and sought a refund under S.C. Code Ann. § 12-60-2560, claiming interest should be calculated on a per diem basis. Dorchester County denied the request for refund. The Board of Assessment Appeals for Dorchester County denied the appeal, finding § 12-60-2560 inapplicable to contest the interest paid to redeem real property. Worsley filed a notice of appeal with the ALJ.

The same ALJ heard both the Buist and Worsley appeals. The ALJ held that the legislature intended the term "interest" as used in S.C. Code Ann. § 12-51-90 to be used in its plain and ordinary terms, such that the counties should not be interpreting it to authorize a flat-rate interest "penalty." Accordingly, the ALJ found interest should be calculated on a per diem basis, entitling Buist and Worsley to a refund.

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[2] Buist is the attorney for the property owners, Michael and Sharon Mayberry.

Counties sought judicial review, and the cases were consolidated for a hearing. The circuit court reversed, finding the ALJ was without jurisdiction over matters arising under S.C. Code Ann. § 12-51-40 et seq. (the Alternate Procedures Act). The circuit court held the Revenue Procedures Act, S.C. Code Ann. § 12-60-2560, under which Petitioners had sought relief, was inapplicable to their claims for a refund. The circuit court reasoned that the "interest" due under S.C. Code Ann. § 12-51-90 is not a "disputed revenue liability" so as to fall within the meaning of the section 12-60-20 of the Revenue Procedures Act. It held the ALJ did not have jurisdiction to determine whether Counties properly calculated interest under § 12-51-40 of the Alternate Procedures Act. The circuit court lastly ruled that that the term "interest" as used in § 12-51-90 was intended by the Legislature to constitute a "penalty" such that the interest was properly calculated by Counties as a lump sum based upon the whole amount of the tax sale bid regardless of when the property was redeemed.

The Court of Appeals affirmed the circuit court's ruling that the ALJ was without jurisdiction to hear the appeal. However, the Court of Appeals also held that because the ALJ lacked jurisdiction, the circuit court was likewise without jurisdiction to address the merits of the issue in its appellate capacity. Accordingly, the Court of Appeals did not address the proper calculation of "interest" under S.C. Code Ann. § 12-51-90.

ISSUES

1. Did the Court of Appeals err in concluding the ALJ was without subject matter jurisdiction?

2. Is the interest collected pursuant to S.C. Code Ann. § 12-51-90 properly calculated based on a flat fee, or on a per diem basis?

1. JURISDICTION

S.C. Code Ann. § 12-51-40 et seq. sets forth an Alternate Procedure for collection of county taxes, authorizing counties to seize property and sell it at

a delinquent tax sale. Pursuant to S.C. Code Ann. § 12-51-90, the defaulting taxpayer may redeem the property within one year of the tax sale by "paying the person officially charged with the collection of delinquent taxes, assessments, penalties and costs, together with interest as provided in subsection B."[3]

Petitioners redeemed their properties within the first year, but challenged the counties' calculation of the amount of interest. Accordingly, they paid under protest and filed claims for refunds pursuant to S.C. Code Ann. § 12-60-2560, which is contained in the South Carolina Revenue Procedures Act. S.C. Code Ann. § 12-60-10 et seq. It is undisputed that a claim for a "refund of real property taxes assessed by the county" is made to the ALJ Division under § 12-60-2560 of the Revenue Procedures Act.[4]

Petitioners' cite S.C. Code Ann. § 12-60-80 of the Revenue Procedures Act, and this Court's opinion in Brackenbrook v. County of North Charleston, 360 S.C. 390, 395, 602 S.E.2d 39, 42 (2004), in support of their claim that the ALJ had jurisdiction.

S.C. Code Ann. § 12-60-80 provides, in part, "there is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes."[5] This Court interpreted § 12-60-80 in Brackenbrook. There, taxpayers brought an action in circuit court alleging Charleston County levied an excessive millage rate on real property. The circuit court allowed the taxpayers' suit, finding taxpayers had no administrative remedies under the Revenue Procedures Act (RPA) because the Act did not cover taxpayer challenges to the county's millage rate determination. The circuit court concluded the RPA's mandated administrative remedies only applied to taxpayer challenges to a county's "property tax assessment." Because the taxpayers in Brackenbrook did not

[3] The amount of interest is addressed in Issue 2 below.

[4] As noted by the majority of the Court in Brackenbrook v. County of North Charleston, 360 S.C. 390, 395, 602 S.E.2d 39, 42 (2004), "the General Assembly adopted the South Carolina Revenue Procedures Act (the Act) to provide the people of this State with a straight forward procedure to determine any disputed revenue liability."

[5] An exception is provided for cases involving the constitutionality of a statute.

dispute any component of their property tax **assessment**, the circuit court held they had an immediate right to bring suit in circuit court. A majority of this Court reversed, holding that:

> While the Act contains many specific procedures for taxpayers challenging their [property tax assessments], **relief under the Act is not limited to these types of protests**. Section 12-60-2530(A) specifically provides the **board of assessment appeals may rule on any PTA dispute and also other relevant claims of a legal or factual nature except claims relating to property tax exemptions**.

360 S.C. at 398, 602 S.E.2d at 44. (emphasis supplied).

Two justices dissented in Brackenbrook, finding the administrative remedy set forth in § 12-60-2560 applicable only to challenges to property tax **assessments**, but not to challenges to the proper **millage** rate to be applied in calculating the amount of tax due. Accordingly, the dissent would have held the administrative remedy limitation in § 12-60-80 did not control.

The circuit court in this case, as well as the Court of Appeals, found that Petitioners' claims did not involve a challenge to a property tax assessment but, rather, a claim for a refund of interest paid to the Delinquent Tax Collector,[6] and that the only provisions governing redemption of property sold at a delinquent tax sale were found in S.C. Code Ann. § 12-51-90, so as to fall within the Alternate Procedures Act, requiring suit to be brought in the circuit court. We agree.

