The Supreme Court of South Carolina

In the Matter of Melvin
Shaddix Hutson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1996, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of Court, South Carolina Supreme Court, dated January 21, 2010, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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 Melvin Shaddix Hutson 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/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 19, 2010

The Supreme Court of South Carolina

In the Matter of Charles E. Johnson, Respondent.

ORDER

By opinion dated February 16, 2010, respondent was suspended from the practice of law in this state for one year. In the Matter of Johnson, Op. No. 26774 (S.C. Sup. Ct. filed February 16, 2010). The Office of Disciplinary Counsel has requested the appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Charles J. Boykin, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Boykin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Boykin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Charles J. Boykin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Charles J. Boykin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Boykin's office.

Mr. Boykin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina

February 23, 2010

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

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

N O T I C E

IN THE MATTER OF ROBERT L. GAILLIARD, PETITIONER

Robert L. Gailliard, who was indefinitely suspended from the practice of law, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

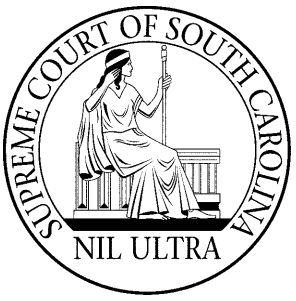
The Committee on Character and Fitness has scheduled a hearing in this regard on Thursday, March 18, 2010, beginning at 10:00 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

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

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
February 24, 2010

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



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
March 1, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dan M. David, Respondent.

Opinion No.26778
Submitted January 25, 2010 – Filed March 1, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Coming B. Gibbs, Jr., for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a public reprimand. Respondent also agrees to complete the Legal Ethics and Practice Program (LEAPP) Trust Account School and Ethics School. We accept the Agreement, issue a public reprimand, and require respondent to complete the LEAPP Trust Account School and Ethics School. The facts, as set forth in the Agreement, are as follows.

Facts

For more than twenty years, respondent maintained a client trust account (the Old Account) without keeping accurate records and without proper reconciliation of the account. In 2006, following an audit by respondent's title insurance company, respondent opened a new trust account (the New Account) because he was unable to sufficiently identify the funds in the Old Account or adequately document outstanding disbursements. Although respondent opened and began to use the New Account, he continued to use the Old Account for a significant number of his clients' transactions.

In August 2008, respondent issued approximately twenty-six checks on the New Account when there were not sufficient funds in the account to cover them. When those checks were presented to the bank, reports were submitted by the bank to the Commission on Lawyer Conduct pursuant to Rule 1.15(h), RPC, Rule 407, SCACR. In response to the reports from the bank, and the resulting disciplinary investigation, respondent retained an accountant to assist him in determining the cause of the overdrafts.

In the meantime, respondent began making deposits of his own funds into the New Account to cover what he thought were the remaining outstanding checks. However, because respondent had not adopted appropriate recordkeeping and reconciliation practices upon opening the New Account, his estimate of the total amount of outstanding checks was incorrect. This inaccuracy, coupled with the fact that respondent continued to issue checks on the New Account, resulted in additional overdrafts.

Between August 1, 2008 and October 31, 2008, respondent issued approximately sixty-one checks on the New Account, totaling in excess of $1,147,000, on insufficient funds. According to the results of the audit, the overdrafts on the New Account were caused by several wires of incoming funds being sent erroneously to the Old Account rather than to the

New Account. Because respondent was not confirming that his wires were received in the correct account prior to disbursement, he issued checks from the New Account not knowing that the funds were not available.

Respondent had delegated complete control over the law office accounting, including both trust accounts, to a single employee. She was responsible for issuing checks, making deposits, reconciling the accounts, reviewing bank statements, and maintaining records. Respondent gave her a signature stamp and authorized her use of it on trust account checks. She had very little formal accounting education and received no instruction or training from respondent regarding ethical obligations related to client funds. Respondent did not review his bank statements, his financial records, or the employee's reconciliation reports. Over a period of about two years, the employee removed approximately $320,000 from the Old Account to the firm's operating account, although the firm was not entitled to the funds. Because respondent was not adequately supervising the management of the accounts, respondent was unaware of the transfers until the audit was conducted.

As a result of the audit, respondent has now identified all outstanding checks and created accurate client ledgers. Respondent has confirmed that all outstanding checks have either been paid or have sufficient funds on deposit to cover them. The incorrect wires into the Old Account in August 2008 covered the funds improperly removed from that account to the operating account by respondent's employee. The shortages caused in the New Account by the incorrect wires were restored by deposit of respondent's own funds. Based on the information now available, it does not appear that any clients, third parties, or banks have suffered any losses.

Law

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.15 (a lawyer shall hold client property in the lawyer's possession in connection with a representation

separate from the lawyer's own property; client property shall be identified as such and appropriately safeguarded, with complete records of such account funds and other property kept by the lawyer; a lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying service charges on that account, but only in an amount necessary for that purpose; a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); Rule 5.1 (a lawyer who possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct); Rule 5.3 (a lawyer who possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a nonlawyer employee's conduct is compatible with the professional obligations of the lawyer and a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct).

Respondent further admits his misconduct constitutes grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct). Finally, respondent admits he failed to comply with the recordkeeping requirements of Rule 417, SCACR.

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Respondent shall also, within one year of the date of this opinion, complete the LEAPP Trust Account School and Ethics School.

Finally, respondent shall, within thirty days of the date of this order, pay $502.23, which represents the costs incurred by the Office of Disciplinary Counsel and the Commission on Lawyer Conduct in the investigation and prosecution of this matter.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE, and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Respondent,

v.

Jane Roe, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Anne Gue Jones, Family Court Judge

Opinion No. 26779
Heard December 1, 2009 – Filed March 1, 2010

REVERSED

Emma Isabelle Bryson, of Baker, Ravenel & Bender, of Columbia, for Petitioner.

Holly Huggins Wall, of Johnsonville, for Respondent.

Patricia Lynn Forbis, of Columbia, Guardian Ad Litem.

