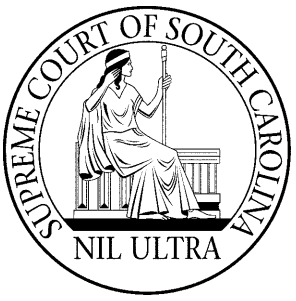

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

January 20, 2004

ADVANCE SHEET NO. 3

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wanda Stanley, Respondent,

v.

Kevin Kirkpatrick, in his official capacity as Columbia Dog Catcher, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
James R. Barber, Circuit Court Judge

Opinion No. 25769
Heard October 21, 2003 – Filed January 12, 2004

AFFIRMED IN PART, REVERSED IN PART

Dana M. Thye, of the Office of the City Attorney, of Columbia, for petitioner.

M. Baron Stanton, of Stanton Law Offices, P.A., of Columbia, for respondent.

William H. Davidson, II, and Kenneth P. Woodington, of Davidson, Morrison and Lindemann,

P.A., of Columbia, for Amicus Curiae South Carolina Municipal Association.

JUSTICE MOORE: Respondent commenced a 42 U.S.C. § 1983[1] action against petitioner (the City) alleging the City had a policy or custom of attempting to oppress and financially hobble her. We granted certiorari to determine whether the Court of Appeals erred by reversing the trial court's order granting the City summary judgment and denying respondent's motion to amend her complaint. Stanley v. Kirkpatrick, 2001-UP-016 (S.C. Ct. App. refiled October 3, 2001). We affirm in part and reverse in part.

FACTS

Respondent bred Shar-Pei dogs at her Columbia home. Due to the complaints of neighbors, the City fined respondent several times for operating an unlawful kennel and for keeping unlicensed pets. Officer Kevin Kirkpatrick issued at least three of these citations.

Kirkpatrick testified he received a complaint in July 1996. As a result, he, along with Officer H.P. Stephenson of the Humane Society, visited respondent's home and saw fifteen Shar-Pei dogs inside the house and in the backyard, which was enclosed with a metal gate. On July 8, 1996, Stephenson and Kirkpatrick returned to the residence in an effort to acquire details for a search warrant. On this visit, they saw five female Shar-Pei

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[1]42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

puppies running around the street and in the neighbor's yard. They captured the at-large puppies.

The following day, Kirkpatrick served a warrant on respondent, citing her for violating a city ordinance restricting the number of dogs per residence. He informed respondent he had captured five puppies that were taken to the Animal Services Shelter (the shelter) and that she needed to contact the shelter to identify the puppies. While Kirkpatrick assumed the dogs were respondent's, he testified that because the dogs were picked up at-large, there was still a question whether they were truly hers.

In her deposition, respondent disputed the events as related by Kirkpatrick and Stephenson. She testified she believed Kirkpatrick opened the gate, entered her backyard, and removed her dogs.[2] However, she stated she did not see him open the gate, nor did anyone tell her they saw him open the gate. She stated a dog had never escaped from her backyard, and there was mesh screening around the gate to prevent such an occurrence.

Respondent contacted the shelter and was informed she would have to pay $129 per dog to redeem them.[3] Two employees at the shelter testified they directly informed respondent she had to identify the dogs because the shelter holds unidentifiable animals for only five days.[4] Respondent claimed no one told her she had only five days to retrieve the dogs.

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[2]Respondent further testified that, at a prior court hearing on her citations, Kirkpatrick told her, "I'll find your dogs." Kirkpatrick denied the conversation.

[3]This fee included a $76 fine for the puppy being at-large, a $20 impound fee, $28 for spaying, and $5 for a future rabies vaccination.

[4]Section 9-5027(a) of the Columbia City Code states, "[I]mpounded animals not redeemed within five (5) days may thereafter be humanely destroyed by the animal control division."

Because no one came to the shelter to identify the dogs, they were euthanized. They were found to be unsuitable for adoption because they had a skin problem and were aggressive towards each other and the handlers.

Respondent filed a § 1983 claim against the City. She later filed a motion to amend the complaint to add state tort claims to her § 1983 lawsuit. The City filed a motion for summary judgment. The trial court denied the motion to amend and granted the City's motion for summary judgment.

The Court of Appeals reversed the trial court's denial of respondent's motion to amend her complaint to add state tort claims and reversed the trial court's order granting summary judgment on the § 1983 claim.

ISSUE I

Did the Court of Appeals err by reversing the trial court's denial of respondent's motion to amend her complaint?

DISCUSSION

Respondent served her original complaint asserting a § 1983 claim in February 1997. The City filed its motion for summary judgment in July 1998. Respondent later served her motion to amend the complaint to add the tort claims of trespass and conversion.

Following hearings, the court issued an order denying respondent's motion to amend on the basis it was made more than two years after the incident and that the applicable statute of limitations had passed on the causes of action against the City under the South Carolina Tort Claims Act.[5] The court noted the motion to amend was denied based on the prejudice to the defendants and the absence of good cause shown to allow the amendments. The Court of Appeals reversed the trial court.

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[5]S.C. Code Ann. § 15-78-110 (Supp. 2002) provides: ". . . any action brought pursuant to [the Tort Claims Act] is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered . . ."

Rule 15(a), SCRCP, provides that, if more than thirty days have elapsed from the time a responsive pleading is served, a party may amend his pleading only by leave of court or by written consent of the adverse party. The rule further provides this leave will be freely given when justice so requires and does not prejudice the other party.

It is well established that a motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999). The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. *Id.*

The trial court erred by not allowing the amendment on the basis the City was prejudiced and respondent had not shown good cause for the amendment. The burden is not on the movant, but on the party opposing the motion to show how it is prejudiced. *See* Tanner, *supra* (responsibility of party opposing amendment to establish prejudice). The City argues the amendment prejudices it because the statute of limitations on the tort claims had passed and because depositions would have to be retaken if the amendment is allowed. However, given the facts of the case, *i.e.* the events giving rise to the claims, are not different from the facts that gave rise to the § 1983 claim, depositions would not have to be retaken. Therefore, the City's argument of prejudice on this point is without merit.

The City's argument the amendment prejudices it because the statute of limitations has passed is likewise without merit. Rule 15(c), SCRCP, states: "[w]henever the claim . . . asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Respondent's tort claims arose out of the conduct previously set forth in the original complaint. The factual circumstances of the tort claims of trespass and conversion have already been set out in the original complaint asserting a § 1983 claim. No new information is required to assert those tort claims. Therefore, under Rule 15(c), the amendment relates back to the date

of the original pleading that was filed within the statute of limitations. *See also* Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377 (1995) (purpose of Rule 15(c) is to salvage causes of action otherwise barred by statute of limitations).

Accordingly, the Court of Appeals properly found the trial court erred by not allowing the amendment of the tort claims.

ISSUE II

Did the Court of Appeals err by reversing the trial court's order granting the City's motion for summary judgment?

DISCUSSION

The City argues the Court of Appeals erred by reversing the trial court's order granting summary judgment to the City on respondent's § 1983 action.

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

Section 1983 allows a civil action to recover damages for deprivation of a constitutionally protected right. In any § 1983 action, "a plaintiff is required to plead three elements: (1) an official policy or custom (2) that causes the plaintiff to be subjected to (3) a denial of a constitutional right." Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (Ct. App. 1985).

Respondent claims the City's policy or custom[6] is to oppress and financially hobble her by charging fines without a lawful citation, by destroying her animals without time restrictions, and by entering her enclosed backyard without a warrant. Considering the evidence in the light most favorable to her, the factual inferences that can be made from the evidence do not rise to the level of a policy[7] or custom set for the purpose of oppressing and financially hobbling her.

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[6]The City argues the Court of Appeals erred by holding the identity of the policymaker was a factual issue. To the extent the Court of Appeals' decision can be read to conclude the identity of the policymaker is a factual issue, we find this holding incorrect. *See* Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989) (as with other questions of state law relevant to application of federal law, identification of officials whose decisions represent official policy of local governmental unit is itself legal question to be resolved by trial judge before case is submitted to jury). In the present case, the City has elected to adopt the council/manager form of government. In this form of government, all legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, with each member, including the mayor, to have one vote. S.C. Code Ann. § 5-13-30 (1977). Therefore, the shelter and those employed by the shelter do not have the authority to set city policy, nor can their acts be said to represent official policy in view of the legislative authority granted to the municipal council. *See* Todd v. Smith, 305 S.C. 227, 407 S.E.2d 644 (1991), *cert. denied*, 502 U.S. 1059 (1992). Therefore, the policymaker is the city council.

[7]The City's *written* policy regarding animal control is contained in Ordinances §§ 9-5021 – 9-5037. These ordinances provide that owners who allow their dogs to run at-large do not have property rights in the dogs and are guilty of a misdemeanor. Further, the keeping of three or more dogs is prohibited without first obtaining an inspection certificate. Any pet found within the city limits in violation of the ordinances may be caught and impounded by city authorities and those impounded animals that are not redeemed within five days may thereafter be destroyed.

The evidence shows that, according to respondent, her dogs may have been removed from inside her fence and she may have not been told she had only five days in which to identify or redeem the dogs. The evidence further reveals respondent was improperly informed she would have to pay a fine to redeem the dogs. However, none of these facts presented by respondent show there was a *deliberate choice* to harm her or that the City was *deliberately indifferent* to the alleged constitutional violations by Kirkpatrick and the shelter. *See* Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (municipal liability under § 1983 attaches where deliberate choice to follow course of action is made from among various alternatives by official responsible for establishing final policy with respect to subject matter in question); Moore v. City of Columbia, *supra* (municipality may be subjected to liability due to its de facto policies as well as its de jure policies; de facto policies may be established by omissions of municipality or supervisory officials where their unreasonable failure to make rules causes employees to engage in unconstitutional conduct; such omissions are actionable, however, only if constitute "tacit authorization" of or "deliberate indifference" to constitutional violations). Respondent has not presented any evidence to show there is a custom that is so widespread as to have the force of law. *See* Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997) (locating "policy" ensures municipality is held liable only for deprivations resulting from decisions of its legislative body or of those officials whose acts may be said to be those of municipality; similarly, act performed pursuant to "custom" that has not been formally approved by appropriate decisionmaker may fairly subject municipality to liability on theory that relevant practice is so widespread as to have force of law).

Further, respondent has not demonstrated that the City, through deliberate conduct, was the "moving force" behind Kirkpatrick's alleged seizure of the dogs and the shelter's alleged wrongful destruction of the dogs. *See* Board of County Commissioners, *supra* (plaintiff must also demonstrate that, through its deliberate conduct, municipality was "moving force" behind injury alleged). There is no evidence that would support an inference City either knew or should have known of the events involved in this case or that the acts complained of were part of a pattern of similar acts.

Accordingly, the Court of Appeals erred by reversing the trial court's order granting the City's motion for summary judgment.