Unlike Brackenbrook, Petitioners in this case challenge neither their underlying tax assessments, nor their millage rates. Rather, Petitioners challenge only the calculation of interest under § 12-51-90. While their interest payment could feasibly be lowered, the underlying tax amount owed is not disputed. Accordingly, we find their challenge is properly brought under S.C. Code Ann. § 12-51-90, such that the Alternate Procedures Act

[6] The circuit court was persuaded by the fact that the taxes are required by §§ 12-51-40 through 12-51-60 to be paid to the delinquent tax collector, rather than the auditor.

controls. The Court of Appeals properly held jurisdiction over such disputes remains in the circuit court, and the ALJ was without jurisdiction.[7]

2. CALCULATION OF INTEREST[8]

As noted previously, S.C. Code Ann. § 12-51-90 permits a defaulting taxpayer to redeem property within one year of a delinquent tax sale and sets forth the interest to be paid. As it read at the time these properties were redeemed, § 12-51-90 provided that a defaulting taxpayer could redeem the property upon payment of the "delinquent taxes, assessments, penalties and costs, **together with eight percent interest on the whole amount of the delinquent tax sale bid**. . . . In the case of a **redemption in the last six months of the redemption period, . . . the applicable rate of interest is twelve percent**." Emphasis supplied.[9]

If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their

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[7] This result is buttressed by the fact that S.C. Code Ann. § 12-60-2560 (under which the ALJ's jurisdiction in this case is premised) requires a taxpayer to seek a refund "by filing a claim for refund with the county assessor who made the property tax assessment for the property for which the tax refund is sought." Here, the assessment of interest was made by the Delinquent Tax Collector rather than the county assessor.

[8] In light of our ruling on the subject matter jurisdiction issue, we would not normally address this issue. However, because the circuit court has already addressed this issue, and in the interest of judicial economy, we proceed to review the proper calculation of interest.

[9] The statute has been amended several times since its adoption in 1962. Each version of the statute, however, has included terminology that the interest is to be "on the whole amount of the delinquent tax sale bid. Section 12-51-90 was most recently amended in 2000 and now reads: The lump sum amount of interest due on the whole amount of the delinquent tax sale based on the month during the redemption period the property is redeemed and that rate relates back to the beginning of the redemption period according to the following schedule:

Month of Redemption Period:	Amount of Interest Imposed:
First three months	three percent of the bid amount
Months four, five, and six	six percent of the bid amount
Months seven, eight, and nine	nine percent of the bid amount
Last three months	twelve percent of the bid amount

plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003).

The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. South Carolina Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)); see also Nucor Steel v. South Carolina Public Serv. Comm'n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) (where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason).

It is undisputed that counties have uniformly been collecting a flat rate of interest on redeemed properties. Further, under a plain reading of the statute, it is clear the Legislature intended to impose a flat-fee interest rate of 8% on property redeemed within the first six months, and a 12% rate for the last six months. In light of the wording of the statute that the interest is charged on the **whole amount of the delinquent tax sale bid,** and the fact that the rate increases to 12% if not paid within the first 6 months, it is patent that the Legislature intended a flat rate of interest. This result is bolstered by the recent amendments to § 12-51-90, as shown in footnote 9, which imposes a different interest rate depending upon which **quarter** the property is redeemed (3%, 6%, 9% and 12%). See Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100 (1992) (subsequent statutory amendment may be interpreted as clarifying original legislative intent). We find nothing in the language of § 12-51-90 indicating a legislative intent that interest be paid on a per diem basis.

Petitioners cite S.C. Code Ann. § 12-54-25(D), governing the interest due on late taxes, and the applicable tax rate, which states that "the rate of interest on underpayments and overpayments is established by the department

in the same manner and at the same time as the underpayment rate provided in Internal Revenue Code Sections 6621(a)(2) and 6622." Under IRC Code 6622, interest is compounded daily. The compounding of interest under § 12-54-25(D) is inapplicable here. Section 12-51-90 does not deal with the late payment of taxes but, rather, the redemption of property sold at a delinquent tax sale. Further, the Legislature saw fit, in § 12-54-25(D) to set forth a federal tax code section upon which interest would be based. Had the Legislature intended interest under section 12-51-90 to be compounded as set forth in the IRC, it could have plainly said so. See Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended a certain result in statute it would have said so).[10] The circuit court correctly held § 12-51-90 imposes a flat rate interest fee.

CONCLUSION

We affirm the Court of Appeals' ruling that the ALJ lacked jurisdiction over Petitioners' claims. We also affirm the circuit court's ruling that Petitioners were properly charged a flat rate of interest.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

[10] Interestingly, at the time of this action, S.C. Code Ann. § 34-31-20 stated that ". . . in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent **per annum**." Emphasis supplied.

The Supreme Court of South Carolina

In the Matter of Darren S. Haley, Petitioner.

ORDER

Petitioner was suspended on November 14, 2005, for a period of thirty days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

January 9, 2006

The Supreme Court of South Carolina

In the Matter of James T. McBratney, Respondent.

ORDER

Respondent was suspended on December 5, 2005, for a period of thirty (30) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this State. Respondent shall, however, pay the sum of $5,570.85 in attorney's fees as requested in the petition of Desa Ballard, Esquire, dated December 22, 2005. These attorney's fees shall be paid within forty-five (45) days of the date of this order.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Waller, J., not participating.

Columbia, South Carolina

January 6, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Retrice Lamont Funderburk, Appellant.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 4066
Submitted November 1, 2005 – Filed January 9, 2006

AFFIRMED

Acting Deputy Chief Attorney Wanda H. Carter, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

WILLIAMS, J.: Retrice Lamont Funderburk appeals following a conviction for trafficking in cocaine. Specifically, Funderburk argues the trial court improperly admitted evidence. We affirm.

FACTS

On November 16, 2000, Officers David Robinson and John McIntyre were patrolling Interstate I-85 in Greenville County when they observed a vehicle traveling too closely to an eighteen-wheeler truck. After activating his blue lights and stopping the vehicle, Robinson approached the passenger side of the car. Arriving at the passenger window, he noticed a female in the driver's seat, a male in the passenger's seat, and smelled what he believed to be burnt marijuana.

After a brief conversation with the occupants, Robinson asked the driver, Debbie Lipscomb, to step out of the car so he could issue her a warning for following too close. While Robinson was writing the warning, he asked Lipscomb about her travels and learned the car belonged to the passenger's mother. As he was talking to Lipscomb, Robinson saw the passenger, Retrice Funderburk, make several hand gestures out of the window. Robinson walked back to the vehicle and asked Funderburk if he needed anything. Approaching the car, Robinson again smelled the odor of burnt marijuana.

Robinson briefly talked with Funderburk and then asked for consent to search the vehicle. Funderburk initially agreed to "open up things" for Robinson, but was told, for safety reasons, "he couldn't do that." Robinson then asked Funderburk to exit the car and leave the keys on the seat. After Funderburk exited the vehicle, Robinson again asked for consent to search. Funderburk responded by pointing toward the vehicle and saying "go ahead." Robinson conducted a brief visual search of the interior and then proceeded to the rear of the vehicle. Robinson opened the trunk and searched through its contents. Soon thereafter, Funderburk questioned why the search was necessary. Robinson then asked, once again, if he could search and Funderburk responded, "yes, you can." After searching a few bags, Robinson put his hand on a black bag and felt two hard brick-shaped items that, from

experience, he identified as either cocaine or marijuana. Funderburk claimed ownership of the bag and then asked Robinson to stop the search. Robinson stopped the search and instructed McIntyre to arrest Funderburk. A struggle ensued, but Funderburk was eventually apprehended. A more thorough search of the bag yielded 3.27 pounds of cocaine. After Funderburk was restrained, Robinson found two blunts, or cigars filled with marijuana, in the vehicle.

