The Supreme Court of South Carolina

In the Matter of Thomas Mark Ramee, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1981, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated November 4, 2009, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Thomas Mark Ramee shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

December 3, 2009

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
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N O T I C E

IN THE MATTER OF ROBERT L. GAILLIARD, PETITIONER

On January 24, 2005, Petitioner was indefinitely suspended from the practice of law. In the Matter of Gailliard, 362 S.C. 428, 608 S.E.2d 434 (2005). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than February 1, 2010.

Columbia, South Carolina
December 3, 2009

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 53
December 7, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Lawrence Tucker, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Calhoun County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26746
Heard November 30, 2009 – Filed December 7, 2009

DISMISSED AS IMPROVIDENTLY GRANTED

Appellate Defender Kathrine H. Hudgins, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Assistant Attorney General Mark R. Farthing, all of Columbia, and Solicitor David M. Pascoe, Jr., of Summerville, for Respondent.

PER CURIAM: This Court granted Lawrence Tucker's petition for a writ of certiorari to review the decision of the Court of Appeals in State v. Tucker, 376 S.C. 412, 656 S.E.2d 403 (Ct. App. 2008), in which the Court of Appeals affirmed Tucker's plea of guilty involving an alleged violation of the Interstate Agreement on Detainers Act (IAD). After careful consideration of the Appendix and briefs, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., WALLER, PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In Re: November 4, 2008
Bluffton Town Council
Election.

Fred Hamilton, Jr., and Allyne Mitchell, Respondents,

v.

Jeff Fulgham, Normand Thomas, and the Beaufort County Board of Elections and Voter Registration

of whom Jeff Fulgham and Normand Thomas are Petitioners.

ON WRIT OF CERTIORARI

Opinion No. 26747
Heard May 13, 2009 – Filed December 7, 2009

VACATED

Karl S. Bowers, Jr., A. Mattison Bogan, and M. Todd Carroll, all of Nelson, Mullins, Riley & Scarborough, of Columbia, for Petitioners.

Daniel E. Martin, Sr. and Daniel E. Martin, Jr., both of Charleston, for Respondents.

CHIEF JUSTICE TOAL: In this case, Petitioners challenged the results of a municipal election based on irregularities discovered in the voting rolls. The county election board voted to hold a new election, and Respondents appealed to the State Election Commission. The Commission overturned the decision of the county election board, and we granted Petitioners' petition for writ of certiorari to review that decision.

FACTUAL/PROCEDURAL BACKGROUND

On November 4, 2008, an election was held for two seats on the Bluffton Town Council. Respondents Fred Hamilton, Jr., and Allyne Mitchell (together "Respondents") were declared the winners of the election with 1,553 and 1,449 votes, respectively. Petitioners Jeff Fulgham and Normand Thomas (together "Petitioners") received 1,423 and 796 votes, respectively.

On November 6, 2008, Fulgham filed a letter of protest with the Beaufort County Board of Elections and Voter Registration ("County Board"), seeking a new election. Fulgham alleged that approximately one-hundred eligible voters had not been allowed to vote. A hearing was held before the County Board the next day.

At the hearing, Fulgham called Charlie Wetmore, candidate for Town of Bluffton Mayor, to testify. Wetmore testified that he received calls from voters telling him they had not been allowed to vote. Agnes Garvin, Executive Director of the County Board, testified that her review of the voter rolls after the election revealed that there were one hundred sixty-six (166)

"coding" irregularities.[1] Garvin could not testify as to how many non-residents had been allowed to vote. No individual voters were called to testify that they had been disenfranchised and no allegations were made regarding specific non-resident voters who were allowed to vote in the municipal elections.

Based upon this testimony, the County Board voted to hold a new election for mayor and town council on November 18, 2008. Respondents appealed to the South Carolina State Election Commission ("the Commission").

The Commission held a hearing on December 3, 2008. Petitioners argued that the Commission lacked subject matter jurisdiction to review the County Board decision, but that the evidence below supported a ruling on the merits in their favor. The Commission assumed jurisdiction and voted to sustain the election results and reverse the County Board decision to order a new election on the grounds that it was supported by insufficient evidence. Petitioners filed a petition for a writ of certiorari, and we granted certiorari to review the following question:[2]

> Did the Commission have subject matter jurisdiction to hear an appeal from a decision of the County Board?

[1] "Coding" refers to the practice of denoting voters with a number to indicate whether they lived in Bluffton and were eligible to vote in the municipal elections.

[2] Petitioners also presented the question of whether the Commission erred on the merits of its decision to overturn the County Board. However, because we find that this matter is foreclosed on the issue of subject matter jurisdiction, we decline to answer that question here.

STANDARD OF REVIEW

In municipal election cases, this Court will review the lower decision for errors of law, and will not overturn findings of fact unless those findings are wholly unsupported by the evidence. *Gecy v. Bagwell*, 372 S.C. 237, 241, 642 S.E.2d 569, 571 (2007).

LAW/ANALYSIS

Petitioners argue that the Commission lacked subject matter jurisdiction to review the decision of the County Board when the County Board adjudicated a municipal election dispute. We agree.

Subject matter jurisdiction is defined as "the power [of a court] to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). Issues related to subject matter jurisdiction may be raised at any time. *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998). The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989).

As a general matter, municipal election disputes are to be adjudicated by municipal election commissions. S.C. Code Ann. § 5-15-130 (2004). Appeals from municipal election commissions are heard by the circuit court. S.C. Code Ann. § 5-15-140 (2004).

County boards are directed by statute to "decide all cases under protest or contest that arise in their respective counties in the case of county officers and less than county offices, except for primaries and municipal elections." S.C. Code Ann. § 7-17-30 (Supp. 2008). However, municipalities that choose not to establish their own election commissions are authorized to transfer the authority to conduct their municipal elections to the county election commission. S.C. Code Ann. § 5-15-145(A) (2004). The statute

requires that in order to effectuate this transfer, the governing bodies of the municipality and the county must agree to the terms of the transfer and enact ordinances embodying the terms of the agreement. S.C. Code Ann. § 5-15-145(B) (2004). The municipal ordinance must state what authority is being transferred and the county ordinance must accept the authority being transferred. *Id.* If only a portion of the municipality's authority for election oversight is transferred to the county, the municipality must maintain its own election commission. S.C. Code Ann. § 5-15-145(D) (2004).

Beaufort County's ordinance accepting the transfer of municipal election authority from the Town of Bluffton provides: [3]

> (a) The [County Board] accepts the transfer of authority to conduct all general and special elections of the Town of Bluffton. The Town of Bluffton Municipal Elections transfers to the [County Board] the following authority, responsibilities, and agreement for reimbursement of expenses associated with conducting the Town of Bluffton's General and Special

[3] Both parties premised their arguments on the fact that the Town of Bluffton transferred all authority to conduct this municipal election to Beaufort County and that Beaufort County accepted this authority. To be sure, neither party has challenged the County Board's authority to hear the election protest at any point in this litigation. What is at issue before us is in which tribunal Respondents were required to file their appeal. For this reason, although the dissent is correct in stating that courts will not take judicial notice of a municipal ordinance, this principal of law is simply not applicable under the facts of this case. *Compare Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (declining to take judicial notice of an ordinance regarding zoning appeals which was not included in the record where such ordinance could have invalidated the challenged ordinance) and *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 92-93, 344 S.E.2d 869, 872 (Ct. App. 1986) (holding the trial court erred in charging the jury that violations of a standard building code is negligence *per se* where plaintiffs failed to offer evidence that the municipality passed an ordinance adopting the building code because courts will not take judicial notice of an ordinance).

