The Supreme Court of South Carolina

PATRICIA A. HOWARD
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

In the Matter of William Barney Weems, Petitioner.

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 419 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on Wednesday, September 21, 2022, beginning at 9:30 a.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

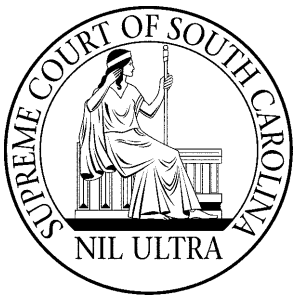
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

June 20, 2022

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
June 22, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

In the Matter of Richard Alexander Murdaugh,
Respondent.

Appellate Case No. 2022-000812

ORDER

On September 7, 2021, the Office of Disciplinary Counsel (ODC) requested this Court place Respondent Richard Alexander Murdaugh on interim suspension based upon information indicating Respondent had stolen funds from the law firm that employed him. Respondent consented to the relief and on September 8, 2021, this Court issued an order suspending Respondent from the practice of law. *In re Murdaugh*, 434 S.C. 233, 863 S.E.2d 335 (2021).

On September 16, 2021, Respondent was arrested and charged with Attempted Insurance Fraud and Filing a False Police Report. The false report was related to an attempted assisted suicide that Respondent reported as an attempted murder because he believed his life insurance policy contained an enforceable suicide exclusion.

On September 16, 2021, December 13, 2021, and January 10, 2022, Respondent appeared at bond hearings and, through counsel, admitted in court that he had, in fact, engineered the events that supported the arrest. On November 22, 2021, Respondent filed an Emergency Motion for a Gag Order in *Satterfield v. Murdaugh*, Case No. 2021-CP-25-00298, in which Respondent admitted to misconduct related to the theft of money from the law firm that employed him. Over the course of several months, Respondent was indicted and charged with over seventy criminal counts involving the theft of funds from various clients, including the Satterfield plaintiffs. On May 27, 2022, Respondent signed a Confession of Judgment and Stipulation in the amount of $4,305,000.00, admitting liability for

the theft of settlement funds in the *Satterfield* matter in which Respondent was the named defendant.[1]

The South Carolina Constitution "commits to this Court the duty to regulate the practice of law in South Carolina." *See In re Unauthorized Practice of Law*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992) (*citing* S.C. Const. art. V. § 4); *see also Kirven v. Sec'y of Bd. of Comm'rs on Grievances & Discipline*, 271 S.C. 194, 197, 246 S.E.2d 857, 858 (1978) ("The jurisdiction of this Court to discipline attorneys for acts of professional misconduct is exclusive."). This constitutional duty includes the duty and the authority to remove unfit persons from the legal profession for the protection of the public and the administration of justice, and to do so through disbarment. *In re Jordan*, 421 S.C. 594, 809 S.E.2d 409 (2017).

As an officer of the Court, an attorney is at all times subject to the Court's control, and the attorney's admission to practice carries with it the imprimatur of this Court. *State v. Jennings,* 161 S.C. 263, 272, 159 S.E. 627, 631 (1931). Disciplinary matters call into question whether a lawyer is no longer worthy to bear the Court's imprimatur. *Id.* at 272, 159 S.E. at 631.

Disciplinary proceedings ordinarily follow a course of investigation, pleading, limited discovery, and a contested hearing before the Commission on Lawyer Conduct. The Commission then submits a report to this Court with findings of fact, conclusions of law, and recommendations for disposition. Rule 26(d), RLDE, Rule 413, SCACR. This Court then reviews those findings and issues a decision accepting, rejecting, or modifying in whole or in part the Commission's findings, conclusions, and recommendations. Rule 27(e), RLDE, Rule 413, SCACR. These procedures ensure that ODC carries its burden of establishing allegations of misconduct by clear and convincing evidence. *See* Rule 8, RLDE, Rule 413, SCACR (stating, "[c]harges of misconduct . . . shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel").

However, here, Respondent has admitted to conduct that amounts to clear and convincing evidence of dishonesty in violation of the Rules of Professional Conduct. *See* Rule 8.4(d), RPC, Rule 407, SCACR (prohibiting conduct involving

[1] The Court obtained this information from the public records in Hampton County, South Carolina, and from the transcripts of the bond hearings.

dishonesty, fraud, deceit, or misrepresentation); Rule 7(a)(1), RLDE, Rule 413, SCACR (providing a violation of the Rules of Professional Conduct is grounds for discipline). Respondent is bound by the admissions contained in the documents he filed in the *Satterfield* case. *See Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions."); *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251–52, 489 S.E.2d 472, 477 (1997) (establishing that a party may not adopt a factual position in conflict with one taken in the same or a related action); *cf. Quinn v. Sharon Corp.*, 343 S.C. 411, 414–15, 540 S.E.2d 474, 476 (Ct. App. 2000) (finding litigant was judicially estopped from asserting a factual position after previously disclaiming those facts in a prior divorce action). Respondent is also bound by the statements his counsel made at the bond hearings in which counsel admitted Respondent staged a suicide attempt to appear as a murder so as to defraud the life insurance company and subsequently filed a false police report to that effect. *Cf. United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) (stating, "a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party"); Black's Law Dictionary 58 (11th ed. 2019) (defining a judicial admission as "[a] formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it"); *Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264–65 (4th Cir. 2004) ("Judicial admissions are not . . . limited to affirmative statements that a fact exists. They also include intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law.").

Based on these admissions, there is no factual dispute about whether Respondent engaged in dishonest conduct. Respondent's admissions in the criminal proceedings that he engaged in conduct that violates the Rules of Professional Conduct satisfies ODC's burden of proving that same misconduct in connection with the pending disciplinary proceedings. Thus, an evidentiary hearing before the Commission is unnecessary for disposition of the pending discipline, as the only remaining issue to be decided is the legal question of determining the appropriate sanction, a matter left to the discretion of this Court under the Constitution.

In this unique case, Respondent's admissions in the public record lead to only one conclusion—that Respondent's egregious ethical misconduct subjects him to the most significant sanction available—disbarment. Accordingly, we find there is no need to expend additional resources to proceed through the normal disciplinary

process. Instead, this Court may act under the Court's constitutional authority to regulate the practice of law in South Carolina and may remove an unfit lawyer from the practice of law to ensure the public, and the administration of justice, are protected.[2]

Therefore, we dispense with further proceedings before the Commission. Respondent shall appear in the Supreme Court Courtroom at 11:00 a.m. on June 22, 2022, to present legal argument on the question of whether this Court should disbar Respondent from the practice of law.

s\Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
June 16, 2022

[2] This procedure is limited to the facts and circumstances of this case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Larry Tyler, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-002364

ON WRIT OF CERTIORARI

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

Opinion No. 5902
Heard November 4, 2020 – Filed March 16, 2022
Withdrawn, Substituted, and Refiled June 22, 2022

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender Victor R. Seeger and Appellate Defender Laura Mary Caudy, both of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, and Assistant Attorney General Johnny Ellis James, Jr., all of Columbia, for Respondent.

MCDONALD: In this action for post-conviction relief (PCR), Larry James Tyler argues his trial counsel provided ineffective assistance by failing to move to sever the trial of his charge for second-degree sexual exploitation of a minor from the trial of his remaining indictments. The PCR court found trial counsel was "not deficient in any manner" and dismissed Tyler's application. We affirm in part, reverse in part, and remand.