JUSTICE WALLER: In this family court case, we granted petitioner's request for a writ of certiorari to review the Court of Appeals' decision in Doe v. Roe, 379 S.C. 291, 665 S.E.2d 182 (Ct. App. 2008). We reverse.

PROCEDURAL BACKGROUND

This case involves the biological child of petitioner Jane Roe (Mother) and respondent John Doe (Father). The child (Daughter) was born on March 6, 2005. In December 2005, when Daughter was **nine months old**, Father filed suit seeking paternity testing, and primary custody or visitation. Mother answered, admitted Father was the biological father, and sought termination of Father's parental rights.

In October 2006, when daughter was 19 months old, the family court held a hearing. All the parties – i.e., Mother, Father, and the guardian ad litem (GAL) for Daughter – agreed to proceed on Mother's termination of parental rights (TPR) counterclaim first. The family court issued a final order in December 2006 which found that Father had: (1) willfully failed to pay support for Daughter for a period in excess of six months, and (2) willfully failed to visit the child for a period in excess of six months. Additionally, the family court found that termination of Father's parental rights would be in the best interest of Daughter. Therefore, the family court ordered that Father's rights and obligations to Daughter be terminated.

Father appealed, and the Court of Appeals reversed and remanded. The Court of Appeals held that the family court had erred by determining TPR was in Daughter's best interest. The Court of Appeals stated that TPR "is premature at this juncture and is, therefore, not in [Daughter's] best interest."[1] Doe v. Roe, 379 S.C. at 300, 665 S.E.2d at 187. Furthermore, the Court of

[1] Because of its ruling on best interest, the Court of Appeals did not address Father's argument that the family court erred in finding there was clear and convincing evidence proving the statutory grounds of willful failure to visit and willful failure to support.

Appeals remanded to the family court "to issue an order of visitation and to establish Father's duty of support." Id. We thereafter granted Mother's petition for a writ of certiorari.

FACTS

In July 2004, Mother found out she was pregnant and informed both Father and another man she was dating about the pregnancy. Mother told both men that either one could be the biological father. Mother and the other man (Fiancé) resumed an exclusive relationship in December 2004 when Mother was six months pregnant; they became engaged in May 2005.

When Mother was about three or four months pregnant, she, Father, and Fiancé had lunch together and discussed the costs of paternity testing. They decided to split the cost of the test. At Father's suggestion, they agreed to only test Fiancé because it was cheaper than doing two tests. Mother explained that because they were all college students, money was an issue.[2] Fiancé ordered the paternity test.

Although Father attended one prenatal appointment when Mother had a sonogram, it was Fiancé who went to almost all the other prenatal appointments with Mother. Fiancé also became Mother's birthing coach. Although Father did arrive at the hospital on the day of Daughter's birth, Fiancé was present in the delivery room. Fiancé testified that when Father was at the hospital, he asked Father about paying his share of the paternity test, but Father did not have the money.

[2] Mother and Father both attended Clemson University. Mother graduated *cum laude* in December 2004. Father attended Clemson "off and on" for over seven years, starting in 1997 and last attending in Fall semester 2004. Father testified that when he left Clemson, he did not have a high enough grade point average to continue as a Clemson student. At the time of the family court hearing, Father was 27 years old, had not completed his college education, and had approximately $30,000 in student loans, several of which had been co-signed and serviced by his mother and his sister.

The day after Daughter was born, Father and Fiancé were both in Mother's hospital room. In the afternoon, shortly after Mother's own father (Grandfather) arrived, Mother asked Grandfather to get Father to leave. Grandfather spoke to Father outside the room and asked him to leave because Mother no longer wanted him in the room. Grandfather stated that Father was not receptive to leaving; according to Grandfather, he explained that if Father did not leave, hospital security would be called.

Later that week, Father went to Grandfather's apartment to talk. Grandfather testified that he tried to explain how parenthood meant both rights and responsibilities, and if Father was not ready for the responsibility then he needed to give up his parental rights. According to Father, however, Grandfather used a threatening tone during this conversation. Father acknowledged that Grandfather brought up the subject of child support and later emailed him the DSS website link for the child support calculator.

Fiancé did the paternity test at the hospital, and on March 15, 2005, the results came back that Fiancé was **excluded** as the biological father of Daughter. At Mother's request, Grandfather called Father and informed him of the results of the paternity test. That same day, Mother sent Father an email with photos of the baby. Two days later, Father's own mother visited Mother and the baby; Mother emailed Father with photos of that visit and asked him to forward them to his mother.

Father testified at the family court hearing that since Daughter's birth he had not paid one penny of financial support and had not had any visitation with Daughter. Approximately one year after she was born, he opened a bank account for Daughter but **in his own name**. At the time of the hearing there was $1,655.81 in the account. He admitted, however, that he had "borrowed" from this bank account more than once. He stated he had been told that Mother did not want his money or to be contacted by him.

Father testified extensively about his spotty work history and criminal record. He has convictions for driving under the influence (DUI) in

September 2003 and driving under suspension (DUS) in March 2005.[3] In October 2003, Father was charged with contributing to the delinquency of a minor after he was caught in a car, partially dressed, with an underage girl. Eventually this charge was dismissed in January 2006.[4]

At the time of the hearing, Father was living with his mother. He has never paid for his own health or car insurance, and he stated that his mother had paid the retainer fee for his attorney in this lawsuit.[5] Father does not work in the graphic design field which is what he studied at Clemson. In October 2006, Father was working a job for $10 per hour and no benefits. When asked about his income, he stated he had – in October – "already surpassed 10,000" dollars of taxable income for that year. Father also acknowledged that he frequently has been in arrears on both his student loans and other debt obligations.

Mother, on the other hand, has worked a steady, full-time job with benefits since graduating from Clemson; at the time of the hearing in October 2006, Mother owned a townhouse.[6] Fiancé, a 26-year-old full-time member of the South Carolina National Guard, had just returned from 13 months of active military service in Afghanistan. Both Mother and Fiancé testified that Fiancé was actively involved in Daughter's life prior to his deployment, and

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[3] On the day Daughter was born, Father drove to the hospital even though his license was suspended. Indeed, Father admitted to driving during the entire time period his license was suspended, from June 2003 until June 2005. Moreover, although Father's 30-day jail sentence on the DUI was suspended upon 48 hours of community service, he failed to perform the community service and spent three weeks in jail.