> Municipal Elections:
>
> . . . .
>
> (c) The [County Board] shall designate all polling places, the inspection and visitation of polls during election day, the recruitment and assignment of poll managers, securing telephones for the polling precincts, *the hearing of challenged ballots and ruling on any protests and/or complaints regarding the election or its procedures, and the certification of the election results.*

Beaufort County Code of Ordinances § 30-3 (emphasis added).

As mentioned above, appeals from municipal election commissions are to be filed in circuit court. Section 5-15-140. Appeals from county election boards are to be made to the South Carolina State Election Commission. S.C. Code Ann. § 7-17-60 (2004). However, these statutes do not speak to the question of where an appeal must be filed from a judgment on a municipal election dispute that is decided by a county election board.

Petitioners argue that there is an ambiguity in the statute and the clear intent of the legislature in drafting these statutes was to prevent challenges of municipal elections from being considered by the Commission. Petitioners' contention can be summarized to say that when a county board hears a municipal election dispute pursuant to a transfer of authority, the county board "stands in the shoes" of the municipality.

Respondents contend that because the Town of Bluffton does not have its own process for appealing from an election, the County Board's process controls. Furthermore, Respondents argue that they filed an appeal with the Commission at the direction of the Executive Director of the County Board, and that Petitioners failed to object to jurisdiction at the hearing.

We find Petitioners' argument persuasive for two reasons. First, just as subject matter jurisdiction cannot be waived or conferred by agreement of the parties to an action, it cannot be conferred at the direction of a county official. *Brown v. State*, 343 S.C. 342, 346, 540 S.E.2d 846, 848 (2001). Furthermore, subject matter jurisdiction may also be raised at any time, and it is properly contested in this appeal even if it was not raised below. *Id.*

Second, we find a statutory ambiguity exists. The cardinal rule of statutory construction is to ascertain the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994). However, where a statute is ambiguous, the Court must construe the terms of the statute according to settled rules of construction. *Lester v. S.C. Workers' Compensation Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

Our reading of the relevant statutes reveals a number of instances where ambiguities arise. First, although § 5-15-145 establishes a clear framework for the transfer of authority from municipalities to county election boards, it fails to provide a procedure for protests and appeals in these circumstances. Furthermore, while there are statutes setting forth the procedure for contesting municipal election results, those statutes refer to contests filed with, and the filing of appeals from, a municipal election system. Lastly, although a county board is authorized to assume the authority to conduct a municipal election, it is specifically prohibited from deciding a protest or contest arising from such an election. S.C. Code Ann. § 7-17-30.

We must construe these statutes together to determine legislative intent. *See Rivas*, 342 S.C. at 109, 536 S.E.2d at 375. We begin our analysis with §

7-17-30, which states plainly that county boards cannot decide protests or contests arising from municipal elections. Sections 5-15-130 and 5-15-140 also make it clear that the standard procedure for contesting a municipal election is to file a protest with the municipal election commission and thereafter seek review of that decision in the court of common pleas.

The construction urged by Respondents, in our view, would lead to a result not intended by the legislature. Specifically, Respondents' position would result in different methods of protest and appeal of municipal elections depending on whether the municipality's elections were conducted by a municipal election commission or a county board.

Construing these statutes together, we therefore hold that the only reasonable interpretation of § 5-15-145 is that it establishes a framework whereby county boards act pursuant to authority bestowed upon them by municipal bodies. Therefore, the proper appellate court for any petitioner seeking review of a county board's decision made pursuant to a transfer of authority from a municipality is the circuit court. We therefore hold that Respondents erroneously filed their notice of appeal with the Commission and hereby vacate that decision.

Recognizing the ambiguity in determining the proper appellate tribunal in a municipal election protest initially submitted to a county board and the fact that Respondents timely filed their notice of appeal with the Commission, we elect to invoke Rule 204(a), SCACR. Rule 204(a) provides that "[i]n the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court." In invoking Rule 204(a), we are guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers.[4] Vacating the judgment

[4] *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) (holding civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party); *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989) (stating rules applicable to

of the Commission and transferring this case to the circuit court will serve the ends of justice by ensuring that the election challenge is heard in the proper appellate forum.

CONCLUSION

Accordingly, we declare the Commission's decision void for lack of subject matter jurisdiction. We vacate the judgment of the Commission and remand the matter to the Beaufort County circuit court for consideration of Respondents' challenge to the decision of the County Board.

VACATED AND REMANDED.

WALLER, KITTREDGE, JJ., concur. BEATTY, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

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post-conviction relief actions should not be construed in manner which operate as a trap for the unwary lawyer).

JUSTICE BEATTY: I respectfully dissent. In my view, construction of the relevant statutes clearly leads to the conclusion that the legislative intent is that county boards of elections shall not be involved in municipal elections unless invited to do so by a particular municipality. County board involvement is limited to the extent of authority granted by the municipality. The authority granted to the county board of elections is required to be evident in ordinances passed by both municipal and county governing bodies.[5]

I find no ambiguity in the statutes or statutory scheme. Appeals from municipal election commissions are heard in the circuit court. S.C. Code Ann. § 5-15-140 (2004). Appeals from county boards of elections are heard by the South Carolina State Elections Commission. S.C. Code Ann. § 7-17-60 (2004). The Legislature is presumed to know that it authorized county boards to conduct municipal elections when requested and agreed upon. Yet, section 7-17-60 does not include an exception for municipal elections appeals.

The decision that the State Elections Commission did not have jurisdiction disregards two points:

> 1) This is an appeal of a county board's decision to the State Election Commission, and there is no authority for the appeal of the county board's decision to the circuit court. The State Elections Commission has subject matter jurisdiction to hear appeals from county boards.
>
> 2) The conundrum created by section 7-17-30. Bluffton does not have an elections commission to hear protests or contests.

[5] The record before us does not contain a Town of Bluffton ordinance authorizing the County Board of Elections and Registration to conduct Bluffton's elections. This is problematical to Appellant's case given this Court is not allowed to take judicial notice of a municipal ordinance. Instead, the ordinance must be proved before the lower court or tribunal. Steinberg v. South Carolina Power Co., 165 S.C. 367, 163 S.E.2d 881 (1932). Arguably, the county board's decision should be vacated.

> Section 7-17-30 prohibits county boards from deciding protests and contests of municipal election. Under the majority's construction, Bluffton could transfer all aspects of its elections process to the county board except for protests and contests. Yet, section 5-15-145 authorizes a municipality to discontinue its elections commission when it transfers all of its election functions to the county board.

In my view, the legislative intent is that section 7-17-30's bar to county boards deciding municipal election protests is not applicable to cases where the municipality has transferred its elections authority to the county board. Congruently, section 5-15-140 is not applicable and any appeal should be to the State Elections Commission not to the circuit court. Moreover, this is not an appeal from a municipal election commission. Section 5-15-140 only applies to appeals from municipal elections commissions.

The Town of Bluffton's elections were conducted by the Beaufort County Board of Elections and Registration. Any appeal should be taken to the State Elections Commission. It is clear that the State Elections Commission has jurisdiction to hear appeals from county boards of elections.