Facts and Procedural History

A Darlington County Grand Jury indicted Tyler for second-degree sexual exploitation of a minor, criminal solicitation of a minor, contributing to the delinquency of a minor, and disseminating harmful material to a minor. Tyler pled not guilty to these charges.

At Tyler's trial, the State's first witness, Dorris Brown, testified she occasionally took her granddaughters (Child and Sister) to visit Tyler's mother, who lived with him. On one of these visits, Tyler gave the children a cell phone. According to Dorris, "when they got in the car they said, 'Grandma, he gave us a phone and . . . [there are] naked men on there.'" The children tried to show Dorris the cell phone, but she did not see any "naked pictures" and told them they needed to give the phone back to Tyler. Within "about ten minutes," Dorris had returned the phone to Tyler's house. On cross-examination, trial counsel asked, "Now, you said that they said there was a picture of a naked lady on the phone. Did you see that picture?" Dorris replied, "Yeah, I glanced and quickly turned my head. . . . [Then, I g]ot the phone from them and [carried] it back in the house."

Child, who was twelve years old at the time of trial, also testified about the cell phone. She had the phone for about ten minutes before the group left Tyler's house. Child saw some pictures of a girl wearing bikinis and another of Tyler wearing blue underwear. On cross-examination, Child confirmed she did not read any of the text messages on the phone and explained on redirect, "We just looked at the pictures."

Sister was ten years old at the time of trial. Sister testified the pictures on the phone were of "[s]ome girls with bathing suits on." One of the pictures was of

Tyler "with some blue drawers on." Neither Child nor Sister read any of the text messages on the phone.

Child's twenty-one-year-old cousin, Tyquan Brown, testified Tyler later gave his mother the cell phone and she gave it to Tyquan to use. As Tyquan began "going through the phone cleaning it out," he saw several pictures, including one of Tyler "in a blue Speedo." Tyquan added, "I think I [saw] a picture of a kid, another kid, or something in there." "But I deleted most of them because I just thought it was just some—that dude had just had a whole bunch of crazy stuff on his phone." However, Tyquan also noticed several text messages on the phone "saved as drafts" that appeared to be intended for Child. He explained,

> At the same time I'm thinking like maybe it's another [redacted first name]. Maybe he's not talking about my cousin. Then I [saw] where he was like, "I know this is wrong because you're a little girl" and all type of stuff like that saying that—talking about he want her in his bed and that she a kid. But what really stood out to me was when he was like, "Don't tell [Sister] because you know she will tell" or something like that.

Tyquan immediately called Child's mother (Mother) and gave her the phone. Mother reviewed the pictures on the phone, including one of Tyler "with just a blue like Speedo on, and he didn't have on any over clothes." Mother called the police after reading the draft text messages on the phone.

Deputy Eric Hodges, a lieutenant in the criminal investigation division of the Darlington County Sheriff's Office, met with Mother and then began to investigate Tyler. Upon learning Tyler was driving with a suspended license, Deputy Hodges initiated a traffic stop and arrested Tyler on the license violation. Hodges advised Tyler of his *Miranda* rights,[1] and Tyler agreed "to answer some questions."[2] Deputy Hodges obtained a search warrant for Tyler's home and vehicle, and law enforcement recovered pictures from Tyler's computer and "some other phones."

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

[2] The trial court admitted Tyler's recorded statement into evidence, and the State published it to the jury.

Deputy Russell Harrell, a forensic investigator for the Darlington County Sheriff's Office, testified that he recovered the text message drafts from the cell phone but was unable to recover any pictures from it. He then read the unsent text messages to the jury. The first draft message stated, "[Child] . . . to fall in love with a little girl as young as you are, but I can't stop my heart from loving you, girl. I wish I had another hour alone with you and nobody knew." The second read, "Me in trouble. Please, [Child] especially don't tell [Sister]. She will surely tell someone. This is just between you and me, my love." The third stated, "Never want to be apart from each other ever again. I love you, little angle [sic]. Wish I could make you my wife. If I could you—if I could you would be in my bed tonight. Don't get me." The fourth stated, "Where we were. I would [tell] you how much I love you, [Child] by holding you close to me and plant a kiss on your lovely lips so powerful that we both would never." Finally, Deputy Harrell read, "[Child] you were so beautiful. Please don't tell anyone what I am telling you. First time I ever saw you; [Child] I fell for you. I know a man should not suppose."

Deputy Harrell then described the images pulled from Tyler's computer and email account, and the State entered these images into evidence without objection.[3] He testified the photos are "predominantly of girls that are below the age of ten. . . . They're posed in unnatural positions, and scant[i]ly clad. Some with bare butts." The most graphic of the photos is an image of "a young girl in a kneeling position, and anal sex is being performed."

In its instructions to the jury, the trial court explained "there are four different charges here, so you will have to take up each of the charges separately in your deliberations and reach separate verdicts on each and every charge." The jury found Tyler guilty as indicted, and the trial court imposed concurrent sentences of three years' imprisonment for contributing to the delinquency of a minor and eight years' imprisonment for each of the other charges. Tyler filed a direct appeal, and this court affirmed his convictions. *State v. Tyler*, Op. No. 2015-UP-025 (S.C. Ct. App. filed Jan. 14, 2015) (finding the case was properly submitted to the jury because Tyler gave Child and Sister a cell phone containing a picture of Tyler in

[3] None of the photographs recovered from Tyler's computer and email account depict Child or Sister, and the record contains no evidence that the two minor children saw these photos.

his underwear and draft text messages indicating his desire to have Child in his bed; the evidence further showed Tyler employed "grooming" tactics with Child).

Tyler subsequently filed this action for post-conviction relief, arguing trial counsel was ineffective in failing to object to the consolidated trial of the four offenses because his charge for second-degree sexual exploitation of a minor should have been tried separately from the charges of criminal solicitation of a minor, contributing to the delinquency of a minor, and disseminating harmful material to a minor. Tyler contends that if the charges had been tried separately, the highly prejudicial photograph relevant to the sexual exploitation charge would not have been admissible as to the other three charges; thus, the trial of all four charges in one proceeding prejudiced him.

At his evidentiary hearing before the PCR court, Tyler testified he wrote trial counsel several times asking to sever the charges, but trial counsel never made a motion for separate trials. Tyler argued the consolidated trial of the four charges was prejudicial because the jury likely considered his guilt on the sexual exploitation charge as indicative that he was guilty of the other offenses as well.

Trial counsel testified his strategy was to show the information on Tyler's phone was not actually disseminated to the girls. Counsel explained that Tyler's draft texts "were thoughts that were not meant to be shared with anybody and just inadvertently got discovered" by their cousin.[4] Trial counsel saw no reason to seek a separate trial of the sexual exploitation charge, explaining, "[B]ased on the theory that we had developed, first of all, the information we felt had not been sufficiently communicated to the young lady on the four [sic] charges dealing with her. And the exploitation, the pictures, except for one, we felt we could minimize."

On cross-examination, trial counsel reiterated his strategy was, "Number One, the pictures, except for one, were not bad. And, Number Two, there was very little if any communication of his thoughts in his e-mails and pictures and otherwise with the young ladies or the young lady specifically." Trial counsel confirmed he never filed a motion to sever or objected to the consolidated trial of Tyler's four indictments.

PCR counsel then asked trial counsel:

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[4] Tyquan was at least nineteen when Tyler gave his mother the cell phone to use.

Q: Do you think that with these two incidents or separate charges that there would have been a reason to make that motion [to sever]?