[4] Father was under bond restrictions while the contributing to the delinquency of a minor charge was pending. One of the restrictions was that Father could not leave the state of South Carolina. Father did, however, live in both Georgia and Florida during this time period.

[5] According to Father, he pays his mother $100 per month toward expenses.

[6] Mother took three months maternity leave, but otherwise has maintained full-time employment at one company. She lived with her mother prior to buying her own home.

had kept up communications while overseas; additionally, Fiancé stated he loves Daughter and would like to adopt her.

Finally, the GAL expressed her opinion to the family court that it would be in Daughter's best interest for Father's parental rights to be terminated.

ISSUE

> Did the Court of Appeals err in reversing the family court's decision to terminate Father's parental rights to Daughter?

STANDARD OF REVIEW

Grounds for termination of parental rights must be proven by clear and convincing evidence. E.g., S.C. Dep't of Soc. Servs. v. Headden, 354 S.C. 602, 608-09, 582 S.E.2d 419, 423 (2003). Upon appellate review, this Court may make its own conclusion from the record as to whether clear and convincing evidence supports the termination. Id. The appellate court, however, is not required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. E.g., S.C. Dep't of Soc. Servs. v. Seegars, 367 S.C. 623, 627 S.E.2d 718 (2006).

DISCUSSION

The TPR procedures are governed by statute. See S.C. Code Ann. § 63-7-2510 *et seq.* (Supp. 2008);[7] Charleston County Dep't of Soc. Servs. v. King, 369 S.C. 96, 104, 631 S.E.2d 239, 243 (2006). The purpose of the TPR statute is:

> [T]o establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, **or abandoned** in order to protect the health and

[7] The TPR statute was previously codified at §§ 20-7-1560 *et seq.*

> welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.

S.C. Code Ann. § 63-7-2510 (emphasis added).

Moreover, the TPR statutes "must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship. **The interests of the child shall prevail if the child's interest and the parental rights conflict.**" § 63-7-2620 (emphasis added); see also Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000) (overruling prior cases calling for strict construction of the TPR statutes).

The family court may order TPR upon a finding of one or more delineated grounds **and** a finding that termination is in the best interest of the child. S.C. Code Ann. § 63-7-2570. The two statutory grounds asserted in this case are the willful failure to support and the willful failure to visit, defined statutorily as follows:

> (3) **The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child.** The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.
>
> (4) **The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child.** Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial

> contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

Id. (emphasis added).

We find the evidence clearly and convincingly supports that Father willfully failed to visit and support Daughter for over six months. Father was definitively on notice that he was the biological father from March 15, 2005 (when Fiancé was excluded by the DNA test), yet Father failed to take legal action until nine months later. In the interim, his brief and few contacts were with Mother only, and he never requested visitation with Daughter and never sent any financial support.[8] Accordingly, we hold the family court properly found that these statutory grounds were met.

Thus, the dispositive issue is whether it is within Daughter's best interest to have Father's parental rights terminated.

Father's behavior as it relates to the statutory grounds for termination is appropriately reviewed for purposes of the best interest analysis because such conduct "evinces a settled purpose to forego parental duties." S.C. Dep't of Soc. Servs. v. Headden, 354 S.C. at 610, 582 S.E.2d at 423 (citation omitted). Here, Father without a doubt did not even attempt to fulfill his parental duties

[8] The family court recognized that Father claimed he did not ask to visit Daughter because Grandfather told him not to make contact and had threatened him. There was a factual dispute about Father's discussions with Grandfather, and the family court specifically found Grandfather's testimony "more credible" than Father's. Significantly, the family court also noted that "whether the alleged conversation took place is not material to the outcome of the case. **The alleged conversation would not have been a sufficient excuse for failing to visit or to ask to visit [Daughter].**" We agree with the family court.

of support and visitation. Although we recognize Father filed this action and sought visitation when Daughter was nine months old, we nonetheless hold that this action simply "came too late" for it to have any significant import. Id. at 611, 582 S.E.2d at 423.

In addition to the evidence which supports the statutory grounds of failing to visit and failing to support, we note the following facts and their impact on the best interest analysis.

First, we find Father's work history reflects an inability to keep a job and several instances of being fired for cause. The testimony at the hearing shows he is not financially independent. Moreover, Father's criminal record is cause for concern. Collectively, this evidence not only indicates that he would likely continue to have trouble meeting his financial obligations toward the child, but more importantly, it also evinces a high level of both instability and immaturity that is inherently contrary to the best interest of Daughter.

Second, Father could produce no evidence that he ever asked for visitation with Daughter prior to filing the lawsuit. Yet, the testimony showed Mother generally responded to Father's attempts to communicate with her; moreover, his own mother had visited with Daughter after she came home from the hospital. Thus, there was no apparent roadblock to Father visiting Daughter. What this signifies is that Father was consciously indifferent to the rights – and emotional needs – of his infant daughter for at least nine months. Cf. Abernathy v. Baby Boy, 313 S.C. 27, 31, 437 S.E.2d 25, 28 (1993) ("[P]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.") (citations omitted).

We now turn briefly to the Court of Appeals' opinion which found that the family court erred in ordering TPR. The Court of Appeals stated the following:

> [T]here is no indication that terminating Father's rights will ensure future stability for [Daughter] or that keeping Father's parental rights intact will disrupt [Daughter's] current living situation. Instead, keeping Father's parental rights intact simply allows Father to establish a relationship with [Daughter] and to provide emotional and financial support for [Daughter]. While we acknowledge that there is some evidence to suggest that Mother had plans to marry and that Fiancé may adopt [Daughter], these plans have not been finalized. Further, at oral argument, nearly three years after Mother's engagement, counsel was unable to confirm such plans. **Thus, while we recognize that a stable family relationship may be in a child's best interest, we find the request herein to be premature based on the record presented. If anything, given Mother's situation and Father's demonstrated desire to establish a relationship with [Daughter], we find that keeping Father's rights intact under these circumstances will only serve to benefit [Daughter] by allowing the familial bond between Father and [Daughter] to be furthered.**

Doe v. Roe, 379 S.C. at 298-99, 665 S.E.2d at 186.