A holding that the State Election Commission lacked jurisdiction due to an ambiguous statutory scheme is to create ambiguity where there is none and, thus, complicates an otherwise clear and simple election process.

I would dismiss certification as improvidently granted.

PLEICONES, J., concurs.

The Supreme Court of South Carolina

Governor Marshall C. Sanford, Jr., Petitioner,

v.

South Carolina State Ethics Commission and Herbert R. Hayden, Jr., in his official capacity as Executive Director of the State Ethics Commission, Respondents,

The Honorable Robert W. Harrell, Jr., Speaker of the South Carolina House of Representatives, Intervenor.

ORDER

This matter is before the Court pursuant to a petition for rehearing, or alternatively for clarification, filed by Robert W. Harrell, Speaker of the South Carolina House of Representatives. Therein, Speaker Harrell seeks clarification of the opinion issued by the Court in this matter on November 5, 2009. The South Carolina State Ethics Commission has filed a return in which it agrees clarification would be helpful. Although, we believe

the mandate set forth in the opinion was clear, we grant the request for clarification given the confusion evidenced by the Commission's return.

In unmistakably unambiguous language, we held in our November 5th opinion that "the Governor's August 28th letter constituted a complete waiver of **his** right to confidentiality under section 8-13-320(10)(g) . . . ." We emphasized that "Governor Sanford's waiver . . . reaches all documentation to which **he** is entitled."

However, the Commission now takes the position, based on a flawed interpretation of this Court's opinion, that it must hold a hearing on the Governor's pending Motion to Enjoin Dissemination of Investigative Report before public dissemination of *any* documentation relating to its investigation of the Governor. The Speaker maintains this Court's opinion requires the Commission to release, without the necessity of a hearing, *all* documents, including the investigative report, that the Commission provides, or has provided, to the Governor during the course of its investigation.

This Court's opinion of November 5, 2009, unambiguously supports the Speaker's position.[1] We therefore order the Commission to *immediately* make public all documents provided to the Governor during the course of its investigation in the underlying matter.[2]

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Donald W. Beatty J.

[1] While the Commission is correct that the Court's opinion consists of two parts, the first part of the opinion merely found the requirements for a writ of mandamus were not met by either the Governor or the Speaker due in part to the fact that both had other avenues of obtaining the relief they sought, including the Governor's motion for an injunction pending before the Commission. However, in the second part of the opinion, the Court construed the Governor's petition for a writ of mandamus as a request for injunctive relief and denied such relief based on the finding that the Governor waived his right to confidentiality as to all documentation to which he is entitled. In light of this finding, the Court's earlier finding that the pending motion before the Commission constituted an alternative method of obtaining relief precluding the issuance of a writ of mandamus does not require the Commission to provide the Governor with a hearing on his pending motion before it can publicly disseminate "all documentation to which [the Governor] is entitled." In other words, if documentation has been provided to the Governor, it is automatically public. The Court also clearly held that the Governor's waiver did not extend to the Commission's work product and internal investigative process. Otherwise, the Court left it to the Commission in the first instance to determine what *other matters and documentation* are subject to the Governor's waiver, noting the Commission could make such a determination, if necessary, when it ruled on the Governor's pending motion for an injunction.

[2] We note this is a continuing obligation on the part of the Commission.

s/ John W. Kittredge J.

Based on my earlier dissent, I would grant the petition for rehearing.

s/ Costa M. Pleicones J.

Columbia, South Carolina
December 2, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Department of Social Services, Respondent,

v.

Laura D. and Jerome C., Defendants,

Of Whom Laura D. is the Appellant.

In the Interests of Carmen C.,
a minor child under the age of 18.

Appeal From Spartanburg County
Robert E. Guess, Family Court Judge

Opinion No. 4634
Submitted November 2, 2009 – Filed December 3, 2009

REVERSED AND REMANDED

William S. F. Freeman, of Greenville, for Appellant.

Robert C. Rhoden, III, of Spartanburg, for Respondent.

Sean Giovannetti, of Boiling Springs, for Guardian Ad Litem.

PER CURIAM: Laura D. (Mother), an inmate at the Camille Griffin Graham Correctional Institution, appeals the family court's denial of her motion for a continuance when the Department of Corrections (the Department) failed to transport Mother to a judicial review hearing despite a court order finding Mother was a "necessary and proper party." We reverse and remand.

FACTS

On April 27, 2007, Mother and Carmen C. (Child), then two years and four months old, tested positive for cocaine. According to the guardian ad litem (GAL), Child ingested drugs that Mother had purchased. As a result, Child was taken into emergency protective custody, and on May 9, 2007, the family court granted the Department of Social Services (DSS) custody of Child. Thereafter, Mother stipulated, without admission, that she physically neglected Child, and therefore, Child had been abused or neglected. On October 2, 2007, the family court issued a removal order and ordered Mother complete a treatment plan. Previously, findings were made against Jerome C. (Father), and he was ordered to complete a treatment plan as well. The family court's order deferred deciding permanency planning and the issue of Mother's payment of child support.

On January 8, 2008, the family court held a hearing and found Father had substantially complied with his treatment plan, but Mother had not. As a result, the family court issued an order for permanency planning, placing Child in Father's custody. The family court stated Father's custody of Child shall not affect Mother's ability to complete her treatment plan, and it ordered DSS to continue supervising visits between Mother and Child. A judicial review was scheduled for six months following Father's taking custody of Child.

Subsequently, Mother was incarcerated. As a result, the family court ordered the Department to transport Mother to the June 27, 2008 judicial review hearing because Mother was a "necessary and proper party." Although the order of transport was faxed to the Department, the Department failed to transport Mother to the hearing. When the hearing began, Mother's counsel moved for a continuance, arguing: "I hate for this hearing to proceed without [Mother] through no fault of her own, and, in fact, despite the court order is not present." The family court responded:

> Well, I want to respond to your statement that she is not here, that it's not her fault that she is not. She did get herself put in prison. So to the extent that she is not able to physically move about as she would like to, she is responsible for that.

Subsequently, the family court denied her motion.[1]

The family court then issued a written order finding Mother responsible for the fact that she was not present at the hearing through her own criminal actions, and ordered Child to remain in Father's custody. Additionally, the family court stated Father was responsible for arranging and supervising Mother's visitation with Child, and that visitation should not occur at Mother's or Father's residence. Lastly, the family court closed the case, stating should Mother wish to seek custody of Child in the future, Mother must file a private action with the family court. This appeal followed.

LAW/ANALYSIS

Mother appeals, arguing she was deprived of meaningful access to the court when the Department failed to transport Mother to the hearing as ordered by the family court and the family court denied Mother's motion for a continuance. We agree.

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[1] Judge Georgia V. Anderson issued the order of transport, and Judge Robert E. Guess presided over the judicial review hearing.