A Greenville County grand jury indicted Funderburk for trafficking in cocaine and resisting arrest. At trial, Funderburk moved to suppress the cocaine, arguing the search exceeded the scope of consent and the officers lacked probable cause to search the trunk. Over his objection, the court allowed evidence and testimony regarding the cocaine.

In addition, Funderburk objected to testimony which referred to the "blunts" as marijuana. Funderburk argued that the substance was not tested, but the trial court allowed the testimony, ruling that Robinson may "testify as to what his state of mind was." Funderburk also objected to the introduction of the blunts into evidence, again arguing the State never definitively determined the substance to be marijuana and that introduction of the evidence was prejudicial. Again, the court allowed the evidence over objection.

At the close of trial, the jury found Funderburk guilty of trafficking in cocaine. This appeal followed.

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). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

LAW/ANALYSIS

I. Scope of Consent

Funderburk argues the trial court erred in denying counsel's motion to suppress the cocaine found in the trunk because the officer's search exceeded the scope of consent. We disagree.

"Under our state constitution, suspects are free to limit the scope of the searches to which they consent." State v. Forrester, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001). "When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable." Id. "The scope of the consent is measured by a test of 'objective' reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect?" State v. Mattison, 352 S.C. 577, 585-86, 575 S.E.2d 852, 856 (Ct. App. 2003) (citation omitted).

We hold the trial court did not err in denying the motion to suppress because evidence exists to support the finding that Funderburk's consent included a search of the trunk. First, the record indicates Funderburk imposed no limits on the scope of his consent to a search. Funderburk consented to the search of the vehicle three times: (1) before he exited the vehicle he agreed to "open things up"; (2) as he walked away from the vehicle he pointed at the car and stated "go ahead"; and (3) when Robinson asked about searching the trunk, Funderburk told him "yes, you can."

Second, Funderburk failed to object to Robinson's search. "[A] suspect's failure to object (or withdraw his consent) when an officer exceeds

limits allegedly set by the suspect is a strong indicator that the search was within the proper bounds of the consent search." United States v. Jones, 356 F.3d 529, 534 (4th Cir. 2004) (citations omitted). Here, Funderburk failed to withdraw his consent when Robinson searched through the vehicle's trunk. Therefore, the record demonstrates the scope of consent was not exceeded. Because Funderburk gave a general consent to a search of the vehicle and failed to object to Robinson's search, we find the trial court's ruling was supported by the evidence, and, therefore, we find no error.

II. Evidence/Testimony Regarding Marijuana

Funderburk argues on appeal, that the trial court erred in allowing the testimony and evidence regarding marijuana found during the search because it constituted improper propensity evidence pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). We disagree.

At trial, Funderburk objected to the admission of the marijuana evidence based on an improper foundation. Specifically, he argued the substance was never tested and/or analyzed and because of this, the substance's admission, or testimony regarding it, would be improper. At no time did Funderburk raise an objection based on Lyle. Because Funderburk's arguments concerning propensity evidence were not presented to the trial court, we find they are not preserved for our review. See, e.g., Ellie, Inc. v. Miccichi, 358 S.C. 78, 102, 594 S.E.2d 485, 498 (Ct. App. 2004) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

Accordingly, the trial court's decision is

AFFIRMED.[1]

STILWELL and KITTREDGE, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David R. Underwood,	Appellant,
v.	
Laurine H. Coponen, Carolyn T. Webb, as Personal Representative of the Estate of Ansel B. Taylor, and County of Greenville,	Defendants,
Of Whom Carolyn T. Webb, as Personal Representative of the Estate of Ansel B. Taylor is the	Respondent.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4067
Submitted November 1, 2005 – Filed January 9, 2006

AFFIRMED

William H. Ehlies, II, of Greenville, for Appellant.

John P. Riordan and Zandra L. Johnson, both of Greenville, for Respondent.

SHORT, J.: Laurine Coponen ran through a stop sign at an intersection and collided with David Underwood's car. Underwood brought an action against Carolyn Webb, the personal representative of Ansel Taylor's estate, alleging Taylor was negligent in failing to trim a tree located on his property, thereby contributing to the accident. The trial court granted Webb's motion for summary judgment, which Underwood now appeals. We affirm.[1]

FACTS

On May 4, 2002, Underwood was driving on Ansel School Road in Greenville County when Coponen ran through a stop sign at the intersection of Ansel School Road and Sharon Drive and collided with Underwood's car. Coponen testified that she did not see the stop sign because the limbs of a tree located on Taylor's property were partially blocking the sign. The respondent, Webb, is the personal representative of Taylor's estate. Taylor's wife testified that Taylor was aware the tree's limbs could obscure the stop sign and occasionally trimmed the tree to prevent it from doing so. Coponen testified that she had driven on Sharon Drive before; however, she also testified that she was not looking for a stop sign because she mistakenly thought she was on another road that did not have stop signs.

Underwood initially brought this action solely against Coponen, alleging that she was liable for his injuries from the collision because she was negligent in running the stop sign. However, on October 23, 2003, Underwood amended his complaint to include both Webb and Greenville County as additional defendants, alleging that either or both were negligent in failing to trim the tree located on Taylor's property, thereby contributing to the accident. Webb filed a motion for summary judgment. After a hearing on November 2, 2004, the trial judge granted Webb's motion. A settlement was reached between Underwood and the other defendants. Underwood now appeals.

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

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, we apply the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Id. at 494-495, 567 S.E.2d at 860. "If triable issues exist, those issues must go to the jury." Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004).

LAW/ANALYSIS

Underwood argues the trial court erred by granting Webb's motion for summary judgment because Taylor owed a duty of care to Underwood as a matter of law. We disagree.

"To prevail on a theory of negligence, the plaintiff must establish three elements: (1) that defendant owed a plaintiff a duty of care; (2) that by some act or omission, defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff suffered damage." Staples v. Duell, 329 S.C. 503, 506, 494 S.E.2d 639, 641 (Ct. App. 1997). "The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000).

In South Carolina, urban landowners have a duty of reasonable care to inspect trees on their property and to make certain they are safe. Staples, 329 S.C. at 508, 494 S.E.2d at 641-42 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 57 at 391 (5th ed. 1984)); Israel v. Carolina Bar-B-Que, Inc., 292 S.C. 282, 288, 356 S.E.2d 123, 127 (Ct. App. 1987).