Mother argues the Court of Appeals erred in concluding there is "no indication that terminating Father's rights will ensure future stability for [Daughter] or that keeping Father's parental rights intact will disrupt [Daughter's] current living situation." We agree with Mother. At the time of the hearing, Mother and Fiancé had established a solid relationship with Daughter, who was at that time 19 months old. In stark contrast, Father had no relationship with her whatsoever. Fiancé testified he loves Daughter and wants to adopt her. Overturning the family court's decision to terminate Father's rights clearly conflicts with the TPR statute's purpose to make a child eligible for adoption by someone "who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life." § 63-7-2510.

Moreover, we find Mother has consistently and appropriately fostered stability for Daughter since her birth. It appears the Court of Appeals inappropriately placed Father's belated interest in fostering a relationship with Daughter above Daughter's significant interest in stability. We reiterate the TPR statute makes clear that if the parent's interests conflict with those of the child, it is **the child's interests** that shall prevail. § 63-7-2620. In the instant case, it is more important that Daughter's stability be maintained. We note that the TPR statute clearly states that **six months** is the appropriate time period for parental action. § 63-7-2570; see also Arscott v. Bacon, 351 S.C. 44, 54, 567 S.E.2d 898, 903 (Ct. App. 2002) ("doubt as to paternity does not totally absolve a putative father of his responsibility to take steps to protect his rights"). Father was put on notice by Mother in July 2004 that he could be the father of her unborn child, and was definitively put on notice in March 2005 that he was the **likely** biological father. Father failed to take any actions – legal or otherwise – for nine months with no justifiable reason for this delay.

Finally, we disagree with the Court of Appeals that any TPR decision is "premature." On the contrary, this case was fully ripe for a TPR decision. The statutory requirements for grounds had been met, a GAL had been appointed, extensive discovery had been done, and a full adversarial hearing was held. The record is sufficient for a best interest determination. We hold the family court correctly ruled it was in Daughter's best interest to terminate Father's parental rights.

Accordingly, the Court of Appeals erred in reversing the family court's decision to order TPR. Accordingly, the Court of Appeals' decision is

REVERSED.

TOAL, C.J., BEATTY, J. and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. Because I believe the Court of Appeals correctly decided the case I would dismiss as improvidently granted.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James L. Verenes, as Successor Trustee of the Charitable Remainder Unitrust Under Agreement with Houndslake Country Club, Inc., dated July 25, 2000, Respondent,

v.

Nicholas L. Alvanos, individually and as Former Trustee of the Charitable Remainder Unitrust Under Agreement with Houndslake Country Club, Inc., dated July 25, 2000, Appellant,

v.

Robert C. Penland, Third-Party Defendant.

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26780
Heard January 5, 2010 – Filed March 1, 2010

AFFIRMED

Warren C. Powell, Jr. and William D. Britt, Jr., both of Bruner, Powell, Robbins, Wall & Mullins, of Columbia, for Appellant

B. Michael Brackett, of Moses, Koon & Brackett, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This Court certified this case for review pursuant to Rule 204(b), SCACR.

FACTS/PROCEDURAL HISTORY

By instrument executed August 2, 2000, HCC Investments, Inc.[1] (HCC) established a charitable remainder unitrust (Trust) between itself, as grantor, and Nicholas L. Alvanos (Appellant), as trustee. At the time the Trust was established, third-party defendant Robert C. Penland (Penland) was President of HCC and signed the Trust documents in that capacity. Penland was also a beneficiary of the Trust. On May 3, 2005, HCC petitioned the Aiken County Probate Court for an order removing Appellant as trustee and naming Penland as successor trustee. Appellant was removed as trustee and Penland was appointed successor trustee by order dated August 3, 2005.

On October 27, 2006, HCC filed suit in probate court against Appellant individually and as former trustee of the Trust. HCC captioned the action as one for "Breach of Trust," triable "Non-Jury." HCC's causes of action included breach of fiduciary duty of care, breach of fiduciary duty of loyalty,

[1] Formerly known as Houndslake Country Club, Inc.

and one for an accounting. The relief sought for the alleged breach of fiduciary duty of care was the restoration to the Trust any lost income, lost capital gain, and lost appreciation in value caused by the alleged breach. The relief sought for the alleged breach of fiduciary duty of loyalty was disgorging all commissions and profits received on the Trust's purchases of annuities and returning those commissions to the Trust.[2] The third cause of action is a classic cause of action for an accounting.

Appellant asserted a third-party claim against Penland, alleging that Penland's actions caused damages to the Trust, not any actions of Appellant. Appellant's single cause of action against Penland alleges entitlement under the alternate remedies of equitable indemnity and contribution.

Pursuant to an order by the Chief Justice of the South Carolina Supreme Court, Judge Daniel R. Eckstrom was appointed as special probate court judge for the present action and the case was transferred to the Lexington County Probate Court. Ultimately, Penland was removed as successor trustee and James L. Verenes (Respondent) was substituted as the named plaintiff as successor trustee of the Trust.

On June 19, 2007, Appellant timely filed a notice of removal and demand for trial by jury, requesting the action be removed to the circuit court and the case tried by a jury. On July 24, 2007, Appellant withdrew his request to have the matter transferred to the circuit court, but renewed his demand for a jury trial. By order filed November 5, 2007, the probate judge denied Appellant's demand. Appellant appealed the probate court's denial to the circuit court pursuant to S.C. Code Ann. § 62-1-308 (2009). The circuit court affirmed the probate court's denial of Appellant's demand for a jury trial. This appeal followed.

[2] Respondent never requested damages as a result of Appellant's alleged breach.

ISSUE

Is Appellant entitled to a jury trial?

STANDARD OF REVIEW

Whether a party is entitled to a jury trial is a question of law. *See Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 345-46 (2005). An appellate court may decide questions of law with no particular deference to the trial court. *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

LAW/ANALYSIS

Appellant argues the present action is primarily a legal action for money damages such that he is entitled to a jury trial. We disagree.

