Judicial Merit Selection Commission

Erin B. Crawford, Chief Counsel
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M E D I A R E L E A S E

January 18, 2019

A vacancy will exist in the office currently held by the Honorable Doyet A. (Jack) Early III, Judge of the Circuit Court, Second Judicial Circuit, Seat 1, upon his retirement on or before February 28, 2019. The successor will serve the remainder of the unexpired term, which expires June 30, 2022.

Normally, the policy of the Judicial Merit Selection Commission is to hold only one screening per legislative session. However, the retirement of Judge Early in February of 2019 will leave vacant the only resident judge seat in the Second Judicial Circuit for an entire year before the next scheduled election. Due to these exceptional circumstances, the Judicial Merit Selection Commission is announcing this vacancy now and accepting applications for this judicial office.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

Erin B. Crawford, Chief Counsel
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ErinCrawford@scsenate.gov
(803) 212-6689

or

Lindi Putnam, JMSC Administrative Assistant at (803) 212-6623 or LindiPutnam@scsenate.gov.

The Commission will not accept applications after
12:00 noon on Tuesday, February 19, 2019.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the Commission website at
http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php.

The Supreme Court of South Carolina

In the Matter of Courtney C. Rugg, Petitioner.

Appellate Case No. 2019-000048

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 26, 2009, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

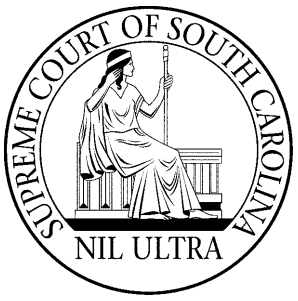
Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
January 18, 2019



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
January 23, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Sarah Denise Cardwell, Petitioner.

Appellate Case No. 2015-002507

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Georgetown County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27860
Heard October 19, 2016 – Filed January 23, 2019

AFFIRMED AS MODIFIED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, and Appellate Defender Benjamin J. Tripp, of Beaufort, both for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: Sarah Cardwell ("Petitioner") appealed her convictions of two counts of unlawful conduct towards a child and two counts of first-degree sexual exploitation of a minor, asserting the trial court erred in denying her motion to suppress a video file taken from her laptop computer. The Court of Appeals affirmed the trial court's denial of Petitioner's motion to suppress. *State v. Cardwell*, 414 S.C. 416, 778 S.E.2d 483 (Ct. App. 2015). We affirm as modified.

I. Factual and Procedural History

Computer technician David Marsh was repairing Petitioner's laptop when Chief Ron Douglas of the Johnsonville Police Department stopped by Marsh's home to deliver packages.[1] While Marsh was taking the packages to his garage, Chief Douglas saw an image go across the computer screen of a naked, male child wearing a pink bra. Chief Douglas called Marsh back into the room, saying "I just saw something go across the screen, can you back it up." Marsh backed up a few files until the image, which was a still shot from a video, reappeared on the screen. At Chief Douglas's request, Marsh clicked play, and the two men watched a minute of the video showing Petitioner's daughter, son, and then-boyfriend, Michael Cardwell, dancing naked.[2] Petitioner cannot be seen in the video; however, Marsh was able to identify Petitioner as the individual behind the camera directing the children's movements based on her voice.

Upon Chief Douglas's instruction, Marsh copied the video to a disc. Due to jurisdictional concerns, Chief Douglas did not take either the disc or the laptop. Rather, he instructed Marsh to secure the items until he contacted the Georgetown County Sheriff's Office ("GCSO") to see if they would take over the investigation. After watching a portion of the video, Investigator Phillip Hanna with the GCSO took possession of the disc and laptop and obtained a search warrant for these items.

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[1] Marsh testified it was customary for either Marsh to pick up his packages from the police department, which was located approximately one block from Marsh's home, or for Chief Douglas to deliver the packages to Marsh's address.

[2] Petitioner's son testified he was approximately eleven years old in the video and his sister was approximately nine years old. However, Petitioner testified her son was seven years old and her daughter was five years old at the time she filmed the video.

A grand jury subsequently indicted Petitioner on two counts of unlawful conduct towards a child and two counts of first-degree sexual exploitation of a minor. Before trial, Petitioner moved to suppress the video file, arguing she had a reasonable expectation of privacy in the contents of her computer, including the video file at issue. The trial court denied the motion, finding Petitioner did not retain a reasonable expectation of privacy in the contents of her computer files since she voluntarily gave her computer to Marsh and thereby exposed its contents to the public. As a result, the trial court admitted both the video and still images from the video into evidence. After a jury found Petitioner guilty on all counts, the trial court sentenced Petitioner to concurrent two-year sentences on the unlawful conduct charges and concurrent three-year sentences for the two counts of first-degree sexual exploitation of a minor. The trial court ordered the three-year sentences to run consecutive to the two-year sentences.

The Court of Appeals affirmed Petitioner's convictions after determining the trial court properly denied her motion to suppress the video evidence. *State v. Cardwell*, 414 S.C. 416, 778 S.E.2d 483 (Ct. App. 2015). In arriving at its decision, the court disagreed with the trial court's conclusion that Petitioner relinquished her reasonable expectation of privacy in the contents of the computer files by giving her laptop to Marsh for repair. *Id*. at 429, 778 S.E.2d at 490. The court reasoned "the act of providing an information technology professional access to one's data for the sole purposes of preserving that data and restoring the computer's functionality does not constitute exposing the data to 'the public.'" *Id*. at 426, 778 S.E.2d at 488. Nevertheless, the court held Petitioner did not have a reasonable expectation of privacy in the particular video file at issue because the still image from the video file of the male child wearing a pink bra "was in Chief Douglas's plain view and gave the appearance that the video file's content included a minor engaging in inappropriate sexual behavior." *Id*. at 433–34, 778 S.E.2d at 492. Therefore, "[o]nce the sexually suggestive still image of the child in a bra appeared, no warrant was required to open and view *this* video file containing that very image." *Id.* at 429, 778 S.E.2d at 490. As an additional sustaining ground, the court determined the evidence would have been admissible under the inevitable discovery doctrine because "[h]aving seen the still image . . . , both Chief Douglas and Investigator Hanna clearly had probable cause to obtain a search warrant to open the video file." *Id*. at 433, 778 S.E.2d at 492.

