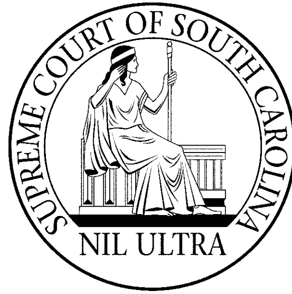

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46

November 29, 2004

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

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2004-UP-534-State v. Jackson	Dismissed 11/22/04

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allendale County Sheriff's Office, Appellant,

and

South Carolina Law Enforcement Division, Intervenor,

v.

Two Chess Challenge II, games of skill, Respondent.

Appeal from Allendale County
Perry M. Buckner, Circuit Court Judge

Opinion No. 25900
Heard November 3, 2004 – Filed November 22, 2004

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert D. Cook, and Senior Assistant Attorney General C. Havird Jones, Jr., all of Columbia, for Appellant and Intervenor.

Richard Mark Gergel and W. Allen Nickles, III, both of Gergel, Nickles & Solomon, of Columbia, for Intervenor.

A. Camden Lewis and Ariail E. King, both of Lewis Babcock & Hawkins, of Columbia; H. Woodrow Gooding, of Gooding &

Gooding, of Allendale; and Jonathan Scott Altman, of Derfner, Altman & Wilborn, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: The magistrate court ruled, and the circuit court affirmed, that the two Chess Challenge II machines examined, and all machines operating in a similar manner, are games of skill that are lawful to possess. After certifying this appeal for review pursuant to Rule 204(b), SCACR, we reverse in part and affirm in part.

FACTUAL/PROCEDURAL BACKGROUND

On September 23, 2003, the Allendale County Sheriff's Office (Sheriff's Office) received an anonymous phone call that video poker machines were being placed in Bert's Fast Stop, a convenience store in Fairfax, South Carolina. Two machines were found and taken to the magistrate's office for a ruling as to their legality.

The machines contained the game Chess Challenge II, a coin-operated game that has a payout feature. The game has four rotating reels in which seven icons spin according to a fixed sequence. Seven different icons (pawn, shield, horse, castle, prince, queen, and king) appear in various combinations over the course of a fixed 255-icon sequence and then repeat. The player is able to stop each reel individually by pushing the corresponding button. To win, a player must match icons on three of the four reels.

After examining the machines, hearing oral argument, considering expert reports, play trials, and affidavits,[1] the magistrate ruled the following:

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[1] An affidavit by Solicitor Ralph Hoisington was submitted in which he stated the following: "it is my belief that the Chess Challenge II game operates in a different manner from the illegal games of chance that have appeared in the state of South Carolina. Chess Challenge II operates utilizing a repeating pattern and does not utilize features that would prevent a player's skill from determining the outcome of the game. In addition, a player is able to identify the icons as they appear, and to time the stopping of the game to increase the chance of winning."

> [t]he Chess Challenge II games examined *and all those operating in an identical manner* are *games of skill* that are *lawful* to possess, own and operate under South Carolina law as redemption machines distributing prizes, including gift certificates, and merchandise.

(emphases added).

In addition, the magistrate found that the developer of Chess Challenge II had "taken certain measures to insure that all Chess Challenge II games operate in the identical manner as those examined," which would allow "law enforcement to quickly detect whether any effort [had] been made to alter the operational characteristics" of the game.

After the ruling, the solicitor filed a notice of appeal on behalf of the Sheriff's Office. But at the beginning of the hearing, the solicitor asked the judge to deny the appeal:

> Solicitor: Your Honor please, I have reviewed the order of [the magistrate]. I have reviewed the information that was presented during that hearing. I have reviewed the machine and I have listened to the advice of someone in whom I have great confidence and faith, and I withdraw my appeal. Don't withdraw my appeal, sir, I think you should deny my appeal.
>
> The Court: So you think I should affirm the judgment of Judge Love?
>
> Solicitor: Yes, sir.

Based on the solicitor's request, and without further consideration, the circuit judge affirmed the magistrate's order.

Four days later, the solicitor inexplicably filed a motion for reconsideration on the basis that the magistrate did not have the authority to

find that the machines examined and all those operating in an identical manner were lawful. The motion was denied.

Soon after, the South Carolina Law Enforcement Division (SLED) filed a motion for relief from the order and an alternative motion to alter, amend or reconsider, arguing that jurisdiction was proper only as to the two machines before the court, not as to machines operating in an identical manner throughout the state. Moreover, SLED argued that because it was not served with notice or given an opportunity to be heard, it was not bound by the court's order.

SLED subsequently withdrew its motion for relief, and moved, instead, to intervene and to have the case certified to this Court. Both motions were granted.

The Sheriff's Office and SLED have raised the following issues for review:

I. Did the lower courts have jurisdiction to rule on the legality of Chess Challenge II machines not before the court?

II. Is the magistrate's order void for lack of controversy and lack of notice to SLED?

LAW/ANALYSIS

STANDARD OF REVIEW

When there is any evidence, however slight, tending to prove the issues involved, this Court may not question a magistrate court's findings of fact that were approved by a circuit court on appeal. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 185, 525 S.E.2d 872, 876 (2000). An action for forfeiture of property is a civil action at law. *Id.*

I. Lack of Jurisdiction

The Sheriff's Office and SLED contend that the magistrate lacked jurisdiction to determine the legality of machines that were not before the court. We agree.

South Carolina statutory law prescribes the procedure for seizing and destroying unlawful machines:

> [a]ny machine, board, or other device prohibited by Section 12-21-2710[2] must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

S.C. Code Ann. § 12-21-2712 (2000).

In general, it is within the State's police power to take gaming devices by forfeiture. *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 303, 534 S.E.2d 270, 273 (2000). An action for forfeiture is a civil *in rem* action at law that is, by its nature, a penal action that must be strictly construed. *Pope v. Gordon*, 359 S.C. 572, 581, 598 S.E.2d 288, 293 (Ct. App. 2004). Consequently, *in rem* forfeiture statutes must be interpreted in light of the evil sought to be remedied and in a manner that is consistent with the statute's purpose. *Id.* (quoting *Ducworth v. Neely*, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995)).

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[2] This section provides, in part, the following: [i]t is unlawful for any person to keep on his premises or operate … any vending or slot machine, punch board, pull board, or other device pertaining to games of chance … including those … that display different pictures, words, or symbols, at different plays or numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine …." S.C. Code Ann. § 12-21-2710 (2000).

The facts in a prior decision by this Court demonstrate that the seizure and destruction process outlined in section 12-21-2712 must be followed even when the machines seized have been previously deemed illegal. In *192 Coin-Operated Video Game Machines*, SLED seized 192 "Cherry Master" and "8-Liner" video machines. *Id.* at 183, 525 S.E.2d at 876. These machines had previously been deemed illegal gambling devices by this Court. *See State v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443 (1996) (finding "Cherry Master" is an illegal slot machine); *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995) (finding "Lucky 8 Line" is an illegal slot machine). Although the machines had previously been deemed illegal, the seizure and forfeiture process outlined in section 12-21-2712 was still followed: SLED obtained a search warrant and seized the 192 machines; and the magistrate personally examined the machines, determined that they were illegal, and ordered their destruction. *192 Coin-Operated*, 338 S.C. at 183, 525 S.E.2d at 875.

Also while at the warehouse, SLED discovered an additional 23 machines that it believed were illegal. Once again, SLED obtained a search warrant and seized the machines; a magistrate examined them, found them to be illegal, and ordered their destruction. *Id.* This Court affirmed both destruction orders. *Id.* at 202, 525 S.E.2d at 886.

In the present case, the magistrate ruled on the legality of the two machines before the court and "all those [machines] operating in an identical manner." This broad ruling exceeded the scope of the magistrate's authority and is contrary to the machine-by-machine forfeiture process outlined in the statute and carried out in other cases. Therefore, we find that the magistrate court lacked jurisdiction to determine the legality of machines not before court.

As to the two machines seized, examined, and deemed legal, there is nothing preventing the Sheriff's Office or other law enforcement officials from seizing the machines once again for the magistrate's examination. Because video machines may be manipulated so as to change their nature from lawful to unlawful, law enforcement may, based on probable cause, seize the machines in question once again. In other words, the effect of the

magistrate's order is that it deems the machines lawful *at the time* they were seized and examined.

II. Other Grounds

The Sheriff's Office and SLED argue that the magistrate's ruling is void because (1) an actual controversy did not exist, and (2) SLED was not notified of the proceedings. We disagree with both arguments.