CONCLUSION

We affirm the decision finding the trial court erred by denying respondent's motion to amend the complaint and reverse the decision finding the trial court erred by granting the summary judgment motion.

AFFIRMED IN PART, REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph A. Samuels, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 25770
Submitted December 4, 2003 – Filed January 12, 2004

AFFIRMED

Tara Dawn Shurling, of Columbia, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, Capital and Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General David Spencer, of Columbia, for respondent.

JUSTICE MOORE: We granted certiorari to determine whether the post-conviction relief (PCR) court erred by finding the trial court did not lack subject matter jurisdiction to convict petitioner and by finding appellate counsel was not ineffective for failing to appeal the denial of petitioner's directed verdict motion at trial. We affirm.

ISSUE I

Was there subject matter jurisdiction to convict petitioner?

DISCUSSION

Petitioner was convicted of entering a bank with the intent to steal and was sentenced to fifteen years imprisonment. The Court of Appeals affirmed his conviction. State v. Samuels, Op. No. 99-UP-205 (S.C. Ct. App. filed March 24, 1999). His PCR application was denied.

The indictment for entering a bank with intent to steal reads:

> That JOSEPH A. SAMUELS did in Richland County on or about May 15, 1996, unlawfully enter a bank, depository, or building and loan association to wit: Richland Teacher's Credit Union,[1] with intent to steal money or securities for money, either by force, intimidation or threats.

Petitioner contends the trial court lacked subject matter jurisdiction on this charge because a credit union is not covered by S.C. Code Ann. § 16-11-380 (2003).

Section 16-11-380 provides: "It is unlawful for a person to enter a building or part of a building occupied as a bank, depository, or building and

[1]Before trial, the indictment was amended to reflect the proper name of the credit union: Richland Teachers Council Federal Credit Union.

loan association with intent to steal money or securities for money, either by force, intimidation, or threats."

While a credit union is not a bank or a building and loan association,[2] a credit union is a financial institution[3] and is, in the language of § 16-11-380, a depository. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002) (all rules of statutory construction are subservient to one that legislative intent must prevail if it can be reasonably discovered in language used, and that language must be construed in light of statute's intended purpose).

The South Carolina Credit Union Act is located under Title 34, which is entitled "Banking, Financial Institutions and Money." A credit union is defined as

> a cooperative, nonprofit corporation, incorporated . . . for the purposes of encouraging thrift among its members, creating a source of credit at fair and reasonable rates of interest, and providing an opportunity for its members to use and control their own money on a democratic basis in order to improve their economic and social condition.

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[2]*See, e.g.,* S.C. Code Ann. § 34-3-10 (1987) (no person shall use word "bank" or "banking" in connection with any business other than legalized incorporated banking institution); S.C. Code Ann. § 34-5-10 (1987) (bank includes building and loan association); S.C. Code Ann. § 34-26-110(5) (Supp. 2002) (definition of credit union).

[3]*See, e.g.,* S.C. Code Ann. § 34-1-20 (Supp. 2002) (two members of State Board of Financial Institutions must be engaged in cooperative credit union business and recommended by State Cooperative Credit Union League); S.C. Code Ann. § 20-7-150(16) (1985) (under Uniform Gifts to Minors Act, credit union included in definition of financial institution); S.C. Code Ann. § 62-6-101 (1987) (under Nonprobate Transfers article, credit union is financial institution).

S.C. Code Ann. § 34-26-110(5) (Supp. 2002).

S.C. Code Ann. § 34-26-720 (Supp. 2002) provides "[a] credit union may accept deposits from members, other credit unions, and governmental units subject to the terms, rates, and conditions established by the board of directors [of the credit union.]" Further, S.C. Code Ann. § 34-26-730 (1) (Supp. 2002) provides that "deposit accounts[4] may be withdrawn for payment to the account holder or to third parties . . ." Accordingly, a credit union is a depository.

Therefore, the PCR court properly denied petitioner's claim the trial court lacked subject matter jurisdiction to convict petitioner of entering a depository with the intent to steal.

ISSUE II

Was appellate counsel ineffective for failing to appeal the trial court's denial of petitioner's directed verdict motion?

DISCUSSION

At trial, petitioner moved for a directed verdict on the basis there was no evidence the credit union was a bank, depository, or building and loan association within the meaning of the statute. The trial court denied the motion because there was evidence the credit union was a depository.[5] Appellate counsel did not raise this issue on appeal.

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[4]"'Deposit account' means a balance held by a credit union and established by a member, another credit union, or a governmental unit in accordance with standards specified by the credit union including balances designated as deposits, deposit certificates, checking accounts, or other names. . . . A deposit account is a debt owed by the credit union to the credit holder." S.C. Code Ann. § 34-26-110(6) (Supp. 2002).

[5]A credit union employee testified the credit union acted like a bank by engaging in the business of deposits, withdrawals, and loans.

Because a credit union is a depository as a matter of law, appellate counsel was not ineffective for failing to raise the directed verdict issue on appeal. *See* Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every nonfrivolous issue presented by the record). *Cf.* Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal). Therefore, the decision of the PCR court is
AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Dorothy Smith, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
Howard P. King, Circuit Court Judge

Opinion No. 25771
Heard June 10, 2003 – Filed January 20, 2004

REVERSED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor J. Gregory Hembree, of Conway, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review a decision of the Court of Appeals holding that the circuit court properly

denied petitioner's motion for a directed verdict on the charge of misprision of felony. State v. Smith, 348 S.C. 601, 560 S.E.2d 430 (Ct. App. 2002). We reverse.

FACTS

The proprietor of a small rural grocery store was found dead in the store at about 2:30 p.m. The cash register and the victim's purse were missing. The victim's pastor had been at the store that afternoon from about 1:45 p.m. to 2:15 p.m. He testified that petitioner's husband purchased several food items. When the pastor left the store, he observed petitioner and her husband eating in their car in the parking lot. Another customer, who had arrived as the pastor was leaving, testified that petitioner and her husband, whom the customer recognized, were sitting in their car and eating while she was at the store.

Early the next morning, petitioner and her husband went to the victim's daughter's home, ostensibly to pay their respects. During this visit, petitioner attempted to mislead the daughter into believing that petitioner and her husband had been at the store hours, rather than minutes, before the murder and armed robbery occurred. The daughter was suspicious, and called the pastor. When he arrived at the daughter's home, he recognized the couple and discreetly telephoned the police. The pastor then told the couple the police wished to speak to the 'witnesses' at the store, and the three left the daughter's home.

After speaking briefly with officers at the store, petitioner and her husband agreed to be interviewed at the police substation. They were interviewed separately, and it is petitioner's statements during this initial interview that gave rise to the misprision charge that she intentionally misled the police. Petitioner told the police that she and her husband stopped at the store to get a few food items, that he went in and bought groceries, returned to the car, then reentered the store and got some cigarettes. Petitioner told the police that she and her husband then drove away from the store.

That evening, following the interviews, officers executed a search warrant at the couple's home. Petitioner returned to the sheriff's department with the officers and gave a statement after being read her Miranda rights. In this second statement, petitioner maintained that she and the husband stopped at the store to get food. Her husband purchased the food, and when he returned to the car they sat there briefly before her husband reentered the store to get cigarettes. While petitioner's husband was in the store, petitioner heard a "pow" and looked towards the store. Petitioner observed her husband coming out of the front door carrying the cash register and "an object with a long strap."[1] Her husband placed the items in the back of the car; they sat in the parking lot and ate some food, then drove home.

ISSUE

> Whether the Court of Appeals erred in holding that the trial court properly denied petitioner's directed verdict motion?

ANALYSIS

Petitioner contends she was entitled to a directed verdict on the misprision charge. We agree. Misprision is:

> [A] criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with, or subsequent assistance of, him as will make the concealer an accessory before or after the fact.
> State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980).

As this Court acknowledged in State v. Carson, there are situations where the defendant's 5th amendment privilege against self-incrimination will bar a misprision prosecution. The privilege acts as a bar where the information

[1] Inferentially this was the victim's handbag.

concealed would incriminate the defendant as an accessory or principal in the underlying felony. Id.

The State contends that because petitioner did not invoke her 5th amendment "right to remain silent" when first questioned by police but instead chose to tell officers only part of the story, she waived any privilege. The State misunderstands the relationship between the privilege against self-incrimination and the right of the State to prosecute an individual for misprision. The issue is not whether the Constitutional privilege was explicitly invoked, but rather whether the individual sought to be charged had a reasonable belief at the time the concealment occurred that revealing the information could lead to her criminal prosecution. Where the information concealed exculpates the individual questioned, the 5th amendment privilege does not bar a misprision charge. State v. Carson, *supra*. Where, however, the speaker reasonably believes[2] that the information concealed could be used against her in a criminal prosecution as an accessory or principal in the underlying felony, then the privilege bars a misprision prosecution. Id.

We find the evidence here is susceptible of the inference that petitioner and her husband sat in the parking lot, waiting for the "coast to clear," before he entered the store intent on committing an armed robbery. Inferentially, petitioner acted as lookout and getaway car driver. In fact, an investigator testified at trial that he believed that petitioner participated in the crimes with 'knowledge aforethought.'

The Court of Appeals held that petitioner could not reasonably have feared prosecution as an accessory after the fact because she was present at the scene. As a brief review of the state of the law on accessory after the fact will show, no lawyer would have been unreasonable in advising petitioner she could face this charge, nor was it unreasonable for petitioner, a layperson, to fear that her acts after the murder and armed robbery could result in her criminal prosecution. See State v. Collins, 329 S.C. 23, 495 S.E.2d 202

[2] This standard is taken from the test used where a witness actively invokes his privilege against self-incrimination. See Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

(1998) (from 1981 until 1998 only, "mere presence" at the scene precluded prosecution as an accessory after the fact). The reasonableness of petitioner's belief in the possibility of an accessory charge is amply demonstrated by the fact she was indicted and tried for that offense in this proceeding. Petitioner was granted a directed verdict on this charge, however, because the murder and armed robbery occurred before State v. Collins was decided, and the trial judge held that petitioner's presence at the scene precluded an accessory conviction.

The Court of Appeals, without explanation, held petitioner had no reasonable belief that she could be charged as a principal. We disagree. As noted above, the record supports an inference that petitioner may have acted as lookout and getaway driver. Accordingly, petitioner had a reasonable belief that full disclosure of the facts surrounding the crimes could have exposed her to prosecution as a principal. See State v. Gates, 269 S.C. 557, 238 S.E.2d 680 (1977) (getaway driver guilty as principal in armed robbery).

Petitioner's belief that revealing all she knew about the crimes could expose her to prosecution as an accessory after the fact or as a principal in the murder and armed robbery of the grocery store proprietor was reasonable. She was therefore entitled to a directed verdict on the misprision charge because her concealment of inculpating information was protected by her privilege against self-incrimination. State v. Carson, *supra*.