We granted Petitioner's writ of certiorari to review the Court of Appeals' decision.

II. Standard of Review

"On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error." *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (quoting *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *Id*. (quoting *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265–66 (2012) (citing *State v. Missouri*, 361 S.C. 107, 603 S.E.2d 594 (2004); *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005)).

III. Discussion

Petitioner contends the Court of Appeals erred in upholding the trial court's denial of her motion to suppress the video file seized from her laptop computer. We disagree.

The Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures. U.S. Const. amend. IV. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed [and a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *State v. Bruce*, 412 S.C. 504, 510, 772 S.E.2d 753, 756 (2015) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). "Searches and seizures without a warrant are per se unreasonable absent a recognized exception." *Bruce*, 412 S.C. at 510, 772 S.E.2d at 756. One such exception is the plain view doctrine. *See State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (recognizing the plain view doctrine as an exception to the warrant requirement and setting forth the test for its applicability as "(1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities"). Of course, even without an applicable exception to the warrant requirement, evidence acquired as a result of a warrantless search or seizure may be admissible if the evidence would have inevitably been

discovered by lawful means. *State v. Brown*, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010), *rev'd on other grounds by* 401 S.C. 82, 736 S.E.2d 263 (2012).

a. Plain View Doctrine

"[T]he two elements necessary for the plain view doctrine are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *State v. Wright*, 391 S.C. 436, 446, 706 S.E.2d 324, 328–29 (2011). As the United States Supreme Court articulated in *Minnesota v. Dickerson*,

> The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point.

508 U.S. 366, 375 (1993).

It is undisputed Chief Douglas was lawfully in the viewing area since he saw the image inside Marsh's house, where he was present upon Marsh's invitation. Furthermore, contrary to Petitioner's position, the incriminating nature of the video was readily apparent from the still image. The image was of a young boy, approximately ten or eleven years old, wearing nothing but a pink bra. This suggests the video from which the image was taken more than likely contained child pornography. Therefore, the plain view doctrine applies and the trial court did not err in denying Petitioner's motion to suppress.

b. Inevitable Discovery Doctrine

Even assuming the video evidence was unlawfully obtained, the inevitable discovery doctrine provides that illegally obtained information may nevertheless be admissible if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been discovered by lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984). Anytime a computer technician discovers images depicting "a child younger than eighteen years of age . . . engaging in sexual conduct, sexual performance, *or a sexually explicit posture*," section 16-3-850 of the

South Carolina Code requires the technician to report the owner of the computer to law enforcement. S.C. Code Ann. § 16-3-850 (2015) (emphasis added). Thus, once Marsh saw the still image of the male child wearing a bra, he was required to report the image to law enforcement. To be sure, when asked whether this was a matter in which Marsh would have felt he had to report, Marsh responded "Yes, it's required of all PC techs."

The fact that Marsh would not have seen the image without Chief Douglas's instruction is irrelevant because there was nothing unlawful about Chief Douglas bringing the still image to Marsh's attention since it was in Chief Douglas's plain view. While there are Fourth Amendment concerns regarding both Chief Douglas's and Investigator Hanna's subsequent search, or viewing of the video without a warrant, those concerns arise out of conduct that occurred *after* Marsh became aware of the image.

IV. Conclusion

Accordingly, the Court of Appeals' decision affirming the trial court's denial of Petitioner's motion to suppress is affirmed as modified.

AFFIRMED AS MODIFIED.

KITTREDGE, HEARN and FEW, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jean P. Derrick, Respondent,

v.

Lisa C. Moore, Appellant.

Appellate Case No. 2016-000804

Appeal From Kershaw County
DeAndrea G. Benjamin, Circuit Court Judge,

Opinion No. 5618
Submitted September 19, 2018 – Filed January 23, 2019

AFFIRMED

Robert Daniel Dodson, of Law Offices of Robert Dodson, PA, of Columbia, for Appellant.

William S. Tetterton, of Tetterton Law Firm, LLC, of Camden, and Katherine Carruth Goode, of Winnsboro, for Respondent.

LOCKEMY, C.J.: This is an appeal from a circuit court order compelling Lisa Moore (Client) to resolve a fee dispute through the Resolution of Fee Disputes Board of the South Carolina Bar (the Board). Client argues (1) Jean Derrick (Attorney) waived the right to compel her appearance before the Board by first filing an action in the circuit court, (2) the circuit court lacked authority to compel

Client's appearance before the Board, and (3) Attorney's fee agreement is unenforceable under the South Carolina Uniform Arbitration Act.[1] We affirm.[2]

I. FACTS

Client retained Attorney in April 2011 to represent her in a family court matter in Kershaw County. At the onset of the representation, Client and Attorney signed a fee agreement, which provided: "ANY DISPUTE CONCERNING THE FEE DUE PURSUANT TO THIS AGREEMENT SHALL BE SUBMITTED BY THE DISSATISFIED PARTY FOR A FULL, FINAL RESOLUTION TO [THE BOARD], PURSUANT TO RULE 416 OF THE SOUTH CAROLINA APPELLATE COURT RULES."

Attorney's representation of Client continued from April 2011 through April 2014. On March 6, 2014, the family court entered a final order largely favoring Client and awarding her attorney's fees.[3] The family court found the litigation was "relatively complex," Attorney had "obtained beneficial results across the board for [Client]," the number of hours expended on the case was reasonable, and Attorney's hourly fee was reasonable for a practitioner with thirty-six years' experience. Based on these findings, the family court ordered the opposing party to pay $12,000 in attorney's fees—or roughly sixty percent of Client's $20,509.55 legal bill—directly to Client by July 4, 2014. This order was not appealed.