Rule 40 of the South Carolina Rules of Civil Procedure provides "[i]f good and sufficient cause for continuance is shown, the continuance may be granted by the court." The grant or denial of a continuance is within the sound discretion of the family court and its ruling will not be reversed on appeal absent an abuse of discretion. S.C. Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 51, 413 S.E.2d 835, 838 (1992). Whether a family court abuses its discretion depends upon the facts before it at the time. Grant v. Grant, 288 S.C. 86, 89, 340 S.E.2d 791, 793 (Ct. App. 1986). The denial of a motion for a continuance "will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of appellant." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). "It is fundamental that '[p]risoners have a constitutional right of access to the courts.'" Kocaya v. Kocaya, 347 S.C. 26, 29, 552 S.E.2d 765, 767 (Ct. App. 2001) (quoting Bounds v. Smith, 430 U.S. 817, 821 (1977)). In Kocaya, this court recognized that while no statute expressly requires the Department to transport prisoners to court under section 24-1-130 of the South Carolina Code, the Department's director is responsible for the "proper care . . . and management of the prisoners confined" within the prison system. 347 S.C. at 29, 552 S.E.2d at 767. The Kocaya court concluded the director's responsibilities include a duty to transport a prisoner to court, criminal or civil, when so directed by a court order. Id.

The family court has the authority to order a prisoner transported from the prisoner's place of confinement to the family court. Id. at 30, 552 S.E.2d at 767. The family court is statutorily authorized "[to] send process and any other mandates in any matter in which it has jurisdiction into any county of the State for service or execution" and "[t]o compel the attendance of witnesses." S.C. Code Ann. § 63-3-530(28) & (29) (2008). Further, one family court judge may not ignore an order of another family court judge. See Cook v. Taylor, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979) (finding when one circuit court judge vacates an order of reference by another circuit judge this amounts to a review of the order of another circuit judge and the second judge does not have the power to set aside the order of another judge); see also Enoree Baptist Church v. Fletcher, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986) (finding a circuit court judge cannot deny the use of an

amended complaint in light of an order of another circuit court judge that permitted use of the amended complaint).

We hold the family court erred in denying Mother's motion for a continuance because Judge Anderson ordered Mother be transported to the hearing. The family court's reliance on Mother's incarceration preventing her from being present at the hearing is misplaced; Mother was entitled to be present at the hearing under Judge Anderson's order of transport. Mother would have been present at the hearing but for the Department's failure to transport Mother. The effect of the family court's refusal to grant Mother's motion for a continuance denied Mother, a necessary and proper party, meaningful access to this State's courts. Therefore, we reverse the family court's order and remand the matter for another judicial review hearing with Mother present.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Chris Anthony Liverman, Appellant.

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

Opinion No. 4635
Heard October 7, 2009 – Filed December 4, 2009

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, South Carolina Commission on Indigent Defense Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Sr., Assistant Attorney General William Edgar Salter, III, Office of the Attorney General, of Columbia, Warren Blair Giese, Fifth Circuit Solicitor's Office, of Columbia, for Respondent.

HUFF, J.: Chris Anthony Liverman was convicted of two counts of murder and was sentenced to two consecutive sentences of life imprisonment. Liverman appeals asserting (1) the trial court erred in failing to conduct an in camera hearing on the reliability of the identification of Liverman by one of the State's witnesses and (2) the trial court erred in allowing one of the State's experts in gang activity and recognition to testify concerning body markings on Liverman indicating Liverman had committed two prior murders. We affirm.

FACTUAL/PROCEDURAL HISTORY

On the night of August 26, 2004, Brian D. was on the porch outside his home with his friend, Christopher, when several boys came around the corner and asked them if there were any "Slobs" around there.[1] Brian and Christopher responded they had not seen any, and did not know. Brian saw the boys walk off behind the house, at which time he went inside his home and told his step-father, Teddy, that something "didn't look right." Brian stepped back outside and started talking to Christopher. As Brian began to re-enter his home, he heard shooting and ran inside the house. Courtney D., Brian's sister, and Terrence M. were in the front yard at that time. After the shots rang out, Brian heard Christopher say that Courtney and Terrance had been shot.

Teddy testified he and Courtney were inside the house when Brian went outside and started talking to his friend on the porch. Courtney told her father she needed to get something from a friend's house. Brian came inside and told Teddy that something did not look right. Brian stepped back outside, followed by Courtney a few seconds later. Just seconds after that, Brian "jumped in the door" and Teddy heard gunshots. Realizing his daughter had just walked out the door, Teddy went outside to find Courtney was not moving and had blood coming from her head. He glanced to his right and saw Terrence out there too. Twelve year-old Courtney and sixteen year-old Terrence subsequently died from their gunshot wounds.

[1] "Slobs" was used as a disrespectful term for a gang called the Bloods.

On the same day, but prior to the shooting of Courtney and Terrence, at least two other incidents occurred on T.S. Martin Drive where Courtney lived. The first situation involved Brady B., who drove his white Ford Escort down this street with Travis W., Travis B., Demetrius B., and Paris A. in the car. The boys in the white Escort had an unfriendly encounter with a male in the neighborhood, and words having gang-related undertones were exchanged.[2] Brady drove away from the situation, and subsequently went to a parking lot at Bethel Bishop Apartments with Paris.

While at Bethel Bishop, Brady and Paris spoke to some of the people outside. Brady testified he, Paris, and Carl Smith, also known as Pooh, were joined by Praylow. Pooh, who was a member of the same gang as Appellant, the Folk Nation Gang, testified he, Paris, and Brady were joined by someone named Sherod,[3] and that they drove back to T.S. Martin looking for a person named Delshawn. Pooh testified Brady and Paris had indicated to the others they had a problem and wanted to go fight.

According to Brady, they turned down T.S. Martin and saw a young girl, about twelve years-old. Brady asked her if she knew the boy they had encountered earlier and the girl cussed at them. They told the girl to go back in her house. They turned around and drove back down the street, parked the car and exited the vehicle. The group walked up the street, but everyone in the neighborhood began closing their doors. There was no one outside, so they walked back to the car and drove away. After leaving T.S. Martin this second time, Brady stated he did not return to the location again, and denied being there during the shooting. He further testified, to his knowledge, no one in his group had a gun during this encounter.

Pooh testified when they exited the car at T.S. Martin, he was wearing a black bandana around his head, signifying the Folk Nation Gang. As they were looking for Delshawn, a female called out Pooh's name as they crossed

[2] Brady testified he later determined the person confronting them that day was "Tyrone."

[3] Sherod is apparently Sherod Praylow.

the street.[4] The others began walking around, but Pooh called them back, realizing that if they jumped someone at that time he would be the one caught since the female recognized him.[5] They got back in the car, and Brady dropped Pooh and Sherod off at Bethel Bishop.

According to Pooh, he first saw Appellant that night coming out of Bayberry Apartments, located right behind Bethel Bishop. Appellant was accompanied by Pooh's deaf friend, Goo, and two other individuals Pooh did not know. Pooh explained to appellant what had happened at T.S. Martin and appellant told Pooh someone from T.S. Martin "had run him out there a couple of days before." Appellant then showed Pooh three or four .22 caliber bullets and said he "might go on a lick." Appellant also told Pooh he had just obtained a .22 caliber gun. Appellant kept telling Pooh he was about to go back to T.S. Martin, but Pooh asked appellant not to, fearing that if anything occurred he would be the person suspected, as the female had called out his name earlier. Appellant then told Pooh he was going to walk Goo home and probably was not "going to go up there."