CONCLUSION

Petitioner was entitled to a directed verdict. The decision of the Court of Appeals is

REVERSED.

MOORE, WALLER and BURNETT, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

Chief Justice Toal: I respectfully dissent, as I find that neither of the two exceptions to the misprision of a felony statute, which are grounded in the Fifth Amendment protection against self-incrimination, applies in this case. Therefore, I would affirm the Court of Appeals' decision to uphold petitioner's conviction of misprision of a felony.

When reviewing the trial judge's denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. *State v. Mahoney*, 344 S.C. 85, 544 S.E.2d 30 (2001).

This Court has described the offense of misprision of a felony as the criminal neglect to either prevent the commission of a felony or to bring a felon to justice. A person commits misprision of a felony only if he makes some positive act of concealment. Therefore, the offense does not contemplate mere silence or a failure to come forward. A person cannot be convicted of misprision of a felony if his act of concealment makes him an accessory before or after the fact. *State v. Carson*, 274 S.C. 316, 318, 262 S.E.2d 918, 920 (1980) (citation omitted).

This Court explained how the privilege against self-incrimination protects the concealer from being convicted of misprision of a felony:

> [w]hile it is true the privilege sometimes works to bar prosecution for misprision, this is *only* when the statements concealed would incriminate the defendant as an accessory or principal in the protected felony.

Carson, 274 S.C. at 319, 262 S.E.2d at 920 (emphasis added). Therefore, in order for this Court to find that the Fifth Amendment protects petitioner's statements to the SLED agent, we also must conclude that one of the exceptions applies: petitioner must either have been an accessory after the fact or the principal actor of the offense.

The trial judge correctly ruled that petitioner could not be convicted of accessory after the fact because on the date of her offense, December 30,

1996, South Carolina law required that a person could only be convicted of accessory after the fact if she was absent from the crime scene. *See State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 (1998).[3]

In her statement made to a SLED agent, petitioner admitted she heard a gunshot inside the store and saw her husband get into the car with a cash register and "an object with a long strap." This statement implicates only petitioner's husband as the principal actor of the crime.

Therefore, in my opinion, the Fifth Amendment privilege does not protect petitioner's statement to the SLED agent because she could not have been prosecuted as an accessory after the fact or a principal actor in the crime.

In my view, the majority inappropriately injects a subjective test into the misprision-Fifth Amendment analysis. The majority holds that the Fifth Amendment protects the concealer if "the individual sought to be charged had a reasonable belief at the time the concealment occurred that revealing the information could lead to her criminal prosecution." The majority bases this subjective analysis on *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), where a witness affirmatively invoked his Fifth Amendment right to remain silent.

In the case at hand, petitioner never invoked her Fifth Amendment right; rather, she affirmatively concealed information from the investigator. She elected to speak to the investigator, and from the moment she elected to speak to the investigator, she no longer was afforded Fifth Amendment protection *unless* she was an accessory after the fact or the principal actor of

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[3] From 1981 until the date of the *Collins* opinion, January 5, 1998, a defendant could not be prosecuted for accessory after the fact if she was present at the crime scene. The Court refused to retroactively apply the new rule that an actor's presence at the crime scene did *not* preclude an accessory after the fact conviction to crimes committed during this seventeen-year period.

the crime.[4] As the United States Supreme Court has duly noted, there is no constitutional right to lie. *United States v. Apfelbaum*, 445 U.S. 115, 117, 100 S. Ct. 948, 950, 63 L. Ed. 2d 250 (1980) ("proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely").

In my opinion, this Court cannot employ a subjective test that essentially condones a suspect lying to the police if she "reasonably believes" that if she told the truth, she might be subjected to criminal prosecution. This test extends well beyond our *Carson* test for misprision of a felony and is inconsistent with the analysis we employ for inculpatory statements.[5]

In my view, the majority's decision inappropriately cloaks the *Carson* analysis with a new subjective test that exceeds the boundaries of our jurisprudence in this area of the law. In effect, the majority opinion encourages a suspect to lie to the police, thoroughly impeding a police investigation, and then hide behind a subjective "reasonableness" standard.

Based on the reasoning above, especially considering that we must view the evidence in the light most favorable to the State, I would hold that petitioner's attempt to conceal her husband's involvement in the robbery and murder of the convenience store clerk is not protected by the Fifth Amendment according to our *Carson* test.

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[4] I respectfully disagree with the manner in which the majority stretches its new, subjective test, in conjunction with its presumptuous inference that petitioner may have been a principal actor of the crime, to conclude that petitioner is not guilty of misprision of a felony.

[5] For example, we employ an objective analysis in determining whether the suspect is in police custody when she elects to give an inculpatory statement. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *see Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994) (the custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Zepsa Construction, Inc, Respondent,

v.

Phillip A. Randazzo and
Virginia M. Randazzo, Appellants.

Appeal From York County
John Buford Grier, Master-in-Equity

Opinion No. 3673
Heard May 13, 2003 – Filed September 15, 2003
Withdrawn, Substituted and Re-filed January 7, 2004

AFFIRMED AS MODIFIED

Douglas Gay, of Rock Hill; for Appellants.

S. Jackson Kimball, III, of Rock Hill; for Respondent.

CURETON, J.: In this action to foreclose a mechanic's lien, the master ordered judgment against Phillip and Virginia Randazzo in the amount of $50,846.00, and awarded attorney's fees to Zepsa in the amount of $8,123.40. The Randazzos appeal, arguing the master erred in: (1) including lost profits and overhead in the amount of the

mechanic's lien; and (2) awarding attorney's fees to Zepsa. We affirm as modified.

FACTS

Phillip and Virginia Randazzo (collectively, "Randazzos"), owned and operated an Italian restaurant near Tega Cay Village Shopping Center in Fort Mill, South Carolina. In September 1996, they contacted Ed Zepsa, president of Zepsa Construction, Inc. ("Zepsa") to inquire about the design and construction of a new restaurant. After several months of discussions and negotiations, the parties entered into on May 14, 1997, a written construction contract for Zepsa to build the restaurant. The agreed price was $610,000.00. The terms of the contract required a deposit in the amount of $61,000.00 to be paid when the contract was signed.

On May 29, 1997, the Randazzos gave written "notice to proceed" with construction. At that time, they provided Zepsa with a check for $21,000.00, representing part of the agreed deposit. Zepsa did not begin work at this time because the Randazzos had not paid the full deposit. By letter dated July 1, 1997, Zepsa agreed to accept the remainder of the deposit in two installments. These installments were to be paid at the time of the first two payment requests after construction began. Zepsa began work on the site on July 7, 1997. Between July 15 and August 2, 1997, Virginia Randazzo (Virginia) spoke by phone with either Ed Zepsa or the project manager on four occasions. During these conversations, she asked about terminating the contract due to the Randazzos' marital problems, instructed Zepsa to stop work, and told Zepsa to continue to delay construction while the Randazzos tried to resolve their marital difficulties. On August 3, Virginia called Ed Zepsa and told him she did not want to continue with the project.

On August 4, the Randazzos contacted Ed Zepsa and instructed him to proceed with construction. In response, he submitted a payment request seeking payment of $8,674.00 for work that had been

performed and $40,000.00 for the balance of the deposit. Also on August 4, Zepsa received a letter from the Randazzos' attorney requesting that Zepsa abide by the deposit payment schedule and proceed with the work. Zepsa resumed work on the project.

On August 11, Zepsa submitted a payment request for work performed through July and included a request for the next deposit installment. No payment was made for this completed work or the deposit installments. By letter dated August 28, 1997, the Randazzos' attorney gave notice of termination of the contract.

Zepsa timely filed a lis pendens and complaint on October 16, 1997. The complaint sought judgment against the Randazzos and foreclosure of a mechanic's lien that Zepsa had previously filed and served. The matter was referred with finality to the master. At the hearing, Zepsa presented uncontested evidence that Zepsa performed construction work on the job site in the amount of $10,846.00. In his order dated January 22, 2001, the master granted Zepsa judgment against the Randazzos in the amount of $50,846.00, which included the unpaid balance for work already performed and payment for the remaining deposit balance of $40,000.00. By order dated March 22, 2001, the master awarded Zepsa attorney's fees in the amount of $8,123.40, and costs in the amount of $1,490.60. The Randazzos appeal.

STANDARD OF REVIEW

"An action to foreclose a mechanic's lien is a law case in South Carolina." Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 553, 548 S.E.2d 900, 901 (Ct. App. 2001). "In an action at law, tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support." King v. PYA/Monarch, Inc., 317 S.C. 385, 388, 453 S.E.2d 885, 888 (1995). "His findings are equivalent to those of a jury in an action at law." Id. at 389, 453 S.E.2d at 888.

DISCUSSION

I. Mechanic's Lien

The Randazzos argue the master erred by including lost profits in the amount of the mechanic's lien when only a small portion of the contract work was actually performed.

Section 29-5-10 of the South Carolina Code of Laws defines a mechanic's lien. S.C. Code Ann. § 29-5-10 (1991 & Supp. 2002).[1] This section provides in pertinent part:

> (a) A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate or the boring and equipping of wells, by virtue of an agreement with, or by consent of, the owner of the building or structure, or a person having authority from, or rightfully acting for, the owner in procuring or furnishing the labor or materials shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the debt due to him.

S.C. Code Ann. § 29-5-10(a) (1991).

In the instant case, the master granted a judgment against the Randazzos in the amount of $50,846.00 based on two grounds. First, the master found Zepsa's lost profits and overhead expenses were recoverable as an element of damages for the Randazzos' breach of the

[1] Although we recognize section 29-5-10 was amended in 1999, we cite to the most current version of this subsection given no substantive amendments have been made to the subsection since this litigation began.

construction contract. Secondly, the master concluded "these elements of damage [were also] recoverable in a mechanic's lien foreclosure action." The master reasoned:

> Since Zepsa is entitled to profits and overhead expenses, there is a reasonable and equitable basis for claiming the balance of the deposit as an integral part of the payment due under the contract, unrelated to actual work performed. Thus, Zepsa is entitled to be paid the balance of the deposit due, along with the balance due for work which was performed.

Given Zepsa's recovery in its mechanic's lien action is limited to that as provided for in the mechanic's lien statute, the question becomes whether the overhead expenses and lost profits were lienable items. In concluding these items were recoverable under a mechanic's lien, the master relied on our Supreme Court's decision in Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 338 S.E.2d 631 (1985). In Sentry, a builder, Sentry, and a developer executed two separate agreements for the construction of a condominium. The first agreement provided for the cost of the construction and the second provided for the additional compensation of overhead and profit. As the project neared completion, Sentry filed a mechanic's lien for balances due under both agreements and change orders. Sentry exercised its right to arbitration and filed a claim in the amount of its mechanic's lien. Sentry later amended its arbitration demand to include claims for damages for wrongful termination of the construction contract. The American Arbitration Association (AAA) found Sentry was entitled to $503,271.00. The circuit court adopted the AAA's award as a judgment, granted Sentry summary judgment on its mechanic's lien foreclosure petition, assessed interest, and awarded Sentry attorney fees.