Client's last payment to Attorney was in May 2014; however, there still remained an outstanding balance of $10,484.40. Client did not object to the amount of the bill and repeatedly assured Attorney she would pay, although this evidently never happened. On October 6, 2014, Attorney commenced an action against Client in the circuit court to recover the unpaid fees.

Client answered, and by way of an affirmative defense, asserted Attorney had failed to comply with the provision of the fee agreement that required all fee disputes to be resolved by the Board. Client also submitted counterclaims for breach of contract accompanied by a fraudulent act, violation of the South Carolina Unfair Trade Practices Act, abuse of process, and conversion. Attorney answered

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[1] S.C. Code Ann. §§ 15-48-10 through -240 (2005).
[2] We decide this case without oral argument pursuant to Rule 215, SCACR.
[3] It is not disputed the outcome was favorable to Client.

and moved for an order compelling Client to submit the fee dispute to the Board pursuant to the fee agreement and Rule 416, SCACR.

At a hearing on Attorney's motion, Client contended the circuit court lacked the authority to send a fee dispute to the Board without her consent. Client also argued Attorney waived the right to have the fee dispute settled before the Board by electing instead to file a lawsuit in the circuit court.

On December 4, 2015, the circuit court granted Attorney's motion, concluding the fee agreement bound Client to adjudicate any fee disputes before the Board. Client filed a motion to reconsider, arguing (1) the circuit court lacked the authority to compel Client to arbitrate fee disputes through the Board, (2) Client did not consent to the Board's jurisdiction, (3) the fee agreement was unlawful under the Uniform Arbitration Act, and (4) Attorney waived the right to compel arbitration by filing a lawsuit in the circuit court. The court denied the motion by form order. This appeal followed.

II. DISCUSSION

Rule 416, SCACR, vests the Board with jurisdiction to hear certain fee disputes. A fee dispute arises "when the parties to an employment agreement between lawyer and client have a genuine difference as to the fair and proper amount of a fee." Rule 416, SCACR, Rule 2. The "amount in dispute" is defined as the difference in the dollar amount between the attorney and client's determination of the appropriate fee. *Id*. But, "[a] dispute does not exist solely because of the failure of the client to pay a fee." *Id*.

Rule 2 of Rule 416, SCACR, further states that the Board may not undertake to resolve: "(1) a fee dispute involving an amount in dispute of $50,000 or more; [or] (2) disputes over fees which by law must be determined or approved, as between lawyer and client, by a court, commission, judge, or other tribunal." Additionally, no fee disputes "may be filed more than three years after the dispute arose." *Id*.

Rule 9 of Rule 416, SCACR, provides:

> (a) Any client-applicant for the services of the Board must consent in writing to be bound by a final decision of the Board. Thereafter, the attorney is also bound.

> (b) No application will be accepted from an attorney unless accompanied by the client's written consent to jurisdiction and consent to be bound by the final decision of the Board. Thereafter, both parties are bound.
>
> (c) Upon consent of the client-applicant to be bound by the final decision of the Board, exclusive jurisdiction over the fee dispute vests in the Board.

A. Waiver by Attorney

Client first argues Attorney waived the right to compel her appearance before the Board by electing instead to file a lawsuit in the circuit court. Client relies on the case of *Hyload, Inc. v. Pre-Engineered Production, Inc.*, for the proposition that a party may waive a contractual right to arbitrate by bringing a suit on the underlying contract rather than the arbitration provision. 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). Attorney contends that under the fee agreement and Rule 416, SCACR, only a "dissatisfied party" could submit a fee dispute to the Board; because Attorney believed her fee to be fair and reasonable, she was not a dissatisfied party and therefore could not institute a fee dispute proceeding.

We find Attorney did not waive the right to resolve the fee dispute before the Board by filing a collection action in the circuit court. Neither the plain language of the fee agreement nor Rule 416, SCACR, mandates that a party must initiate a proceeding before the Board prior to filing an action to recover unpaid attorney's fees. The fee agreement provides that "any dispute concerning the fee due" shall be submitted by the "dissatisfied party" to the Board. There is no evidence suggesting Client was dissatisfied with Attorney's performance or that Client contested the amount or reasonableness of Attorney's bill prior to the present action. To the contrary, the family court's unappealed final order found Attorney's performance supported an award of attorney's fees. Only when Client disputed the amount of the bill and refused to pay, could Attorney become a "dissatisfied party" under the fee agreement.

Moreover, Rule 2 of Rule 416, SCACR, provides that a "fee dispute" does not exist until after the attorney and client "have a genuine difference as to the fair and proper amount of a fee." Nothing in Rule 416 precludes an attorney from filing a

civil suit to collect a delinquent fee from a client who has not contested the validity of the fee; rather, Rule 2 of Rule 416 explicitly states "[a] dispute does not exist solely because of the failure of the client to pay a fee." Here, Client allegedly failed to pay her fee, but under Rule 416, that alone was insufficient to bring the matter before the Board. Importantly, Client did not actually dispute the fee until she filed an answer to Attorney's complaint and invoked the fee dispute provision as an affirmative defense.

Furthermore, we find *Hyload, Inc. v. Pre-Engineered Production, Inc.* distinguishable from the present case.[4] In that case, a distributor sued Hyload for breach of contract, but when Hyload sought to enforce an arbitration provision in the contract, the distributor complied by sending the arbitration documents to Hyload's office for its signature. 308 S.C. at 279, 417 S.E.2d at 623-24. After receiving the arbitration documents, however, Hyload refused to sign and instead commenced a claim and delivery action against the distributor under a different section of the agreement. *Id*. When the distributor reinstituted its original action for breach of contract, Hyload again asserted the breach of contract action was subject to the arbitration provision. *Id*. at 280, 417 S.E.2d at 624. This court held that under those facts, Hyload waived its contractual right to arbitrate by bringing a suit on the underlying contract rather than seeking to enforce the arbitration provision. *Id*.