A: Perhaps. I don't remember that being an issue that we discussed in detail. No.

Q: Going along with that, perhaps, I guess what would your reason, looking at it, what would it be to make that request?

A: Well, as [Tyler] says, you know, perhaps one would lead the jury to believe the other.

Q: Do you think that that could have been the case in this case?

A: I didn't see it. No.

There is some confusion in the transcript about who speaks next, but it appears the State asked trial counsel whether the reason he did not see the need for a motion to sever was based on his experience and the facts of the case. Trial counsel's response: "And the development of the trial strategy with Mr. Tyler, yes."

The PCR court then inquired:

Q: Just how could you have separated [the four different indictments]? . . . .

A: Three dealt with his attempted communication with the young lady, and one dealt with the picture.

Q: We've got disseminating, contributing.

A: And the solicitation of a minor.

Q: Exploitation.

A: In my mind the exploitation dealt with the picture of the young lady involved in a sexual act. The disseminating, the solicitation of a minor and contributing all dealt with [Child].

Q: So there is some distinction there?

A: There is some distinction there, yes, sir.

Q: Okay. But in your mind was it a significant enough distinction on which a Court could separate these?

A: I did not think so, Your Honor.

The PCR court denied relief and dismissed the application, finding Tyler's claim that trial counsel was ineffective in failing to move for a separate trial on the sexual exploitation charge was "without merit" because there was no reasonable basis upon which to make a motion for separate trials. Relying on this conclusion, the PCR court found trial counsel's representation was not deficient. The PCR court further found Tyler was not prejudiced by the trial of all four charges in a single proceeding because the trial court instructed the jury to consider each charge separately and "reach separate verdicts on each and every charge."

Tyler's PCR counsel filed a petition for a writ of certiorari pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 210 (1988), along with a motion to be relieved. Tyler filed a pro se response to the court's *Johnson* letter and several supplemental letters. This court denied counsel's request to be relieved and ordered briefing on the question of whether trial counsel was ineffective in failing to move to sever Tyler's second-degree sexual exploitation of a minor charge from the trial of his remaining charges.

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record

to support them." *Id.* at 180. "We review questions of law de novo, with no deference to trial courts." *Id.* at 180–81, 810 S.E.2d at 839.

Law and Analysis

Tyler argues trial counsel was ineffective in failing to move for a separate trial of his charge for second-degree sexual exploitation of a minor because it was unrelated to the other charges, did not arise from the same set of circumstances, and could not be proved by the same evidence. Tyler further notes the evidence providing the basis for the sexual exploitation charge would not have been admissible in a separate trial of the three charges related to Child and the cell phone. Moreover, he contends trial counsel's failure to seek a separate trial on the sexual exploitation charge prejudiced him because the evidence relevant only to that charge—namely, the photograph of a child being anally assaulted—was improper propensity evidence and "impermissibly convinced the jury" he was guilty of the remaining charges. We agree.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). To prove ineffective assistance, a petitioner must prove trial counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result in his trial would have been different. *Id.* at 691–94; *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case."). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* In determining whether "the identified acts or omissions were outside the wide range

of professionally competent assistance. . . . , the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* "At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010).

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002). "Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." *State v. Simmons*, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002); *see also State v. Middleton*, 288 S.C. 21, 23, 339 S.E.2d 692, 693 (1986) (holding the defendant's charges failed to meet the requirements for consolidation because "the crimes did not arise out of a single chain of circumstances, and required different evidence for proof"); *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (1985) (finding the joinder of two forgery charges of the same nature in one indictment and one trial was improper where the offenses did not arise out of a single chain of circumstances, the offenses were not provable by the same evidence, and joinder prejudiced the defendant).

Here, the PCR court erred in relying on its finding that, "Trial Counsel noted that all charges stemmed from the same events and one search warrant." The record does not support this finding. While the exploitative photos from Tyler's computer were located during the execution of a search warrant obtained as a result of the draft texts and photos reported in connection with the cell phone, no other evidence supports the statement that the exploitation charge resulting from the computer photos "stemmed from the same events." Trial counsel recognized the distinction when specifically questioned about it.

Our case law addressing trials of separate charges in consolidated proceedings demonstrates the error in Tyler's case. In *State v. McGaha*, 404 S.C. 289, 299, 744 S.E.2d 602, 607 (Ct. App. 2013), this court found the trial court properly permitted

the trial of McGaha's charges in a single proceeding. Examining the *Harris* test, the court reiterated that "a trial court may try separate charges together" when all four elements of the test are met. *Id.* at 293–294, 744 S.E.2d at 604. The court further recognized that our supreme court has, at times, articulated the test differently, addressing only the "fourth element from *Harris*—whether the joint trial prejudiced the defendant. It was unnecessary in those cases, therefore, for the court to consider the first three elements." *Id.* at 294 n.4, 744 S.E.2d at 604 n.4; *see also State v. Cutro*, 365 S.C. 366, 375–76, 618 S.E.2d 890, 895 (2005) (holding three offenses similar in kind, place, and character—each involving Shaken Baby Syndrome inflicted on infants at a defendant's daycare—fit within the *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) exceptions for common scheme or plan or motive; thus, the charges were properly tried jointly and defendant suffered no propensity prejudice); *State v. Nelson*, 331 S.C. 1, 6–7, 501 S.E.2d 716, 719 (1998) (reversing the defendant's convictions for criminal sexual conduct (CSC) and committing lewd acts on a minor because children's toys, videos, photographs of young girls, and other evidence tending to depict him as a pedophile were improperly admitted at trial); *State v. Smith*, 322 S.C. 107, 110–11, 470 S.E.2d 364, 365–66 (1996) (reversing homicide conviction because failure to sever charges prejudiced the defendant and finding conviction for assault and battery of a high and aggravated nature would not be admissible under *Lyle* as evidence of other relevant crimes in subsequent trial on homicide charge); *Lyle*, 125 S.C. at 406, 118 S.E. at 811–13 (discussing permissible uses of bad acts evidence and noting prejudicial nature of evidence submitted solely to establish propensity).

McGaha was alleged to have committed first-degree CSC and lewd acts upon two minor sisters. *McGaha*, 404 S.C. at 291–92, 744 S.E.2d at 603. In finding the trial court properly held McGaha's abuse of both minors stemmed from a single chain of circumstances, the court noted:

> McGaha gained access to the children because the grandmother allowed him to live in their [playroom]. McGaha used this access on multiple occasions to take each child from her bed to the [playroom], where he molested her. [Child 1] was eight and [Child 2] was seven when the abuse ended. The time periods of the abuse overlapped almost precisely—McGaha abused [Child 1] between March 2009 and August 2010 and [Child 2] between May 2009 and August 2010. Their

> similar ages and the similar duration of the abuse supports the trial court's emphasis on its finding that they "had the same relationship to" McGaha. The molestation of each child during the same time period and in the same location, accomplished through the same access to them, established a sufficiently connected chain of circumstances to satisfy this element.

Id. at 295, 744 S.E.2d at 605.

The charges in McGaha's two cases were "not merely of the same general nature—they [were] identical." *Id.* at 297–98, 744 S.E.2d at 606. And it is significant that McGaha's charges were proved by the same evidence. *Id.* The court held, "a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other." *Id.* at 297, 744 S.E.2d at 606. The State correctly argued evidence of McGaha's molestation of either child would be admissible in a separate trial as to the other under Rule 404(b), SCRE, as proof of a common scheme or plan in that there existed a logical connection between the crimes due to the showing of a "close degree of similarity." *Id.* at 298, 744 S.E.2d at 607.