On appeal, the developer raised several issues, including the assertion the circuit court judge erred in holding that profit and overhead were components of "debt" under the mechanic's lien statute. Id. at 349, 338 S.E.2d 633. Our Supreme Court rejected the

developer's argument. The Court held "that overhead and profit, when stated as part of the contract price, are proper components of a mechanic's lien." Id. at 352, 338 S.E.2d at 635. The Court found that "'[s]uch items, as such and standing by themselves, are nonlienable, but they become lienable when they are included in a contract price or are reflected in the reasonable value of labor or materials furnished.'" Id. at 352, 338 S.E.2d at 634 (quoting 53 Am. Jur. 2d Mechanics' Liens § 107 (1970)).

Based on our reading of Sentry, we believe the Supreme Court expanded the items that are recoverable under the mechanic's lien statute to include overhead and profit. However, this holding is only available in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract.

In view of the specific facts of the instant case, Sentry is inapplicable for several reasons. Significantly, the parties in Sentry entered into a separate agreement that specifically provided for the recovery of overhead and profit. In contrast, Zepsa and the Randazzos did not execute an agreement providing for overhead and profit. Their contract is silent concerning these items. Even though Ed Zepsa testified the deposit constituted compensation for pre-construction or "up front" work, his testimony is not determinative of the agreed upon terms of the contract. There is no evidence the parties agreed to pay $61,000.00 as an upfront cost. Additionally, the account statement of the contract does not list overhead and profit as terms, but instead indicates the $61,000.00 is an additional amount that represents 10% of the $610,000.00 contract price. Furthermore, the construction in Sentry was substantially completed whereas only $10,000.00 of the $610,000.00 Zepsa project had been completed.

Because we find Sentry distinguishable, Zepsa is limited to recovery provided for by the strict terms of the mechanic's lien statute. This "statute provides that debts for 'labor performed' or 'materials furnished' are lienable debts." Hardin Constr. Group, Inc. v. Carlisle Constr. Co., 300 S.C. 456, 457, 388 S.E.2d 794, 795 (1990); see

Johnson v. Barnhill, 279 S.C. 242, 245, 306 S.E.2d 216, 218 (1983) ("In order to establish a mechanic's lien, it is generally necessary that the labor performed go into something which has attached to and become a part of the real estate, adding to the value thereof."); Tenny v. Anderson Water, Light & Power Co., 67 S.C. 11, 17, 45 S.E. 111, 113 (1903) ("'The extent of the remedy afforded by the [mechanic's lien] act is to enforce the lien upon the property covered.'" (quoting Johnston v. Frazee, 20 S.C. 500 (1884))).

With respect to overhead and profits, the extent of a contractor's recovery has been interpreted as follows:

> A contractor is only allowed a privilege for claims expressly granted by the statute and equitable considerations do not enlarge such right. Generally, overhead costs and lost profits are not within the purview of a mechanics' lien statute; but, where overhead costs and profits are provided for in the contract, they become subject to collection on a mechanic's lien.

56 C.J.S. Mechanics' Liens § 196 (2000).

As testified to by Ed Zepsa, the $61,000.00 deposit was not associated with any labor performed. The master also recognized this fact given he stated in his order "there is a reasonable and equitable basis for claiming the balance of the deposit as an integral part of the payment due under the contract, unrelated to actual work performed." Thus, we find the master erred in finding Zepsa was entitled to the balance of this amount under a mechanic's lien action. Moreover, we note the mechanic's lien statement of account, which outlines the amount that is recoverable, is not included in the Record on Appeal. Despite this omission from the record, there is a letter from Zepsa's attorney to the Randazzos' attorney that itemizes the amount of Zepsa's claim. In this accounting, the "Total due on work" is valued at $10,846.00. Accordingly, Zepsa's recovery under its mechanic's lien action is limited to $10,846.00, an amount that the parties agree represents the work completed.

Our decision is consistent with the holdings in other jurisdictions. See, e.g., In re Reg'l Bldg. Sys., Inc., 273 B.R. 423, 443 (Bankr. D. Md. 2001), aff'g 320 F.3d 482 (4th Cir. 2003) ("[A] claim for lost profits arising from a breach of contract based on wrongful termination of a contract before construction is completed cannot be asserted as a mechanic's lien or as a claim payable from contractor's trust."); Tilt-Up Concrete, Inc. v. Star City/Federal, Inc., 582 N.W.2d 604 (Neb. 1998) (concurring with other jurisdictions which deny lien for lost profits because they compensate a party for work not yet performed); Fortune v. Million Dev. Co., 768 P.2d 1194, 1197 (Ariz. Ct. App. 1989) (holding that "a lien filed before completion of a contract is limited to the value of the labor or services actually furnished at the time the lien is filed . . . rather than the full contract price payable after completion of the contract"); Bangor Roofing & Sheet Metal Co. v. Robbins Plumbing Co., 116 A.2d 664 (Me. 1955) (recognizing that overhead and lost profit standing by themselves are not lienable); see generally W. J. Dunn, Annotation, Amount For Which Mechanic's Lien May Be Obtained Where Contract Has Been Terminated or Abandoned by Consent of Parties or Without Fault on Contractor's Part, 51 A.L.R.2d 1009 (1957 & Supp. 2003) (discussing the following methods for valuing a mechanic's lien where contract had been prematurely terminated: (1) amount of work performed up to the date work was stopped; (2) amount proportional to entire contract price; (3) amount of profit included in lien in limited jurisdictions; (4) amount of profit excluded; and (5) amount includes contract price less amount of completion).

II. Attorney's Fees

The Randazzos argue the master erred by awarding attorney's fees to Zepsa and not to them.

The Randazzos raise this issue in conjunction with their first issue. They assert that "[i]f this Court reverses the lower court's finding regarding the lien, the Appellants will become the prevailing

party under the statute." The Randazzos do not make any argument that the master erred in awarding attorney's fees other than to contend that because we should reverse on the first issue, we should also reverse the award of attorney's fees.

"The determination as to the amount of attorney's fees that should be awarded under the mechanic's lien statute is addressed to the sound discretion of the trial court." Keeney's Metal Roofing, Inc., 345 S.C. 550, 553, 548 S.E.2d 900, 901 (Ct. App. 2001). "The court's decision regarding such a matter will not be disturbed absent an abuse of discretion." Id.

In an action to foreclose a mechanic's lien, the award of attorney's fees is governed by section 29-5-10(a). This section states in pertinent part, "The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party." S.C. Code Ann. § 29-5-10(a) (1991).

Section 29-5-10(b) outlines the procedure for determining the "prevailing party." The statute in effect at the time of this action provides in relevant part:

> For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees.
>
> If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement.

> If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

S.C. Code Ann. § 29-5-10(b) (Supp. 2002).[2]

In the instant case, Zepsa made a written offer of settlement for $40,000.00. Because the Randazzos did not make an offer of settlement, the value of their counterclaims, $88,000, is considered a

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[2] We note section 29-5-10(b) was substantively amended in 1999 and the new version became effective on June 11, 1999. Act No. 83, 1999 S.C. Acts 269. Prior to the amendment, the portion of the statute applicable to settlement offers and the award of attorney's fees stated, "If the defendant makes no written offer of settlement, his offer of settlement is considered to be zero." S.C. Code Ann. § 29-5-10(b) (1991); see Lauro v. Visnapuu, 351 S.C. 507, 570 S.E.2d 551 (Ct. App. 2002), cert. denied (Apr. 24, 2003) (discussing determination of prevailing party for award of attorney's fees in mechanic's lien action under pre- and post-amendment version of section 29-5-10(b)).

The Randazzos do not present any argument concerning which version of the statute is applicable to their case. However, based on the following procedural facts, we find the post-amendment version of the statute governs our analysis in this case. Zepsa filed its Complaint on October 16, 1997. The Randazzos filed their Answer and Counterclaim on August 17, 1998, to which a Reply was made on September 10, 1998. On November 13, 2000, Zepsa made its offer of settlement. The master entered his final order for judgment and foreclosure of the mechanic's lien on January 22, 2001. Subsequently, the master awarded Zepsa attorney's fees by order dated March 22, 2001. Given Zepsa made its offer of settlement and the master awarded attorney's fees after the 1999 amendment, we conclude the post-1999 version of the statute is applicable to this case.

negative offer of settlement. As previously discussed, the $40,000.00 deposit should not have been included as part of the mechanic's lien and, thus, Zepsa should have been awarded $10,864.00. Even excluding the amount of the deposit, Zepsa still remains the prevailing party and was properly awarded attorney's fees. Given the Randazzos do not challenge the amount of the award of attorney's fees, we affirm the master's decision.

CONCLUSION

In view of the foregoing analysis, we hold the master erred in awarding $50,486.00 to Zepsa for its mechanic's lien. Because the $40,000 balance of the agreed upon deposit, which the parties characterized as overhead expenses and lost profit, was not a term of the construction contract, it was not a proper lienable item under the mechanic's lien statute. The master did, however, correctly award $10,864.00 to Zepsa for the value of work that had been completed on the project. Finally, we affirm the master's decision to award Zepsa attorney's fees given it was the "prevailing party" under the mechanic's lien statute.

AFFIRMED AS MODIFIED.

HEARN, C.J. and STILWELL, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Charles Pagan,

Appellant.

Appeal From Florence County
L. Casey Manning, Circuit Court Judge

Opinion No. 3724
Heard December 9, 2003 – Filed January 12, 2004

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

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

ANDERSON, J.: Charles Pagan was convicted of murder and sentenced to life imprisonment. Pagan appeals, arguing the trial judge erred in allowing testimony from an individual about an incident that occurred more than one year after the victim's murder. We affirm.

FACTS/PROCEDURAL BACKGROUND

At approximately 8:00 a.m. on December 11, 1997, the victim's body was discovered in a vacant lot in Florence, South Carolina. DNA testing revealed there was semen on the victim's pants and in her vagina. Dr. Edward Proctor, the forensic pathologist who performed the autopsy, concluded the victim died as a result of "massive blunt force injury to the head," likely caused by multiple blows from a heavy object, such as a board.

Steven[1] Blathers, an acquaintance of the victim, lived across the street from the vacant lot where the body was found. After DNA testing, it was determined that the semen found on the victim belonged to Blathers. Blathers admitted to having sex with the victim in exchange for providing her with crack cocaine. However, Blathers was not viewed as a suspect because his mother attested he was home at the approximate time the victim was attacked. Additionally, Jessie Jones, a neighbor of Blathers who lived in front of the vacant lot, saw the victim fighting with a man that night and testified Blathers did not match the description of that individual. The following colloquy occurred during direct examination of Jones:

> Q. How tall is Mr. Steve Blathers?
>
> A. About five foot if he that. He was short.
>
> Q. You didn't see Steve Blathers out there by that school bus at the fight, didn't you?