Additionally, both *Hyload* and subsequent cases have required the party opposing arbitration to show actual prejudice before a waiver is found. *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) ("In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration."); *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct. App. 2003) ("South Carolina has primarily . . . followed the approach adopted by the federal courts of the Fourth Circuit and other jurisdictions which require a showing of actual prejudice before finding waiver."); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (Ct. App. 2003) ("Mere inconvenience to an opposing party is not sufficient to establish prejudice, and thus invoke the waiver of right to arbitrate."). Here,

[4] We also note the procedure under Rule 416, SCACR, for resolving a fee dispute before the Board is inconsistent with the arbitration procedures outlined in the Uniform Arbitration Act. For this reason, we believe Client's reliance on arbitration decisions is misplaced.

Client has not alleged any prejudice she will suffer if required to resolve the fee dispute through the Board. *See Rich*, 357 S.C. at 72, 590 S.E.2d at 510 ("The party seeking to establish waiver has the burden of showing prejudice."). Client will still be able to litigate her counterclaims for potential malpractice and unfair trade practices against Attorney, as they are still under the jurisdiction of the circuit court. Furthermore, if dissatisfied with the decision of the Board, Client will be able to seek review of the decision with the circuit court. *See* Rule 416, SCACR, Rule 20; *Wright v. Dickey*, 370 S.C. 517, 521, 636 S.E.2d 1, 2 (Ct. App. 2006) "[Rule 416, SCACR] provides that a party may appeal a final decision of the Board to the circuit court on certain limited grounds.").

B. Withdrawal of Consent

Client next argues the circuit court lacked legal authority to compel Client to appear before the Board because Client did not consent to the Board's jurisdiction. Specifically, Client asserts Rule 416, SCACR, requires the client to give written consent to the Board's jurisdiction *after* the fee dispute arises.

We find Client consented to the jurisdiction of the Board as required under Rule 9 of Rule 416, SCACR, by signing the fee agreement. The rule does not draw a distinction between a client who consents to jurisdiction prior to the representation and one who gives consent after a fee dispute arises. *See* Rule 416, SCACR, Rule 9(b) ("No application will be accepted from an attorney unless accompanied by the client's written consent to jurisdiction and consent to be bound by the final decision of the Board."). Here, Client entered into a valid contract, the plain language of which contemplated that if a fee dispute arose, it would be sent to the Board for a resolution. *See Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect."). By signing the contract and agreeing to be bound by the terms of the fee agreement, the parties conferred exclusive jurisdiction to the Board over fee disputes. *See Bailey v. Bailey*, 312 S.C. 454, 459, 441 S.E.2d 325, 327 (1997) (noting exclusive jurisdiction over a fee dispute vests in the Board upon a client's consent to be bound). Accordingly, we find the circuit court was within its authority to enforce the contractual provision and send the fee dispute to the Board.

C. Applicability of the Uniform Arbitration Act

Finally, Client argues that because the Board is effectively an arbitral body, it was necessary that the fee dispute provision comply with all portions of the Uniform Arbitration Act requiring arbitration clauses to appear conspicuously on the first page of a contract. Client argues the fee dispute provision here is unenforceable because it appears on the second page of the fee agreement.

Section 15-48-10(a) of the South Carolina Code (2005) requires certain arbitration agreements to be "typed in underlined capital letters, or rubber stamped prominently, on the first page of the contract." Otherwise, the provision is unenforceable. The Uniform Arbitration Act does not apply, however, to "pre-agreement[s] entered into when the relationship of the contracting parties is [] that of lawyer-client . . . ." S.C. Code Ann. § 15-48-10(b)(3) (2005).

While we acknowledge the resolution of a fee dispute before the Board is similar to arbitration, section 15-48-10(b)(3) of the Uniform Arbitration Act explicitly states that pre-agreements between an attorney and a client are not subject to the requirements of the Uniform Arbitration Act. In the present case, the agreement between Attorney and Client cannot fairly be categorized as anything other than a "pre-agreement entered into when the relationship of the contracting parties is such that of lawyer-client." Furthermore, even if we were to accept Client's argument—that the fee agreement falls under the purview of the Uniform Arbitration Act—we note that orders compelling arbitration are not immediately appealable. *See* S.C. Code Ann. § 15-48-200(a) (2005) (listing orders related to arbitration that are subject to immediate appeal); *Toler's Cove Homeowners Ass'n, Inc.*, 355 S.C. at 610, 586 S.E.2d at 584 (stating that all orders relating to arbitration not mentioned in section 15-48-200(a) are not immediately appealable). Accordingly, we find the circuit court correctly found the Uniform Arbitration Act was inapplicable to the current case.

III. CONCLUSION

Based on the foregoing, we find no error in the circuit court order compelling Client and Attorney to resolve their fee dispute before the Board. We further find the Uniform Arbitration Act is inapplicable to fee agreements entered into between an attorney and client. Therefore, the order of the circuit court is

AFFIRMED.

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Suzanna Brown Simpson, Appellant.

Appellate Case No. 2016-001387

Appeal From Pickens County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5619
Submitted September 19, 2018 – Filed January 23, 2019

AFFIRMED

J. Falkner Wilkes, of Greenville, for Appellant.

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

LOCKEMY, C.J.: Suzanna Simpson appeals her convictions for murder, attempted murder, and possession of a weapon during the commission of a violent crime. Simpson argues the trial court erred in (1) admitting forensic expert testimony, (2) excluding expert testimony, and (3) denying her motion for a directed verdict. We affirm.