First, in support of their argument that the magistrate's ruling is void for lack of controversy, the Sheriff's Office and SLED claim that they were not given the opportunity to present evidence that the machines were illegal. While it is true that the magistrate's order only cites evidence presented by Respondents, there is no evidence in the record suggesting that the Sheriff or other law enforcement officials did not have an opportunity to present evidence that the machines were illegal.

Second, a plain reading of the statute does not support the argument that the magistrate's order should be voided because SLED was not notified of the forfeiture hearing. *See State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991) (a statute must be given its plain and ordinary meaning). The statute states that the machines may be "seized by any law enforcement officer." Nothing in the statute specifically provides that SLED must be notified before the magistrate makes a determination.

Therefore, the magistrate's order should not be voided for lack of controversy or lack of notice to SLED.

CONCLUSION

We affirm the magistrate's decision finding that the two Chess Challenge II machines seized and examined were lawful. Because the magistrate did not have the authority to deem "all those [machines] operating in an identical manner" lawful, we reverse that portion of the ruling.

MOORE, WALLER, BURNETT, JJ., and Acting Justice G. Thomas Cooper, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sherwood N. Fender, Petitioner,

v.

Heirs at Law of Roger Smashum, John Smashum and Arthur Smashum, if living or such heirs of them as may be living, Carolee H. Goodwine, Mae Olive Henderson, Audrey Polite Sawyer, Diana Cornish, Heirs of John Frasier, if living or such heirs of them as may be living, Bernadette Anderson, Eloise Gadson and all other persons unknown, having or claiming any right, title or estate or interest in or lien upon the real property described in the complaint herein, being designated collectively as John Doe and Sarah Roe, including all minors, persons in the armed forces, insane persons and all other persons under any other disability who might have or claim to have any right, title or interest in or lien upon the real property described in the complaint herein, Defendants,

Of whom Henrietta Jones, Sarah Shepard and Lucy Smith, as heirs at law of John Smashum, and Queen Smashum, as grantee of Adam Smashum, heir at law of John Smashum, are Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Perry M. Buckner, Circuit Court Judge

Opinion No. 25901
Heard November 17, 2004 – Filed November 29, 2004

DISMISSED AS IMPROVIDENTLY GRANTED

Alysoun Meree Eversole, of Beaufort, for Petitioner.

Derek C. Gilbert, of Harvey & Battey, P.A., of Beaufort, for Respondents.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' decision in Fender v. Heirs at Law of Smashum, 354 S.C. 504, 581 S.E.2d 853 (Ct. App. 2003). We dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., MOORE, WALLER, BURNETT, JJ., and Acting Justice Marion D. Myers, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Yukoto Eugene Cherry, Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25902
Heard December 2, 2003 – Filed November 29, 2004

AFFIRMED IN RESULT

Chief Attorney Daniel T. Stacey, of S.C. Office of Appellate Defense, of Columbia; and Jeanne Allison Pearson, of Kennedy Covington Lobdell & Hickman, LLP, and Thomas F. McDow, both of Rock Hill, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Deborah R. J. Shupe, all of Columbia, and Solicitor Thomas E. Pope, of York, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001). We affirm in result.

FACTS

Cherry was convicted of possession of crack cocaine with intent to distribute (PWID crack) and sentenced to five years and a twenty-five thousand dollar fine.[1] The state's evidence at trial showed that Cherry was a passenger in the back seat of a vehicle which was stopped for going straight from a left turn lane and for failing to use a signal. Officer Parker, who stopped the car, testified that while he was writing out a citation, his backup, Officer Lubben, observed the driver of the vehicle place a pistol in a diaper bag; the driver was arrested. Officer Parker then asked the passengers to exit the vehicle. A pat-down search of Cherry revealed 8 rocks of crack cocaine in the watch pocket of his jeans.[2] The officer testified that he found $322.00, mostly in twenty-dollar bills, in Cherry's left front pocket, and that crack cocaine is usually sold in twenty dollar rocks. Officer Parker also testified he did not find any drug paraphernalia or crack pipes in the car which would typically be associated with smoking rock cocaine. Lastly, Officer Parker testified that the stop was made in a high crime area known for drugs.

At the close of the state's evidence, Cherry's motion for a directed verdict on PWID crack was denied. Thereafter, the court instructed the jury on "circumstantial evidence," essentially giving the charge recommended by this Court in State v. Grippon, 327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1998) to wit:

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[1] He was also indicted for possession of crack within proximity of a park. The trial judge directed a verdict for Cherry on this count.

[2] The total weight of the crack was .9 grams, one-tenth gram short of the amount required to give rise to a permissive inference of distribution. S.C. Code Ann. § 44-53-375 (B) (Supp. 2002)(possession of one or more grams of crack cocaine is prima facie evidence of a violation of the PWID statute). However, a conviction of PWID does not hinge upon the amount involved. State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987); State v. Simpson, 275 S.C. 426, 272 S.E.2d 431 (1980), *cert. denied* 451 U.S. 911 (1981).

> There are two types of evidence which are generally presented during a trial--direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.[3]

After the judge finished instructing the jury, Cherry requested an instruction on the difference between direct and circumstantial evidence, essentially to the effect that in considering circumstantial evidence, all of the circumstances proven must be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.[4] The court declined the charge; the jury convicted Cherry of PWID crack.

On appeal, Cherry contended he was entitled to a directed verdict on the charge of PWID crack, and that the trial judge erred in refusing to give a traditional circumstantial evidence charge, pursuant to State v. Edwards supra. The case was initially decided by a three-judge panel of the Court of Appeals, which affirmed Cherry's conviction.[5] An *en banc* rehearing yielded six separate opinions. Three judges (Stilwell, Huff and Goolsby) voted to affirm, believing that the PWID charge was properly submitted to the jury and that the circumstantial evidence charge was proper under Grippon. Four

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[3] The trial court also gave a very thorough "reasonable doubt" charge.

[4] See State v. Edwards, 298 S.C. 272, 379 S.E.2d 888, cert. denied, 493 U.S. 895 (1989); State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); Tom J. Ervin, Ervin's South Carolina Requests to Charge-Criminal § 3-4 (1994).

[5] State v. Cherry, 353 S.C. 263, 577 S.E.2d 719 (2001).

judges (Howard, Hearn, Cureton and Connor)[6] believed Cherry was entitled to a directed verdict on the PWID crack charge, and three (Anderson, Shuler, and Connor[7]) believed Cherry should have been given a fuller circumstantial evidence charge. Cherry's conviction was affirmed. State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001).

ISSUES

1. Was Cherry entitled to a directed verdict on the PWID crack charge?

2. Should the trial court have given a fuller circumstantial evidence charge pursuant to State v. Edwards?

1. DIRECTED VERDICT

Cherry contends there was insufficient evidence of his intent to distribute crack cocaine, such that he was entitled to a directed verdict on the PWID crack charge. We disagree.

In his majority opinion, Judge Stilwell cited the following evidence warranting submission of the case to the jury: the arrest occurred in a high crime area known for violence and drug activity; Cherry had a small bag containing **eight rocks of crack cocaine** on his person; he had no crack pipe or other drug paraphernalia indicating the crack cocaine was for his personal consumption; he had **$322.00 cash** on his person, **mostly in twenty dollar bills**; and Officer Parker testified a **single rock of crack cocaine is typically sold for twenty dollars**. Viewing this evidence in the light most favorable to the state, the Court of Appeals majority found the combination of these factors constitute evidence which would reasonably tend to prove Cherry intended to distribute crack such that the matter was properly submitted to the jury. We agree.

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[6] Judges Hearn and Cureton concurred in Judge Howard's opinion; Judge Connor wrote separately and concurred in part with Judge Howard's opinion, and concurred in part with Judge Shuler's opinion.

[7] Judge Connor was the only member of the panel who would have reversed on both issues.

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. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171, *cert. denied,* 124 S.Ct. 101 (2003); State v. Rothschild, 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2002). When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002); State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272-73 (1990). See also State v. Gaster, supra (on an appeal from trial court's denial of a motion for a directed verdict, appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling).

When the state relies exclusively on circumstantial evidence and a motion for directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. Id. at 409, 535 S.E.2d at 127. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis**. State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996); State v. Edwards, supra.

In Edwards, supra, we rejected the contention that in ruling on a directed verdict motion, the trial judge must grant a directed verdict unless the circumstantial evidence pointed conclusively to the defendant's guilt, to the exclusion of every other reasonable hypothesis. Instead, we held it is the

trial judge's "duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." 298 S.C. at 275, 379 S.E.2d at 889, *citing* State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955) (emphasis in original).