Also, landowners have a duty of reasonable care to make certain their trees are safe for travelers of streets adjoining their land. Staples, 329 S.C. at 508, 494 S.E.2d at 642. In Israel v. Carolina Bar-B-Que, 292 S.C. 282, 288-90, 356 S.E.2d 123, 127-28 (Ct. App. 1987), we held that a landowner has a duty to protect others from "defective or unsound trees on his premises" and found the landowner was liable for the damage caused by the fallen tree limb because there was evidence that the owner either saw or could have seen upon reasonable inspection that the tree that caused the damage was partially decayed.

In this case, Taylor's tree was not unsafe or defective. The tree limb did not fall and injure Coponen. The only effect the tree limb had was that it partially obscured the stop sign, which Coponen testified that she was not looking for because she thought that she was driving on another street, which does not have stop signs. Therefore, the rule set forth in Israel does not apply to the facts in this case.[2]

Underwood also claims that because Taylor periodically trimmed the tree on his property, he undertook the duty to keep his tree from blocking the stop sign. However, the Restatement (Second) of Torts provides:

[2] In making their decision, the Israel court adopted Illinois' ruling in Mahurin v. Lockhart, 390 N.E.2d 523 (Ill. 1979). Therefore, it is worth noting that subsequent to publishing the Mahurin decision, Illinois issued several opinions on visual obstructions. In Nichols v. Sitko, 510 N.E.2d 971, 974 (App. Ct. Ill. 1987), the court refused to extend the Mahurin rule, which involved an injury caused by a fallen dead branch, to an alleged visual obstruction from overgrown weeds. The court reasoned that the alleged obstruction was "no different from obstructions which are caused by houses and buildings encountered routinely in daily life." Id. Also, in Adame v. Munoz, 678 N.E.2d 26, 29 (App. Ct. Ill. 1997), the court held that there is no duty "on the part of landowners to maintain their property in such a way that it does not obstruct the view of travelers on an adjacent highway, and this refusal to find such a duty applies even where the obstruction is an artificial condition."

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Staples, 329 S.C. at 510, 494 S.E.2d at 643 (quoting Restatement (Second) of Torts § 323(a) (1965)). While Taylor did trim the tree occasionally for the purpose of clearing the stop sign and his failure to trim the tree might have increased the risk that the sign would be obstructed, neither Underwood nor Coponen knew that Taylor trimmed the tree, and thus they did not rely on his doing so. Therefore, Taylor's occasional trimming of his tree did not create a duty for which he can be held liable.[3] Additionally, even if Taylor had assumed a duty to trim the trees, he could have abandoned the duty at any time so long as his actions did not increase any risk that might have existed. See Id. at 506, 494 S.E.2d at 641 (affirming the trial court's ruling that the defendant's policy of searching for dead trees did not create a duty because he could have abandoned the policy at any time as long as doing so would not increase the risk of harm).

AFFIRMED.

GOOLSBY, and ANDERSON, JJ., concur.

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[3] We further note that not imposing a duty on Taylor promotes good public policy. If we extended the duty to require private landowners to ensure that their trees do not hinder traffic control devises, we would be discouraging private landowners from voluntarily maintaining vegetation on their property which adjoins a public roadway or highway in an effort to shield themselves from unwarranted liability.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gerri B. McDill, individually and as Guardian ad Litem for Garrett B. McDill, Appellant,

v.

Mark's Auto Sales, Inc., J. Mark Lawhon, DMD, James Marion Lawhon, Jr., and Christopher M. Lawhon, a minor over the age of fourteen, Respondents.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 4068
Heard December 6, 2005 – Filed January 9, 2006

AFFIRMED

William P. Hatfield and Robert D. McKissick, both of Florence, for Appellant.

Charles E. Carpenter, Carmen V. Ganjehsani, G.D. Morgan, Jr., Albert R. Pierce, Jr., Karl S. Brehmer, and J. Austin Hood, all of Columbia, for Respondents.

GOOLSBY, J.: Gerri B. McDill filed this action on behalf of herself and her minor son, Garrett,[1] alleging Garrett suffered severe injuries in an automobile collision caused by Christopher Lawhon, a minor over the age of fourteen. In her lawsuit McDill asserted claims against Christopher as well as his father, Dr. Mark Lawhon; his grandfather, James M. Lawhon; and the grandfather's business, Mark's Auto Sales, Inc. McDill appeals from a jury verdict in favor of the defendants, arguing the trial court abused its discretion in failing to qualify a trooper as an expert in accident reconstruction and to allow his opinion testimony regarding the cause of the accident. We affirm.

FACTS

Shortly after 6:00 p.m. on July 23, 2001, Garrett McDill, then 15, was seriously injured while driving a 1992 Honda Accord that collided with a 1997 Camaro driven by Christopher Lawhon, also 15. The accident occurred as the two cars traveled in the same direction in adjacent lanes of West Palmetto Street, a four-lane road in Florence.

Just before the accident, Christopher had recognized Garrett and made a U-turn and then accelerated to catch up with him. Garrett likewise recognized Christopher and several passengers in his car. As they traveled next to each other on the four-lane road, Garrett was on the left and Christopher was on the right. It had been raining most of the day and water had collected in the right-hand lane. According to Garrett and one of his passengers, Christopher hit a puddle and then struck Garrett's car, causing it to slide sideways and then wrap around a utility pole. In contrast, Christopher denied causing the accident, asserting Garrett was the one who apparently hit a puddle and then struck his vehicle.

[1] Garrett's name also appears spelled as "Garret" in the Record on Appeal.

Gerri McDill brought this action on behalf of herself and Garrett against Christopher, his father, his grandfather, and his grandfather's car dealership, Mark's Auto Sales, Inc., which held title to the Camaro Christopher was driving at the time of the accident. A jury returned a verdict in favor of the defendants.[2] The trial court thereafter denied McDill's motion for a new trial.

LAW/ANALYSIS

On appeal, McDill argues the trial court committed reversible error in failing to qualify Trooper Bernard Williams of the South Carolina Highway Patrol as an expert in accident reconstruction and in excluding his opinion testimony that Christopher caused the automobile accident. We disagree.

At the start of the trial, McDill asked that Trooper Williams's opinion regarding the cause of the accident be admitted as expert testimony. The testimony was from Trooper Williams's deposition – he was not present at trial. The defendants objected, arguing Trooper Williams was never listed as an expert witness in the area of accident reconstruction and he had never been qualified as such; therefore, although factual testimony as to his investigation was allowable, any testimony specifically regarding his opinion as to causation should be excluded.