FACTS/PROCEDURAL BACKGROUND

On May 14, 2013, a neighbor of Suzanna and Michael Simpson heard a noise in his yard and found Suzanna Simpson's truck in a ditch near some downed trees. When the neighbor approached the truck, Simpson told him her back hurt. The neighbor repeatedly asked Simpson where her husband and children were, and Simpson only responded "I don't know" and "Am I going to be okay?" According to the neighbor, Simpson was coherent, and he had no trouble communicating with her.

Simpson was transported to the hospital for treatment. According to a nurse who treated Simpson, Simpson told him, "I shot my husband and kids . . . [a]nd then I had an accident." When the nurse asked Simpson why she shot her family, she responded, "because it's an awful world." When the nurse asked why Simpson did not kill herself instead, she replied, "I thought about it and tried, but I couldn't do it." According to the nurse, Simpson was alert, knew where she was, and spoke clearly. Simpson refused to talk to the police at the hospital.

While Simpson was receiving treatment, police went to the Simpson home and found the bodies of Simpson's five-year-old son and seven-year-old daughter in their bedrooms, both with gunshots to the head. Michael Simpson was also shot and found still breathing on the floor of the master bedroom. Police later found a .40 caliber handgun at the scene of Simpson's wreck.

In February 2014, Simpson was indicted by the Pickens County Grand Jury for two counts of murder, one count of attempted murder, and possession of a weapon during the commission of a violent crime. A jury trial was held on June 20-23, 2016.

During pre-trial motions, Simpson moved for a directed verdict, arguing that after she informed the State she intended to plead not guilty by reason of insanity, the State was required to put her on notice of any expert witnesses to rebut her insanity claim. Because the State had not given Simpson notice of its intention to call an expert witness, she argued the State would not meet its burden of proof. The State argued the motion for a directed verdict was not appropriate as a pre-trial motion because the defense of insanity is an affirmative defense requiring Simpson to present some evidence. The State also asserted it was not obligated to give Simpson notice of an expert witness and an expert witness was not required to combat the affirmative defense of insanity. The trial court denied Simpson's

motion for a directed verdict.

Simpson also sought to limit the opinion testimony of lay witnesses, again arguing the State could not prove she was sane without expert testimony. The State countered they could prove their case with lay witnesses. The trial court denied Simpson's motion. Simpson then asserted the State could not prove through lay witnesses that she had a mental impairment, and, thus, could not conform her conduct to the requirements of the law. The trial court denied Simpson's motion to limit witness testimony.

Simpson next moved to bar the testimony of her treating psychiatrist, Dr. Jeff Smith. Simpson's expert witnesses had consulted Dr. Smith and he was a known witness. The State informed the court it might ask to qualify Dr. Smith as an expert in psychiatry, but it was not sure how it would use his testimony. The trial court decided to rule on any objections to the testimony at the appropriate time.

During trial, several witnesses testified as to Simpson's behavior leading up to the shootings. Nathan Stegall, a friend of the Simpsons, testified he visited the Simpson's home the day before the shootings. Stegall testified that while he waited for Michael, Simpson seemed angry. Stegall believed Simpson and her husband were arguing. Later that evening, Stegall received a text message from Simpson that read, "Hell on earth?"

At Simpson's children's school, another parent testified he saw Simpson in the school office the day before the shootings. The parent observed Simpson withdrawing her daughter from school. When asked for the reason, Simpson said she was picking up her daughter because her son was sick, and she was afraid her daughter might also be sick. Simpson's son, who was with her, said, "I'm not sick, Mom." The parent observed Simpson pacing back and forth and growing impatient while waiting for her daughter. When the parent suggested Simpson's daughter was likely collecting her backpack, Simpson replied "Where she's going to go, she don't need no backpack." Simpson also appeared angry and snapped at the parent as she left the building with her children.

Simpson's mother-in-law, Allison, testified regarding a conversation the night before the shootings in which Simpson asked her why her mother-in-law and father-in-law did not come to visit and help with the kids more often. Allison also recalled another conversation with Simpson the previous year following Simpson's release from a behavioral care center. After Simpson was discharged, Michael left on a hunting trip, and Simpson called Allison asking if she thought Michael would

return home to his family.

Simpson's mother, Susan, testified Simpson called her the day before the shootings and asked her if her parents really wanted her. Later that day, Simpson called again and asked her mother if various relatives who were deceased were better off in heaven. In another call, Simpson spoke to Susan about the evils of the world and how you could not protect your children from those evils. When Simpson called again that evening, Susan testified Simpson sounded happy, saying she and her husband were going to seek marital counseling. Later that evening, however, Simpson called Susan again and said, "Mike's through with me. He thinks I can't take care of the children." When Susan pressed her for details, Simpson said Michael told her she stares into space all the time. Susan also testified Simpson had what appeared to be a psychotic episode in 2012. Simpson was hospitalized for five days after this episode and was then transferred to a behavioral health center where she remained for three days. Susan recalled several instances in which her daughter told her she believed the family was being watched.

At the close of the State's case, Simpson renewed her motion for a directed verdict, arguing the State had failed to give the defense notice of their intent to call an expert witness. The State argued the law presumes the defendant is sane and an affirmative defense requires the defense to prove by a preponderance of the evidence that Simpson was insane at the time of the shootings. The trial court asked the State if it intended to call an expert witness, and the State said it could not be sure without knowing how Simpson would present her case, but if it did call a witness, it would be Dr. Smith. The trial court again denied Simpson's motion for a directed verdict.

Simpson presented three expert witnesses at trial. Dr. Leonard Mulbry testified he met with Simpson three times after the shootings and examined her medical records. Dr. Mulbry diagnosed Simpson with schizoaffective disorder bipolar type. Dr. Mulbry outlined her medical treatment in the years before the shooting, beginning with mild depression in college, followed by episodes of post-partum depression. He further noted that in 2010 Simpson began seeing Dr. Smith who treated Simpson with several medications in an effort to control her symptoms. After a review of Simpson's medical records and Dr. Smith's notes, Dr. Mulbry explained that Simpson's moods cycled through depression, sleeplessness, confusion, and paranoia. Dr. Mulbry opined Simpson was unable to distinguish legal and moral right from wrong at the time of the shootings.