Here, there was evidence at trial which reasonably tended to prove Cherry's guilt of PWID, and from which a jury could fairly and logically deduce his guilt of that offense. As noted previously, the evidence relied upon to prove PWID crack was as follows: the arrest occurred in a high crime area known for violence and drug activity; Cherry had a small bag containing eight rocks of crack cocaine on his person; he had no crack pipe or other drug paraphernalia indicating the crack cocaine was for his personal consumption; he had $322.00 cash on his person, mostly in twenty dollar bills; and Officer Parker testified a single rock of crack cocaine is typically sold for twenty dollars.[8] We find this combination of factors is sufficient for the jury to infer an intent to distribute. Accordingly, the Court of Appeals' opinion is affirmed on this issue.

2. CIRCUMSTANTIAL EVIDENCE CHARGE

Cherry asserts the trial court erred in refusing to instruct the jury the law of circumstantial evidence, as set forth by this Court in State v. Littlejohn, supra, and State v. Edwards, supra. We disagree.

Traditionally, when charging the jury in a circumstantial evidence case, the following was the recommended instruction:

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[8] In State v. Robinson, 344 S.C. 220, 543 S.E.2d 249 (2001), the Court of Appeals affirmed the denial of the defendant's motion for a directed verdict on the offense of PWID crack where the evidence at trial revealed police observed the defendant throw a plastic bag up in the air, which contained seven rocks of crack cocaine, having a total weight of .9 grams. There was no evidence the defendant had an excess amount of cash, or twenty dollar bills on his person, no evidence of any other drug paraphernalia, and no testimony as to the amount each rock of crack would sell for. The sole testimony relied upon by the Court of Appeals panel in that case was testimony of police officers that it is not typical for a simple user of crack cocaine to possess seven rocks of crack at one time, and that they typically possess only one or two rocks. 344 S.C. at 223, 543 S.E.2d at 250.

> every circumstance relied upon by the State [must] be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, **point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.** It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

State v. Edwards, 298 S.C. at 275, 379 S.E.2d at 889, *citing* State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955) (emphasis supplied).

However, in 1997, in light of the United States Supreme Court's opinion in Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), a majority of this Court held in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997), that so long as the jury is properly instructed on reasonable doubt, it is unnecessary for the trial court to instruct the jury that "circumstantial evidence must be so strong as to exclude every reasonable hypothesis other than guilt." Id. at 83, 489 S.E.2d at 464.

In Grippon, the defendant was indicted for murder, but convicted of voluntary manslaughter. Grippon asserted he had stabbed the victim after the victim attempted to rape him. The trial judge charged the jury the law of circumstantial evidence, but omitted the phrase "to the exclusion of every other reasonable hypothesis," believing the phrase shifted the burden of proof from the state to the defendant.[9] Although this Court held that the "reasonable hypothesis" language did not shift the burden of proof, we held the instruction actually given by the trial court, adequately conveyed the level of proof required to find Grippon guilty. Id. The Grippon majority went on

[9] In State v. Manning, 305 S.C. 413, 417, 409 S.E.2d 372, 374 (1991), we held that a circumstantial evidence charge which requires the jury to seek some reasonable explanation other than the defendant's guilt "turns the State's burden of proof on its head by requiring the jury to find a 'reasonable explanation' of the evidence inconsistent with appellant's guilt before it can find him not guilty."

to recommend the following charge in cases relying on circumstantial evidence:

> There are two types of evidence which are generally presented during a trial--direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. at 83-84, 489 S.E.2d at 464.[10]

Since Grippon was decided, several opinions of this Court have appeared to retain the traditional Edwards circumstantial evidence charge as an alternative to the charge recommended in Grippon. See State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001) (upholding charge which was a hybrid of the traditional charge and that recommended by Grippon); State v. Needs, 333 S.C. 134, 156, 508 S.E.2d 857, 868, n. 13 (1999) (noting there are two appropriate ways to charge circumstantial evidence). See also Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 338, 534 S.E.2d 672, 681, n.6 (2000) (noting that the traditional circumstantial evidence charge requires greater scrutiny than direct evidence in a criminal proceeding).

It is patent from our decision in Grippon that the Edwards charge is no longer a **required** instruction. However, we must decide whether the Edwards charge **may** be given as an alternative to a Grippon charge, or

[10] Justice Toal, joined by Justice Finney, concurred in result only. Although they agreed that Grippon's conviction should be affirmed, they saw no need to discontinue use of the standard Edwards circumstantial evidence charge.

whether the language recommended in Grippon is the sole remaining instruction in a circumstantial evidence case. We hold that Grippon is the sole remaining charge to be utilized by the courts of this state in instructing juries in cases relying, in whole or in part, on circumstantial evidence.

The first American case adopting the "to the exclusion of every reasonable hypothesis" standard was Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850). However, from its outset, critics challenged the "reasonable hypothesis" circumstantial evidence charge on the ground that circumstantial evidence should be treated no differently than direct evidence. See Irene Rosenberg and Yale Rosenberg, "Perhaps What Ye Say Is Based Only on Conjecture"—Circumstantial Evidence Then and Now, 31 Hous. L. Rev. 1371, 1392, nn. 79-80 (1995) (hereinafter Rosenberg article) at p. 1392, nn. 79-80.

Ultimately, the United States Supreme Court, in Holland v. United States, supra, held there was no difference between direct and circumstantial evidence, and that consequently in federal court there was no requirement the trial judge charge the jury that the evidence must be such as to exclude every reasonable hypothesis but that of guilt. Justice Clark reasoned that if the jury was properly instructed on the standards for reasonable doubt, a circumstantial evidence instruction was "confusing and incorrect." 348 U.S. at 139-140.

All of the federal courts, and the vast majority of state courts have adopted the United States Supreme Court's approach in Holland. See Rosenberg at nn. 121-122.[11] A number of the state court decisions offer persuasive reasoning for abandoning the "reasonable hypothesis" circumstantial evidence charge.

In State v. Adcock, 310 S.E.2d 587, 602-608 (N.C. 1983), the defendant objected to the trial court's failure to instruct the jury that in order

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[11] For a list of states adopting the Holland approach, see Hankins v. State, 646 S.W.2d 191, 197-198 (Tex. Crim. App. 1983)(op. on reh'g). See also Carroll J. Miller, Modern Status of Rule Regarding Necessity of Instruction on Circumstantial Evidence in Criminal Trial-State Cases, 36 A.L.R.4th 1046, § 5(1985).

to justify a verdict of guilty, the circumstantial evidence must "exclude every reasonable hypothesis of innocence." The North Carolina Supreme Court agreed that the evidence must indeed exclude every reasonable hypothesis of innocence but held that:

> after all, the convincing effect of circumstantial evidence on the mind of the jury is measured by the same standard of intensity required of any other evidence--the jury must be convinced beyond a reasonable doubt as to every element of the crime before they find the defendant guilty of it, whether the evidence is wholly circumstantial, only partly so, or entirely what we sometimes refer to as direct. No set formula is required to convey to the jury this fixed principle relating to the degree of proof required for conviction. The instruction adopts the formula most often used and to which we sooner or later all refer--proof beyond a reasonable doubt.

Citing Judge Learned Hand, the Adcock Court went on:

> The judge failed to charge the jury as to circumstantial evidence, contenting himself with an entirely neutral statement of the opposed contentions of the parties, though he had been asked to say that such evidence was enough only when it foreclosed the hypothesis of innocence. He had with ample elaboration told them that they must be satisfied beyond fair doubt of the defendant's guilt, and that in our judgment was enough, though some courts have held otherwise. **The requirement seems to us a refinement which only serves to confuse laymen into supposing that they should use circumstantial evidence otherwise than testimonial.** All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these as do inferences from events. A jury tests a witness's credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past

> history, or from an event what must have preceded it. **All that can be asked is that the importance of the result to the accused shall demand a corresponding certainty of his guilt; and this is commonly and adequately covered by telling them that the conclusion shall be free from fair doubt. To elaborate this into an inexorable ritual, or to articulate it for different situations, is more likely to impede, than to promote, their inquiry.**

301 N.C at 34-35, 310 S.E.2d at 606-607, *citing* United States v. Becker, 62 F.2d 1007, 1010 (2nd Cir. 1933) (emphasis supplied).

The Vermont Supreme Court has also noted that the "exclusion of every reasonable hypothesis of innocence" standard is simply a method for evaluating whether the reasonable doubt standard has been met. State v. Derouchie, 440 A.2d 146, 149 (Vt. 1981).[12] Derouchie noted other criticisms of the "reasonable hypothesis" standard: "first, as a device for judicial evaluation of the sufficiency of the evidence, the 'exclusion of every reasonable hypothesis of innocence' test is premised upon a now suspect distrust of circumstantial evidence. . . . Second, . . . [r]ather than assisting jurors in applying the reasonable doubt standard, the traditional circumstantial evidence charge has been condemned for having the opposite effect. **By directing juror's attention to an additional, yet unnecessary, level of analysis, the circumstantial evidence charge serves only to confuse the real issue**." Id. (emphasis supplied).