[1] In the record and Respondent's brief, "Steven" is spelled with a "v." In the Appellant's brief, his name is written as "Stephen."

A. Not that I can say for sure, no.

Q. Well, that fellow you described is six feet light-skinned wasn't Steve Blathers?

A. No.

Q. And you didn't see Steve Blathers around there, didn't you?

A. No, I didn't. Because I couldn't recognize none of them.

Jones stated that, around 2:00 a.m. the morning of the murder, he observed a group of people hitting a sign with a stick outside of his house. Thereafter, Jones noticed a "tall man" and a "lady [who] was kind of short" arguing and "hitting each other with sticks." Another neighbor, Patrice Washington, said that, at approximately 2:10 a.m., she witnessed a "shadow run pas[t] [her] window," followed by "two more shadows." Washington declared "[t]he first shadow was screaming." Sometime after 2:00 a.m., Blathers looked out the door of his house and saw a six-foot tall "shadow run across the street" with "something in [his] hand."

Monique Ellerbee Cooks[2] called Crime Stoppers the night the victim's body was discovered. Cooks informed Crime Stoppers that she was with the victim at a club on the night of the murder. Cooks claimed the victim left the club with a man and that Cooks did not see the victim again. Cooks gave a detailed description of the man. When police visited Cooks, she reiterated that she had been with the victim the night she was killed but did not tell the police that she had witnessed the murder. Cooks failed to point out anyone in three photographic lineups, one of which included Pagan.

Cooks later assisted police in drawing a composite sketch of the man she saw with the victim the night of the murder. Police interviewed Pagan

[2] The record refers to "Monique Ellerbee Cooks." In the Appellant's brief, her name is written as "Monique Cooks." The Respondent's brief states her name as "Monique Ellerby."

after an individual identified him from the composite sketch. Police then re-interviewed Cooks, who identified Pagan in a photographic lineup as the person she saw with the victim the night of the murder. Cooks indicated that she had recognized Pagan the first time she viewed the lineup but that "she was scared to point him out" at that time.

Approximately one month later, Cooks professed that she witnessed the murder. On the night the victim was killed, Cooks followed the victim, who was walking with a man that Cooks had never seen before. Cooks heard the victim arguing with the man about money and drugs. Speaking in an angry tone, the man asked the victim for the twenty dollars she owed him. While standing in the area where Jessie Jones stated he had seen people hitting a sign, Cooks watched the man and victim "hitting each other with sticks." The man told the victim, "Bitch, you gone give me my money." When the victim ran, the man chased the victim and beat her in the face and head with a board. Cooks screamed. The man told Cooks that he was going to "get [her] next." Cooks identified Pagan as the victim's attacker.

Police issued an arrest warrant for Pagan on January 15, 1998. Pagan fled to New Jersey but was apprehended on February 20, 1998.

In February 1999, more than one year after the murder, Pagan was arrested while out on bond. The arrest was based upon a statement given by Tamika Lambert. Lambert stated she was the passenger in a vehicle being driven by someone named "Derrick" when a police car with its blue light on attempted to pull them over. According to Lambert, "Derrick" drove off at a high speed, crashed the car, and ran away. When Lambert saw "Derrick" several hours later, "Derrick" apologized to her and explained why he ran from the police. Lambert declared:

> He start[ed] out telling me that he couldn't stop because he didn't have no [driver's] license. Then he told me that he was on—I'm trying to see which one he told me first. He was on a $100,000 bond because they had—[t]his girl—[t]hey accused him of killing some girl. And it was all because of some girl named Monica.

Lambert identified Pagan as the man who (1) told her his name was "Derrick"; (2) ran from the police; (3) wrecked the car; and (4) later explained to her why he had run from the police. The car that Pagan wrecked after the chase was registered to Pagan's wife. Pagan denied both knowing Lambert and wrecking his wife's car.

Before Lambert testified at trial, defense counsel objected to her testimony, claiming the evidence was unduly prejudicial and too remote in time to be considered in conjunction with the murder charge. The trial court overruled the objection, finding Lambert's testimony was admissible under Rule 404(b), SCRE, as Monique Ellerbee Cooks said she'd been threatened and Lambert's testimony referred to Pagan's comment that a girl named "Monica" was the cause of his problems. Defense counsel unsuccessfully renewed this objection after Lambert testified. In charging the jury, the trial judge instructed that Lambert's testimony was admissible only as to identification.

The jury found Pagan guilty of murder. He was sentenced to life imprisonment.

LAW/ANALYSIS

Pagan contends the trial judge erred in admitting Tamika Lambert's testimony. Specifically, Pagan claims Lambert's testimony that Pagan ran from police while out on bond for this murder charge was only slightly relevant, yet highly prejudicial. We disagree.

I. Evidence of Flight

"Flight from prosecution is admissible as evidence of guilt." State v. Al-Amin, 353 S.C. 405, 413, 578 S.E.2d 32, 36-37 (Ct. App. 2003); see also State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (stating flight is "at least some evidence" of defendant's guilt); State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916) (declaring the flight of one charged with crime has always been held to be some evidence tending to prove guilt). Evidence of flight has been held to constitute evidence of defendant's guilty knowledge

and intent. See State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); Town of Hartsville v. Munger, 93 S.C. 527, 77 S.E. 219 (1913); State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct. App. 1995); see also State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension); State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent.") (internal quotation marks omitted); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003) (noting that circumstances of defendant's flight from police after they attempted traffic stop allowed reasonable inference of guilty conduct). Flight, when unexplained, is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee. See State v. Williams, 350 S.C. 172, 564 S.E.2d 688 (Ct. App. 2002) (citing 29 Am. Jur. 2d Evidence § 532 (1994)).

The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Beckham, 334 S.C. at 315, 513 S.E.2d at 612. It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Id. (citing Commonwealth v. Jones, 319 A.2d 142 (Pa. 1974)). Flight or evasion of arrest is a circumstance to go to the jury. See Beckham, 334 S.C. at 315, 513 S.E.2d at 612; State v. Turnage, 107 S.C. 478, 93 S.E. 182 (1917); see also State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1981) (recognizing that evidence of flight is proper and that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight); Grant, 275 S.C. at 408, 272 S.E.2d at 171 (stating that while a jury charge on flight as evidence of guilt is improper, admission of evidence and argument by counsel concerning it are allowed).

Tamika Lambert's testimony was clearly admissible for the purposes of proving Pagan's flight and "guilty knowledge." After failing to stop for a blue light, evading police, and leaving the scene of the accident, Pagan told Lambert he was out on bond "because they . . . accused him of killing some

girl," and that he was in trouble because of a girl named "Monica." As such, Lambert's testimony was admissible for proving: (1) Pagan was attempting to avoid capture and violate his bond provisions for the murder charged in the instant case and (2) Pagan could identify the very person, Monique Ellerbee Cooks, who was the key witness in the case. A jury could have easily inferred knowledge of Pagan's guilt from these actions.

In State v. Beckham, the defendant left for a vacation in Florida several hours before a warrant was issued for his arrest. After spending one hour in a Florida hotel, defendant then drove all night to Kentucky. Our Supreme Court held this was admissible as flight evidence and was properly submitted to the jury. Beckham, 334 S.C. at 315, 513 S.E.2d at 612-13. Similarly, in State v. Al-Amin, the defendant fled the scene after dumping the victim's body in a dumpster next to his apartment. This Court found evidence of the defendant's flight was circumstantial evidence to be submitted to the jury. Al-Amin, 353 S.C. at 413, 578 S.E.2d at 36-37.

Pagan cites McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000), in his brief for the proposition that Tamika Lambert's testimony was not admissible as evidence of flight because the police were "not at that point pursuing [Pagan] as a suspect in the earlier murder." However, McFadden is clearly inapposite as it concerns the rule that, in a trial in absentia, the jury cannot consider the defendant's absence at trial as evidence of defendant's guilt. McFadden, 342 S.C. at 644-45, 539 S.E.2d at 395.

Concomitantly, we find Tamika Lambert's testimony was properly admitted as flight or "guilty knowledge" evidence.

II. Corroboration Evidence

All relevant evidence is admissible. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003); Rule 402, SCRE. "Relevant evidence" is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003); State v.

Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); Rule 401, SCRE. Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); Adams, 354 S.C. at 378, 580 S.E.2d at 794; State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002).

As the only eyewitness able to identify Pagan as the victim's killer, Monique Ellerbee Cooks's credibility was of utmost importance. Cooks was not entirely forthcoming in her first few meetings with investigators, which might have adversely affected the veracity of her testimony. We find Lambert's testimony about Pagan's comments after he fled from police was relevant in corroborating Cooks's testimony. Lambert declared that Pagan told her he was out on bond "because they . . . accused him of killing some girl," and he blamed this trouble on someone named "Monica." This corroborates Cooks's testimony in two respects: (1) that she was an eyewitness to the crime and (2) that Pagan knew her identity. Similarly, Lambert's testimony corroborates Cooks's statement that she was afraid of Pagan, and that he said he would "get [her] next."

Consequently, Tamika Lambert's testimony was properly admitted as corroboration evidence, as it supported Cooks's testimony.

III. Identity Under Rule 404(b)

Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity therewith). Such evidence is admissible, however, when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); Rule 404(b), SCRE; see also Anderson v. State, 354 S.C. 431,

581 S.E.2d 834 (2003) (explaining that Rule 404, the modern expression of the Lyle rule, excludes evidence of other crimes, wrongs, or acts offered to prove character of person in order to show action in conformity therewith; the rule creates an exception when testimony is offered to show motive, identity, existence of common scheme or plan, absence of mistake or accident, or intent). If there is any evidence to support the admission of bad act evidence, the trial judge's ruling will not be disturbed on appeal. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

The bad act must logically relate to the crime with which the defendant has been charged. Beck, 342 S.C. at 135, 536 S.E.2d at 682-83; State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) (declaring that record must support logical relevance between prior bad act and crime for which defendant is accused). The trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Beck, 342 S.C. at 135-36, 536 S.E.2d at 683; Rule 403, SCRE.

We rule Tamika Lambert's testimony was admissible as tending to establish Pagan's identity. After Pagan fled the scene for failing to stop for the blue light, he told Lambert that he was accused of killing a woman, and that "Monica" was to blame for his trouble. Lambert's eyewitness testimony was relevant in putting Pagan's flight into context. The testimony proved Pagan was attempting to flee from police because he was charged with murdering the victim in the present case, and that he blamed the State's key witness, Monique Ellerbee Cooks, for his situation. This testimony was logically relevant as evidence of Pagan's identity because it connected the murder with Pagan's flight from the police one year later.