On cross examination, Dr. Mulbry testified he examined Simpson nine months after the shootings. Dr. Mulbry also acknowledged he never consulted with Dr. Smith and relied only on Dr. Smith's notes in forming his opinion. Dr. Mulbry noted that after Simpson received treatment for her bipolar disorder at the treatment facility in 2012, her mood improved, she had no hallucinations or homicidal thoughts, and she didn't mention any concerns for her children. Dr. Mulbry also noted Simpson had not been diagnosed with schizoaffective disorder prior to the shootings. Dr. Mulbry admitted that during the period he believed Simpson suffered from schizoaffective disorder in the hours before the shooting, he could not opine whether Simpson knew right from wrong when she spoke to the officials at the children's school, interacted with Nate Stegall and her neighbor, and had several conversations with her mother and mother-in-law.

Simpson's second expert witness, Dr. David Price, evaluated Simpson by meeting with her and Dr. Smith and reviewing Simpson's extensive medical records. Dr. Price also diagnosed Simpson with schizoaffective disorder bipolar type and opined Simpson was not able to distinguish between right and wrong at the time of the shootings. Dr. Price testified there was "no question" about Simpson's psychosis, delusions, and paranoia on the night of the shootings. Dr. Price testified Dr. Smith agreed with his opinion, and the State objected based on hearsay. The trial court sustained the objection.

Dr. Richard Frierson, a court appointed psychiatrist, also diagnosed Simpson with schizoaffective disorder bipolar type. Dr. Frierson testified Simpson suffered from episodes of mania, depression, and delusional or paranoid thinking. Dr. Frierson opined Simpson could not distinguish right from wrong at the time of the shootings.

At the conclusion of the defense's case, the State informed the court it sought to call Dr. Smith as a reply witness. Simpson renewed her motion for a directed verdict, arguing the State was not entitled to present a rebuttal witness because her due process rights were violated when the State did not present evidence of her sanity beyond a reasonable doubt in its case-in-chief. Simpson further argued she did not consent to Dr. Smith's testimony, nor had she waived her physician/client privilege. The State argued Simpson waived her privilege in accordance with section 44-22-90 of the South Carolina Code (2018) when she released her medical records to her retained experts. The State also argued it was entitled to call Dr. Smith pursuant to Rules 703 and 705, SCRE, because Simpson's experts relied on Dr. Smith's treatment of Simpson in forming their opinions about her diagnosis. The State said Dr. Smith would be qualified as a psychiatrist and as a fact witness

to his treatment of Simpson in the years prior to the shootings. The State informed the court it also expected Dr. Smith to explain that Simpson's remediation within forty-eight hours of the shootings was atypical, and that he would not expect to see that in a patient with a true psychosis.

Simpson argued Dr. Smith should not be permitted to testify whether she knew right from wrong or could conform her behavior. The trial court replied, "Because you say he's not qualified to because he's not a forensic psychiatrist." The court informed Simpson it would make that determination after voir dire. The following day, the State argued Dr. Smith was qualified to testify about Simpson's ability to conform her behavior to the requirements of the law because of his qualifications as a psychiatrist. The State argued any distinction between a treating psychiatrist and a certified forensic psychiatrist would be a matter of weight for the jury to determine. Simpson countered that it would be unethical for the State to call a treating physician to testify "in a forensic manner against his own patient."

The trial court issued several rulings. First, the court found the State was entitled to present reply evidence. The trial court also found Simpson waived her privileged medical information because she released her records to three defense experts. The trial court further ruled it would allow Dr. Smith to testify and he would likely be qualified as an expert in psychiatry, and the court would make its determination of his qualifications as set forth in *State v. Council*[1]. The trial court found it was within the purview of the jury to weigh the credibility of the expert's opinion on the matter.

Dr. Smith began treating Simpson in March of 2010. Over the course of his treatment, he saw Simpson as a patient thirty-four times. According to Dr. Smith, Simpson's condition appeared stable at times over the years, and at other times Dr. Smith would adjust her medications to treat her three conditions: bipolar disorder, attention deficit disorder (ADD), and anxiety. Dr. Smith testified these three conditions were "tricky" to manage because the medications for ADD could enhance the symptoms of bipolar disorder if the patient were not taking the mood stabilizer to manage the mood disorder. In fact, in one of three instances in which Simpson admitted having paranoia, she also told Dr. Smith she had stopped taking her mood stabilizer. Dr. Smith stated Simpson's decision to continue taking the stimulant medication for ADD without the stabilizer would significantly contribute to her psychosis.

[1] 335 S.C. 1, 515 S.E.2d 508 (1999).

Dr. Smith reviewed the report of Dr. Frierson and spoke to Dr. Price. Dr. Smith testified he told Dr. Price that Simpson presented entirely differently in the thirty-four visits with Dr. Smith than she did during their evaluation. Dr. Smith stated he told Dr. Frierson, "it was like we were talking about two different individuals." Dr. Smith explained Simpson only complained vaguely of paranoid thoughts along the lines of "I think people are talking about me." Dr. Smith testified the delusions reported by Simpson and her family were never mentioned to him during the course of his treatment. Dr. Smith noted the hospital records from the treating emergency room psychiatrist, who saw Simpson directly after the shootings, did not indicate Simpson wanted to kill herself or heard any voices. Further, the emergency room psychiatrist's description of Simpson's psychosis was not nearly as severe as the forensic psychiatrists' reports. Dr. Smith believed Simpson's rapid resolution of symptoms, both during the earlier admission and during the treatment after the shootings, was an unusual response to a functional psychosis. Dr. Smith testified that typically a functional psychosis such as schizophrenia, bipolar disorder with psychosis, or depression with psychosis would not react that quickly and positively to medication.