In *State v. Tallent*, 430 S.C. 438, 442, 845 S.E.2d 508, 510 (Ct. App. 2020), *cert. denied*, S.C. Sup. Ct. order dated March 9, 2021, the defendant argued the circuit court erred in denying his motion to sever his charge for contributing to the delinquency of a minor from the consolidated trial of other indictments alleging he sexually abused his minor stepdaughter for several years.[5] Tallent claimed the charges did not arise from the same set of circumstances and the admission of evidence that he provided drugs and alcohol to his stepdaughter and her minor brothers was unduly prejudicial and would be otherwise inadmissible in a separate trial of his CSC and lewd act charges. *Id.* at 445, 845 S.E.2d 511–12. This court rejected Tallent's arguments and affirmed his convictions because:

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[5] Tallent also argued the circuit court erred in admitting evidence of his manufacture, sale, and use of cocaine, crack cocaine, and methamphetamine in violation of Rule 403, SCRE, as the probative value of this drug evidence was substantially outweighed by its prejudicial effect. *Id.*

First, Tallent's abuse of stepdaughter covered a period of years in various homes where the family lived. During parts of this same period, Tallent supplied stepdaughter and her brothers with illegal drugs and alcohol. He also taught the brothers how to manufacture crack cocaine during this same time period. Although the charges did not arise out of a single isolated incident, the CSC, lewd act, and contributing to the delinquency of a minor charges "arose from, in substance, a single course of conduct or connected transactions." In short, there was evidence that this improper conduct was continuous and spanned several years.

Second, the charges were proved by common evidence. All four charges were proved by the same witnesses—stepdaughter and her brothers.

Third, the charges were of the same general nature. The State presented evidence showing Tallent abused stepdaughter in the same locations and during the same time periods that he supplied her and her younger brother (the only brother mentioned in the indictment) with drugs and alcohol.

The State's witnesses also testified Tallent's providing stepdaughter with marijuana and alcohol was evidence of Tallent "grooming" stepdaughter so he could abuse her. Although the charges in this case technically differ from each other in that some were sexual in nature and the contributing to the delinquency of a minor charge was drug-related, all are more broadly of the same general nature and could be fairly characterized as involving abusive conduct toward minors.

Fourth, and critically, it is hard to say the joinder of these charges caused unfair prejudice. Tallent contends he was harmed by the drug evidence because it was not relevant to the CSC and lewd act charges. But the test is not so

> narrow, and precedent says "there may be evidence that is relevant to one or more, but not all, of the charges."

Id. at 430 S.C. at 446–47, 845 S.E.2d at 512–13 (internal citations omitted).

Unlike the circumstances in *McGaha* and *Tallent*, Tyler's charges did not all arise from a single course of conduct, connected transactions, or a course of continuous grooming-related conduct. The charge for second-degree sexual exploitation of a minor arose from Tyler's possession of photographs, found on his computer and in connection with his email account, depicting young girls engaged in provocative poses or sexual activity. The three other indictments arose from the pictures and text messages found on the cell phone he gave Child, Sister, and Tyquan. The only connection between the sexual exploitation offense and Tyler's other three offenses was the fact that law enforcement found the exploitative pictures on his computer while executing a search warrant obtained during the investigation of the deleted photos and draft messages from the cell phone.

Additionally, the evidence the State needed to prove the exploitation offense—the photographs from the computer and email account—was distinct from that used to prove Tyler's other offenses—the text messages from the cell phone and testimony about the messages and pictures on the phone. Thus, the exploitation charge should have been tried separately, and trial counsel was deficient in failing to seek separate trials. *See Simmons*, 352 S.C. at 350, 573 S.E.2d at 860 (holding "offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together").

In the present case, Tyler took photographs of Child and her family, none of which were alleged to be criminal in nature, and drafted text messages on his phone in which he inappropriately professed his feelings for her. Such conduct was most definitely "odd" and "creepy," as described by trial counsel in his closing argument. However, the State's introduction of the photograph from Tyler's computer depicting an unrelated young girl being anally assaulted emphasized Tyler's behavior was not just "odd" or "creepy," but that of a sexual predator.

Tyler's substantive rights were violated because trying the charges together created the risk that the jury would wrongfully convict him on one set of charges based on evidence admissible only as to the other. Such prejudice could have been avoided

had trial counsel sought a separate trial of Tyler's exploitation charge because the highly prejudicial evidence—the photo and other provocative images from Tyler's computer—would not have been admissible in a trial on the three charges related to Child and the cell phone. *See State v. Perry*, 430 S.C. 24, 37 n.6, 842 S.E.2d 654, 661 n.6 (2020) (noting that while "dissimilarities between charged crimes are not integral to the joinder analysis, the State's choice to try them together made their dissimilarity directly related to the Rule 404(b) analysis"); *McGaha*, 404 S.C. at 298, 744 S.E.2d at 606 ("In cases where the defendant argues prejudice from the admission of evidence of the other charges tried in the same case, our courts have analyzed whether evidence of one or more charges would be admissible in a trial involving only the other charge."); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.").

At the PCR hearing, trial counsel testified he did not see any reason to seek separate trials, and no evidence supports that his analysis was related to a valid strategic decision. *Contra Smith*, 386 S.C. at 567, 689 S.E.2d at 632 ("[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." (emphasis added)). Trial counsel acknowledged the unrelated photo of a young girl engaged in a sex act "was an awful picture" but did not explain how he thought he could minimize its impact or why this was a reasonable tactic. Trial counsel admitted when asked about the sexual exploitation charge in relation to the three indictments involving Child that "perhaps one would lead the jury to believe the other." He further agreed with the PCR court that there was "some distinction" between the charges, adding, "three dealt with his attempted communication with the young lady, and one dealt with the pictures. . . . In my mind the exploitation dealt with the picture of the young lady involved in a sexual act. The disseminating, the solicitation of a minor and contributing all dealt with [Child]."

While our supreme court's decision in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019), addressed bifurcation rather than a consolidated trial, we find the court's analysis instructive here. In 2013, Cross was indicted for first-degree CSC with a minor. *Id.* at 469, 832 S.E.2d at 283. As Cross had pled guilty to a previous charge of first-degree CSC with a minor in 1992, the State used the 1992 conviction as the predicate element supporting the 2013 first-degree CSC charge.

Id. at 470, 832 S.E.2d at 283–84; s*ee* S.C. Code Ann. §16-3-655(A) (2015) ("A person is guilty of criminal sexual conduct with a minor in the first degree if: . . . (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).").

In a pretrial hearing, Cross moved to bifurcate the 2013 trial, requesting that the lewd act charge and sexual battery element of first degree CSC with a minor be tried first; then, if the jury concluded Cross was guilty of the sexual battery alleged in the indictment, evidence of the 1992 conviction and Cross's sex offender registry status could be introduced to prove section 16-3-655(A)(2)'s prior conviction element. *Cross*, 427 S.C. at 470, 832 S.E.2d at 284. Cross argued he would be prejudiced if the jury were to learn of his 1992 conviction and registry status in the same trial phase addressing his conduct against the minor victim in the 2013 case because the evidence of his prior conduct against another child would cement his "predilection" for such offenses. *Id.* The trial court disagreed and denied bifurcation; Cross was convicted and sentenced to an aggregate term of twenty-five years' imprisonment. *Id.* at 473, 832 S.E.2d at 285.