We conclude Tamika Lambert's testimony was properly admitted as evidence of Pagan's identity under Rule 404(b), SCRE.

IV. Harmless Error

Assuming arguendo the trial judge erred in admitting Tamika Lambert's testimony, we find such error was harmless.

Whether an error is harmless depends on the circumstances of the particular case. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. at 63, 584 S.E.2d at 897; Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795; see also State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (noting that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside conviction for insubstantial errors not affecting result). The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) (instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (explicating that any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

At trial, the State presented evidence of two incidents in Pagan's past that demonstrated his attempts to avoid arrest or prosecution. First, while under investigation for the murder in the case sub judice, Pagan fled to his mother's home in New Jersey and refused to return to South Carolina. On

January 21, 1998, six days after an arrest warrant was issued, Pagan phoned Lt. Carlos Raines and told Raines that he would turn himself in. When this did not occur, United States Marshals located Pagan in New Jersey approximately one month later, arrested him, and arranged for transport to South Carolina.

Second, in 1995, Pagan was charged with failure to stop for a blue light—the same type of offense that formed the basis of Tamika Lambert's testimony. Pagan stated: "In 1995, I caught a parole violation due to a failure to stop for a blue light. . . . I came [to South Carolina] in '95 to see my kids; that's when I caught the failure to stop for a blue light. And I went back home [to New Jersey] and that's when they violated my parole." In addition to this prior flight and parole violation evidence, the State introduced Pagan's criminal record, which included two convictions for conspiracy to distribute crack cocaine. Extensive testimony was presented regarding Pagan's various stays in prison. Pagan admitted violating certain rules and regulations of the Department of Corrections by getting married while incarcerated at Palmer Pre-Release Center and possessing a cell phone.

Moreover, the State presented a witness, Lavenia Helton, who testified regarding an argument between the victim and Pagan that occurred prior to the murder of the victim. In early December of 1997, the victim and Pagan were at Helton's apartment. The victim attempted to leave the apartment with a bag of crack cocaine. Pagan told the victim, "Bitch, give me my shit." The victim handed the bag containing the crack cocaine to Pagan, who had a gun in his hand. Pagan then told the victim, "Bitch you gone die."

Because there was testimony regarding other episodes of flight, prior convictions, a parole violation, violations of Department of Corrections rules and regulations, and a previous incident of violence between Pagan and the victim, Lambert's testimony did not have a substantial effect upon Pagan's trial. We hold Tamika Lambert's testimony was cumulative to the evidence presented by the State at trial. Any error in admitting this testimony was harmless.

CONCLUSION

The trial judge did not err in admitting Tamika Lambert's testimony that Pagan ran from police while out on bond for the murder charge. Lambert's testimony was admissible as (1) flight and "guilty knowledge" evidence; (2) corroboration of Monique's testimony; and (3) evidence of Pagan's identity under Rule 404(b), SCRE. Furthermore, any error in admitting Lambert's testimony was harmless as it was cumulative to the evidence presented at trial. Accordingly, Pagan's conviction is

AFFIRMED.

GOOLSBY, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of: Christopher H., a minor under the age of seventeen, Appellant.

Appeal From Darlington County
J.L. Murdock, Jr., Family Court Judge
William J. McLeod, Family Court Judge
James A. Spruill, III, Family Court Judge

Opinion No. 3725
Heard December 10, 2003 – Filed January 20, 2004

REVERSED and REMANDED

Assistant Appellate Defender Tara S. Taggart, of the SC Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, all of Columbia;

and Solicitor Jay E. Hodge, Jr., of Darlington, for Respondent.

HEARN, C.J.: Christopher H. pled guilty to grand larceny and first-degree burglary and was committed to the Department of Juvenile Justice for an indeterminate period not to exceed his twenty-first birthday. He was not represented by counsel at any of his juvenile hearings. Christopher argues on appeal that: (1) he did not validly waive his right to counsel pursuant to Faretta v. California, 422 U.S. 806 (1975); and, (2) his guilty plea was not knowingly, voluntarily, and intelligently entered. We reverse and remand for a new trial.

FACTS

Christopher H. was charged in Darlington County with the following five offenses that occurred between March and September of 2001: (1) grand larceny of a Yamaha four-wheeler, (2) assault and battery, (3) first-degree burglary, (4) grand larceny of a Honda four-wheeler, and (5) second-degree burglary. At his 48-hour detention hearing, the assistant solicitor told the judge that the clerk's office had screened Christopher and his legal guardian and determined they did not qualify for a public defender. Although Christopher did not have counsel, the public defender sat in on the detention hearing. The judge ordered detention until a hearing the following Tuesday. At the conclusion of the detention hearing, the solicitor noted that he had advised Christopher's legal guardian that she needed to retain counsel for him. The judge responded: "Yes. You would need – If you don't qualify for the Public Defender, you do need to go ahead and retain private counsel. These offenses are of a very serious nature, so, you know, he needs some representation in this case."

Christopher's ten-day detention hearing was held at the same time as five other juveniles' detention hearings. Several of the juveniles were represented by the public defender. When Christopher's turn came, the public defender stated: "Your Honor, on the [Christopher H.] child, I remember that I stood with him last week but he did not qualify. His parents made too much money. That's why

we're not representing him." The judge responded "Okay," and asked if Christopher had anything to tell him. Christopher stated in response, "I don't have nothing really to say. I did all the crimes and I committed them and I did them and that's my fault." When the judge asked what he was charged with, the solicitor initially listed all five charges. Later, however, the solicitor stated that Christopher was charged with only two offenses, second-degree burglary and grand larceny of a Yamaha four-wheeler. The solicitor further noted:

> He is not represented. The parents do not qualify for the Public Defender. I told them, approached them and talked with them and told them that if he was guilty, it would be in his interest to go ahead and plead today and the recommendation would be that he'd be committed to Midlands for an evaluation . . . .

The judge questioned Christopher directly:

THE COURT: Now you've heard the Solicitor and you heard what he said. Do you feel like you're threatened or coerced in any way by anyone?
CHRISTOPHER: No, sir.
THE COURT: Did you do the things you're accused of?
CHRISTOPHER: Yes, sir.
THE COURT: Do you understand that we'd give you a trial if you'd like it and put up witnesses and that kind of thing?
CHRISTOPHER: Yes, sir.
THE COURT: Understanding that, do you still wish to plead delinquent?
CHRISTOPHER: Yes, sir.
THE COURT: Are you delinquent?
CHRISTOPHER: Yes, sir.
THE COURT: Did you break in the church?
CHRISTOPHER: Yes, sir.
THE COURT: Did you steal the four-wheeler?
CHRISTOPHER: Yes, sir.

THE COURT: And no one has forced you to plead this way? You understand that we can send you away for a while?
CHRISTOPHER: Yes, sir.
THE COURT: Understanding that, do you still wish to plead delinquent?
CHRISTOPHER: Yes, sir.

Thereafter, the family court judge ordered that Christopher be committed to the Department of Juvenile Justice for evaluation for a period not to exceed forty-five days.[1]

At Christopher's dispositional hearing, the State presented its report recommending commitment. Christopher was not represented by an attorney and the judge was advised that he had never had an attorney. After hearing briefly from the solicitor and from Christopher's legal guardian, the judge committed him for an indeterminate period of time not to exceed his twenty-first birthday. Christopher appeals.

DISCUSSION

1. Did Christopher validly waive his right to counsel?

The right to counsel is guaranteed by the Sixth Amendment of the United States Constitution and extends to juvenile proceedings.

[1] While this appeal was pending, Christopher petitioned this court for supersedeas, habeas corpus, or other relief, arguing he was not advised of the right to counsel and risks of proceeding *pro se*. This court denied the request for habeas corpus and remanded the petition for supersedeas to the family court. Because this court remanded the petition for supersedeas only, the issue concerning Christopher's right to counsel remained before us. On remand, however, the family court granted Christopher's motion for supersedeas. While both the adjudicatory and dispositional orders originally stated that Christopher pleaded guilty to all five charges, the orders were amended following the remand to reflect Christopher's plea to only two of the five charges.

See e.g. In re Winship, 397 U.S. 358 (1970). "A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003).

Christopher argues that he did not waive his right to counsel because the family court judge did not comply with the procedures set forth in Faretta v. California, 422 U.S. 806 (1975). A valid waiver of counsel, either by affirmative, verbal request or by conduct, requires compliance with Faretta. See Thompson, 355 S.C. at 263, 584 S.E.2d at 135 ("'[T]o the extent that the defendant's actions are examined under the doctrine of 'waiver,' there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings.' Any subsequent misconduct will be treated as a 'waiver by conduct.'")(citations omitted).

Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990). Furthermore, "[i]n the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Id. (citation omitted). To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including:

> (1) the accused's age, educational background, and physical and mental health;
> (2) whether the accused was previously involved in criminal trials;
> (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
> (4) whether the accused was represented by counsel before trial and whether that attorney

explained to him the dangers of self-representation;
(5) whether the accused was attempting to delay or manipulate the proceedings;
(6) whether the court appointed stand-by counsel;
(7) whether the accused knew he would be required to comply with the rules of procedure at trial;
(8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;
(9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and
(10) whether the accused's waiver resulted from either coercion or mistreatment.

Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002).

The record in this case reveals that that neither the judge at the adjudicatory hearing nor the judge at the dispositional hearing complied with the procedures in Faretta. Initially, Christopher was never adequately advised of his right to an attorney. At Christopher's 48-hour detention hearing, the judge urged Christopher's legal guardian to find representation because of the serious nature of the charges. At Christopher's adjudicatory hearing, the judge merely asked him if he understood that the court would "give [him] a trial if [he'd] like it and put up witnesses and that kind of thing." Although the solicitor stated he had spoken with Christopher's legal guardian about acquiring representation, that by itself does not meet the requirements of Faretta. See Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001) (finding the plea judge ineffectively warned of the dangers of appearing *pro se* when, among other things, he "permitted *the solicitor* to relate the circumstances of Petitioner's release of his appointed attorney") (emphasis in original). Additionally, the record does not indicate Christopher ever elected to proceed *pro se*. See State v. Reed, 332 S.C.

35, 41, 503 S.E.2d 747, 750 ("The right to proceed *pro se* must be clearly asserted by the defendant prior to trial.").