The Ohio Supreme Court has also addressed the continued validity of the charge, stating "[t]he underlying rationale for the requirement that a circumstantial-evidence instruction should be given is predicated upon the assumption that circumstantial evidence is inherently suspicious and less trustworthy than is direct evidence. It is assumed that the multiple-hypothesis instruction is desirable in order to guard against an improper reliance and use by the jury of tenuous circumstantial evidence." State v. Jenks, 574 N.E.2d 492 (1991)*, superseded by state constitutional amendment*

[12] See also United States v. Richardson, 562 F.2d 476 (7th Cir.1977), *cert denied,* 434 U.S. 1021 (1978); Nichols v. State, 591 N.E.2d 134 (Ind. 1992).

on other grounds, State v. Smith, 684 N.E.2d 668 (Ohio l997), *cert denied,* 523 U.S. 1125 (1998). Jenks went on to hold:

> It is simply untenable to assume that circumstantial evidence is less reliable than is direct evidence. In short, whether direct evidence or circumstantial evidence is more trustworthy and probative depends upon the particular facts of the case and no generalizations realistically can be made that one class of evidence is per se more reliable than is the other class of evidence. Obviously, since circumstantial evidence is not per se less reliable than is direct evidence, there is no need to give the multiple-hypothesis instruction when circumstantial evidence is involved. In addition, **we think the instruction is essentially a convoluted one, the main effect of which is to confuse the jury, possibly implying that a higher standard than reasonable doubt is necessary to render a verdict of guilty when circumstantial evidence is employed.**

574 N.E.2d at 501, *citing* State v. Gosby, 539 P.2d 680 (Wash. 1975) (emphasis supplied). The West Virginia Supreme Court has similarly stated:

> Circumstantial evidence and direct evidence inherently possess the same probative value. In some instances certain facts can only be established by circumstantial evidence. Hence, we can discern no reason to continue the requirement that circumstantial evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt. We agree with those courts that have held that an additional instruction on the sufficiency of circumstantial evidence invites confusion and is unwarranted. Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. Nothing more should be required of a factfinder.

State v. Guthrie, 461 S.E.2d 163, 175 (W. Va. 1995). See also State v. Humpherys, 8 P.3d 652 (Idaho 2000)(holding that in all criminal cases there should be only one standard of proof, which is beyond a reasonable doubt. Therefore, once the jury has been properly instructed on the reasonable doubt standard of proof, the defendant is not entitled to an additional instruction on circumstantial evidence even when all the evidence is circumstantial); State v. Ferm, 7 P.3d 193 (Haw. Ct App. 2000).

We are persuaded by the authorities highlighted above that the reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not.[13] The standard remains whether the evidence reflects proof of the defendant's guilt beyond a reasonable doubt. Accordingly, we hold that the recommended language in Grippon is the sole and exclusive charge to be given in circumstantial evidence cases in this state,[14] along with a proper reasonable doubt instruction. The opinion of the Court of Appeals is affirmed in result only.[15]

AFFIRMED IN RESULT ONLY.

MOORE and BURNETT, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which Acting Justice Reginald I. Lloyd concurs.

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[13] We are not unmindful that there are arguments, as pointed out by Chief Justice Toal's dissent, which may be advanced in favor of retention of the traditional Edwards circumstantial evidence charge, and some jurisdictions have chosen to adhere to the "exclusion of any reasonably hypothesis" instruction. However, these same arguments were advanced by the concurrence in State v. Grippon, supra, and the majority of this Court declined, at that time, to join the concurrence. See Grippon, supra, 327 S.C. at 84-89, 489 S.E.2d at 464-467 (Justice Toal, concurring in result only).

[14] To the extent our opinions in Grippon, supra; State v. Graddick, supra; State v. Needs, supra and Moriarty v. Garden Sanctuary Church of God, supra, are inconsistent with this holding, they are modified.

[15] In light of our holding, we need not address Cherry's remaining argument concerning the effect of the Court of Appeals' divided opinions.

CHIEF JUSTICE TOAL: The majority holds that the jury charge recommended in *State v. Grippon* is the sole and exclusive charge to be given in cases relying, in whole or in part, on circumstantial evidence. Because I believe that South Carolina courts should not abandon the traditional circumstantial evidence charge described in *State v. Edwards*, I dissent.

The traditional circumstantial evidence charge provides that when the State relies on circumstantial evidence to prove its case, a jury may not convict the defendant unless "every circumstance relied upon by the State [has been] proven beyond a reasonable doubt," and "all of the circumstances so proven [are] consistent with each other and, taken together, point conclusively to the guilt of the accused *to the exclusion of every other reasonable hypothesis*." *State v. Edwards*, 298 S.C. 272, 275, 379 S.E.2d 888, 889, *cert. denied*, 493 U.S. 895 (1989) (citing *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955)) (emphasis added). This charge is well established in South Carolina. *E.g., Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338 n. 6, 534 S.E.2d 672, 681 n. 6 (2000); *State v. Owens*, 291 S.C. 116, 352 S.E.2d 474 (1987); *State v. McIver*, 238 S.C. 401, 120 S.E.2d 393 (1961); *State v. Dornberg*, 192 S.C. 513, 7 S.E.2d 467 (1940).

Recently, in *State v. Grippon*, this Court approved another charge that may be given instead of the traditional circumstantial evidence charge.[16] 327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997). The charge recommended in *Grippon* emphasizes that direct and circumstantial evidence are to be given the same weight. More importantly, the charge does not require, as does the traditional charge, that the circumstances "point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." Consequently, the *Grippon* charge leads jurors to believe, in my view, that direct and circumstantial evidence are to be evaluated in the very same manner. Because I disapproved of the new charge, I wrote a separate, concurring opinion. *Id.* at 84, 489 S.E.2d at 464.

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[16] Although a new charge was recommended, the Court did not overrule the traditional circumstantial evidence charge. *State v. Graddick*, 345 S.C. 383, 388, 548 S.E.2d 210, 212 (2001).

Today, the Court holds that once a proper reasonable doubt instruction has been given, the charge recommended in *Grippon* is the sole remaining charge to be given in circumstantial evidence cases. In support of its holding, the majority finds that the traditional circumstantial evidence charge confuses jurors "by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence." Because I continue to disapprove of the *Grippon* charge, I write separately once again, this time in dissent.

It is clear that circumstantial and direct evidence may be "equally valid and convincing" in a criminal case. *Moriarty*, 341 S.C. at 338 n. 6, 534 S.E.2d at 681 n. 6. But unlike direct evidence, circumstantial evidence establishes *collateral facts* from which the main facts may be *inferred*. *State v. Salisbury*, 343 S.C. 520, 525 n. 1, 541 S.E.2d 247, 249 n. 1 (2001) (citations omitted). The evaluation of circumstantial evidence, therefore, requires jurors to connect collateral facts in order to reach a conclusion—a process not required when evaluating direct evidence.

The traditional circumstantial evidence charge does not, in my view, create confusion or change the standard for measuring circumstantial evidence. Instead, the charge clarifies the jury's responsibility to evaluate circumstantial evidence carefully and gives jurors more detailed information about the relation of circumstantial evidence to the determination of guilt. Moreover, the standard for evaluating evidence remains unchanged: every circumstance must be proven beyond a reasonable doubt. Therefore, in my view, the *Edwards* charge should be retained.

The *Grippon* charge, on the other hand, does nothing to alert the jury to this separate and distinct analytical framework. This lack of instruction may have unintended, dangerous consequences. Juries may make logical leaps when putting evidence together, and in doing so, may reach illogical conclusions based on emotion or intuition instead of a rational, deliberative process.

In the present case, the State relied on the following evidence to prove, beyond a reasonable doubt, that Cherry was guilty of PWID: Cherry was a passenger in a car that was in a high crime area "known for drugs"; Cherry was carrying eight rocks of crack cocaine and $322.00, most of which was in twenty-dollar bills; and no drug paraphernalia were found in the car. Because the evidence of "intent to distribute" was purely circumstantial, Cherry requested that the trial judge charge the jury with the traditional circumstantial evidence charge.