Our supreme court reversed and remanded for a new trial, finding the probative value of the 1992 conviction—at the point in the trial at which it was introduced—was substantially outweighed by the danger of unfair prejudice and "that prejudice would have been totally eliminated had the trial been bifurcated." *Id.* at 482, 832 S.E.2d at 290. The court recognized "evidence of Cross's 1992 conviction for first-degree CSC with a minor had insurmountable probative value in proving the prior conviction element of the 2013 charge. However, evidence of the 1992 conviction was in no way probative of whether Cross committed the underlying sexual battery" at issue in the 2013 trial. *Id.* at 477, 832 S.E.2d at 287–88. The court determined the danger of the jury convicting Cross because of his 1992 conviction alone was so high, the trial court should have prevented the jury from hearing of it until the jury reached a verdict on the underlying conduct alleged in the indictment. *Id.* at 477–78, 832 S.E.2d at 288.

The same danger arose here when the highly prejudicial photo supporting Tyler's sexual exploitation charge was admitted as evidence before the same jury considering his unrelated charges involving Child. It is difficult to imagine how

such an image could *not* influence a jury, and the likelihood that the jury convicted Tyler on the three charges involving Child based on evidence inadmissible as to those charges and introduced to support only the separate sexual exploitation charge is not a danger we can ignore.

The fact that the evidence of Tyler's guilt for disseminating harmful material to a minor was marginal adds to the likelihood that Tyler was prejudiced by the trial of all four charges in one proceeding. The relevant statute provides that the minor must be exposed to "material or performance that depicts sexually explicit nudity or sexual activity." S.C. Code Ann. § 16-15-375(1) (2015). Although Child and Sister initially told Dorris there were "naked" pictures on the cell phone, they clarified at trial that the pictures were of girls wearing bikinis and Tyler wearing blue underwear. Likewise, both Tyquan and Mother testified Tyler was wearing "a blue Speedo."

We are bound by the language of the statute, and although providing a phone with bikini and Speedo pictures to the children was inappropriate, the photos did not depict "sexually explicit nudity" or "sexual activity." Thus, it appears the jury's guilty verdict on the dissemination charge was likely based on the evidence admitted on the sexual exploitation charge. At least one of the photos recovered from Tyler's computer and email account most certainly depicted "sexually explicit nudity or sexual activity," but there is no evidence that those photos were ever disseminated to Child or Sister. *See, e.g.*, *Tate*, 286 S.C. at 464, 334 S.E.2d at 290 (finding joinder prejudicial where it is likely a jury would infer criminal disposition based on evidence of one forgery and on that basis alone find defendant guilty of a separate forgery). The prejudicial impact of the computer photos likewise undermines confidence in the jury's consideration of Tyler's charges for criminal solicitation of a minor and contributing to the delinquency of a minor. For these reasons, trial counsel's failure to move for a separate trial on the sexual exploitation charge constituted deficient performance that prejudiced Tyler.

Conclusion

Based on the foregoing, we find the evidence does not support the PCR court's dismissal of Tyler's action as it relates to his charges of criminal solicitation of a minor, contributing to the delinquency of a minor, and disseminating harmful material to a minor. Thus, we reverse these three convictions and remand to the court of general sessions for a new trial. However, as the computer photographs

were properly admitted as to the sexual exploitation charge, we affirm Tyler's conviction for second-degree sexual exploitation of a minor.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS, J. and LOCKEMY, A.J. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent

v.

Zantravious Randell Hall, Appellant.

Appellate Case No. 2018-002176

Appeal From Greenwood County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5919
Heard December 8, 2021 – Filed June 22, 2022

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia, and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

KONDUROS, J.: Zantravious Randell Hall appeals his convictions for murder, attempted murder, and possession of a weapon during the commission of a violent crime. Hall contends the trial court erred by (1) failing to admit certain social

media messages into evidence and (2) enhancing his sentence to life imprisonment without the possibility of parole (LWOP) pursuant to section 17-25-45 of the South Carolina Code (2014 & Supp. 2021) (the recidivist statute). We affirm.

FACTS

On November 21, 2017, Michael "Luke" Lukie and Timothy Wilson were smoking marijuana across the street from Phoenix Place Apartments. Emyle "Gump" McDuffie exited his apartment, joined Lukie and Wilson, and asked Lukie if he could borrow a pair of pants. Lukie said he had a pair for McDuffie at his apartment, so he and McDuffie began walking that way without Wilson.

According to Lukie, someone in a red car pulled up to them as they were walking and called out to McDuffie. When McDuffie reached the car, Lukie saw Hall get out, ask McDuffie a question, and then start shooting a gun. Lukie got shot in his hip, but he managed to run away and get into another car with McDuffie's sister and her girlfriend, who then drove him to the hospital.

Wilson claimed he did not "see the actual shooting" but saw a red car "pull[] in and let loose." Wilson also saw McDuffie fall to the ground and watched Lukie run away. Phoenix Place Apartment residents Marisha C.,[1] Lakisha Bletcher, and Terrance Gilchrist all heard gunshots and rushed to the scene of the shooting, where they found McDuffie shot and lying on the ground. Bletcher and Gilchrist picked McDuffie up and put him in Gilchrist's car, and Gilchrist drove him to the hospital. Hospital personnel attempted to resuscitate McDuffie, but he was pronounced dead.

At the hospital, Lukie told officers to look for a red car with tinted windows on security cameras at a 7-Eleven convenience store located about twenty-five yards from Phoenix Place Apartments; however, Lukie did not initially tell officers that Hall was the shooter. After interviewing other witnesses[2] and reviewing the

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[1] The record does not contain Marisha's surname because she was a minor when she testified.

[2] Marisha told officers she saw McDuffie talking through the passenger window of a red car with tinted windows immediately before she heard gunshots. Bletcher told officers she saw a red car with tinted windows leave the apartment complex shortly after the shooting occurred.

7-Eleven surveillance video, officers issued a "be on the look out" alert for a red car with tinted windows. A few hours later, officers saw a car matching that description about two miles from the scene of the shooting and attempted a traffic stop; however, Hall led officers on a chase through rush-hour traffic. Eventually, Hall crashed the red car and fled on foot, but officers apprehended him.

Officers determined the car belonged to Hall's pregnant girlfriend, Miangel Clark, towed it from the crash site, and searched it pursuant to a warrant the next day. Officers recovered a 9 mm shell casing from the cowl of the car,[3] and a red bandana, Hall's driver's license, and Hall's birth certificate from inside the car. Tests for fingerprints and DNA inside the car were negative or inconclusive, but the bandana tested positive for gunshot residue. At the scene of the shooting, officers recovered thirteen shell casings and removed a bullet from an apartment wall. Additionally, officers obtained bullet fragments from Lukie's hip, and McDuffie's thigh, lower leg, right foot, and clothing.

The State charged Hall with murder, attempted murder, possession of a weapon during the commission of a violent crime, and failure to stop for a blue light. The State also served notice on Hall that it was seeking LWOP for the murder and attempted murder charges pursuant to the recidivist statute. At trial, Lukie testified Hall got out of Clark's car and started shooting. Lukie explained he initially did not tell officers Hall was the shooter because he wanted to first tell McDuffie's family and he did not want to be labeled a snitch. Marisha testified she saw McDuffie walk towards Clark's car and talk to someone through the passenger side window shortly before she heard gunshots. Bletcher testified she saw Clark's car leave the apartment complex shortly after the shooting.