In his deposition, Trooper Williams testified that he was called to the scene of the accident and while there he spoke to Christopher, whom he identified as the driver of one of the vehicles in the accident. Trooper Williams stated Christopher told him that he had hit a puddle of water on the roadway and that it caused him to hydroplane and slide into the left lane where Garrett was traveling. Trooper Williams additionally stated that after his visit to the scene, based on his experience, it was his opinion that

[2] The jury answered "No" to the following question, at which point it ceased further deliberation as per the instructions on the verdict form: "Do you find that the Defendant Christopher Lawhon was negligent and that such negligence proximately caused the Plaintiffs' injuries?"

Christopher most probably caused the accident by striking a puddle and then hydroplaning into the left lane where Garrett was traveling.

After reviewing the deposition testimony, the trial court sustained the defendants' objection, ruling McDill had not established a sufficient basis to qualify Trooper Williams as an expert and to permit him to give an opinion. The court stated, however, that Trooper Williams's testimony regarding adverse statements allegedly made to him by Christopher at the scene, i.e., that he was traveling in the right lane, hit water, and then hydroplaned, striking the rear of Garrett's vehicle, would be admissible as fact evidence for which it was not necessary that Trooper Williams be qualified as an expert or give expert opinion testimony. During the trial, portions of Trooper Williams's recorded deposition were subsequently played for the jury. Christopher denied at trial ever having made the alleged statements to Trooper Williams.

After the jury returned a verdict for the defendants, McDill filed a motion for a new trial alleging, among other things, that the trial court erred in excluding the opinion testimony of Trooper Williams as to the cause of the automobile accident. The trial court denied McDill's motion, finding it had properly excluded any opinion testimony from Trooper Williams because "neither Trooper Williams'[s] training nor testimony supported a ruling that he qualified as an expert in accident reconstruction" and "[b]y Trooper Williams'[s] own admission, he was not qualified to testify regarding accident reconstruction."

"To qualify as an expert, a person must have acquired by study or practical experience a special knowledge of a subject matter about which the jury's good judgment and average knowledge is inadequate." Manning v. City of Columbia, 297 S.C. 451, 453-54, 377 S.E.2d 335, 337 (1989).

The qualification of an expert witness and the admissibility of his or her opinion are matters resting within the sound discretion of the trial judge. Id. at 453, 377 S.E.2d at 336-37. On appeal, we will not disturb the trial judge's ruling absent an abuse of that discretion and a showing of prejudice. Strange v. South Carolina Dep't of Highways & Pub. Transp., 307 S.C. 161, 163, 414 S.E.2d 138, 139 (1992).

"An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." Id.

To the extent McDill contends the trial court abused its discretion in failing to qualify Trooper Williams as an expert in accident reconstruction, we find no error in this regard. Aside from the fact that Trooper Williams was, admittedly, never listed as an expert witness by McDill,[3] there is evidence to support the trial court's concerns as to his qualifications as an expert in accident reconstruction. It was undisputed that Trooper Williams had experience in investigating accidents as a highway patrolman and that he did take a six-week accident reconstruction course in 1995 or 1996, as well as a few updating courses, but he was not a member of the Highway Patrol's official accident reconstruction team. We note that when Trooper Williams was asked how he determined the approximate speeds of the two drivers in this accident, he stated he based it on what the drivers told him, as he did not have any evidence to the contrary. Thus, he did not use any particular reconstructive techniques in making this determination. He also apparently was allowed to give his opinion in a federal court proceeding, but that was because none of the attorneys objected to his testimony. Thus, the court was not specifically asked to make a determination regarding his qualifications.[4]

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[3] See Strange, 307 S.C. at 164, 414 S.E.2d at 139 (holding the trial court abused its discretion in qualifying the plaintiffs' expert as an expert in accident reconstruction where the plaintiffs had not identified their expert witness as being an expert in this field in addition to the fields of traffic engineering and geometric design prior to trial).

[4] During his deposition, McDill's attorney asked Trooper Williams whether he had previously been qualified in court as an expert in the area of accident reconstruction. One of the defense attorneys objected on the basis of relevance. Trooper Williams was somewhat unsure in his answer, stating,

Just as a trial court has broad discretion in qualifying a witness as an expert, which this court may not overturn on appeal, a trial court also has broad discretion in deciding not to qualify a witness as an expert. As noted by Lawhon in his brief, if investigating an accident qualified an officer as an expert in accident causation, then every highway patrolman would qualify as an expert. At most, the testimony presented by McDill established that Trooper Williams had investigated automobile accidents and possibly gave an opinion in a federal court proceeding regarding accident investigation. Upon reviewing the record, we hold McDill has not clearly demonstrated the trial court abused its discretion in failing to qualify Trooper Williams as an expert in accident reconstruction.

In any event, even assuming it was error to fail to qualify Trooper Williams as an expert, McDill has not established prejudice warranting reversal. See Owners Ins. Co. v. Clayton, 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005) ("Error without prejudice does not warrant reversal."); Fields, 363 S.C. at 26, 609 S.E.2d at 509 ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.").

As noted above, Trooper Williams was listed as a fact witness and the trial court allowed portions of his deposition testimony, with his opinion redacted, to be presented to the jury. The jury was given Trooper Williams's testimony that Christopher allegedly told him at the scene of the accident that he had hit a puddle, hydroplaned, and then moved over into the left lane, striking Garrett's vehicle. This information is basically the same as the trooper's opinion that Christopher had hit a puddle and then hydroplaned into Garrett's vehicle. It was up to the jury, as the finder of fact, to judge the credibility of the witnesses and to resolve any conflicts in their testimony. See, e.g., Curcio v. Caterpillar, Inc., 355 S.C. 316, 320, 585 S.E.2d 272,

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"Yes. I'm not sure about the reconstruction part, but as far as the accident investigation, yes . . . ."

274 (2003) (holding it is up to a jury to decide credibility issues and to resolve any conflicts in the testimony or the evidence); Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 428, 489 S.E.2d 223, 225 (Ct. App. 1997) (stating conflicts in the testimony are for the jury to resolve as the finder of fact) (citing Garrett v. Locke, 309 S.C. 94, 419 S.E.2d 842 (Ct. App. 1992)).

AFFIRMED.

SHORT, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Frank Robert Patterson, **Appellant.**

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

Opinion No. 4069
Heard December 6, 2005 – Filed January 9, 2006

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter III; and Solicitor Warren Blair Giese, of Columbia, for Respondent.

ANDERSON, J.: Frank Robert Patterson appeals his conviction for murder. He argues the trial court erred (1) in admitting a witness's statement to police; (2) by requiring Patterson's presence during the videotaping of a witness's testimony; and (3) by refusing to charge the jury on proximate cause. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Patterson was accused of murdering his girlfriend, Sharon Clark, by beating her to death. Clark and her friend, Mary Richardson, walked to Patterson's home where the three of them drank for several hours. Later that night, Clark and Richardson decided to leave despite Patterson's insistence Clark should stay. As Richardson and Clark walked away, Patterson began striking Clark repeatedly with a blunt instrument.