Diego T., who was seventeen years-old at the time of trial, testified regarding his role in the incidents that occurred that night. Diego testified he ran into appellant, who went by the name Baby Jesus, at Bethel Bishop Apartments as it started to get dark. Appellant told Diego he had to go handle something at T.S. Martin, and asked Diego to go with him. Diego agreed, and as they walked they met up with Ty, Goo, and Little Chris. After appellant had a conversation with these three, they also agreed to accompany him to T.S. Martin. As they walked through Bethel Bishop they saw Pooh, and appellant had a conversation with Pooh. Pooh told them to be careful "because they had pulled some guns on some Slobs."

It was nighttime and dark when the five of them, appellant, Diego, Ty, Goo, and Little Chris, walked over to T.S. Martin. Appellant put a black "flag," or bandana, around his neck, indicating he was representing his set,

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[4] Pooh later identified this female as Precious, a person with whom he had worked in the past.

[5] Pooh stated they did not have any guns with them, but someone in the car did have some brass knuckles.

the Folk Nation Gang. As they arrived there, Little Chris asked a boy sitting on a porch if he was a "Slob." The boy responded that there was "no gang banging" around there. The boy then got on the phone, at which time Diego told the rest of them it was time to go, as he believed the boy was calling the police or other boys to come over there. Appellant responded that he wanted him to call his boys. At that point, Diego saw appellant pull out a .22 rifle. When appellant pulled out the gun, he was across the street from the house where they saw the boy on the porch. Diego told them it was time to leave and he started to back away. He then saw Goo with a "shotgun at his hand" and appellant sign to Goo to shoot at the house. After appellant pointed the rifle at the house, Ty, Goo and Little Chris started running away and Diego heard gunshots. When he looked back, he saw appellant throw down the rifle and pick up the shotgun and point it. However, he did not hear any more shots. Appellant eventually caught up with them, and Diego saw appellant wrap the guns and place them under a log.[6] Some weeks thereafter, appellant called Diego and asked him to get the guns from under the log and move them. However, Diego did not do so because he knew someone else had already moved them. The only person Diego observed pointing the .22 rifle or shooting that night was appellant. Diego described appellant as wearing two shirts, one black and the other white, along with long, black Dickey shorts and a pair of black and white shoes on that night.

Shante B., who was also a member of the Folk Nation Gang, testified to her encounter that night with appellant and Pooh. Shante was standing in front of a building at Bethel Bishop when appellant told her he was going to T.S. Martin to "ride with some Slobs." Pooh told appellant not to go over there. Appellant left the area with Goo, Mirage and Diego. A little while later, Shante saw appellant running back to Bethel Bishop from the woods in the direction of T.S. Martin "at full speed." Shante overheard appellant telling one of his friends he had just left T.S. Martin, that he was "spraying" when he was shooting, and that two little kids were shot. Appellant stated he had done this because earlier in the evening "they had got in something with some Bloods." Appellant then ran away from Bethel Bishop.

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[6] In a statement to Investigator Gray, Diego informed him that after appellant caught up with them, he took off a shirt, wrapped the guns in it, and hid it under a log near the railroad tracks.

After the second incident, where the boys drove back to T.S. Martin in Brady's car looking to fight the individual they previously encountered, the police were called. Officer Reynolds was dispatched to T.S. Martin at 9:11 p.m. on August 26, 2004, in regard to a civil disturbance. After being informed that some irate black males in a small white vehicle had come to the area looking for someone named "Delshawn," Officer Reynolds, along with another policeman who responded to the call, left the neighborhood to find Delshawn and see if he could identify the people involved. The officers spoke with Delshawn for ten to fifteen minutes, and upon leaving received a call at 9:44 regarding another disturbance on T.S. Martin. The dispatch then immediately changed to a "shots fired" call at the location. Officer Reynolds testified he was able to get back to T.S. Martin in about three or four minutes, and when he arrived he observed two individuals on the ground and a lot of people in the yard. Those standing there began yelling to him that the suspects had run behind the house, in the direction of Beltline.

Sergeant Auld also responded to the 9:44 p.m. shots fired dispatch, and heard over the radio that the subjects were running toward the railroad track. Sergeant Auld and Officer Whittle proceeded to the bottom of a cut, went over some railroad tracks, and as they reached the top of a mound, they heard crashing noises in the woods. Using a flashlight, they spotted appellant running out of the woods and commanded him to stop. Other individuals who could be heard in the woods took off in another direction. The officers placed appellant in handcuffs and detained him in Officer Whittle's vehicle. Investigator Gray then brought a witness to the site, and Officer Whittle removed appellant from his car and used his flashlight to shine on appellant for the witness to observe him. Officer Whittle described appellant as wearing a pair of gray shorts over a pair of dark blue basketball shorts, a white t-shirt, and black and white tennis shoes that night.

After arriving at the scene of the incident, Investigator Gray interviewed witness Tyrone S., who informed Gray he had observed the shooting. Tyrone indicated there was only one shooter, and identified the person by his nickname. Upon hearing a possible suspect had been detained, Gray drove Tyrone to the location of the detention, pulled about twenty feet behind the car holding the suspect, and turned on his high beam lights.

Officer Whittle removed the suspect from his car and had the person face Investigator Gray's vehicle for a few minutes. Based upon the identification process, Gray requested Whittle transport appellant to police headquarters. Thereafter, Gray interviewed appellant. When told he had been identified as being involved in a shooting at T.S. Martin, appellant initially denied having been there. When told he had been placed at T.S. Martin at the time of the shooting, appellant then stated he had been at T.S. Martin "earlier" and "one of the dark skinned dudes" was shooting at a house. Appellant denied that he shot a gun that night. Approximately twelve hours later, and after a gunshot residue test had been performed on appellant,[7] appellant gave another statement. This time he stated he had been firing a gun on the night in question, but claimed it was a .32 caliber gun, he only had two bullets, and that he shot at a top window of a house with a round hole like an attic, situated on the corner. Authorities were unable to discover any bullet holes in the only home in the area with an attic vent, or any damage to any homes in the area other than Courtney's home.

Tyrone S. testified regarding his witness of the shooting and the events surrounding it. Tyrone saw appellant at an apartment complex around 3:00 in the afternoon on August 26, 2004. Tyrone was with Delshawn, a member of the Bloods Gang. Tyrone did not speak with appellant, but he observed a conversation take place between Delshawn and appellant that he did not hear. Tyrone and Delshawn then went back to T.S. Martin where Tyrone lived. A little after 9:00 that evening, Delshawn, who did not live on T.S. Martin, left Tyrone's home. After his departure, Tyrone received a call from Courtney wherein she relayed that some boys had asked her where the "Slobs" stayed. Tyrone went outside to talk to Courtney. He observed some boys exit a car onto T.S. Martin. Someone from the car had yelled, "There goes Delshawn," referring to Tyrone. One of the boys, who had braids, was wearing a light t-shirt and a black bandana covering half of his face. This person, who was two houses up as Tyrone stood on his porch, pointed a gun at Tyrone and said he was going to kill him. He then stated, "That ain't Delshawn," and turned and walked away, at which point Tyrone ran into his house, and someone in

[7] Appellant's gunshot residue test ultimately did not detect sufficient residue to conclusively determine whether appellant had fired a weapon that night, and thus the test "came back negative."

his house called the police. After telling the officers the boys were looking for Delshawn, the police left to find Delshawn themselves. At the time, Tyrone did not know who the person was with the bandana, but he later told the police he thought it was appellant. Tyrone testified this same white vehicle had come into their neighborhood earlier that day. At that time, they rode down the street and started saying, "Come down here," speaking to Delshawn. As they were riding past, Delshawn and Tyrone were throwing up gang signs to them.