Moreover, both family court judges failed to comply with Faretta because Christopher was never adequately warned of the dangers of self-representation. In addition, the record reflects that Christopher has an insufficient background to comprehend the dangers of self-representation based on an application of the Gardner factors: (1) Christopher was sixteen years old at the time of the proceedings, but his psychosocial report states that he "appears emotionally and physically younger than his stated age." Christopher has a full scale IQ of seventy-four (borderline range) and his last year in school was the tenth grade. (2) It appears from the record that Christopher had been to family court before, but it is unclear as to the nature of his family court experience. (3) Nothing in the record indicates that Christopher had any knowledge of the nature of the charges or the possible penalties. Instead, Christopher merely indicated his willingness to accept responsibility for certain acts he had committed. (4) Christopher never appeared represented by counsel. While the public defender sat through Christopher's initial detention hearing, it is unclear whether he had any active involvement or communication with Christopher. (5) There is nothing in the record to indicate Christopher was attempting to delay or manipulate the proceedings. (6) The court did not appoint stand-by counsel. (7) The record does not indicate Christopher had any knowledge that he needed to comply with any rules of procedure or (8) any of the legal challenges he could raise in his defense. (9) The exchange between Christopher and the family court judges amounted to little more than *pro forma* questions and answers. (10) Notwithstanding, the record does not suggest that Christopher's appearance without counsel was a result of coercion or mistreatment. See Gardner, 351 S.C. at 412-13, 570 S.E.2d at 186-87.

We find the record in this case does not show that Christopher knowingly and intelligently waived his right to counsel. Furthermore, nothing in the record suggests Christopher forfeited his right to counsel. See Thompson, 355 S.C. at 267, 584 S.E.2d at 137 (stating that forfeiture requires extremely dilatory conduct and

situations involving forfeiture are unusual, typically involving a manipulative or disruptive defendant).

The typical remedy for failing to show a knowing and intelligent waiver of counsel is to remand to the trial court for an evidentiary hearing to determine whether the waiver was, in fact, knowingly and intelligently made. State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977). However, this court can grant an appellant a new trial without an evidentiary hearing if it is clear that a hearing on remand would serve no useful purpose. State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991). Because we find the record clearly reflects that the family court failed to adequately advise Christopher of the right to counsel, failed to make a specific inquiry as to Christopher's knowledge of the dangers of self-representation, and demonstrated that Christopher has an insufficient background to comprehend the dangers of self-representation, we find that remanding this case for a factual determination as to whether the waiver was knowingly and intelligently made would serve no useful purpose. Instead, we reverse and remand for a new trial.

2. Did Christopher knowingly, voluntarily, and intelligently enter a plea of guilty?

Because we reverse and remand for a new trial on the right to counsel issue, we need not reach the issue concerning the voluntariness of his guilty plea. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when disposition of prior issues are dispositive).

Accordingly, we reverse and remand for a new trial.

REVERSED and REMANDED.

ANDERSON and CURETON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carl W. Bowman, Appellant,

v.

Norma M. Bowman, Respondent.

Appeal From Lexington County
Richard W. Chewning, III, Family Court Judge

Opinion No. 3726
Heard November 4, 2003 – Filed January 20, 2004

AFFIRMED

Cynthia Barrier Castengera, of Newland, North Carolina; J. Mark Taylor and C. Vance Stricklin, both of West Columbia, for Appellant.

F. Glenn Smith, of Columbia, for Respondent.

KITTREDGE, J.: The family court granted Carl W. Bowman (Husband) a divorce from Norma M. Bowman (Wife), equitably divided the marital estate, and awarded Husband attorney fees and suit monies. Following the denial of the parties' Rule 59(e), SCRCP, motions, Husband filed a Rule 60(b)(2) and (3) motion to set aside the judgment. The family court denied the motion. On appeal Husband challenges the adequacy of the attorney fee and suit money award and the denial of his Rule 60(b)(2) and (3) motion. We affirm.

FACTS

In July 1997, after thirty-five years of marriage, Husband filed an action for divorce seeking equitable division of the marital estate, attorney fees, and suit monies. Wife admitted to adultery in her pleadings, and the paramount issue remaining was the equitable division of the marital estate. Each party challenged the inclusion in the marital estate of his and her respective retirement plans,[1] and Wife contested Husband's claim for attorney fees and suit monies.

The family court issued an order granting Husband a divorce, excluding Wife's defined benefit plan from the marital estate, including Husband's retirement plan in the marital estate, and awarding Husband $7,048 in attorney fees and suit monies. The court further requested that the parties attempt to reach an agreement concerning the division of marital property to accomplish the equitable division of 60% to Husband and 40% to Wife. The parties were unable to resolve all issues, necessitating the family court's involvement in concluding the matter.

Both parties filed Rule 59(e) motions, which were denied. Thereafter, upon receipt of information through post-judgment discovery concerning the funding source of Wife's defined benefit

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[1] Wife's purchase money pension plan was, without objection, included in the marital estate. Regarding Wife, this appeal only concerns her defined benefit plan that was created after the filing date of this action.

plan, Husband sought relief from the judgment pursuant to Rule 60(b)(2) and (3). The family court denied the motion, primarily finding Husband could have discovered the information prior to trial.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find 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 this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). On review, we are limited to determining whether the trial court abused its discretion in granting or denying such a motion. Saro Invs. v. Ocean Holiday P'ship, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994).

LAW/ANALYSIS

I. Exclusion of Wife's Defined Benefit Plan from the Marital Estate and the Denial of Husband's Rule 60(b)(2) and (3) Motion

Husband argues the family court erred in not granting a new trial as he sought a second opportunity to persuade the court to include Wife's defined benefit plan in the marital estate. Specifically, Husband asserts the family court erred in denying his Rule 60(b)(2) and (3) motion after Husband provided evidence that Wife's defined benefit plan was funded, at least in part, from life insurance policies purchased by Wife's employer during the marriage. As noted, marital litigation commenced in July 1997. Wife's defined benefit plan was created on July 1, 1998 and was funded in June 1999. It is stipulated that Wife's defined plan "was substantially funded at its inception." The family court reasoned that since Wife did not own the defined benefit plan until after marital litigation was filed, the retirement plan should be

excluded from the marital estate. Husband appeals from the denial of his Rule 60(b)(2) and (3) motion.[2]

The new evidence submitted post-judgment in support of Husband's Rule 60(b)(2) and (3) motion consists of a statement from Wife's employer, the South Carolina Student Loan Corporation, showing that the assets of the defined benefit plan include the cash surrender values of eight life insurance policies with New York Life Insurance Company. Additional evidence reveals that one of the policies was purchased in 1988, and Wife was listed as the named insured. While we agree with Husband that this information establishes a nexus between Wife's defined benefit plan and the cash surrender values of the life insurance policies as a funding source for the plan,[3] we find Husband's Rule 60(b)(2) and (3) motion was nevertheless properly denied. We consider it unnecessary to explore the differing standards between Rule 60 (b)(2) and (3) as advanced by Husband, for we conclude that South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial. See Bryan v. Bryan, 220 S.C. 164, 168, 66 S.E.2d 609, 610 (1951) (finding that equitable relief from a judgment is not available for intrinsic fraud "on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action of equitable relief, and that otherwise litigation would be interminable"); Chewning v. Ford Motor Co., 354 S.C. 72, 86, 579 S.E.2d 605, 613 (2003) (finding that while post-judgment relief was granted as a result of "unique facts," the court reaffirmed South Carolina's "longstanding policy towards final

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[2] Rule 60(b)(2), SCRCP, provides that judgments may be set aside if there has been "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . ." Under Rule 60(b)(3), SCRCP, judgments may also be set aside for "fraud, misrepresentation, or other misconduct of an adverse party . . . ."

[3] The family court's error in concluding otherwise does not require reversal. As correctly determined by the family court, Husband could have ascertained this information prior to trial.

judgments").

Husband invites this court to apply the "misconduct" standard in Rule 60(b)(3). Were we to do so, we would still be constrained to affirm the family court. The cases cited by Husband permit Rule 60(b)(3) relief only where "the misconduct prevented the moving party from fully presenting its case." Schultz v. Butcher, 24 Fed.3d 626, 630 (4th Cir. 1994) citing Square Constr. Co. v. Washington Metro. Area Transit Auth., 657 Fed.2d 68, 71 (4th Cir. 1981); Anderson v. Cryovac, Inc., 862 Fed.2d 910, 924 (1st Cir. 1988) (stating "the challenged behavior must *substantially* have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial") (emphasis in original); see also Rycroft v. Tanguay, 279 S.C. 76, 79, 302 S.E.2d 327, 329 (1983) (stating "equity will not grant relief to one against whom an unfavorable judgment has been rendered, even in consequence of fraud, where the aggrieved party has not acted with diligence"); Dunn v. Consolidated Rail Corp., 890 F.Supp. 1262, 1269 (M.D.La. 1995) (stating "[a] Rule 60(b)(3) assertion . . . must be such as to prevent the losing party from fully and fairly presenting its case or defense").

Here, Husband was aware of Wife's defined benefit plan, as well as her management position with the South Carolina Student Loan Corporation. Wife acknowledged this post-filing retirement account at her May 11, 2000 deposition, approximately seven months prior to trial. Also prior to trial, Husband noticed the deposition of James Kenneth Player, the executive vice president of Wife's employer, for the purpose of gaining additional evidence and information concerning the defined benefit plan. However, Husband elected not to take Player's deposition, opting instead to enter into the following stipulation with Wife:

> As to [Wife's] plan, we will stipulate that the defined benefits were not created until after the date of filing. The plan was funded by the South Carolina Student Loan Corporation. The plan was substantially funded at its inception.

> The plan utilized past "time of service" to calculate the initial contribution to the plan. We stipulate that this is what [Wife's employer] and/or [Wife] would otherwise testify to if called as a witness.

Husband was thus aware *prior to trial* of this asset and Wife's reluctance to disclose it. Significantly, Husband faced no legal impediment prior to trial precluding his access to information concerning any aspect of Wife's defined benefit plan, including the plan's funding source. Against this procedural history, Husband elected not to pursue further discovery, and he entered into the above stipulation. Absent valid grounds for Rule 60(b) relief, an unfavorable ruling at trial does not provide an unsuccessful litigant another opportunity to litigate an issue. We find no abuse of discretion and therefore affirm the family court's denial of Husband's Rule 60(b)(2) and (3) motion.

We in no manner condone Wife's noncompliance with the rules regarding discovery supplementation, and we are not unsympathetic with litigants, like Husband, who encounter adversaries who display a deliberate indifference to the discovery rules.[4] We further recognize the myriad difficulties and vagaries inherent in the family court arena for judges and practitioners alike.

In this case, Husband is ultimately not prejudiced by the denial of Rule 60(b) relief, for we are persuaded that the family court correctly excluded Wife's defined benefit plan from the marital estate. The post-judgment discovery does little to advance Husband's argument, as it simply bolsters the prior stipulation that the "plan was substantially funded at its inception." The life insurance policies at issue are best described as corporate assets, which Wife neither controlled nor had the right to control based on the record before us.

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[4] When invoked, the rules governing court procedures in general and discovery in particular provide meaningful remedies and sanctions for noncomplying parties and attorneys. See, e.g., Rule 37, SCRCP.