The South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." *Mims Amusement Co.*, 366 S.C. at 149, 621 S.E.2d at 348 (citation omitted). "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). A proceeding in probate court may either be an action at law or in equity. *In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000) (citation omitted).

Characterization of an "action as equitable or legal depends on the appellant's 'main purpose' in bringing the action." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citations omitted).[3]

[3] "[T]he 'main purpose' rule evolved from a determination that where a plaintiff has prayed for money damages in addition to equitable relief,

"The main purpose of the action should generally be ascertained from the body of the complaint." *Id.* (citation omitted). "However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. *Bell v. Mackey*, 191 S.C 105, 119-20, 3 S.E.2d 816, 822 (1939) (citations omitted).

"Trusts have long and broadly been a field for the jurisdiction of equity." *Epworth Orphanage v. Long*, 199 S.C. 385, 389, 19 S.E.2d 481, 482 (1942). "A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust." S.C. Code Ann. § 62-7-1001(a) (2009).[4] To remedy a breach of trust the court may compel the trustee to redress the breach of trust by "paying money, restoring property, or other means." *Id.* § 62-7-1001(b)(3). The Comment to section 62-7-1001 states, "The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge."

This Court has held that an action alleging a breach of fiduciary duty is an action at law. *See Corley v. Ott*, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997). However, a breach of fiduciary duty may sound in equity if the relief sought is equitable.[5] *See Bivens v. Watkins*, 313 S.C. 228, 230 n.3, 437

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characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action." *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991) (citations omitted).

[4] A trustee owes a trust a duty of loyalty. *See* S.C. Code Ann. § 62-7-802 (2009). Moreover, a trustee owes a trust a duty of reasonable care, skill, and caution. *See id.* § 62-7-804.

[5] Dating back to our holding in *O'Shea v. Lesser*, 308 S.C. 10, 416 S.E.2d 629 (1992), this Court has stated in several opinions that a breach of a fiduciary duty is an action at law. We now take this opportunity to stress that

S.E.2d 132, 133 n.3 (Ct. App. 1993). Restitution and disgorgement are equitable remedies. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215-16 (2002); *see also Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 63, 644 S.E.2d 675, 679 (2007) (Toal, C.J. dissenting) (noting disgorgement results from the equitable remedy of restitution); *Wallace v. Milliken & Co.*, 305 S.C. 118, 120, 406 S.E.2d 358, 359 (1991) (stating restitution is an equitable remedy).

In this case, Appellant contends that Respondent's causes of action for breach of fiduciary duty of care and breach of fiduciary duty of loyalty are actions at law that entitle him to a jury trial.[6] The remedy sought for the alleged breach of the fiduciary duty of care is essentially the remedy of restitution.[7] As noted above, the remedy sought by Respondent for the alleged breach of fiduciary duty of care is restoring to the Trust the lost

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an action for a breach of a fiduciary duty may sound in law or equity depending on the nature of the relief sought.

[6] Appellant does not dispute that an action for an accounting is an action sounding in equity. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (holding an action for accounting sounds in equity). Also, Appellant brought a claim against Penland under the alternate remedies of equitable indemnity and contribution; both of which are equitable remedies. *See RIM Assocs. v. Blackwell*, 359 S.C. 170, 179 n.3, 597 S.E.2d 152, 157 n.3 (Ct. App. 2004) (stating an action for contribution lies in equity); *Loyola Fed. Sav. Bank v. Thomasson Props.*, 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct. App. 1995) (citation omitted) (noting a cause of action for equitable indemnity is necessarily equitable in nature).

[7] The remedy sought for the alleged breach of the fiduciary duty of care is similar to the remedy for a constructive trust which can arise from a breach of a fiduciary duty giving rise to the obligation in equity to make restitution. *See Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987). In this case, there was an alleged breach of a fiduciary duty and the plaintiff is asking that funds be restored back into the Trust.

income, lost capital gain, and lost appreciation in value as a result of the alleged breach. Hence, the remedy sought by Respondent is more akin to restitution than money damages, particularly in light of the main purpose of the action.[8] Because the nature of the issues raised by the pleadings and character of relief sought for the alleged breach of the fiduciary duty of care is equitable, Appellant does not have the right to a jury trial on that issue.

The remedy sought for the alleged breach of the fiduciary duty of loyalty is disgorgement. As outlined above, the relief sought for the alleged breach of fiduciary duty of loyalty is disgorging all commissions and profits Appellant received on the Trust's purchases of annuities and returning those commissions to the Trust. Disgorgement is an equitable remedy, thus Appellant does not have the right to a jury trial for the alleged breach of the fiduciary duty of loyalty.

While Appellant will have to pay money to the trust if the allegations are proven, that does not mean Respondent's causes of action are legal in nature. Upon looking at the body of the complaint, the main purpose in bringing this action is equitable, not legal. Respondent's breach of fiduciary duty claims seek equitable remedies, not damages at law. Thus, Appellant does not have the right to a jury trial.

CONCLUSION

In light of the nature of the relief sought, Respondent's breach of fiduciary duty claims are equitable. Because there is no right to trial by jury for equitable actions, the circuit court did not err in denying Appellant a jury trial.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[8] This action was brought as a "Breach of Trust." As outlined above, trusts have long been a field for the jurisdiction of equity.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Angela Youmans as Personal Representative of the Estate of Deonte Elmore, Respondent,

v.

South Carolina Department of Transportation, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Allendale County
John C. Few, Circuit Court Judge

Opinion No. 26781
Heard February 4, 2010 – Filed March 1, 2010

DISMISSED AS IMPROVIDENTLY GRANTED

Marshall H. Waldron, Jr., of Griffith, Sadler & Sharp, of Beaufort, for Petitioner.

Mark B. Tinsley, of Gooding & Gooding, of Allendale, and Robert Norris Hill, of Newberry, for Respondent.