Officers never located the gun used at the Phoenix Place Apartments shooting, but a forensic firearms examiner for the South Carolina State Law Enforcement Division (SLED), James Green, determined a 9 mm gun had fired all but one of the recovered bullet fragments. Green testified the unidentified bullet fragment was too damaged to determine if it had been fired by a 9 mm gun, and all of the bullet fragments were too damaged to determine if they had been fired by the same 9 mm gun. Still, Green opined the same 9 mm gun had fired all fourteen 9 mm shell casings officers recovered. Additionally, the forensic pathologist who performed

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[3] The cowl is immediately below the windshield wipers and separates the windshield from the hood.

McDuffie's autopsy testified he had been shot nine times and opined the gunshot wound to his back was clearly the fatal shot.

The State also introduced recordings of three telephone conversations Hall initiated while detained in the Greenwood County Detention Center. During a November 23, 2017 conversation, the recipient of Hall's call said there was a rumor that Hall was mad at McDuffie because McDuffie and Clark had been having sex and McDuffie was probably the father of Clark's unborn child. Hall denied the rumor and said McDuffie and Clark could not have been having sex because Hall had been sleeping with Clark every night for three months. Hall said he had Clark's car "24/7" and explained he drove Clark to and from work every day. Hall claimed no one had seen Clark drive her car since he began "talking to her." During a November 30, 2017 conversation, the recipient of Hall's call claimed officers had found fingerprints in Clark's car. Hall asked "who's fingerprints," said he had "wiped that mother fucker down," and laughed. Finally, during a December 4, 2017 conversation, Hall's mother told him to "talk in code" before they talked about cleaning and disposing of his shoes.

The State also charged Cedric Elmore and Kemad White for murder and attempted murder based at least in part on Joseph Holland's statement to officers that he saw Elmore and White shoot McDuffie after they got out of a red car driven by Hall. However, Hall was tried alone. During Hall's case-in-chief, Holland claimed he had told officers what he had heard from others rather than what he had seen. Holland testified he saw gunshots coming from a red car but could not see the shooter.

Additionally, Hall sought to introduce evidence from Snapchat[4] and present Elmore's girlfriend, Raven Jackson, as a witness. According to Hall's attorney,

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[4] Snapchat is a popular social media platform for cell phones that allows users to send modifiable photographs, videos, and text messages that are only visible for a limited time after the recipient opens them. *Explainer: What is Snapchat?*, Webwise, https://www.webwise.ie/parents/explainer-what-is-snapchat-2/ (last visited June 15, 2022). Users can send messages directly to another user with a timer of 1-10 seconds; alternatively, users can send messages without a timer, and the messages disappear after the recipient's initial viewing. *Id.* Additionally, users can post messages to their "story," which allows their friends to view them multiple times for twenty-four hours. *Id.* However, message senders can save

Jackson was prepared to testify Elmore sent her video messages via Snapchat that placed him at their apartment when the Phoenix Place Apartments shooting occurred.[5] However, the trial court prohibited the Snapchat evidence due to concern the material's date and time stamp had been manipulated in some way. Hall maintained Jackson could authenticate the evidence and submitted court exhibits but declined to proffer her testimony.

Ultimately, the jury found Hall guilty of murder, attempted murder, and possession of a weapon during the commission of a violent crime.[6] The trial court deferred sentencing to consider Hall's memorandum in opposition to sentencing pursuant to the recidivist statute. When Hall was fifteen years old, the State charged him with assault and battery with intent to kill (ABWIK). The family court transferred Hall's case to general sessions court, and he pled guilty on December 7, 2011.

The State argued Hall's murder and attempted murder sentences should be enhanced to LWOP pursuant to the recidivist statute because they were considered most serious offenses, and Hall's ABWIK conviction was also a most serious offense. Hall argued his ABWIK conviction should not enhance his sentences under the recidivist statute because he was a juvenile when he committed that offense and the family court failed to make adequate findings of fact pursuant to *In*

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messages before sending them, and message recipients can save messages by taking a screenshot of their phone or using their screen recorder before the message disappears. *How To Screenshot On Snapchat Without The Sender Knowing (2022)*, Alphr, https://www.alphr.com/social-media/1007983/how-to-screenshot-on-snapchat-without-them-knowing/#:~:text=Swipe%2C%20locate%2C%20and%20select%20the,screenshot%20alert%20will%20not%20appear (last visited June 15, 2022).

[5] Hall was attempting to use the Snapchat messages and Jackson's testimony to further discredit Holland's initial statement that he saw Elmore and White shoot McDuffie after they got out of a red car driven by Hall.

[6] During the State's case-in-chief, Hall pled guilty to failure to stop for a blue light.

re Sullivan[7] before it transferred that case to general sessions court.[8] Alternatively, Hall asserted his mandatory LWOP sentence enhancements due to his ABWIK conviction violated the Eight Amendment's prohibition on cruel and unusual punishment because he was a juvenile when he committed that offense. The trial court denied Hall's motion and sentenced him to LWOP for both murder and attempted murder pursuant to the recidivist statute.[9] The trial court did not impose a sentence for Hall's possession of a weapon during the commission of a violent crime conviction pursuant to section 16-23-490(A) of the South Carolina Code (2015). This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "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." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.*

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[7] 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980) ("[I]t is the responsibility of the family court to include in its waiver of jurisdiction order a sufficient statement of reasons for, and considerations leading to, that decision. Conclusory statements, or a mere recitation of statutory requirements, without further explanation will not suffice. The order should be sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court. The salient facts upon which the order is based are to be set forth in the order.").

[8] On October 11, 2018, while his trial for the Phoenix Place Apartments shooting was underway, Hall filed an application for post-conviction relief (PCR) challenging the ABWIK conviction for the first time. On December 14, 2021, the State filed a Return. As of the date of this writing, that action is still pending.

[9] The trial court gave Hall a time-served sentence for failure to stop for a blue light.

LAW/ANALYSIS

I. Excluded Evidence

Hall asserts the trial court erred by failing to admit the Snapchat messages between Elmore and Jackson into evidence. Hall contends the messages were relevant because they were evidence of an alibi for Elmore, which discredited Holland's initial statement that placed Hall and Elmore together at the scene of the shooting. Hall maintains the messages could have been properly authenticated pursuant to Rule 901, SCRE, because (1) Jackson received the messages and would have testified about her personal knowledge regarding them and (2) circumstantial evidence of the messages' distinctive characteristics established the evidence was what it purported to be. We agree the trial court erred, but we find that error harmless.

"[E]vidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018). "The authentication standard is not high, and a party need not rule out any possibility the evidence is not authentic." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019) (citation omitted), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020). "The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims." *Id.* "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court[,] and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Cartwright*, 425 S.C. 81, 89, 819 S.E.2d 756, 760 (2018) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)).

"Social media messages and content are writings, and evidence law has always viewed the authorship of writings with a skeptical eye." *Green*, 427 S.C. at 230, 830 S.E.2d at 714. "The requirement of authentication cannot be met by merely offering the writing on its own. Something more must be set forth connecting the writing to the person the proponent claims the author to be." *Id.* at 231, 830 S.E.2d at 714 (citation omitted). "Rule 901(b), SCRE, lists ten non-exclusive methods of authentication." *Id.* at 231, 830 S.E.2d at 715. "Rule 901, SCRE, does not care what form the writing takes, ... [a]ll that matters is whether it can be

authenticated, for the rule was put in place to deter fraud." *Id.* at 231, 830 S.E.2d at 714.