Richardson screamed at Patterson to stop hitting Clark. She ran to a neighbor's house for assistance. When Richardson returned to the scene, she saw Clark lying on the ground motionless. Richardson ran down the street and flagged down a police car in the neighborhood. Richardson led the officer to Clark's location. Patterson, with his clothes bloody, returned to the scene while the officer was there. He admitted he had beaten Clark and was arrested.

Clark was taken to Richland Memorial Hospital where she was placed on a respirator and immediately rushed into the first of her two surgeries. Clark's skull was cracked in multiple places, and she had skull fragments in her brain. She lost a significant amount of blood due to the severity of her head injury. Clark's prognosis was poor; she was taken off life support nine days later. Her feeding tube was removed on March 25, and she died on March 27.

The grand jury indicted Patterson for murder. Due to medical reasons, Richardson's testimony was videotaped. At the hearing, Patterson requested that he be allowed to waive his presence. The trial court refused his request.

At trial, the jury found Patterson guilty of murder, and the trial court sentenced Patterson to life without parole.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). "The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Staten, 364 S.C. 7, 15, 610 S.E.2d 823, 827 (Ct. App. 2005) (citing State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003)); see also State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004) ("In criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous."). This Court should examine the record to determine whether any evidence supports the trial court's ruling. See Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

On review, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); Preslar, 364 S.C. 466, 613 S.E.2d 381. An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). In order for an error to warrant reversal, the error must result in prejudice to the appellant. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); see also State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (holding error without prejudice does not warrant reversal).

LAW/ANALYSIS

I. Rule 106, SCRE

Patterson claims the trial court erred in admitting Richardson's entire statement to police on redirect examination. We disagree.

The State and defense counsel agreed to take Richardson's testimony by video before trial. Richardson testified that while she was talking to police on the night of Clark's murder, Patterson returned to the scene, walked up to Clark, pointed to her and said, "You see that right there? I did that." On cross-examination, defense counsel elicited from Richardson that she believed the accuracy of her account of the murder to police was very important. Richardson indicated she carefully read her statement to police before she affixed her signature. Defense counsel then handed Richardson her statement and asked if Patterson's admission was included in the statement. Richardson conceded her statement to police did not include Patterson's admission. On redirect examination, the State argued defense counsel had, by cross-examining Richardson on her statement, opened the door to admit Richardson's entire statement to police. Despite objections from defense counsel that Richardson had merely been asked about an omission in the report, the trial court allowed Richardson to publish the statement in its entirety.

Significantly, Richardson's testimony on redirect examination was not played for the jury. At trial, the defense stated:

> Ms. Pringle: Your Honor, I'll go ahead and put on the record with respect to the next witness who is a Mary Richardson, **we have stipulated with the Solicitor's Office** previously that Ms. Richardson's testimony may be admitted by videotape, previously taped testimony 2002. Your Honor, we of course obviously have no problem with the admission of the videotape in lieu of her testimony even though it is our understanding that she may be available to

testify; with one caveat, Your Honor, that **we have agreed to cut the tape off at the end of cross-examination.** Mr. Cathcart indicates that he is going to just walk right up there and turn it off as soon as the end of cross.

Mr. Cathcart: I believe the area she is talking about is the redirect by the State.

(Emphasis added.) The record indicates that the videotape was played for the jury. No objection was made at the conclusion of the taped testimony.

Initially, we note the issue of whether Richardson's statement to police was properly admitted into evidence is not properly before this Court. Pursuant to the parties' stipulation, the jury never heard Richardson publish her statement. Although counsel timely objected to publication of the statement at the time Richardson's testimony was being taped, at trial, the videotape was played without objection by the defense. Objecting to admission of a statement during pretrial video testimony does not preserve an issue for review. Cf. State v. Fletcher, 363 S.C. 221, 250, 609 S.E.2d 572, 587 (Ct. App. 2005) (citing State v. Forrester, 343 S.C. 637, 647, 541 S.E.2d 837, 840 (2001); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002)). To preserve an issue for appellate review, a contemporaneous objection must be made when the evidence is offered. See State v. Mitchell, 330 S.C. 189, 193 n. 3, 498 S.E.2d 642, 644 n. 3 (1998) (citing State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review.")); State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) ("[A]ppellant made no contemporaneous objection at trial and did not raise this issue at any point during trial. Consequently, this issue is not preserved for review."); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993).

Adverting to the merits, we find the trial court properly ruled Richardson's statement to police was admissible. Rule 106, SCRE provides:

> When a writing, or 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 writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 106 was promulgated by Order of the Supreme Court and became effective September 3, 1995. See Editor's Note, Rule 106, SCRE. The Rule restates the common law rule of completeness with one significant change. Prior to the enactment of Rule 106, when part of a document, writing, or conversation was introduced into evidence, the opposing party could introduce the remainder of the communication. See Dukes v. Smoak, 181 S.C. 182, 186 S.E. 780 (1936). However, whereas under common law the opposing party was required to wait until cross-examination to complete the communication, under Rule 106, the party can now require introduction of the remainder of the statement contemporaneous with the original proffer. See Rule 106, SCRE.

As the South Carolina Supreme Court explained in State v. Taylor, "The text of Rule 106, SCRE, is substantially similar to Rule 106 of the Federal Rules of Evidence. Rule 106, Fed.R.Evid., is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context." 333 S.C. 159, 170, 508 S.E.2d 870, 876 (1998) (internal quotation marks omitted) (quoting Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529 (11th Cir. 1986)). The rule applies to oral communications as well as written statements. State v. Cabrera-Pena, 361 S.C. 372, 379, 605 S.E.2d 522, 526 (2004); State v. Jackson, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975).

In Cabrera-Pena, the State elected to use a witness to elicit portions of the defendant's conversation. 361 S.C. at 380, 605 S.E.2d at 526. Our supreme court found the rule of completeness required the defendant to be permitted to inquire into the full substance of the conversation. Id. Similarly, defense counsel, by asking Richardson whether her statement to police included Patterson's admission, opened the door for the State to inquire into the full substance of her statement.

Patterson argues that because the inquiry referred to an alleged omission by Richardson as opposed to an affirmative declaration in the statement, Rule 106 does not apply. We disagree.

After eliciting testimony from Richardson regarding how careful she was in giving police a correct depiction of the events that led to Clark's murder, defense counsel in essence insinuated Richardson's statement to police was incomplete. The defense put Richardson's statement to police at issue, and fundamental fairness required the entire statement be admitted into evidence. 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 Richardson's statement.