Although it is inferable that Cherry intended to distribute crack cocaine, it is equally as inferable, in my view, he did not. Possessing drugs in a high crime area "known for drugs" does not automatically make one a drug dealer. It is also reasonable that $322 in cash would be comprised of mostly twenty-dollar bills. Moreover, it is reasonable to conclude that because Cherry did not have the requisite amount of crack cocaine on him to give rise to a permissive inference of distribution, he did not intend to distribute crack cocaine. Finally, that there were no drug paraphernalia in the car may or may not establish that Cherry was carrying the crack for his personal use.

In sum, there is no direct evidence that Cherry intended to distribute crack cocaine. Therefore, even if each circumstance were proven beyond a reasonable doubt, jurors must still ask themselves, under the *Edwards* charge, whether there is any other reasonable conclusion other than guilt. Without this instruction, the jury does not know that this critical step in the reasoning process exists. In fact, the jury is without an analytical framework in which to evaluate the evidence. That the circumstances could lead a juror to make reasonable inferences either way highlights the importance of retaining the *Edwards* charge.

I recognize, as I did in my *Grippon* concurrence, that a majority of states have abandoned the circumstantial evidence charge in favor of an approach that does not differentiate between direct and circumstantial evidence and simply provides that a defendant's guilt must be proven beyond a reasonable doubt. *See* Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say Is Based Only on Conjecture"—Circumstantial Evidence Then and Now*, 31 Hous. L. Rev. 1371, 1400 (1995) (describing the abandonment of the circumstantial evidence charge as a "bandwagon effect"

in response to the United States Supreme Court's decision in *Holland v. United States*, 348 U.S. 121 (1954), rather than a reasoned rejection of the longstanding charge). But several states have continued to require the special charge when the State's case is based wholly or substantially on circumstantial evidence.[17] *E.g.*, *Stubbs v. State*, 463 S.E.2d 686 (Ga. 1995); *Nichols v. State*, 591 N.E.2d 134 (Ind. 1992); *People v. Ford*, 488 N.E.2d 458 (N.Y. 1985); *People v. Towler*, 641 P.2d 1253 (Cal. 1982). Further, some states have advanced cogent reasons for retaining the charge. *See, e.g., Ford*, 488 N.E.2d at 465 (retaining the charge because it emphasizes the need for careful reasoning and "forecloses [the] danger … that the trier of facts may leap logical gaps in the proof offered and draw unwarranted conclusion based on probabilities of low degree"); *State v. Nelson*, 731 P.2d 788 (Idaho Ct. App. 1986), *aff'd*, 756 P.2d 409 (Idaho 1998) (rejecting the argument that the "reasonable hypothesis" language confused jurors and concluding that the language gave "sharpened clarity" to the meaning of reasonable doubt).

> In my view, the charge advanced today as the sole and exclusive charge to be given in circumstantial evidence cases does nothing to direct the jury's deliberative process. By omitting the "reasonable hypothesis" language, this Court leaves open the possibility that even when a reasonable theory exists supporting a defendant's innocence, a (possibly erroneous) conviction will stand.

Therefore, in my view, the trial judge erred in not granting Cherry's request that the jury be given the *Edwards* charge.

Acting Justice Reginald I. Lloyd, concurs.

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[17] For a complete list of states requiring the charge in cases where the evidence is wholly or substantially circumstantial, see Caroll J. Miller, *Modern Status of Rule Regarding Necessity of Instruction on Circumstantial Evidence in Criminal Trial—State Cases*, 36 A.L.R.4th 1046, § 3 (2004).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In Re: The Estate of Melvin Hyman; In Re: The Estate of Maintzie R. Hyman; In Re: The Ancillary Estate of Melvin Richardson Hyman, Sr.

M. Richardson Hyman, Jr., Appellant,

v.

Maintzie Carolina Gugliotti; Mary Caroline Hyman, as Personal Representative of the Estate of Maintzie R. Hyman; The Estate of Maintzie R. Hyman; Mary Caroline Hyman, Individually; Mary Caroline Hyman, as Guardian of Benjamin Fraser Hyman, a person who is Incapacitated or Incompetent; Benjamin Fraser Hyman, a person who is Incapacitated of Incompetent; and Sara H. Hyman, Respondents.

Appeal From Darlington County
Paul M. Burch, Circuit Court Judge

Opinion No. 3895
Heard October 12, 2004 – Filed November 22, 2004

AFFIRMED

Melvin Richardson Hyman, Jr., of Charleston, for Appellant.

Charles J. Hupfer, Jr., and John R. Chase, both of Florence, Maintzie Caroline Gugliotti, of Charleston, and Mary Caroline Hyman and Benjamin Fraser Hyman, both of Savannah, for Respondent.

PER CURIAM: M. Richardson Hyman, Jr. appeals a circuit court order affirming the special referee's decision that a vested remainder in certain stocks owned by Hyman's father passed to his wife through the residuary clause of his will and not through a direct devise to his children. We affirm.

FACTS

Following a lifetime of distinguished service to the people of this state as a highly respected member of the South Carolina Bar, Melvin Hyman passed away in 1973. He was survived by his wife, Maintzie R. Hyman, and two children, Melvin R. Hyman and Mary C. Hyman. In his last will and testament, Melvin Hyman granted a life estate in certain securities to his wife, with a remainder interest to his two children. Melvin Hyman expressly stated in his will that his children's remainder interest would "vest immediately upon [his] death, subject only to the life estate devised and bequeathed to my said wife."

In 1984, Melvin Hyman's son, Melvin R. Hyman ("Testator"), was diagnosed with a life threatening disease. Because his condition worsened over the years following this diagnosis, Testator decided to undergo an operation in September 1987. In contemplation of serious risks inherent in this particular kind of surgery, he executed a will shortly before the operation. A few weeks following the surgery, Testator passed away. Testator was survived by his mother, Maintzie; his second wife, Sara Hyman; and three children from his first marriage, M. Richardson Hyman, Jr. ("Appellant"), Benjamin F. Hyman, and M. Caroline Hyman.

Article three of Testator's will, which establishes a trust for the benefit of his children, states the following:

> I will, devise, and bequeath to my three children any and all property which I may receive by reason of inheritance from my mother's [Maintzie's] estate.

Testator also provided that the residue of his estate was to be distributed to his wife, Sara Hyman, outright and free of trust.

In January 1999, Maintzie R. Hyman, wife of Melvin Hyman and mother of Testator, passed away, terminating her life estate in the aforementioned securities at issue in this case. At this time, the remainder interests devised to Testator and Mary C. Hyman became possessory. Sara Hyman, Testator's wife, began receiving distributions and paying taxes on Testator's portion of the securities pursuant to the residuary clause of Testator's will.

In 2001, Appellant filed this action seeking to reopen Testator's estate and declare Testator's three children the lawful heirs of the securities pursuant to article three of Testator's will. The case was referred by consent of the parties to a special referee. At trial, Appellant offered testimony, over the respondents' objection, from Mary C. Hyman, sister of Testator, which evidenced Testator's intent that his remainder interest in the securities pass

through his will to his children, notwithstanding the will's express language.[1] Although this testimony was allowed at trial, the referee later determined it was improperly admitted, as the will contained no ambiguity which would warrant the admission of extrinsic evidence. The referee found, by the plain and ordinary meaning of the will's language, that the remainder interest in the securities owned by Testator passed to his wife through the residuary clause of his will and not to his children by the direct devise of article three. The circuit court affirmed the referee's decision. This appeal follows.

STANDARD OF REVIEW

The standard of review applicable to cases originating in the probate court is controlled by whether the underlying cause of action is at law or in equity. Howard v. Mutz, 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993). This is an action at law. NationsBank of South Carolina v. Greenwood, 321 S.C. 386, 392, 468 S.E.2d 658, 661 (Ct. App. 1996) (holding an action to construe a will is an action at law). If a proceeding in the probate court is in the nature of an action at law, review by this court extends merely to the correction of legal errors. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ ANALYSIS

Appellant argues the probate court erred in finding no ambiguity in Testator's will and refusing to consider extrinsic evidence to ascertain Testator's true intent. We disagree.

In construing a will, a court should give effect to the expressed intention of the testator. Bagwell v. Alexander, 285 S.C. 331, 329 S.E.2d 771 (Ct. App. 1985). In ascertaining this intent, a court's first reference is always to the will's language itself. Fenzel v. Floyd, 289 S.C. 495, 498, 347

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[1] Specifically, Testator's sister testified she and her brother both frequently referred to their vested remainder interests in their mother's life estate as property that would come to them from their mother, their "mother's estate," or "the Hyman estate."

S.E.2d 105, 107 (Ct. App. 1986). When construing this language, the reviewing tribunal must give the words contained in the document their ordinary and plain meaning. In re Estate of Fabian, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997). Where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. Id. Only when the will's terms or provisions are ambiguous may the court resort to extrinsic evidence to resolve the ambiguity. See Fenzel, 289 S.C. at 498, 347 S.E.2d at 107.