Under Rule 901(b)(1), SCRE, evidence may be authenticated by "having someone with personal knowledge about the writing testify the matter is what it is claimed to be." *Id.* at 231, 830 S.E.2d at 715. "This method may be accomplished by testimony from a person who sent or received the writing." *Id.* Additionally, "[o]ne who witnessed the creation or signing of the writing also has the personal knowledge Rule 901(b)(1), SCRE, demands." *Id.* "As long as a witness with personal knowledge testifies that an exhibit accurately portrays what it depicts, that should be sufficient to establish its authenticity." 3 Barbara E. Bergman et al., *Wharton's Criminal Evidence* § 14:2 (15th ed. 2021).

Alternatively, "[m]ost writings meet the authenticity test through Rule 901(b)(4), SCRE, which enables authentication to be proven by: '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.'" *Green*, 427 S.C. at 232, 830 S.E.2d at 715 (second alteration in original) (quoting Rule 901(b)(4), SCRE). "Rule 901(b)(4), SCRE, meshes with prior South Carolina law, which has long endorsed authentication by circumstantial proof." *Id.*

Additionally, "appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Brown*, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018) (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). "Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." *Id.* (quoting *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011)). "A harmless error analysis is contextual and specific to the circumstances of the case." *Id.* (quoting *Byers,* 392 S.C. at 447-48, 710 S.E.2d at 60). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." *Id.* (quoting *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006)). "'Harmless beyond a reasonable doubt' means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002).

In *Green*, the defendant asserted the trial court erred by admitting into evidence Facebook messages allegedly between his codefendant and the victim because they

were not properly authenticated. 427 S.C. at 227, 229, 830 S.E.2d at 712, 714. First, this court noted social media's seemingly unique authentication problems "dissolve against the framework of Rule 901, SCRE." *Id.* at 230, 830 S.E.2d at 714. Applying that framework, this court determined the messages could not be authenticated by personal knowledge under Rule 901(b)(1), SCRE, because the testifying witness did not send or receive the messages, nor witness their creation. *Id.* at 231, 830 S.E.2d at 715.

However, this court then applied Rule 901(b)(4), SCRE, and determined the messages had been authenticated because their content "was distinctive enough that a reasonable jury could find [his codefendant] wrote them." *Id.* at 233, 830 S.E.2d at 715. This court noted several facts linked the messages to the defendant via his codefendant and ruled that "[t]aken together, th[o]se circumstances serve[d] as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets." *Id.* at 233, 830 S.E.2d at 715-16. This court concluded it was "persuaded the [fraud] risk [surrounding social media] is one Rule 901, SCRE, contemplates and can contain. Lawyers can always argue case-specific facts bearing on this risk and attempt to convince the jury the writing is not genuine." *Id.* at 234, 830 S.E.2d at 716.

Here, the trial court erred by failing to admit the Snapchat video messages between Elmore and Jackson into evidence. Unlike the witness in *Green*, Jackson received the messages from Elmore; therefore, she could have authenticated the messages with personal knowledge under Rule 901(b)(1), SCRE.[10] While there is a risk the video messages were not contemporaneously recorded at the time they were sent, a reasonable jury could find the messages were what Jackson said they were: videos of Elmore playing with their daughter at their home while the Phoenix Place Apartments shooting occurred. Indeed, "[t]he authentication standard is not high, and a party need not rule out any possibility the evidence is not authentic." *Green*, 427 S.C. at 230, 830 S.E.2d at 714 (citation omitted). "Lawyers can always argue

[10] Because we determine the messages could have been authenticated by Jackson's personal knowledge under Rule 901(b)(1), SCRE, we do not address Hall's contention that the messages could have been authenticated by circumstantial evidence under Rule 901(b)(4), SCRE. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting appellate courts do not need to address remaining issues when the determination of a prior issue is dispositive).

case-specific facts . . . and attempt to convince the jury the writing is not genuine." *Id.* at 234, 830 S.E.2d at 716.

However, the trial court's error was harmless. First, the Snapchat messages between Elmore and Jackson had little probative value. While the excluded evidence would have contradicted Holland's initial statement that he saw Hall, Elmore, and White involved in McDuffie's shooting, Holland recanted that statement and testified at Hall's trial that he could not see those involved. More importantly, the excluded evidence provided an alibi for Elmore, not Hall.

Additionally, the record contained substantial evidence of Hall's guilt. Multiple witnesses testified the shooter was in a red car with tinted windows, and Lukie, Marisha, and Bletcher identified Clark's car as the red car they saw involved in the shooting. Moreover, Hall was in Clark's car a few hours after the shooting, and Hall did not stop when officers attempted to pull him over. Also, the State presented the following evidence that officers recovered from Clark's car: (1) a red bandana that tested positive for gunshot residue; (2) Hall's driver's license; (3) Hall's birth certificate; and (4) a 9 mm shell casing that was fired from the same gun that fired the shell casings found at the scene of the shooting. Further, the State presented several 9 mm bullet fragments that were removed from Lukie and McDuffie. Finally, the State presented incriminating statements Hall made while in jail. Hall claimed he had been in control of Clark's car "24/7" since he began "talking to her," said he had wiped down the interior of Clark's car, and talked about cleaning and disposing of shoes when his mother told him to "talk in code." We conclude beyond a reasonable doubt the trial court's error did not contribute to the jury's verdict; thus, it was harmless. Accordingly, we affirm as to this issue.

II. LWOP Sentences

Hall asserts the trial court erred by enhancing his sentences to LWOP pursuant to the recidivist statute. We address his two arguments in turn.

A. Insufficiency of Transfer Order

Hall contends his ABWIK conviction should be construed as a juvenile adjudication because the family court failed to make adequate findings of fact pursuant to *In re Sullivan* before it transferred that case to general sessions court. We disagree.

Under the recidivist statute, a defendant convicted of a most serious offense must be sentenced to LWOP if that defendant was previously convicted of another most serious offense. § 17-25-45(A)(1)(a) (2014). Murder, attempted murder, and ABWIK are all statutorily defined as most serious offenses. § 17-25-45(C)(1) (Supp. 2021). Guilty pleas are considered convictions, § 17-25-45(C)(3) (2014), but "a juvenile adjudication is not a conviction under the mandatory LWOP provisions of the recidivist statute." *State v. Green*, 412 S.C. 65, 84, 770 S.E.2d 424, 434 (Ct. App. 2015) (citing *State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001)).

"The family court has exclusive jurisdiction over children who are accused of criminal activity." *State v. Pittman*, 373 S.C. 527, 558, 647 S.E.2d 144, 160 (2007) (footnote omitted); *see* S.C. Code Ann. 63-3-510 (Supp. 2021). However,

> If a child fourteen, fifteen, or sixteen years of age is charged with . . . a felony which provides for a maximum term of imprisonment of fifteen years or more,[11] the court, after full investigation and hearing, may determine it contrary to the best interest of the child or of the public to retain jurisdiction.

S.C. Code Ann. § 63-19-1210(5) (Supp. 2021). "The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult." *Id.* "[W]hen a juvenile is tried and adjudicated as an adult . . . in general sessions court, the guilty plea is a conviction for purposes of the recidivist statute." *Green,* 412 S.C. at 84, 770 S.E.2d at 434 (citing *State v. Standard*, 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002)).