Finally, even if the trial judge had erred in admitting the entire statement, Patterson has failed to demonstrate any resulting prejudice because the jury never heard the statement. An error not shown to be prejudicial does not constitute grounds for reversal. See State v. Preslar, 364 S.C. 466, 472-73, 613 S.E.2d 381, 384 (Ct. App. 2005) ("A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant.") (citations omitted); Rule 103, SCRE ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]"). The jury never heard the disputed portion of the videotape, and therefore, we cannot discern any prejudice to Patterson. State v. Gathers, 295 S.C. 476, 482, 369 S.E.2d 140, 143 (1988), aff'd, 490 U.S. 805 (1989).

II. Presence During Videotaping of Witness Testimony

Patterson argues the trial court erred by requiring his presence during the videotaping of Richardson's testimony. Patterson maintains he was

severely prejudiced by Richardson's claim that he was smiling during the commission of the murder. We disagree.

Patterson made no objection after Richardson's video testimony was played for the jury, and, therefore, this issue is not preserved for review. To preserve an issue for appellate review, a contemporaneous objection must be made when the evidence is offered. See State v. Mitchell, 330 S.C. 189, 193 n. 3, 498 S.E.2d 642, 644 n. 3 (1998) (citing State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("[U]nless an objection is made at the time the evidence is offered and a final ruling is procured, the issue is not preserved for review.")); State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) ("[A]ppellant made no contemporaneous objection at trial and did not raise this issue at any point during trial. Consequently, this issue is not preserved for review."); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993).

Even if the issue were properly preserved, we find the trial court did not err by requiring Patterson's presence during the videotaping of Richardson's testimony. Patterson's reliance on Rule 16, SCRCrimP is misplaced.

Rule 16, SCRCrimP provides:

> Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend court.

Apodictically, a criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial. See U.S. Const. amend. VI; Illinois v. Allen, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at

every stage of his trial."). While Rule 16 permits a knowing and intelligent waiver of the right to be present, such a waiver is permitted only in limited circumstances. "A trial judge must determine a defendant voluntarily waived his right to be present at trial in order to try the case in abstentia." State v. Truesdale, 345 S.C. 542, 549, n. 5, 548 S.E.2d 896, 899, n. 5 (Ct. App. 2001) (citing State v. Rich, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987); State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986); State v. Castineira, 341 S.C. 619, 622, 535 S.E.2d 449, 451 (Ct. App. 2000)). Additionally, the trial judge must make findings of fact that the defendant (1) received notice of the right to be present and (2) was warned the trial would proceed in his absence. Jackson, 288 S.C. at 95, 341 S.E.2d at 375; Castineira, 341 S.C. at 622, 535 S.E.2d at 451.

The right to be present at trial is not the right to be absent from trial. A criminal defendant has no absolute right to be absent during trial proceedings. In State v. Moore, the South Carolina Supreme Court held a defendant had no constitutional right to be absent from trial to prevent in-court identification. 308 S.C. 349, 351, 417 S.E.2d 869, 870 (1992). The court found the State has a corresponding right to have the defendant present, elucidating: "'[I]t is the right of the prosecution to have [the defendant] in the view of the presiding judge and jury, and the counsel engaged in the trial.'" Id. (quoting State v. O'Neal, 210 S.C. 305, 310-311, 42 S.E.2d 523, 525 (1947)). In some circumstances, a defendant may be presumed to waive or forfeit the right to be present by misbehaving in the courtroom or by voluntarily remaining away from trial. State v. Shuler, 344 S.C. 604, 625, 545 S.E.2d 805, 815 (2001); State v. Bell, 293 S.C. 391, 401, 360 S.E.2d 706, 711 (1987); Ellis v. State, 267 S.C. 257, 260-61, 227 S.E.2d 304, 305-06 (1976). However, even though a criminal defendant may waive or forfeit his right to participate in the proceedings, "a defendant has no contrasting right to be absent from trial, even when his absence might assist the defense." 5 Wayne R. LaFave, Jerold H. Isreal, Nancy J. King, Criminal Procedure § 24.2(b) (1999) (citations omitted).

The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. "The general rule in this State is that the conduct of a criminal

trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) (citing State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981)); Cf. State v. Tuckness, 257 S.C. 295, 185 S.E.2d 607 (1971). Patterson's sole reason for desiring to be absent was his belief that he had a right to waive his presence. Although a criminal defendant has a constitutional right to be present during court proceedings, the defendant has no absolute corresponding right to be absent. The precedent extant edifies that a defendant may waive his right to be present in very limited scenarios. The trial court did not err by refusing to allow Patterson to waive his presence at Richardson's video hearing.

Further, the alleged prejudicial statement was made during recross-examination and was not played for the jury. Patterson could not have been prejudiced by testimony the jury never heard. An error not shown to be prejudicial does not constitute grounds for reversal. See State v. Preslar, 364 S.C. 466, 472-73, 613 S.E.2d 381, 384 (Ct. App. 2005) ("A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant.") (citations omitted); Rule 103, SCRE ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]"). Therefore, we find Patterson cannot show he was prejudiced. See Gathers at 482, 369 S.E.2d at 143 (finding the duty is upon the defendant to prove prejudice.).

III. Jury Charge

Patterson contends the trial court erred in refusing to charge the jury on proximate cause because there was evidence Clark's death was due to her removal from life support. We disagree.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989); State v. Staten, 364 S.C. 7,

40, 610 S.E.2d 823, 840 (Ct. App. 2005). The trial court is required to charge only the current and correct law of South Carolina. State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000) (citing Cohens v. Atkins, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (Ct. App. 1998)); see also State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005) ("Generally, the trial judge is required to charge only the current and correct law of South Carolina.") (citing Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004); State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002); State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000)). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." Zeigler, 364 S.C. at 106, 610 S.E.2d at 865; accord State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Adkins at 318, 577 S.E.2d at 463-64.

To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Reese, 359 S.C. 260, 273, 597 S.E.2d 169, 176 (Ct. App. 2004). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining issues." Burkhart, 350 S.C. at 263, 565 S.E.2d at 304. "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Zeigler, 364 S.C. at 106, 610 S.E.2d at 865 (citing State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989)). A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994).

Patterson relies on State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986), and State v. Jenkins, 276 S.C. 209, 277 S.E.2d 147 (1981), for the proposition that, at the very minimum, he was entitled to a jury charge on proximate cause.