After the police left to look for Delshawn, Tyrone was sitting on the porch with his two female cousins and one of their friends when they saw five males walking up from the front of the neighborhood. Appellant was walking in the front of the group, and he was the only one who was not wearing a bandana around his face. Tyrone and the others ran into the house and cut off the indoor house lights when they saw the boys. Tyrone ran upstairs to a window. A motion detector light on the house where the boys were standing, as well as a street light located a little bit down the street, provided light. From his position in the upstairs window, Tyrone saw appellant get a rifle and then provide a revolver to another person. Appellant then knelt down, aimed, started shooting, stood up, and then continued shooting. After the first shot was fired, all the other boys ran away. Tyrone heard multiple shots, and someone in his house called the police to return to T.S. Martin. Appellant was in the street when he was shooting. Appellant tried to shoot again, but was unsuccessful. He then turned around and ran away in the same direction as the other boys. Tyrone estimated he watched from the upstairs window for a period of four to five minutes.

Tyrone spoke with Investigator Gray at the scene and told him what he had observed and identified the shooter by his nickname. Gray then transported Tyrone to another location about four or five miles away, where Tyrone identified appellant as the shooter.

The State also presented testimony from two individuals qualified as experts in the field of gang activity and/or gang recognition. Both experts testified generally regarding several gangs with a presence in South Carolina, as well as to the meaning of certain tattoos and brands on the body of appellant, affiliating appellant with the Folk Nation Gang and possibly

indicating he had "bodies" attributed to him. Additionally, the experts testified the Bloods and the Folk Nation did not "get along," and are considered rival groups.

Precious D. also testified to her observation of a small white car on T.S. Martin approximately thirty minutes prior to the shooting incident. According to Precious, the car stopped in the middle of the road and she saw one individual exit the vehicle. This person started arguing with someone at one of the houses and lifted his shirt to show he had a gun tucked in his pants. When he started talking, Precious recognized the person as Pooh, whom she had worked with in the past. Precious called him "Pooh," and told him "you need to go somewhere with that mess." After calling out his name, the people from the car left within about two or three minutes. Although Pooh had a bandana on his face, she recognized him by his voice and the way he walked.

The defense argued to the jury that Pooh and Diego had fabricated appellant's involvement in order to make him the "fall guy" and cover for one another. Counsel also maintained Tyrone was mistaken about his identity of appellant as the person who pointed a gun at him in the second incident, just prior to the shooting, and because of this mistake, his identification of appellant as the shooter could not be trusted. The matter was submitted to the jury and appellant was found guilty of the murders of Courtney and Terrence. This appeal follows.

ISSUES

1. Whether the trial judge committed reversible error by refusing to conduct an in camera hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972) and Rule 104(c), SCRE, on the reliability of Tyrone's identification of appellant as the shooter, especially in light of the fact Tyrone had incorrectly identified appellant as a participant in an earlier incident shortly before the shooting, and his identification of appellant as the triggerman was the product of an inherently suggestive show-up conducted by the police after appellant was arrested.

2. Whether the trial judge committed reversible error by allowing the State's purported gang expert to testify that one of appellant's body markings meant that he had committed two prior murders, as this evidence placed appellant's character at issue in violation of Rules 403 and 404, SCRE.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support. Id. 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. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

LAW/ANALYSIS

I. Tyrone's Identification

In a pretrial motion two months before the trial, the trial judge indicated he was ready to proceed on the Neil v. Biggers hearing. Before calling any witnesses, the State noted the constitutional safeguards in place under Neil v. Biggers were designed to avert the dangers of mistaken identity and applied in situations involving strangers. The State argued, pursuant to State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973), the trial judge did not need to conduct a basic review of the totality of the circumstances and the suggestiveness of the show-up where the witness knows, independently from the incident, the person he or she is identifying. Accordingly, the State maintained that Neil v. Biggers did not apply in this situation. Defense counsel countered that this case was distinguishable from McLeod inasmuch

as here, the witness viewed the incident from some distance away and, further, there was not a sufficient existing relationship between the witness and the person identified.

The trial judge determined the State should put up evidence on Tyrone's prior relationship or knowledge and he would then decide whether there needed to be further showing other than the relationship between the two. Tyrone testified in an in camera hearing that he was in a house on T.S. Martin on August 26, 2004, when he observed the shooting from an upstairs window. Tyrone made an in-court identification of appellant as the shooter. Tyrone further testified he had known appellant since he was elementary school age,[8] had known him for a period of approximately seven years, that appellant used to visit Goo's home, an apartment next to where Tyrone's aunt lived, that appellant and Goo were friends of his at the time, appellant used to talk to Goo for him because Goo was deaf, and the three of them "hung out" together for about a four day period. Since elementary school, Tyrone had seen appellant twice in 2003 at McDonald's, where appellant worked, and he also saw appellant earlier on the day of the shooting, from about two houses away, at a housing complex where he observed appellant talking to Delshawn.

Defense counsel argued the State failed to make a sufficient showing there was any kind of preexisting relationship between Tyrone and appellant and therefore there was no reliable basis for Tyrone's identification of appellant. The trial judge found the facts to be close to McLeod, but before ruling determined the State should continue the examination to show exactly what occurred at the time the identification was made so he could look at the totality of the circumstances. Thereafter, Tyrone testified he observed appellant shooting from "right across the street." He gave Investigator Gray his statement shortly after the shooting identifying appellant as the shooter by his nickname. He was taken to another location about four blocks away and he sat in Investigator Gray's vehicle and observed appellant standing on the side of a police car wearing the same clothes he was wearing at the time of the shooting. It was dark outside at the time he saw appellant, and he remained inside the police car approximately three to six feet away from

[8] Tyrone and appellant did not attend the same school.

appellant. At the time of the shooting, there were no lights on in the upstairs room where he stood, but there was a street light on behind the shooter and a light on the side of a house.

Following Tyrone's in camera testimony, defense counsel objected "to the lack of allowing a full Neil v. Biggers hearing." Counsel argued this matter did not fall within McLeod as there was an insufficient showing of "any real meaningful preexisting relationship between" Tyrone and appellant. Counsel therefore asked for "a full Neil v. Biggers hearing on this issue." The trial judge noted McLeod indicated constitutional and procedural safeguards under Neil v. Biggers were not intended to apply where a victim knows an accused, and McLeod does not talk about the degree of knowledge or indicate there must be an intimate relationship. He found, based on the evidence presented, that a relationship, or at least knowledge existed, and whether that knowledge was sufficient went to the weight of the testimony rather than the admissibility of it. The trial judge additionally determined there was sufficient showing by the State, under the totality of circumstances, to make an identification, even considering the suggestiveness of show-ups, as the witness testified he knew the defendant since elementary school, he had seen him at McDonald's, he had seen him at the apartment complex on the day of the shooting, he knew him by nickname, and he identified him by nickname prior to being taken to the location of the identification. The trial judge therefore determined the identification testimony was admissible, and the defense could argue about its weight to the jury.