PER CURIAM: This Court granted a petition for a writ of certiorari to review the decision of the court of appeals in *Youmans v. South Carolina Department of Transportation*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008). We dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Timothy Edward Stahlnecker, Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 26782
Heard October 20, 2009 – Filed March 1, 2010

AFFIRMED

Appellate Defender LaNelle C. DuRant, of SC Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert Mills Ariail, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Because Timothy Edward Stahlnecker (Appellant) challenges the constitutionality of a state law, this Court reviews this matter pursuant to Rule 203(d)(1)(A), SCACR. On February 21, 2006 a Greenville County Grand Jury indicted Appellant on the charges of first degree criminal sexual conduct (CSC) with a minor and lewd act upon a child. Appellant went to trial and the jury returned guilty verdicts on both charges. Appellant was sentenced to twenty years on the CSC charge and fifteen years on the lewd act charge, the sentences to run concurrently. We affirm.

FACTS/PROCEDURAL HISTORY

Appellant lived in Greenville County with his wife, their two-year-old daughter, his wife's seven-year-old daughter (Victim), and his wife's five-year-old son from another previous marriage. Around four o'clock in the afternoon on November 6, 2005, Victim was left home alone with Appellant.

At trial, Victim testified that she went to the upstairs bedroom and sat next to Appellant. Victim recalled that Appellant removed her pants and touched her vagina with his hand. Victim also testified that Appellant performed oral sex on Victim and touched her vagina with his penis. Victim stated she tried to push Appellant away during the incident. Appellant stopped because Victim's mother returned home.

Victim's mother testified that when she returned home, she noticed Victim had different clothes on and told her to change her clothes. Victim's mother then went to check on Victim and found her lying in a fetal position on the bed. She testified Victim said she just wanted to go to bed, so she started to undress Victim in order to put on her pajamas. She stated that as she did, she discovered the inside of Victim's panties were wet and a hair was stuck to Victim's "private area." She then asked Victim if Appellant had been touching her. Victim's mother testified that Victim responded by nodding her

head yes and crying. Defense counsel objected on grounds of hearsay. The trial judge overruled the objection.

Victim's mother took Victim to the hospital where Victim was interviewed by Ty Bracken, a sex crimes investigator, in the presence of Victim's mother and grandmother. Prior to trial, the State requested a ruling on the introduction of Victim's interview with Bracken pursuant to S.C. Code Ann. § 17-23-175 (Supp. 2008). Bracken testified *in camera* that she reported to the hospital and met with Victim. Bracken stated she did not have recording equipment with her because it was in the middle of the night and the hospital did not have recording equipment in the room. Bracken testified she did not conduct a follow-up interview because she received a very clear disclosure from Victim and did not want Victim to have to perform a second interview. Bracken noted that getting the statement from Victim was an emergency-type situation. Bracken took notes of Victim's statements and specifically noted direct quotations from Victim. At the conclusion of the hearing, defense counsel moved to exclude Victim's statement to Bracken. Defense counsel argued section 17-23-175 violated the *ex post facto* laws and Appellant's right to confrontation. The trial judge denied the motion to suppress Victim's statement to Bracken.

At trial, Bracken testified Victim told her that when her mother left that afternoon, Appellant called her to come upstairs, and when she went into the bedroom Appellant was naked on the bed. Bracken then stated Victim said Appellant kissed her vagina with his mouth and touched under her panties with his penis. Lastly, Bracken testified Victim told her this was not the first time this happened.

At trial, the State called Victim's *guardian ad litem* (GAL) as a witness. Prior to the GAL's testimony, defense counsel asked for a ruling from the court as to whether the GAL could testify as to any incriminating statements made by Appellant to the GAL during the GAL's interview of Appellant. Defense counsel argued the GAL was a state actor and allowing the GAL to testify against Appellant violated his Sixth Amendment right to counsel. The trial court allowed the GAL to testify. The GAL testified Appellant admitted

to her the police reports of the incident were accurate and Victim initiated the incident.[1]

ISSUES

I. Did the trial court err in admitting the unrecorded out-of-court statement of Victim to Bracken under section 17-23-175?

II. Did the trial court err in admitting Appellant's admission to the GAL?

III. Did the trial court err in admitting the testimony of Victim's mother concerning Victim's statements to her mother regarding the sexual assault?

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." *State v. Wilson,* 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This 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." *Id.* at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001).

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[1] The following evidence was also admitted at trial: (a) Deputy Dustin Woodall testified Victim's mother told him Appellant sexually assaulted Victim in their home; (b) Deputy Matthew Owens testified Appellant was read his warrant at the detention center and Appellant admitted that he did what the warrant stated he did; (c) the crotch of Victim's panties tested positive for saliva; (d) a signed statement of Appellant admitting he performed the acts on Victim was admitted for impeachment evidence; and (e) a letter from Appellant to Victim's mother apologizing and asking for forgiveness.

ANALYSIS

I. Investigator Bracken's Testimony

Appellant argues the trial court erred in admitting the out-of-court statement of Victim to Bracken under section 17-23-175 because it violated the *ex post facto* laws, violated the rule against hearsay, and was prejudicial to Appellant. We find that Appellant's hearsay and prejudice arguments are not preserved for review. We also find that section 17-23-175 does not violate the *ex post facto* laws.

A. Issue Preservation

An objection must be made on a specific ground. *State v. Nichols*, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). For an issue to be properly preserved it has to be raised to and ruled on by the trial court. *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). A party need not use the exact name of a legal doctrine in order for the issue to be preserved, but it must be clear the argument has been presented on that ground. *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001).

At trial, defense counsel argued Victim's statement to Bracken was inadmissible because application of section 17-23-175 violated the *ex post facto* laws and his right to confrontation. However, defense counsel did not contend Victim's statement constituted impermissible hearsay, that it was unduly prejudicial because it was inconsistent with Victim's trial testimony, or that the State failed to comply with section 17-23-175. Hence, the only issue preserved on appeal is whether section 17-23-175 violated the *ex post facto* laws.[2]

[2] While defense counsel argued below the application of section 17-23-175 violated his right to confrontation, Appellant failed to raise that issue on appeal.