The sixteen-year-old decedent in Matthews was shot in the head and pronounced dead after being transported to a hospital. Her kidneys were

harvested and donated for transplantation. The appellant, Earl Matthews, argued the doctors prematurely declared the victim dead. Matthews maintained the removal of her kidneys was a superseding cause of death which relieved him of liability for her murder. 291 S.C. at 346, 353 S.E.2d at 448. The appellant conceded negligent medical treatment would not relieve him of liability; however, he argued declaring the victim brain dead and removing her kidneys did not constitute medical treatment. Id. at 346, 353 S.E.2d at 448-49. Matthews objected to the trial court's jury charge on the applicable law of proximate cause regarding medical treatment because he believed harvesting organs for transplanting did not constitute medical care. Our supreme court disagreed: "The decision to declare a patient dead and to harvest organs for transplantation is clearly part of the care or duty that a doctor is responsible for providing. We hold that the actions of the doctor did constitute medical care." Matthews, 291 S.C. at 347, 353 S.E.2d at 449.

In Jenkins, the victim had a rare, fatal reaction to the dye used in performing an arteriogram—a common procedure administered to determine the extent of injuries to the major blood vessels. 276 S.C. at 210-11, 277 S.E.2d at 148. Evidence at trial showed the victim would have "survived absent the reaction, but that she would not have survived without medical treatment." Id. On appeal, Jenkins argued the trial court erred by failing to charge the jury on assault and battery with intent to kill and assault and battery of a high and aggravated nature. The court noted the appellant did not challenge the sufficiency of the evidence to sustain the murder conviction, and therefore the trial court committed "no prejudicial error in refusing to submit to the jury the two degrees of assault and battery." Id.

Unlike the present case, both Jenkins and Matthews involved a medical procedure between the appellant's crime and the victim's death. In Mathews, the appellant claimed the removal of the victim's kidneys was a superseding cause of death. In Jenkins, despite appellant's contention that the victim's reaction to the dye was the cause of death, the South Carolina Supreme Court found no prejudice in the trial court's failure to charge the jury as requested. The court found "**one who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the cause of the death of the other.**" Jenkins, 276 S.C. at

211, 277 S.E.2d at 148 (emphasis added). In neither case did appellant argue, as Patterson here argues, that removal from life support was the intervening cause of death.

Because Clark showed signs of improvement, Patterson avers the doctors prematurely removed Clark's ventilator and feeding tube. The evidence shows Clark was operated on within thirty minutes of her arrival at the hospital due to the severity of her injuries. Dr. Raymond Bynoe testified when Clark was brought to the hospital, "she [had] lost at least a third of her blood volume" and "had no spontaneous respiratory effort." Additionally, Clark's skull had an "eggshell type of appearance . . . which meant that it was cracked in multiple places[.]" Dr. Clay Nichols, a forensic pathologist corroborated the severity of Clark's injuries, stating she sustained "such massive brain death and swelling that the dead brain tissue was . . . actually oozing out of the open skull fracture." Clark's cause of death, in Dr. Nichols's opinion, was "[m]assive blunt head trauma due to beating with a pipe." The fact that she lived for a period of time after the beating had no effect as to the cause of her death and was in fact a "compliment to the medical treatment she received at Richland Memorial." Further, Dr. Nichols opined Clark would have "died within minutes of . . . the injury" without medical attention.

"Courts have confronted whether a victim's removal from life support renders a homicide verdict against the weight of the evidence and have rejected the contention that there was insufficient evidence to support a conviction[.]" State v. Pelham, 824 A.2d 1082, 1091 (N.J. 2003) (citing State v. Fierro, 603 P.2d 74 (Ariz. 1979); Porter v. State, 823 S.W.2d 846 (Ark. 1992); People v. Saldana, 121 Cal. Rptr. 243 (Ct. App. 1975); State v. Guess, 692 A.2d 849 (Conn. App. 1997), aff'd, 715 A.2d 643 (1998); Johnson v. State, 404 S.E.2d 108 (Ga. 1991); People v. Caldwell, 692 N.E.2d 448 (Ill. App. 1998); Ewing v. State, 719 N.E.2d 1221 (Ind. 1999); Carrigg v. State, 696 N.E.2d 392 (Ind. Ct. App. 1998); Spencer v. State, 660 N.E.2d 359 (Ind. Ct.App. 1996); People v. Bowles, 607 N.W.2d 715 (Mich. 2000); State v. Olson, 435 N.W.2d 530 (Minn. 1989); State v. Meints, 322 N.W.2d 809 (Neb. 1982); People v. Laraby, 665 N.Y.S.2d 180 (N.Y. App. Div. 1997), aff'd, 703 N.E.2d 756 (N.Y. 1998); State v. Johnson, 381 N.E.2d 637 (Ohio

1978); Eby v. State, 702 P.2d 1047 (Okla. Crim. App. 1985); Commonwealth v. Kostra, 502 A.2d 1287 (Pa. Super. 1985); State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995); Felder v. State, 848 S.W.2d 85 (Tex. Crim. App. 1992), cert. denied, 510 U.S. 829 (1993)).

The trial court refused Patterson's jury charge on proximate causation, finding the mere fact Clark was withdrawn from life support was not the cause of death. In State v. Pelham, the New Jersey Supreme Court noted "the widely recognized principle that removal of life support, as a matter of law, may not constitute an independent intervening cause for purposes of lessening a criminal defendant's liability." Pelham, 824 A.2d at 1092; see also State v. Velarde, 734 P.2d 449, 455-56 (Utah 1986) ("[R]emoval of the respirator was not the cause of death . . . . the neurological surgeon who performed the surgery on [the victim] after the assault, testified that blunt-instrument injuries were the cause of death."); State v. Yates, 824 P.2d 519, 523 (Wis. Ct. App. 1992) ("When life support is removed, the cause of death is not the removal, but whatever agency generated the need for life support in the first instance."). Other courts have denied requests by defendants for jury instructions charging that a victim's removal from life support constitutes an independent intervening cause sufficient to relieve the defendant of criminal liability. See, e.g., People v. Funes, 28 Cal.Rptr.2d 758 (Ct. App. 1994); In re J.N., 406 A.2d 1275 (D.C. 1979); State v. Yates, 824 P.2d 519 (Wis. Ct. App. 1992) reh'g denied, 833 P.2d 1390 (1992).

The trial court has a duty to instruct the jury only on an issue that is supported by the evidence. Knoten, 347 S.C. at 302, 555 S.E.2d at 394. We find the trial court did not err in failing to instruct the jury on proximate cause. The State's evidence clearly established Clark died from severe traumatic blows to the head. Under these facts, the removal of life support cannot be considered an independent intervening cause capable of breaking the chain of causation triggered by the defendant's wrongful actions.

CONCLUSION

Accordingly, the conviction of the appellant for murder is

AFFIRMED.

GOOLSBY and SHORT, JJ., concur.