Further, "in South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485 (2013). "[A]n error in a waiver proceeding which does not deprive the adult court of jurisdiction over criminal proceedings

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[11] ABWIK was a felony codified in section 16-3-620 of the South Carolina Code (2003) (repealed 2010) and was punishable by a maximum of twenty years' imprisonment. *State v. Fennell*, 340 S.C. 266, 275, 531 S.E.2d 512, 517 (2000).

involving a juvenile can be waived if the juvenile pleads guilty." *Id.* at 333, 737 S.E.2d at 486. "[A]n erroneous order transferring a juvenile to general sessions court . . . [is] a judicial error—not a jurisdictional error." *Id.*

Additionally, "a party aggrieved by an order, judgment, sentence[,] or decision may appeal." Rule 201(b), SCACR. "[A]n aggrieved party is one who is injured in a legal sense . . . ." *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997). A PCR application is the exclusive method for collateral attack upon a conviction. *See* S.C. Code Ann. § 17-27-20(B) (2014).

In *State v. Atkins*, the defendant contended on his consolidated direct appeal and resentencing trial for his murder conviction that his previous murder conviction was invalid because he had received ineffective assistance of counsel. 303 S.C. 214, 216-18, 399 S.E.2d 760, 761-62 (1990). Our supreme court noted that previous murder conviction had "not been reversed or set aside" because his PCR application had been dismissed and his petition for certiorari had been denied. *Id.* at 218, 218 n.1, 399 S.E.2d at 762, 762 n.1. Our supreme court concluded the defendant's resentencing trial was not the proper forum to attack the validity of his previous conviction. *Id.* at 218, 399 S.E.2d at 762.

In *Green*, the defendant had been tried and convicted as an adult for a "most serious offense" he committed as a juvenile; he was convicted of a second "most serious offense" as an adult and received a mandatory LWOP sentence pursuant to the recidivist statute. 412 S.C. at 74-75, 85, 770 S.E.2d at 429-30, 435. This court affirmed the defendant's mandatory LWOP sentence and reasoned the defendant's previous conviction for an offense committed as a juvenile was nevertheless "a 'conviction' for purposes of [the recidivist statute]" because he "was tried and adjudicated as an adult." *Id.* at 84-85, 770 S.E.2d at 435.

Here, the trial court did not err by enhancing Hall's sentences to LWOP pursuant to the recidivist statute. First, like the defendant in *Atkins*, Hall's ABWIK conviction is still valid. In 2018, Hall filed a PCR application challenging his 2011 ABWIK guilty plea, but that action is still pending. *But see* § 17-27-45(A) (2014) ("An application for relief filed pursuant to [the Uniform Post-Conviction Procedure Act] 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."). Thus, Hall

cannot collaterally attack the validity of his ABWIK conviction on this appeal for his murder and attempted murder convictions.

Further, like the defendant in *Green*, Hall was tried and adjudicated as an adult for his ABWIK conviction. Because Hall was tried and adjudicated as an adult, his ABWIK conviction required LWOP sentences for his subsequent murder and attempted murder convictions under the recidivist statute. Indeed, Hall cites no authority in which a court has treated an adult conviction as a juvenile adjudication under the recidivist statute. Consequently, Hall's contention that his ABWIK conviction should be construed as a juvenile adjudication has no merit, regardless of the sufficiency of the family court order transferring him to general sessions court. *See Green*, 412 S.C. at 84, 770 S.E.2d at 434 ("[W]hen a juvenile is tried and adjudicated as an adult . . . in general sessions court, the guilty plea is a conviction for purposes of the recidivist statute."); *Atkins*, 303 S.C. at 218 n.1, 399 S.E.2d at 762 n.1 ("[T]he fact that [the defendant] may be allowed to collaterally attack the prior conviction in another forum does not entitle him to relief unless and until the conviction is invalidated."); *see also Rice*, 401 S.C. at 333, 737 S.E.2d at 486 ("[A]n error in a waiver proceeding which does not deprive the adult court of jurisdiction over criminal proceedings involving a juvenile can be waived if the juvenile pleads guilty."). Thus, the trial court properly enhanced Hall's sentences to LWOP pursuant to the recidivist statute.

B. Eighth Amendment Violation

Alternatively, Hall argues his mandatory LWOP sentence enhancements due to his ABWIK conviction violate the Eighth Amendment's prohibition on cruel and unusual punishment because he was a juvenile when he committed that ABWIK offense. We disagree.

"[O]ur appellate courts have rejected the argument that it is cruel and unusual punishment to use prior convictions for offenses committed as juveniles for sentencing enhancement under [the recidivist statute]." *Green*, 412 S.C. at 86, 770 S.E.2d at 435. Accordingly, "an enhanced sentence based upon a prior most serious conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment." *Standard*, 351 S.C. at 206, 569 S.E.2d at 329.

In *Miller v. Alabama*, the Supreme Court held that mandatory LWOP sentences for juveniles violated the Eighth Amendment. 567 U.S. 460, 479 (2012). In *Green*, the defendant argued his mandatory LWOP sentence "would violate the Eighth Amendment's ban on cruel and unusual punishment because he was a juvenile" when he committed the offense that subsequently required his mandatory LWOP sentence. 412 S.C. at 75, 770 S.E.2d at 429. The *Green* court found the defendant's reliance on *Miller* was misplaced because, unlike the defendant in *Miller*, he was not a juvenile when he committed the offense that resulted in his mandatory LWOP sentence. *Id.* at 86-87, 770 S.E.2d at 436. This court reasoned that because "*Miller's* holding was based, in part, on the 'recklessness, impulsivity, and heedless risk-taking' of children[,] . . . the policy considerations from *Miller* [we]re inapplicable." *Id.* at 87, 770 S.E.2d at 436. Consequently, the *Green* court ruled the defendant's mandatory LWOP sentence enhancement due to his previous conviction for an offense he committed as a juvenile did not violate the Eighth Amendment. *Id.*

Therefore, Hall's contention that his LWOP sentence violated the Eighth Amendment has no merit. Like the defendant in *Green*, Hall was tried and adjudicated as an adult for his ABWIK conviction. Critically, like the defendant in *Green*, and unlike the defendant in *Miller*, Hall was not a juvenile when he committed the offense that resulted in his enhanced LWOP sentences. Moreover, a panel of this court cannot overrule a decision by another panel. S.C. Code Ann. § 14-8-210 (2016) ("The decisions of a panel of th[is] court . . . shall be final and not subject to further appeal, except by petition for review or by other exercise of discretionary review by the Supreme Court."). Thus, Hall's mandatory LWOP sentence enhancements due to his ABWIK conviction did not violate the Eighth Amendment. Accordingly, we affirm Hall's LWOP sentences.

CONCLUSION

The trial court erred by failing to admit into evidence the Snapchat messages between Elmore and Jackson, but that error was harmless in light of the messages' limited probative value and the overwhelming evidence of Hall's guilt. Additionally, Hall's sentences for murder and attempted murder were properly enhanced to LWOP pursuant to the recidivist statute because Hall was tried and convicted as an adult for ABWIK, that conviction is still valid, and he cannot collaterally attack the validity of that ABWIK conviction on this direct appeal for his murder and attempted murder convictions. Finally, Hall's mandatory LWOP

sentence enhancements did not violate the Eighth Amendment's prohibition of cruel and unusual punishment because Hall was tried and convicted as an adult for ABWIK, and he was not a juvenile when he committed the offense that resulted in his mandatory LWOP sentence enhancements. Accordingly, Hall's convictions for murder, and attempted murder are

AFFIRMED.

HILL and HEWITT, JJ., concur.