B. S.C. Code Ann. § 17-23-175

"[T]he reason the *Ex Post Facto* Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 429 (1987). An *ex post facto* law "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings v. Missouri*, 71 U.S. 277, 278 (1866). "[I]n order for a law to fall within the *ex post facto* prohibition, two critical elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment, and (2) the law must disadvantage the offender affected by it." *State v. Huiett*, 302 S.C. 169, 171, 394 S.E.2d 486, 487 (1990) (citation omitted).

The United States Supreme Court has set forth four general categories of law that are violative of the United States Constitution's *ex post facto* clause:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3 U.S. 386, 390 (1798).

"[I]n order for the *ex post facto* clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature."

Huiett, 302 S.C. at 172, 394 S.E.2d at 487. A change in the law does not violate the *ex post facto* clause if it merely affects a mode of procedure and does not alter substantial personal rights. *Id.* at 171, 394 S.E.2d at 487 (citation omitted). "Even though a procedural change may have a detrimental impact on a defendant, a mere procedural change which does not affect substantial rights is not *ex post facto*." *Id.* at 171-72, 394 S.E.2d at 487.

The United States Supreme Court has held changes in laws that made previously inadmissible evidence admissible did not violate the *ex post facto* clause. *See Thompson v. Missouri*, 171 U.S. 380 (1898) (holding a law admitting previously inadmissible handwriting samples did not violate *ex post facto* clause); *Hopt v. Utah*, 110 U.S. 574 (1884) (holding admission of convicted felon's testimony, which was inadmissible at the time the crime was committed, did not violate *ex post facto* clause). Furthermore, other jurisdictions that have considered the admission of hearsay statements of child victims have reached the same conclusion. *See State v. Stevens*, 757 S.W.2d 229, 232 (Mo. Ct. App. 1988) ("[A] change in a statute after the alleged crime which allowed the hearsay statements of a child victim of sexual abuse to be admitted against an accused at trial when previously such a statement was inadmissible was not a prohibited *ex post facto* law because it simply authorized the introduction of additional evidence of guilt."); *accord Cogburn v. State*, 732 S.W.2d 807 (Ark. 1987); *People v. Koon*, 724 P.2d 1367 (Colo. Ct. App. 1986).

Section 17-23-175 allows an out-of-court statement of a child under twelve to be admissible under certain circumstances.[3] In interpreting section

[3] The pertinent part of section 17-23-175 provides:

> (F) Out-of-court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If, however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider

17-23-175, the court of appeals concluded the section was not penal in nature but rather "deals with procedural, evidentiary matters." *State v. Bryant*, 382 S.C. 505, 512, 675 S.E.2d 816, 820 (Ct. App. 2009). Furthermore, section 17-23-175 does not fall into one of the four categories set forth in *Calder*. *See id.* The amount or type of evidence required at the time of the commission of the offense in order to convict the offender is not altered by section 17-23-175. Because section 17-23-175 merely authorizes the introduction of new evidence and does not alter substantial personal rights, it does not violate the *ex post facto* laws. Therefore, the trial court committed no error in allowing Bracken's testimony pursuant to section 17-23-175.

II. Appellant's Admission to the GAL

Appellant argues the trial court erred in allowing the admission of Appellant's statement to the GAL because it violated his Sixth Amendment right to counsel. We disagree.

The Sixth Amendment right to counsel "attaches only at or after the initiation of adversary judicial proceedings against the defendant." *U.S. v. Gouveia*, 467 U.S. 180, 187 (1984). "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial

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> the statement in a hearing outside the presence of the jury to determine:
>
> > (1) the necessary visual and audio recording equipment was unavailable;
> >
> > (2) the circumstances surrounding the making of the statement;
> >
> > (3) the relationship of the professional and the child; and
> >
> > (4) if the statement possesses particularized guarantees of trustworthiness.
>
> After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

proceedings that trigger attachment of the Sixth Amendment right to counsel." *Rothgery v. Gillespie County, Tex.*, __ U.S. __, 128 S. Ct. 2578, 2592, 171 L. Ed. 2d 366, 383 (2008). In *Massiah v. U.S.*, 377 U.S. 201, 206 (1964) the United States Supreme Court held "that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." That language has given rise to a two-part test to determine whether a violation of the Sixth Amendment has occurred: "[t]o find a Sixth Amendment violation, the statements in question must have been (1) deliberately elicited (2) by a government agent." *U.S. v. Li*, 55 F.3d 325, 328 (7th Cir. 1995); *see also Creel v. Johnson*, 162 F.3d 385, 393 (5th Cir. 1998); *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991).

"There is, by necessity, no bright-line rule for determining whether an individual is a government agent for purposes of the sixth amendment right to counsel." *Dupree*, 946 F.2d at 793-94. Whether someone is a government agent for purposes of Sixth Amendment jurisprudence depends on the facts and circumstances of each case. *Id.* at 794 (citation omitted). However, "[a]t a minimum . . . there must be some evidence that an agreement, express or implied, between the individual and a government official existed at the time the elicitation takes place." *Id.* (citation omitted). Regarding the “deliberate elicitation” prong, the Supreme Court has explained that "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986).

In the present case, Appellant contends the GAL was a state actor because she was appointed by the court. However, the record clearly indicates the GAL was not acting as a government agent for purposes of the Sixth Amendment right to counsel. There was no express or implied agreement between the GAL and a government official involved in the prosecution of Appellant's case. The GAL was meeting with Appellant to see that Victim received the social services she needed. In *State v. Sprouse*, 325 S.C. 275, 284, 478 S.E.2d 871, 876 (Ct. App. 1996), the court of appeals

found that a case manager for the Department of Social Services (DSS) was not acting as an agent of law enforcement and, therefore, the requirements of *Miranda* did not apply. Similarly, the GAL in this case was an employee of DSS appointed by the family court and in no way a government agent for purposes of the Sixth Amendment right to counsel.

Additionally, the GAL did not deliberately elicit Appellant's incriminating remarks. When the GAL met with Appellant, she told him that she did not want to discuss the details of the sexual assault. However, Appellant voluntarily made incriminating statements to the GAL during the interview. In no way did the GAL take any action designed to deliberately elicit incriminating statements. Hence, the statements made to the GAL were not deliberately elicited and the GAL was not a government agent for purposes of the Sixth Amendment. Therefore, the trial court did not err in allowing Appellant's admission to the GAL.