In the case at bar, the Testator's remainder interest in the securities clearly does not pass through article three of the will to his children when the language of article three is given its plain and ordinary meaning. The provision states, "I will, devise, and bequeath to my three children any and all property which I may receive by reason of inheritance from my mother's estate." Testator owned his remainder interest in the securities at the time he executed his will. The remainder interest, though subject to his mother's life estate, was at no time part of his mother's actual estate and, thus, never passed to him through inheritance from his mother. Appellant contends, however, that the provision is ambiguous; therefore, the court should consider extrinsic evidence to ascertain Testator's true intent. We do not agree with this position.

There are two types of ambiguities found in the construction of wills:

> Ambiguities . . . are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the . . . instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the . . . instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe.

Fabian, 326 S.C. at 353, 483 S.E.2d at 476 (quoting Jennings v. Talbert, 77 S.C. 454, 456, 58 S.E. 420, 421 (1907)). It is undisputed that the will in the case before us contains no patent ambiguity arising from the will's own language. It is, however, argued that, when one considers Testator's property

and the circumstances known to him at the execution of his will, a latent ambiguity arises and extrinsic evidence may be admitted to resolve it.

Appellant first contends the will is inconsistent when applied to Testator's property because, without the remainder interest, the children's trust is left unfunded. According to Appellant, Testator must have been aware of his mother's relative good health at the time of the will's execution and, thus, could not have intended to leave the trust barren in the probable circumstance that he predeceased his mother. Because a testator is presumed to have disposed of all property that he owned and the remainder interest was not specifically disposed, Appellant argues the will is ambiguous. See Gano v. Gano, 88 N.E. 146, 147 (Ill. 1909).

The presumption, arising from the law's disfavoring of partial intestacy, that a testator intends to dispose of his entire estate is, in fact, a longstanding rule in South Carolina. See Dobson v. Smith, 213 S.C. 15, 48 S.E.2d 607 (1948). However, intestacy is not an issue in this matter. Testator disposed of his entire estate under the will's residuary clause. Furthermore, by Testator's language in article three, he acknowledges he does not own the property, which he "may receive by reason of inheritance" from his mother. These words clearly establish a contingency providing for Testator's children in the event their grandmother died before their father, no matter how unlikely. Where a testator employs language that is clear and definite, the function of the court is consigned to the interpretation of the will and the enforcement of its provisions without resorting to rules of construction. 80 Am. Jur. 2d Wills §1132 (2004). "Circumstances known to Testator at the time of execution are an admissible aid in construing doubtful provisions, but the main recourse must be to the language used in the will." Limehouse v. Limehouse, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971) (emphasis added). Because the language of Article three is clear and definite, not doubtful, the referee was proper in upholding the provision's plain meaning.

Appellant also contends the will is ambiguous because extrinsic evidence in the form of Testator's sister's testimony shows Testator's intent

to be different from the plain language of the will and the findings of the special referee. Again, we disagree.

A court may admit extrinsic evidence to determine whether a latent ambiguity exists.[2] Fabian, 326 S.C. at 353, 483 S.E.2d at 476. In order to find an ambiguity, however, the extrinsic evidence must reflect that the words of the will, when applied to the object or subject which they describe, are "incapable of application as they stand." Boykin v. Capehart, 205 S.C. 276, 31 S.E.2d 506 (1994). The mere showing that a testator may have intended a testamentary construction in direct contradiction to the plain meaning of the will's language is not enough. As the supreme court has stated, "[a] will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy or inconsistency with the declared intention of the testator" should follow. In the Matter of Ezra Clark, 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992).

The special referee correctly found that giving the language of this will its plain and ordinary meaning did not render it "incapable of application" or result in "an obvious absurdity, repugnancy, or inconsistency with Testator's declared intent." Boykin, 205 S.C. at 279, 31 S.E.2d at 508; Id. At the time Testator created his will, Maintzie Hyman had a considerable estate she conceivably could have left to Testator if the contingency of her death before his had been met, thereby fulfilling his primary goal of providing for the "reasonable comfort" and proper education of his three children. Accordingly, the evidence supports the trial court's findings that no latent ambiguity exists; therefore, the use of extrinsic evidence to determine Testator's intent is not appropriate.

CONCLUSION

For the reasons stated herein, the circuit court is

[2] Once the court finds a latent ambiguity, extrinsic evidence is also permitted to help the court determine the testator's true intent and resolve the ambiguity. Fabian, 326 S.C. at 353, 483 S.E.2d at 476.

AFFIRMED.

GOOLSBY, ANDERSON, and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, Appellant,

v.

Gedney M. Howe, III, and
Gedney M. Howe, III, P.A., Respondent.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 3896
Heard October 13, 2004 – Filed November 22, 2004

REVERSED

Desa A. Ballard, of West Columbia, for Appellant.

M. Dawes Cooke, Jr., of Charleston, for Respondent.

KITTREDGE, J.: John Doe filed an action for breach of fiduciary duty and professional negligence against Gedney M. Howe, III and Gedney M. Howe, III, P.A. (collectively, "Howe"). Doe filed a motion for

confidentiality seeking permission from the circuit court to proceed anonymously, which was denied. Doe appeals, and we reverse.

FACTS

Doe was previously represented by Howe and his brother Donald H. Howe in connection with a civil claim against Porter Gaud School and others relating to allegations of sexual abuse by an employee of the school, Eddie Fischer.[1] Doe attended Porter Gaud from 1968 through 1980. The alleged abuse occurred from 1977 until 1982, two years after his graduation from Porter Gaud. In 1999, Howe agreed to represent Doe in the civil action against the Porter Gaud defendants. When the action was filed Doe was 36 years old. Doe's legal counsel recognized two potential impediments to a favorable judgment. The first and primary concern dealt with the statute of limitations, and the second hurdle dealt with a potential immunity defense. Because of these problems, counsel pursued, with Doe's consent, settlement negotiations. These negotiations resulted in a settlement agreement. On May 24, 2000, Doe signed a "Confidential Settlement Agreement and Release" settling all past, current, and future claims against Porter Gaud, in exchange for what Doe characterizes as "a modest payment of money ...."

In November 2000, another former student who claimed to have been sexually abused by Fischer, brought an action against Porter Gaud. That case proceeded to a jury trial, resulting in a verdict for over one hundred million dollars. Doe responded to news of the jury verdict by contacting Donald Howe to discuss the possibility of setting aside his settlement. Donald Howe ultimately informed Doe that the settlement was final, and there was no basis to set aside the settlement agreement.

Doe filed a complaint asserting causes of action for breach of fiduciary duty and professional negligence against Howe. Doe subsequently filed a motion of confidentiality asking the circuit court to issue an order "requiring the parties and their counsel, and any expert witnesses who may be consulted

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[1] Doe's primary counsel was Donald Howe, and the allegations in connection with the malpractice claim are primarily directed against Donald Howe.

or designated by the parties, from directly or indirectly divulging the true identity of the plaintiff in this matter, until further order of the Court." The motion states, "it is the interests of justice that he be permitted to proceed in this matter confidentially, at least in the pretrial phases, in order to protect him from embarrassment, harassment, or divulging of personal information." (emphasis added). Doe's counsel confirmed at the motion hearing that Doe's request for anonymity was limited to the pretrial proceedings.

Following a hearing, the circuit court issued an order denying the motion. The circuit court order acknowledged that in the course of the Porter Gaud litigation, victims and witnesses were permitted to use pseudonyms but found the issues in this case "entirely different from the Porter Gaud litigation." On a motion for reconsideration, the circuit court affirmed its previous order denying the motion to proceed anonymously. This appeal followed.

STANDARD OF REVIEW

This court will be bound by the factual findings of the trial court made in response to motions preliminary to trial where the findings are supported by evidence and not clearly wrong or controlled by error of law. City of Chester v. Addison, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981); Askins v. Firedoor Corp. of Florida, 281 S.C. 611, 615, 316 S.E.2d 713, 715 (Ct. App. 1984).

LAW/ANALYSIS

The single issue raised on appeal is whether the circuit court erred in denying Doe's motion to proceed anonymously. However, we are first confronted with whether this interlocutory order is immediately appealable. A fundamental rule of appellate procedure is that a judgment or order must usually be final before it can be appealed. See Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) ("As a general rule, only final judgments are appealable."). Rule 201(a) SCACR, provides that an:

"[a]ppeal may be taken, as provided by law, from any final judgment or appealable order." Section 14-3-330 of the South Carolina Code (1991) defines categories of appealable judgments and codifies the final judgment rule. "Final judgment" is a term of art referring to the disposition of all the issues in the case. Link v. Sch. Dist. of Pickens County, 302 S.C. 1, n.3, 393 S.E.2d 176, n.3 (1990).