At the commencement of the trial two months later, defense counsel asked the trial judge to revisit the Neil v. Biggers issue previously raised. Counsel noted that some information came out in an unrelated hearing on this case and, at the time of the judge's initial ruling on this matter, it had not been known that Tyrone had inaccurately identified appellant as the person who had pointed a gun at Tyrone in the incident prior to the shooting incident. Counsel therefore argued that the judge never had an opportunity to consider this fact and appellant was entitled to a full Neil v. Biggers hearing that would allow this other information to be considered. Counsel further asserted a full in camera hearing was required by Rule 104, SCRE. The State continued to maintain that it had established Tyrone had prior knowledge of the defendant and counsel's arguments went to the weight of the evidence and

not admissibility. The trial judge stated he was still of the opinion a sufficient showing had been made by the State to establish a prior knowledge or relationship between the witness and the defendant and found, under McLeod, that a full Neil v. Biggers hearing was not required. At the close of the State's case, counsel renewed the defense objection to the denial of a full Neil v. Biggers hearing. The trial judge overruled the objection.

On appeal, appellant contends the trial judge erred in refusing to conduct an in camera hearing regarding the reliability of Tyrone's identification of appellant as the shooter. He argues that the shooting occurred in a dark neighborhood with various people moving about, and Tyrone testified he observed the shooter from an upstairs window. Appellant asserts there were substantial problems with the reliability of Tyrone's identification too because, although Tyrone claimed to know appellant since elementary school, he was unaware of appellant's real name until after he identified appellant to police. Additionally, appellant notes Tyrone incorrectly identified appellant as the person who had threatened to kill him a short time before the shooting. Appellant contends the fact that a witness knew the defendant prior to the commission of the crime is only another factor to consider in a Neil v. Biggers analysis when, as here, the witness had incorrectly identified the defendant on a previous matter and subsequently participates in an inherently suggestive show-up. Appellant further maintains, given the importance of Tyrone's testimony identifying him as the shooter, the failure to hold a full Neil v. Biggers hearing could not have been harmless error. We disagree.[9]

[9] We note the State contends, because defense counsel failed to object when Tyrone's identification testimony was presented during the trial and the pre-trial rulings on the matter were not made immediately prior to Tyrone's trial testimony, the issue is not preserved for review. However, trial counsel did not simply object to the admission of the identification evidence in the pre-trial motions, but specifically argued the defense was entitled to a "full Neil v. Biggers hearing" and objected to the trial judge's failure to grant appellant a more extensive hearing on the matter. It is from the denial of this extensive hearing that appellant appeals. The matter was repeatedly argued and ruled on by the trial court, and we find it adequately preserved for our review.

When identification of a defendant is at issue, the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation. State v. Miller, 359 S.C. 589, 596, 598 S.E.2d 297, 301 (Ct. App. 2004), aff'd, 367 S.C. 329, 626 S.E.2d 328 (2006). Additionally, our courts have noted Rule 104(c), SCRE,[10] "unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury," and while the adoption of Rule 104 did not abrogate the viability of the rulings in the pre-Rules of Evidence cases, an in camera hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible misidentification or bias outside the presence of the jury. State v. Cheatham, 349 S.C. 101, 117, 561 S.E.2d 618, 627 (Ct. App. 2002).

In State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973), our supreme court addressed the issue of a whether a lone confrontation was unfair and untrustworthy where the facts showed the victim knew the accused. The facts in McLeod indicate the victim struggled with her assailant and exclaimed, "oh, you Hattie's boy," causing the assailant to flee. The victim went to another woman's house after the attack and said simply, "Hattie's boy." The morning after the incident, the defendant was arrested and taken to the victim's home. Though the victim did not know her assailant's name, she identified the person arrested as the one who assaulted her. The victim testified at trial she recognized her assailant as "Hattie's boy," and made an in-court identification of her assailant. Id. at 447, 196 S.E.2d at 645. It was "apparent from the record [victim] knew the defendant," "[s]he had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son." Id. at 448, 196 S.E.2d at 645. On appeal, McLeod challenged the fairness of the pre-trial identification procedure used by the police. Id. at 448, 196 S.E.2d at 645-46. The court held the rulings in decisions which attempted to avert the danger of

[10] Rule 104(c), SCRE provides, in part, that "[h]earings on the admissibility of . . . pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury."

mistaken identity by establishing mandatory constitutional and procedural safeguards were designed for application where the accused and victim are strangers to each other, and were "never intended to apply where the victim new the accused." Thus, the constitutional and procedural safeguards McLeod claimed were necessary simply did not apply to the facts of his case. Id. at 448, 196 S.E.2d at 646.

In the more recent case of In re Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000), this court held the family court did not err in failing to hold an identification hearing pursuant to Neil v. Biggers, as the hearing was not necessary because the victim knew the defendant. Id. at 17-18, 530 S.E.2d at 140-41. The record reflected the victim knew Robert D. by his first name, recognized him as a friend of two of her classmates, and remembered he watched a couple of films with her class. The court cited McLeod, noting the rules regarding out-of-court identifications were "designed for application where the accused and the victim are strangers to each other; they were never intended to apply where the victim knew the accused." Id. at 18, 530 S.E.2d at 141. Thus, the constitutional and procedural safeguards, which McLeod claimed were necessary, simply did not apply under the facts of the case. Id.

We find McLeod and In re Robert D. to be controlling, and that there was sufficient evidence presented of Tyrone's prior knowledge of appellant such that a Neil v. Biggers hearing was not required. Here, the witness knew appellant by his nickname, had known him for a number of years, and specifically testified to having seen appellant on several occasions over the years, including having seen him earlier in the day on the date of the shooting. Additionally, while the defense presented evidence Tyrone mistakenly identified appellant as the person who pointed a gun at him and threatened him in one of the prior incidents, we agree such argument goes to the weight of the evidence.[11]

[11] We note that Tyrone did not identify the appellant as the person who pointed a gun in his face in the earlier incident until after the shooting. It is more likely that any mistaken identity from the earlier incident was the result of his identification of appellant as the shooter in the latter event.

II. Meaning of Body Markings

In the pretrial hearing two months prior to appellant's trial, the State indicated its intention to present evidence regarding tattoos on appellant's body. Defense counsel objected, asserting no specific meaning could be attributed to the tattoos, the State was attempting to admit the evidence so the jury would infer the tattoos represented the death of the two children, that the tattoo evidence was grossly and unduly prejudicial and that it was irrelevant. Counsel further argued the State intended to bring out testimony that he received the tattoos while in prison, which was improper character propensity evidence. Counsel asked the court for an in camera hearing on the matter. When the case resumed two months later, counsel sought to exclude the State's gang expert testimony on the meaning of two teardrop tattoos on appellant's body, arguing the State could not lay a proper foundation to the meaning, and testimony from a corrections officer regarding when appellant received the tattoos would allow the State to impermissibly remark on appellant's prior criminal record. The trial judge determined the evidence was admissible as long as the State laid a proper foundation.

Prior to the State calling its gang expert witnesses, the defense renewed its objection to any testimony regarding the purported meaning of "any tattoos," asserting such testimony would be cumulative and unduly prejudicial, and that the State would be unable to provide a foundation for the meaning of the tattoos. Thereafter, the State presented the testimony of Investigator O'Cain, who was qualified as an expert in gang activity and recognition, and Officer Mahoney, who was qualified as an expert in the field of gang activity.