We believe it useful to the family court bench and bar to provide a general framework within which to address and properly classify employment related benefits, such as a retirement plan, purportedly created after the date of filing of marital litigation but prior to dissolution of the marriage. We do so in recognition of the reality that some spouses in anticipation of, and during, marital litigation have a lamentable tendency to engage in a variety of deceptive acts and practices to secrete assets.[5]

For property to be included within the term "marital property," two factors must exist: property must be (1) "acquired . . . during the marriage" and (2) "owned as of the date of filing or commencement of marital litigation." S.C. Code Ann. § 20-7-473 (Supp. 2002). The "acquired during marriage" component is generally established by showing that the property relates to compensation earned or effort expended during the marriage. See Mallett v. Mallett, 323 S.C. 141, 150, 473 S.E.2d 804, 810 (Ct. App. 1996) (stating "[u]pon dissolution of the marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title."); Johnson v. Johnson, 296 S.C. 289, 297, 372 S.E.2d 107, 111 (Ct. App. 1988) (finding only the appreciation in value of assets "resulting directly or indirectly from the efforts of the parties was marital property"). The "ownership" prong, while ostensibly straightforward, can raise troublesome issues. A technical application of the "ownership" prong may in some cases invite fraud, resulting in the improper exclusion of property from the marital estate, which, we believe, would be contrary to legislative intent. For example, a party may sufficiently possess an ascertainable interest in or entitlement to property "acquired during the marriage," yet purposefully delay ownership until after marital litigation has commenced. In such an

[5] The issue in this case is limited to the proper classification of an asset, though we acknowledge that such deception may go well beyond asset classification and include efforts to assign unreasonable values to assets, as well as artificially portraying earnings and earning capacity.

example, the party's interest in and entitlement to ownership is sufficient to conclude the "ownership" prong has been satisfied.[6] To conclude otherwise would promote fraud, reward misconduct, and contravene legislative intent.

Regarding retirement plans and employment benefits created after the commencement of marital litigation but before dissolution, the mere fact that some aspect of the plan or benefit may relate to service during the parties' marriage does not mandate inclusion in the marital estate. Indeed, virtually all retirement plans and employment benefits are connected in some manner to an employee's prior service. Further, an employer may, completely independent of the employee, institute a retirement plan or benefit after commencement of marital litigation. Depending on the totality of the facts and circumstances, the employee-spouse may not have an interest in or entitlement to such plan or benefit at the time of marital litigation, i.e., a bona fide absence of ownership when marital litigation is commenced.

The mere fact that technical ownership of a retirement plan or employment benefit is delayed until after the commencement of marital litigation does not mandate its exclusion from the marital estate. Where a party possesses an ascertainable interest in or entitlement to property during the marriage, the party's attempts to delay technical ownership status until after marital litigation has commenced shall not prevent a finding of the requisite "ownership" necessary for inclusion in the marital estate. Therefore, where lack of ownership status as of the date of marital litigation is attributable to any purposeful act or omission by the spouse, the property shall be deemed "owned" within the meaning of § 20-7-473 so as to include the marital portion in the marital estate.

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[6] "South Carolina courts construe the term 'property' very broadly. The term 'property' is a general term that is used to designate a right of ownership and it includes every subject of whatever nature upon which the right of ownership can legally attach, including choses in action." Ball v. Ball, 312 S.C. 31, 33, 430 S.E.2d 533, 534 (Ct. App. 1993).

Resolution of this marital property classification dilemma is certainly fact-intensive, and no bright line test will suffice. We continue to recognize and respect the broad discretion accorded to family court judges in the fact-sensitive inquiries surrounding the identification of marital and nonmarital property as well as the determination of the equitable distribution of the marital estate. See Murphy v. Murphy, 319 S.C. 324, 329, 461 S.E.2d 39, 41 (1995) (stating "[f]amily court judges have wide discretion in determining how marital property is to be distributed") (citation omitted).

II. Inclusion of Husband's Retirement Plan in the Marital Estate

Husband argues the family court erred in including his retirement plan in the marital estate, valuing the plan as of the filing date of marital litigation, and apportioning 40% of the plan's monthly payments to Wife.

In May 1996, approximately one year before the filing of marital litigation, Husband's employer, South Carolina Electric and Gas (SCE&G), informed Husband that his position would be "eliminated as of June 30, 1996." SCE&G extended Husband three "severance options." On May 30, 1996, Husband elected the third option, referred to as "six months' severance and early retirement." The six months' "severance pay" amounted to $46,332 and was paid to Husband on or about July 1, 1996. Monthly payments to Husband pursuant to the early retirement option also began in July 1996, one year prior to the commencement of marital litigation. The family court included Husband's early retirement benefit in the marital estate. Husband, referring to this asset exclusively as "severance pay," assigns error to its consideration as marital property and inclusion in the marital estate.

We initially clarify the true nature of this asset. The "severance option" exercised by Husband in May 1996 consisted of two components: (1) severance pay of $46,332; and (2) a "Special Incentive Retirement Benefit" paid in monthly installments over a multi-year period. We find these benefits were "acquired during the marriage" in the sense that the payments were compensation for

services performed during the course of the marriage. See S.C. Code Ann. § 20-7-473 (Supp. 2002); Tinsley v. Tinsley, 326 S.C. 374, 381, 483 S.E.2d 198, 202 (Ct. App. 1997). The valuation of these benefits by Raymond McKay, Husband's expert, omits the actual severance pay portion and includes only those retirement benefits due on or after the date of filing of marital litigation. McKay properly utilized a "valuation date" of July 9, 1997.[7] He valued the retirement benefits at $326,148 at the time of filing and $254,637 at the time of trial. While Husband asserts error in the inclusion of these benefits in the marital estate, the parties accept McKay's methodology and valuation.

We reject Husband's continuing efforts to characterize his retirement benefits as "severance." Not only does McKay's valuation of these benefits *exclude* the severance benefits paid one year prior to marital litigation, we adhere to South Carolina's sound and established approach of scrutinizing the true nature and purpose of the benefit. See, e.g., Mears v. Mears, 305 S.C. 150, 156, 406 S.E.2d 376, 380 (Ct. App. 1991), overruled on other grounds by Marsh v. Marsh, 313 S.C. 42, 437 S.E.2d 34 (1993) (concluding proper classification of employment termination benefits as marital or nonmarital property "depends on the purpose of the payments"); Mallet, 323 S.C. at 152, 473 S.E.2d at 810 (holding property classified as nonmarital because the "purpose" of the benefit was to replace earnings after the date commencement of marital litigation); Fisher v. Fisher, 319 S.C. 500,

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[7] McKay's analysis structures the monthly retirement benefits at three levels. Payments began on July 1, 1996. McKay's valuation reflects the benefits "in pay status" as of July 9, 1997, with 8.23 "years pension to be received." The 8.23 years reflects the period from the commencement date of marital litigation (the valuation date) to October 2005 when Husband reaches age 62. The agreement between Husband and SCE&G anticipated a reduced monthly benefit effective October 2005, which McKay's valuation recognizes. The third level of benefits begins in October 2008 when Husband reaches age 65. Close scrutiny of McKay's detailed valuation demonstrates the *exclusion* of the severance pay as well as those retirement benefits paid before the valuation date.

504, 462 S.E.2d 303, 305 (Ct. App. 1995) (finding benefits paid pursuant to a "voluntary separation incentive" were analogous to an "early retirement," and the payments were thus deemed marital property "under the facts of this case"); Tinsley, 326 S.C. at 381-82, 483 S.E.2d at 202 (holding disability benefits were not marital property since the "payments are a replacement for income he would be earning currently and would be able to earn in the future had he not become disabled"). Thus, classification of property as marital or nonmarital must be determined in light of the true nature and purpose of the benefit. South Carolina does not classify property as marital or nonmarital based on the title or nomenclature assigned by a party.

We find the family court correctly classified Husband's retirement benefits as marital property subject to equitable distribution. The benefits are compensation for services performed during marital years and were, thus, acquired during the marriage and owned by Husband as of the commencement of marital litigation. See S.C. Code Ann. § 20-7-473 (Supp. 2002).

Husband next contends the family court erred in valuing his retirement plan as of the date marital litigation was filed. A decrease in value occurred post-filing, solely attributable to Husband's expenditure of these funds after the filing date. Husband suggests a valuation as of the date of trial would be more appropriate. We disagree with Husband's position for two reasons. First, Husband's proposed property division relies on the July 1997 valuation date, with the plan value furnished by Husband's expert. Second, Husband's expenditure of these funds was voluntary. Unlike the situation in Tinsley where disability payments by necessity replaced future earnings, Husband acknowledged at trial his continuing ability to work:

> Wife's counsel: Do you have any impediments or disabilities at this time?
>
> Husband: No, sir.
>
> Wife's counsel: You're in good health?

Husband:	Are you talking about impediments that would stop me from going to work?
Wife's counsel:	Yes, sir.
Husband:	No, sir, I don't have any.
Wife's counsel:	Okay. So you could go to work, couldn't you?
Husband:	Yes, sir.

Accordingly, we concur with the family court's reliance on the statutory valuation date.[8]

Husband's final argument in connection with his retirement benefits is the family court's award to Wife of a portion of his monthly benefits. In this regard, the family court did precisely what Husband requested. It adopted Husband's proposed equitable division, and in so doing, rejected Wife's efforts to avoid the monthly pay-out from Husband's retirement benefits. Husband may not seek and receive a particular result at trial and then challenge it on appeal. See, e.g., Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 255, 569 S.E.2d 349, 355 (2002), vacated and remanded on other grounds by Green Tree Fin. Corp. v. Bazzle, 123 S.Ct. 2402 (2003) (stating "[t]he courts of this state have recognized that a party cannot complain when it receives the relief for which it has asked.").

We find the family court did not err in including Husband's

[8] We do, however, recognize that passive post-filing changes in the appreciation or depreciation of marital assets may be considered by the family court in determining an equitable apportionment of the marital estate. See Dixon v. Dixon, 334 S.C. 222, 228, 512 S.E.2d 539, 542 (Ct. App. 1999).

retirement plan in the marital estate. Further, we find there was no error in the valuation or apportionment of the plan.

III. Adequacy of Award of Attorney Fees and Suit Monies

Husband argues the family court's award of $7,048 in attorney fees and suit monies was inadequate.

"The award of attorney fees in a divorce action and the amount thereof are matters within the discretion of the trial judge." Sexton v. Sexton, 321 S.C. 487, 491, 469 S.E.2d 608, 611 (Ct. App. 1996) (citations omitted). While we acknowledge that Husband incurred litigation expenses in excess of the amount awarded, we find no abuse of discretion. We affirm the family court's award of attorney fees and suit monies in the amount of $7,048.

AFFIRMED.

HEARN, C.J., and HOWARD, J., concur.