Certain interlocutory orders are, however, immediately appealable. An interlocutory order is appealable if it falls into one of a few, limited categories of appealable judgments or orders. S.C. Code Ann. § 14-3-330 (Supp. 2003); Woodward v. Westvaco Corp., 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995) (overruled on other grounds by Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002)). Whether the denial of a request to proceed anonymously is immediately appealable is an issue of first impression in South Carolina.

The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment. In light of the policy underpinnings of the final judgment rule, exceptions should be recognized cautiously.

Federal courts have addressed the issue of the appealability of such orders, holding that the refusal "to allow parties to proceed anonymously at trial is 'separate from and collateral to' the merits of the action.'" James v. Jacobson, 6 F.3d 233, 237 (4th Cir.1993) (citing Doe v. Stegall, 653 F.2d 180 (5th Cir.1981) and S. Methodist Univ. Ass'n v. Wynne & Jaffee, 599 F.2d 707 (5th Cir.1979)). Under the collateral order analysis employed by the federal courts, the order is appealable if it (1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment. Id., 653 F.2d at 236.

We are persuaded that the denial of Doe's motion to proceed anonymously meets the criteria for appellate review. The decision conclusively determines the question, is a question independent of the merits of the litigation and would be effectively unreviewable on final appeal once

Doe's true identity was revealed. The order denying Doe's motion to proceed anonymously prior to trial has the effect of revealing his identity, the very thing he was seeking to keep confidential. Therefore, we find that the order is immediately appealable and address whether the circuit court erred in denying Doe's motion to proceed anonymously.

Our courts have long recognized the need for confidentiality in cases dealing with sensitive and personal subject matter. In cases involving the sexual abuse of children, the courts have judicially protected the names of the victims. See Doe by Roe v. Orangeburg County Sch. Dist., 335 S.C. 556, 518 S.E.2d 259 (1999); Doe by Doe v. Greenville Hosp. Sys., 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994). Additionally, the names of victims of criminal sexual conduct are prohibited by law from being publicly disclosed in news media. See S.C. Code Ann. § 16-3-730 (2003) ("Whoever publishes or causes to be published the name of any person upon whom the crime of criminal sexual conduct has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years.").

There is no litmus test in South Carolina to determine whether a litigant in a civil proceeding should be allowed to proceed anonymously. We believe that the better practice is one which avoids a rigid, formulaic approach, thereby allowing the trial courts a degree of flexibility in this fact-sensitive area. In the present case, we find the factors utilized in the Fourth Circuit provide appropriate guidance:

> (1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation <u>or is to preserve privacy in a matter of sensitive and highly personal nature</u>;
> (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties;

(3) the ages of the persons whose privacy interests are sought to be protected;
(4) whether the action is against a governmental or private party; and
(5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.[2]

James v. Jacobson, 6 F.3d at 238 (emphasis added); America On Line, Inc. v. Anonymous Publicly Traded Company, 261 Va. 350, 363, 542 S.E.2d 377, 384 (2001) (citing James v. Jacobson) (trial court considered enumerated factors and permitted the plaintiff to proceed anonymously "to avoid annoyance and criticism that may attend any type of litigation" and "to preserve privacy in a matter or sensitive and highly personal nature").

The decision to proceed anonymously is committed to the discretion of the trial court. Though there is a presumption of openness of judicial proceedings, it operates "only as a presumption and not as an absolute, unreviewable license to deny." James v. Jacobson, 6 F.3d at 238.

We agree with Doe that the circuit court erred in finding that the underlying facts of the sexual abuse claims "are not the focus of this particular litigation." The court found that "[p]ursuing the malpractice cause of action does not require [Doe] to publish his personal life and sexual history indiscriminately. The allegations of sexual abuse are peripheral to the malpractice allegations." The record does not support this finding.

Here, Howe's defense to the claims of professional negligence and breach of fiduciary duty requires an examination of the merits of the original sexual abuse claims against Porter Gaud. In effect, it requires a "trial within a trial." The record includes Doe's deposition in which the times, places, and sexual acts that were the basis of the claim against Porter Gaud appear. Clearly, the malpractice case cannot be litigated in a vacuum. It is readily apparent that revealing Doe's identity would likely cause the harm and social

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[2] We cite these factors as a nonexclusive list, and recognize that on a case-by-case basis other factors may require consideration.

stigmatization he understandably seeks to avoid. Doe has established the need to "preserve privacy in a matter of [a] sensitive and highly personal nature." Id.

Furthermore, the order of the circuit court found that "[t]he sexual assaults in the underlying claim for which Defendants represented him occurred many years ago." Answers in the deposition belie the suggestion that the mere passage of time removes the claimed embarrassment and humiliation purportedly suffered by Doe. While the passage of time may be an appropriate factor in the judge's analysis, it is not dispositive and in this case, it carries little weight in advancing Howe's efforts to compel Doe to disclose his identity.

We conversely discern no prejudice or "risk of unfairness" to Howe in allowing Doe to proceed anonymously in the "pretrial phases."[3] Howe has failed to demonstrate that his ability to conduct further discovery or otherwise prepare for trial will be hindered by allowing Doe to proceed anonymously prior to trial.[4]

CONCLUSION

We are firmly persuaded that the general presumption of public identification of parties should yield under the record before us to Doe's request that he be permitted to proceed anonymously prior to trial. Accordingly, the decision of the circuit court is

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[3] This is the relief sought by Doe in his motion in the circuit court, and this is the relief he will receive as a result of our reversal of the circuit court. The matter of additional relief is not before us.

[4] It was disclosed at oral argument that Howe has been granted summary judgment on Doe's malpractice complaint. We are further informed that Doe has appealed the grant of summary judgment. Doe's appeal from the denial of his motion to proceed anonymously remains a justiciable controversy, and the present appeal is not rendered moot by the grant of summary judgment to Howe.

REVERSED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Paris McLeod, Appellant.

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

Opinion No. 3897
Heard November 9, 2004 – Filed November 29, 2004

AFFIRMED

Acting 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 Cecil Kelly Jackson, of Sumter, for Respondent.

ANDERSON, J.: This case arises from a convenience store robbery, which resulted in the death of one of the store's owners and injury to the other owner. Paris McLeod appeals from his conviction for murder and sentence of thirty years imprisonment. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Perry Lloyd and his wife owned and operated the B & D convenience store in Rembert, South Carolina. On December 21, 1999, Lloyd was locking up the store for the evening after removing the day's proceeds. His wife was seated in the passenger seat of his truck parked in front of the store. When Lloyd turned from locking the front door, Rashaun Brooks, one of McLeod's codefendants, jumped around the corner of the store holding a gun and demanded that Lloyd "give it up." Lloyd initially thought it was a joke. However, Brooks fired his gun twice. Dropping the bag of money, Lloyd backed toward his truck.

Brooks retrieved the bag of money from the ground and said to Lloyd, "Didn't I say give it up?" Brooks shot again, this time in the direction of the truck. Lloyd observed McLeod emerge from the dark holding a shotgun. As Lloyd reached for his pistol, McLeod stumbled and the shotgun fired. The shot struck Lloyd in the leg. At the same time Lloyd was pulling his pistol, Jermaine Harris, McLeod's second codefendant, began shooting at Lloyd. Lloyd fired two bullets from his pistol and, after Brooks fired two more shots, the three assailants ran.

Lloyd stood after the robbers fled, though he had multiple wounds to the legs. Lloyd testified he heard a bullet strike the truck during the shooting. When he checked on his wife in the truck, he discovered she had been wounded from a gunshot to the head. He stated he saw "the last breath and the blood running from her head." Lloyd went inside the store, called 911, and frantically sought help for his wife. Yet his wife's gunshot wound was fatal.

In his telephone call to 911, Lloyd explained he and his wife had both been shot. He advised the dispatcher that the suspects included McLeod. Lloyd referred to McLeod as P.J. on the 911 call and when he made his identification to Lieutenant Wesley Gardner. Additionally, he stated all of the suspects had weapons. When describing the individuals to the dispatcher, he stated: "Alright, I can't tell you exactly what the other ones had on, but I know P.J. All of 'em the same ones I have trouble with right here all the time."

One of the initial responding officers was Lieutenant Wesley Gardner, an investigator with the Sumter County Sheriff's Office. Lt. Gardner questioned Lloyd regarding the events. Lloyd declared he knew three of the attackers. He identified his attackers as McLeod, Brooks, and Harris. The identification of these three men was certain. However, Lloyd told Lt. Gardner that he saw shadows, so there may have been more individuals involved.