O'Cain testified to various tattoos and brandings he observed on appellant's body, including some indicating appellant's affiliation with the Folk Nation Gang and a "set" of the Folk Nation Gang. O'Cain further testified that a branded pitchfork on appellant's back appeared to have two hash marks on the right side of the pitchfork which could signify appellant's rank. When asked what his expert opinion was as to appellant's rank as denoted by the hash marks, O'Cain stated, from what he had been told "from the streets and interviews," appellant is now "a set King, strike two," and "to

get the strike series of that rank, you have to have bodies attributed to you." Counsel objected to this testimony and asked for a mistrial arguing the evidence was without support, it was inflammatory, and O'Cain was improperly relying on hearsay evidence to support his opinion. The trial court overruled the objection, noting reliance on hearsay by the expert was proper under Rule 703, SCRE.[12] O'Cain continued this line of testimony, stating the hash marks represent a rank structure and that it could represent bodies attributed to appellant. When asked what he meant by "bodies," O'Cain responded, "That they have committed some sort of act or murder where bodies - - dead people." O'Cain also testified in regard to two teardrops above appellant's right eye, one of which was filled in and the other one which was open. O'Cain stated the open tear drop could mean a fellow gang member or relative died, or that an innocent person was killed by mistake, while the filled in teardrop is supposed to represent a retribution, where someone died and that person is responsible for that killing.

Mahoney likewise testified to his observation of various tattoos and brandings on appellant's body. In regard to the pitchfork brand on appellant's back, Mahoney testified the hash marks could mean a lot of things, including "it could mean bodies." He testified it could also mean robbing someone or other things, but "it would be something he did on behalf of the gang," and could include murder. As for the teardrops, Mahoney opined that the open teardrop could represent a lost soldier or someone who was innocent, while "the closed teardrop is a body." The open teardrop could be for a fellow gang member or an innocent person taken out by mistake, and the closed teardrop would represent "a body," indicating the person is a gang member who "took somebody out."

[12] Rule 703, SCRE provides as follows: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

After the State rested, appellant renewed his objection "to any gang expert testimony, especially any references to the tattoos." He argued the State introduced inadmissible character propensity evidence that was irrelevant to the identity of the perpetrator of the crime and was unduly prejudicial. Appellant further objected to the expert testimony as it was based on hearsay. The trial judge overruled the objection.

The defense presented its own expert in the field of gang identification, Robert Walker, who also observed appellant's tattoos and agreed appellant's tattoos reflected his affiliation with the Folk Nation Gang. As to the hash or "slash" marks, Walker testified he had heard they signify rank, but the marks were new to him and he really had no knowledge about the meaning. He had not heard it meant there were bodies attached to it. In regard to the teardrops, Walker explained there were many meanings that could be attributed to them, including having killed someone or having served time, but there was no way to say it had a specific meaning.

On appeal, appellant contends the trial judge erred in allowing Investigator O'Cain to testify the hash marks on appellant's back indicated he had bodies attributed to him, as this evidence placed his character at issue in violation of Rules 403 and 404(b), SCRE.[13] He argues this testimony, in violation of Rule 404(b), "referred to possible homicides prior to the two for which [appellant] was standing trial," as the State had maintained the two teardrop tattoos symbolized the homicide of Courtney and Terrence. He further summarily argues evidence appellant was involved in two prior murders is inadmissible under Rule 403, SCRE, as it is "unduly prejudicial and inflammatory."

Rule 403, SCRE provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pursuant to Rule 404(b), SCRE provides, "Evidence

[13] Appellant argues generally about "[o]ne of these witnesses" and "[o]ne of these [tattoos]," and cites only to the testimony of Investigator O'Cain and O'Cain's reference to the hash marks on appellant's body.

of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule further provides, "It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Id.

The precise argument appellant raises on appeal, that the hash mark testimony referred to prior homicides and thus violated Rules 403 and 404(b), was not raised to the trial judge and therefore is not preserved for review. In his argument to the trial court, appellant asserted the State intended to bring out testimony that he received the teardrop tattoos while in prison, which was improper character propensity evidence. Appellant argued the State's gang expert testimony on the meaning of two teardrop tattoos should be excluded, asserting testimony from a corrections officer regarding when appellant received the tattoos would allow the State to impermissibly remark on appellant's prior criminal record.[14] On appeal, appellant challenges the admission of the hash mark evidence, not that of the teardrops. Appellant never argued to the trial judge as he does on appeal that the hash mark brand referred to possible homicides prior to the two for which appellant was standing trial, thereby amounting to improper character propensity evidence that was unduly prejudicial and inflammatory. Further, there is nothing in the record to indicate the State asserted the hash marks referenced prior bad acts. The State did not present evidence as to when appellant obtained the hash marks, nor argue the hash marks were placed on his body to signify murders or bad acts committed in incidents unrelated to that for which appellant stood

[14] The record shows the State sought to introduce evidence that appellant did not have the two teardrop tattoos on his face when he initially entered the Department of Corrections after the death of the two victims, but was subsequently found to have the tattoos during his time there, implying he received the tattoos while in the prison system, after the death of the victims. Appellant objected to this line of testimony, arguing it would unfairly remark on his prior criminal history, and proposed the State introduce the time line of the tattoos without referring to the Department of Corrections. As a result, appellant and the State thereafter entered into a stipulation that tattoos depicted in certain pictures of appellant's body were observed as of February 2, 2006, but were not present on appellant's body as of March 11, 2005.

trial. Because this argument was neither raised to nor ruled upon by the trial judge, it is not properly preserved for our review. See State v. McKnight, 352 S.C. 635, 646-47, 576 S.E.2d 168, 174 (2003) (issue must be raised to and ruled upon by trial court to be preserved for review).

Further, even if we assumed appellant's objection to the teardrop tattoo evidence as improper character propensity evidence, along with his general objection to any tattoo evidence, is sufficient to preserve his assertion on appeal that the hash mark evidence improperly placed his character in evidence and was unduly prejudicial, we find any error in the admission of this evidence to be harmless. As noted, the record shows Pooh testified that appellant stated an intent to go over to T.S. Martin just after Pooh's run-in over there. Diego testified he agreed to accompany appellant to T.S. Martin to "handle something" and identified appellant as the one in the group who pointed a rifle at a house while all the others ran after the first shot, and later observed appellant dispose of the weapon. Shante testified she observed appellant running from the direction of T.S. Martin at full speed, she overheard appellant saying he had just left T.S. Martin, that he was "spraying" when he was shooting, that two little kids where shot, and that he had done this because earlier in the evening they had gotten into something with some Bloods. Also, Tyrone witnessed the shooting and identified appellant as the shooter.

Further, appellant admitted in his last statement to police that he was present at the shooting and he had in fact fired a weapon. Thus, there is substantial other evidence suggesting appellant's guilt. Additionally, appellant only points to the testimony of O'Cain regarding the hash mark evidence. It is clear Mahoney likewise testified the hash marks on appellant "could mean bodies," and the testimony of O'Cain would therefore be largely cumulative to that of Mahoney. See State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct. App. 2008) (holding error is harmless where it could not reasonably have affected the trial's outcome; no definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case; in considering whether error is harmless, a case's particular facts must be considered along with various factors including: the importance of the witness' testimony in the prosecution's case, whether the testimony was

cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case). Accordingly, any error in the admission of the hash mark evidence would be harmless.

For the foregoing reasons, appellant's convictions are

AFFIRMED.

THOMAS and PIEPER, JJ., concur.