Dr. Smith also found it unusual for Simpson's statements to her mother the day before the shootings to sound normal in one call and psychotic in another. Dr. Smith stated it would be unusual for someone who is psychotic to come in and out of psychosis throughout the day. Dr. Smith also pointed out Simpson's comment about her husband being "done with her" and her decision to withdraw the children from school indicated some organized planning on her part. Dr. Smith opined Simpson knew right from wrong at the time of the shootings.

At the conclusion of trial, the jury returned a verdict of guilty on all charges and the court sentenced Simpson to consecutive life sentences for the two counts of murder, a consecutive term of thirty years' imprisonment for attempted murder, and a consecutive term of five years' imprisonment for possession of a weapon during the commission of a violent crime.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Jenkins*, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015).

LAW/ANALYSIS

I. Dr. Smith

A. Qualification of Dr. Smith

Simpson argues the trial court erred in allowing Dr. Smith to give forensic testimony and offer his opinion on sanity where he was not qualified as an expert in forensic psychiatry. We disagree.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. However, "[b]efore a witness is qualified as an expert, the trial court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) . . . the expert's testimony is reliable." *State v. Martin*, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011). "The qualification of a witness as an expert is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). While an expert's qualification generally goes to weight of his testimony and not its admissibility, the trial court acts as a gatekeeper in vetting its reliability and deeming the testimony admissible. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

Here, the trial court qualified Dr. Smith as an expert in psychiatry. On appeal, Simpson argues the determination as to whether she knew right from wrong at the time of the shootings is a determination that can only be made by experts qualified in *forensic* psychiatry. Simpson contends that while Dr. Smith was qualified to testify as to her condition during his treatment, he was not qualified to testify as to his forensic opinion of her condition at the time of the shootings. Simpson argues Dr. Smith's opinion was based on a review of the case, including records previously unseen by Dr. Smith; thus, Dr. Smith prepared for and testified to his opinions based on a forensic evaluation of the case.

We find the trial court did not abuse its discretion in qualifying Dr. Smith as an expert in psychiatry and allowing him to testify as to Simpson's ability to distinguish between right and wrong. First, we note Simpson failed to cite any case law supporting her argument that only a forensic expert can testify as to whether a defendant knew right from wrong at the time of the crime. Moreover, in

the case of an affirmative defense of insanity, the jury decides whether the defendant knew right from wrong based on either the testimony of lay witnesses or expert witnesses or both. *See State v. Lewis*, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997).

In addition, we find Dr. Smith, as Simpson's treating psychiatrist, was qualified to opine as to Simpson's mental capacity. At the time of trial, Dr. Smith had practiced psychiatry for twenty-six years and been deposed "hundreds of times" in civil cases. He also completed a rotation in forensic psychiatry during his residency. Dr. Smith has offered his opinion on a patient's criminal responsibility on five occasions and rendered an opinion on his patients' ability to conform their behavior on multiple occasions. Not only was Dr. Smith qualified to opine on Simpson's mental capacity, he also had the most direct and most recent interaction with Simpson in relation to the shootings. Dr. Smith saw Simpson thirty-four times over a three-year-period, including a visit three months before the shootings**.** In contrast, Dr. Mulbry examined Simpson nine months after the shootings, Dr. Price examined her one year later, and Dr. Frierson began his evaluation almost two years after the shootings.

B. Admission of Dr. Smith's Testimony

Simpson argues the trial court erred in admitting Dr. Smith's testimony. Specifically, Simpson contends the court erred in admitting testimony: (1) despite discovery violations under Rule 5, SCRCrimP, and *Brady v. Maryland*[2]; (2) based on evidence obtained in violation of state and federal privacy laws; and (3) based on evidence obtained as a result of an unlawful seizure under the Fourth Amendment. We disagree.

"Generally, the admission of expert testimony is a matter within the sound discretion of the trial court." *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991)). This court will not disturb the trial court's admissibility determinations absent a prejudicial abuse of discretion. *State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001). "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion whe[n] the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C.

[2] 373 U.S. 83 (1963).

374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003). To show prejudice, the appellant must demonstrate "a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

1. Rule 5, SCRCrimP, and *Brady*

Simpson argues the trial court erred in allowing Dr. Smith's testimony despite discovery violations under Rule 5, SCRCrimP, and *Brady*. We disagree.

Pursuant to Rule 5(a)(1)(D), SCRCrimP,

> Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

"The *Brady* disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." *State v. Anderson*, 407 S.C. 278, 286, 754 S.E.2d 905, 909 (Ct. App. 2014). "[A]n individual asserting a *Brady* violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or [impeachment evidence]." *Id.* at 287, 754 S.E.2d at 909. "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996).

Simpson's medical records were central to her defense of insanity. Shortly after trial counsel was appointed to represent Simpson, she signed a HIPAA release authorizing the release of her medical records. Simpson's records were then disclosed to the defense experts and the court appointed psychiatrist to aid in the formation of their opinions.

We disagree with Simpson's argument that the State violated Rule 5 and *Brady* by failing to disclose the records as the basis for Dr. Smith's opinion when the documents were in the possession of the defense and submitted to the defense experts. Simpson contends the State was required to disclose the basis of Dr. Smith's opinion, pursuant to Rule 5 and *Brady*, but the law does not support this contention. Rule 5 does not obligate the solicitor to notify the defendant of the substance of an expert's testimony that has not been put in the form of a written report, particularly when the expert is relying on information within the defendant's possession.

2. Privacy Laws

Simpson argues the trial court erred in admitting Dr. Smith's testimony based on evidence obtained by SLED in violation of state and federal privacy laws. We disagree.

Pursuant to the record: (1) SLED submitted a form requesting medical information from Simpson's medical providers; (2) the form cited an inapplicable state statute[3]; and (3) the State was unaware of the form submitted by SLED. Simpson did not request a suppression hearing, no records custodians from the medical providers testified about when the documents were disclosed, and no representative from SLED testified about how the information ultimately came into its possession. The trial court did not make a finding as to how SLED retrieved Simpson's records. However, the trial court did find Simpson waived her privilege to protect her medical records by disclosing the information to her own experts, then calling those experts to testify to the contents at trial.