Shortly after the shooting, McLeod, Brooks, and Harris were arrested at a nearby residence. The police arrested Leroy Porter at the same time, but on an unrelated charge. Following his arrest, Porter offered to assist in retrieving the weapons used in the convenience store robbery and murder. The police were unable to find the guns in their first search attempt using Porter's information. Thereafter, Porter was asked to wear a wire to record a conversation between himself and Brooks in Brooks' jail cell. After reviewing the recorded conversation, the police located a rifle that was connected to the shells used during the convenience store robbery.

As corroborating evidence, the State presented the testimony of Lakeysha Nelson. Nelson informed the police she was at a gathering with McLeod and Brooks shortly prior to the attack. Nelson stated Brooks had a gun and McLeod told Brooks "that he needed money," and "that they needed to rob somebody."

McLeod was thirteen at the time of the robbery and shootings. He was indicted for murder, armed robbery, assault and battery with intent to kill, possession of a weapon during the commission of a violent crime, first degree

lynching, and second degree lynching. After hearings before the family court, jurisdiction was transferred to General Sessions court. All charges except the murder charge were remanded to the family court for consideration.

McLeod was tried with his codefendants. He was convicted of murder. The trial judge sentenced him to thirty years imprisonment.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Mattison, 352 S.C. at 6, 583 S.E.2d at 855.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Adams, 354 S.C. 361, 377-78, 580 S.E.2d 785, 793-94 (Ct. App. 2003). In order for an error to warrant reversal, the error must result in prejudice to the appellant. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); see also State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

LAW/ANALYSIS

I. Rule 613(b), SCRE

During the trial, Lt. Gardner was questioned about whether he had entered into a prior agreement with Porter. Lt. Gardner denied making a statement that he made an agreement with Porter. Brooks sought to impeach Lt. Gardner by introducing evidence of a purported prior statement Lt. Gardner had made admitting he had entered into an agreement with Porter.

After removing the jury, the trial judge heard testimony regarding the circumstances of the prior statement. Brooks' trial counsel alleged the conversation between Lt. Gardner and Porter occurred at the solicitor's office. Brooks called Officer John Davis[1] who recalled a conversation occurring on the second floor of the law enforcement center. Davis said the term "agreement" was not specifically used but that Lt. Gardner agreed to take his cooperation into consideration. Davis alleged that the conversation took place in either December or January. After hearing the testimony, the trial judge sustained the State's objection and refused to allow Brooks to impeach Lt. Gardner. McLeod's counsel joined in the objection to the refusal to allow the impeachment evidence and the proffer of the evidence.

McLeod argues the circuit court erred when it did not allow him to impeach Lt. Gardner with his prior statement. We disagree.

Rule 613(b), SCRE, provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

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[1] Officer Davis is no longer employed with the Sheriff's Department, but worked as an investigator with the Department in December of 1999.

The South Carolina rule differs from the federal rule in that a proper foundation must be laid before admitting a prior inconsistent statement. It is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement. Under Rule 613(b), extrinsic evidence of the statement is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made. Rule 613(b) explicates the procedure for impeachment by a prior inconsistent statement and requires laying the foundation. See State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999).

During questioning of Lt. Gardner about the alleged conversation, counsel asked whether he recalled a conversation that took place in the solicitor's office. Davis testified to a conversation which occurred in the second floor classroom of the law enforcement center. Finally, Davis could not testify to the statement or its meaning. Davis gave his own interpretation. He admitted the conversation could have been about a prior instance and may have involved other charges. Consequently, the trial judge did not abuse his discretion in excluding the testimony due to the failure to provide a sufficient foundation under Rule 613(b).

II. Relevance

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Cooley, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). We review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).

The trial judge determined the evidence would be more prejudicial than probative. The judge found the only way the State could contradict the evidence would be to call the solicitor as a witness. The individual who allegedly received a deal, Leroy Porter, did not testify at trial. He wore a wire to record a conversation with Brooks, which was played at trial. Brooks' words spoke for themselves. It is hard to discern what benefit there would have been for the jury to know the solicitor and Lt. Gardner agreed "to help him on some charges."

Additionally, any attempt to introduce the impeaching evidence to raise the issue of Porter's possible guilt in the crime is not a proper reason for its admittance. "Our Supreme Court has imposed strict limitations on the admissibility of third-party guilt." State v. Mansfield, 343 S.C. 66, 81, 538 S.E.2d 257, 265 (Ct. App. 2000). "Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt." Id.

Given the minimal probative effect of the evidence, and its clear prejudicial effect, the trial court properly excluded the testimony under Rule 403, SCRE.

III. Harmless Error

Any error arising from the exclusion of the evidence in the present case would be harmless.

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). 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. 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); Pagan, 357 S.C. at 146, 591 S.E.2d at 653.

In State v. Fossick, 333 S.C. 66, 70, 508 S.E.2d 32, 33-34 (1998), and State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999), the supreme court applied a harmless error analysis to the failure to allow impeaching testimony. In both cases, the court ruled that although the judge erred in not admitting the impeachment evidence, the error was harmless. The Fossick court concluded:

> In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).
>
> Here, the main thrust of Shane's testimony was that he left appellant and Marilee about 1:30 p.m. on the day Marilee disappeared. This same information was admitted into evidence as part of a statement appellant made to police months before his confession that he was with Marilee at 1:30 p.m. that day when Shane saw them on the side of the road. Appellant's father also testified to this statement which appellant made to police in his father's presence. Accordingly, Shane's testimony was cumulative.
>
> Further, Shane's testimony was relatively unimportant to the State's case which rested on appellant's confession and the fact he led police to the murder weapon. In addition, appellant was permitted extensive cross-examination of Shane and impeached him with extrinsic evidence of conduct Shane denied.

> In light of all these factors, exclusion of Shane's prior inconsistent statement as impeaching evidence was harmless.

Id. at 70, 508 S.E.2d at 34. Citing State v. Fossick, the Beckham court held:

> [H]ere, the trial judge erred in not admitting the impeachment evidence but we find the error was harmless. McCraw's testimony was not that important to the State's case. Much of McCraw's testimony was merely cumulative to Anderson's testimony and corroborated by other evidence. The majority of McCraw's testimony was about the phone records of appellant, appellant's father, Vickie's father, Anderson, Anderson's employer (Smuggler's), and several pay phones, and appellant's bank records. McCraw also testified as to Anderson's statement and how he had investigated the information contained in the statement. Appellant was permitted to extensively cross-examine McCraw. Lastly, the State's case was fairly strong. Anderson's testimony and the evidence of flight were very damning. After considering the Van Arsdall factors in light of the evidence against appellant, we hold the exclusion of this impeachment evidence was harmless.

Id. at 319, 513 S.E.2d at 614-15 (footnote omitted).

In the instant case, there was overwhelming evidence of McLeod's guilt. Lloyd identified McLeod as one of the assailants when he called 911. Specifically, he enounced: "Alright, I can't tell you exactly what the other ones had on, but I know P.J. All of 'em the same ones I have trouble with right here all the time." Additionally, Lloyd was certain of McLeod's involvement when he provided Lt. Gardner with a list of the individuals involved in the shooting. Finally, during his testimony, Lloyd stated unequivocally: "P.J. comes over from out of the dark. When I looked up, I look right straight and I seen him. I look straight down a gun barrel." Lloyd then explained how he was shot by McLeod.

Additionally, the testimony of Nelson provided support for McLeod's guilt. Nelson stated it was McLeod's idea to rob someone, because he "needed money." She testified that when most of the group left, McLeod, Brooks and Harris stayed behind. These are the same three individuals later identified by Lloyd as his assailants and his wife's murderers.

Finally, Lt. Gardner's main testimony was in regard to Lloyd's identification of McLeod. Because this testimony was cumulative to Lloyd's identification of McLeod without any qualification, as well as the 911 tape, the error would be harmless. See Fossick, 333 S.C. at 70, 508 S.E.2d at 33-34. Accordingly, even if there were an error in admitting the evidence, which we do not find, the error would be harmless given the overwhelming evidence against McLeod.

CONCLUSION

The impeachment testimony sought to be introduced by McLeod was properly excluded because a foundation had not been laid pursuant to Rule 613(b), SCRE. Additionally, the testimony's prejudicial effect greatly outweighed its probative value. Finally, any possible error in its admittance was harmless given the strength of the State's case against McLeod and the cumulative nature of Lt. Gardner's testimony. Accordingly, McLeod's conviction and sentence are

AFFIRMED.

STILWELL and SHORT, JJ., concur.