We agree with the trial court's finding that Simpson waived her privacy interest in her medical records when she consented to the disclosure of her records to her own experts and opened the door to her mental health by raising the defense of insanity. Because Simpson waived her claim of privilege in her records, her argument SLED obtained her records improperly had no bearing on the issue before the trial court.

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[3] SLED is authorized to "expeditiously investigate child deaths in all counties of the State" in accordance with section 63-11-1940 of the South Carolina Code (2010). In addition, section 63-11-1960 of the South Carolina Code (2010) authorizes SLED to obtain the medical records of a child whose death is being reviewed by the department. Here, SLED requested Simpson's records, not the children's.

Furthermore, Simpson cannot demonstrate any prejudice from the trial court's decision to allow Dr. Smith's testimony based on her medical records. Simpson called three expert witnesses to testify as to their opinions of her mental health after reviewing her records from Dr. Smith. These experts explained to the jury the portions of Dr. Smith's records they found relevant to their opinions. Simpson cannot show Dr. Smith revealed information to the jury that was not previously revealed through the defense experts.

3. Fourth Amendment

Simpson argues the trial court erred in admitting Dr. Smith's testimony because it was based on evidence obtained as a result of an unlawful seizure under the Fourth Amendment. We disagree.

The Fourth Amendment provides no remedy for a violation of the warrant requirement, but the United States Supreme Court fashioned the exclusionary rule, a deterrent sanction whereby the State is barred from introducing evidence obtained in violation of the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 237 (2011). A Fourth Amendment seizure "deprives the individual of dominion over his or her person or property." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting *Horton v. California*, 496 U.S. 128, 133 (1990)). However, "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, . . . then the deterrence rationale has so little basis that the evidence should be received." *Nix v. Williams*, 467 U.S. 431, 432 (1984).

Simpson argues Dr. Smith's testimony should have been excluded because SLED violated her Fourth Amendment rights. The trial court declined to make a finding that Simpson's medical records obtained by SLED were a search or seizure in violation of Simpson's Fourth Amendment rights.

As discussed above, the State was entitled to Simpson's medical records, and was entitled to call Dr. Smith as a reply witness. At trial, Simpson did not request, nor did the trial court conduct, a suppression hearing on her medical records. Simpson does not object to the disclosure of the information in her medical records to expert witnesses. Nor does she object to the information in her medical records being presented to the jury. Instead, Simpson seeks to suppress Dr. Smith's opinion on the basis of her records. We find Simpson's Fourth Amendment violation claim is

not supported by the record or an appropriate claim of exclusion to Dr. Smith's testimony.

II. Dr. Price

Simpson argues the trial court erred in excluding Dr. Price's testimony regarding statements made to Dr. Price by Dr. Smith. We disagree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "[I]t is well-settled that an exception to the rule prohibiting hearsay exists when it is used by an expert." *State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432, 433 (1997). "An expert may base his opinion on hearsay evidence so long as it is of a type reasonably relied upon by other experts in the field." *Id.*

Dr. Price testified Dr. Smith agreed with his opinion that Simpson was not able to differentiate between right and wrong at the time of the shootings. The State objected based on hearsay and the trial court sustained the objection. On appeal, Simpson argues an expert witness may testify as to matters of hearsay for the purpose of showing what information he or she relied upon in giving an opinion of value.

We find the trial court did not err in excluding Dr. Price's testimony. Dr. Price testified Dr. Smith agreed with his opinion, which necessarily indicates Dr. Price formed his opinion *before* Dr. Smith agreed with it. Dr. Price's testimony was an impermissible attempt to bolster his credibility before the jury, and did not fit within the hearsay exception for expert testimony.[4] *See State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (holding a witness is not permitted to vouch for the credibility of another witness by offering testimony that bolsters the testimony of another witness).

III. Directed Verdict

Simpson contends the trial court erred in denying her motion for a directed verdict, arguing the State failed to present sufficient evidence tending to prove her guilt. We disagree.

[4] We note Simpson did not attempt to enter Dr. Smith's statement to Dr. Price pursuant to Rule 613(b), SCRE.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *Id.* "On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State." *State v. Stanley*, 365 S.C. 24, 41, 615 S.E.2d 455, 464 (Ct. App. 2005). "If there is any direct or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the issues were properly submitted to the jury." *State v. Mollison*, 319 S.C. 41, 46, 459 S.E.2d 88, 91 (Ct. App. 1995).

Pursuant to section 17-24-10(A) of the South Carolina Code (2014),

> It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

However,

> [a] defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

S.C. Code Ann. § 17-24-20(A) (2014).

Viewing the evidence in the light most favorable to the State, we find a jury could reasonably deduce Simpson was capable of recognizing her actions as morally or legally wrong. Although Simpson's three experts opined she was unable to distinguish between right and wrong at the time of the shootings, Simpson's treating psychiatrist Dr. Smith testified she was capable of distinguishing between right and wrong. Additionally, several lay witnesses testified as to Simpson's behavior around the time of the shootings. The following evidence was introduced

from which a jury could conclude Simpson understood right from wrong: (1) Simpson removed her children from school and lied as to the reason; (2) Simpson appeared irritated with her husband and children the day before the shootings; (3) Simpson turned off the home's alarm system before the shootings; and (4) Simpson refused to tell her neighbor or the police about the whereabouts of her family.

Although Simpson's experts opined she did not know right from wrong at the time of the shootings, the jury was not required to give the expert testimony greater weight than that of the lay witnesses. *See State v. Douglas*, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009) (holding the fact that a witness was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness). Accordingly, the trial court did not err in denying Simpson's motion for a directed verdict.

CONCLUSION

Simpson's convictions are

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.