Victim's Statement to her Mother

Appellant argues the trial court erred in admitting the testimony of Victim's mother concerning the statements of Victim to her about the sexual assault because they violated the rule against hearsay and Rule 801(d)(1)(D), SCRE as the statements went beyond the time and place of the assault. We disagree.

A. Issue Preservation

At trial, defense counsel objected to the introduction of Victim's statement as hearsay in general. The trial judge overruled the objection. Defense counsel never argued that Victim's statement went beyond the time and place of the assault as provided in Rule 801(d)(1)(D). Because this issue was not raised below, it is not preserved for appellate review.

B. Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. "A statement that is admissible because it falls within an exception in Rule 803, SCRE, such as the excited utterance exception, may be used substantively, that is, to prove the truth of the matter asserted." *State v. Sims*, 348 S.C. 16, 20, 558 S.E.2d 518, 520-21 (2002) (citation omitted).

Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. *Id.* at 21, 558 S.E.2d at 521. A court must consider the totality of the circumstances in determining whether a statement falls within the excited utterance exception. *State v. McHoney*, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001). The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor. *Sims*, 348 S.C. at 21, 558 S.E.2d at 521. "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." *Id.* at 22, 558 S.E.2d at 521.

In the present case, Victim's statement to her mother related to the startling event of being sexually assaulted by Appellant immediately before her mother returned home. Victim was lying in a fetal position when her mother came to check on her minutes after arriving home. Victim was upset and crying when she told her mother about the abuse; thus, Victim made the statement while under the stress of excitement. Finally, this stress was

obviously caused by the sexual assault. The requirements of Rule 803(2), SCRE were satisfied in this case. Victim's statement to her mother was an excited utterance and the trial judge did not err in allowing Mother's testimony.[4] *See also State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007) (holding a trial judge did not abuse his discretion by admitting a hearsay statement under the excited utterance exception when the statement was made by a two-and-a-half year old girl to her caretakers after they discovered blood coming from her vaginal area and the statement related to the startling event of a sexual assault).

CONCLUSION

For the aforementioned reasons, we affirm the decision of the trial court.

WALLER, BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

[4] Even if the statement was not an excited utterance, the admission of this evidence at trial was harmless considering the evidence noted in footnote 1. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Karl P. Jacobsen, Respondent.

Opinion No. 26783
Heard February 16, 2010 – Filed March 1, 2010

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Karl P. Jacobsen, of West Columbia, pro se.

PER CURIAM: This is an attorney disciplinary matter involving multiple allegations of misconduct arising out of Karl P. Jacobsen's (Respondent's) operation of his bankruptcy practice. After a full investigation, the Office of Disciplinary Counsel (ODC) filed formal charges against Respondent with the Commission on Lawyer Conduct (the Commission). Respondent did not file an Answer and, as a result, was found to be in default. After a hearing,[1] a Hearing Panel of the Commission (the Panel) recommended that Respondent be disbarred and ordered to pay costs in the amount of $552.37. Additionally, the Panel recommended that Respondent be ordered to reimburse the Lawyers' Fund for Client Protection for any amount paid to clients as a result of Respondent's misconduct. Respondent did not file a brief with this Court. We agree with the Panel's recommended

[1] Respondent did not appear at the hearing.

sanction. Accordingly, we disbar Respondent effective the date of this opinion.[2]

FACTUAL/PROCEDURAL HISTORY

Respondent was licensed to practice law in South Carolina on November 16, 1998. Respondent was a member of a statewide bankruptcy firm (the Firm). Respondent and another member of the Firm worked in the Columbia office while the other member of the Firm operated the Greenville office. Respondent's practice was so extensive that it was estimated that he filed between 700 and 800 bankruptcy cases per year.

In the fall of 2003, one of the Firm's members reported to the Bankruptcy Court and to the Commission that Respondent had committed numerous ethical and rule violations.[3] As a result of

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[2] Respondent did not appear at the argument before this Court despite efforts to contact him via certified mail at the West Columbia address on file with the South Carolina Bar as well as an Atlanta address and a San Francisco address.

[3] Specifically, it was alleged that Respondent: failed to devote sufficient time and attention to client matters; failed to file complete and accurate bankruptcy schedules and statements of debtors' affairs with the Bankruptcy Court; allowed non-lawyer assistants to execute legal documents on behalf of clients and Respondent without the supervision of a lawyer; allowed non-lawyer assistants to negotiate with adverse parties on behalf of clients without the supervision of a lawyer; failed to meet deadlines imposed by the Bankruptcy Court and the bankruptcy trustees for the provision of information to the court; failed to file or to advise clients regarding the filing of motions to reconsider when such motions would be appropriate; failed to timely correct mistakes in documents filed with the Bankruptcy Court; failed to present meritorious claims of clients to the Bankruptcy Court or to timely object to relief sought against debtor clients by creditors; refused to communicate with clients; negotiated with creditors and settled matters on behalf of debtor clients without appropriate client authority and without informing clients of such action; failed to adequately advise clients regarding the ramifications of certain decisions in their bankruptcy matters; refused to communicate with the Bankruptcy Court and the bankruptcy trustees; and allowed bankruptcy cases to be dismissed in order to avoid confronting the Bankruptcy Court to resolve Respondent's own mistakes through appropriate motions.

Respondent's errors, numerous client matters were dismissed by the Bankruptcy Court. In turn, the Office of the United States Trustee filed an action against Respondent in October 2003, seeking for Respondent to be indefinitely suspended from practicing before the Bankruptcy Court. By consent order dated November 7, 2003, the United States Trustee's complaint was resolved and Respondent was required to: (1) withdraw from practicing before the Bankruptcy Court for a period of one year; (2) consult with Lawyers Helping Lawyers and cooperate with any recommendations thereof for medical or other treatment; (3) complete 8.0 hours of approved legal ethics training and 25.0 hours of approved bankruptcy training; and (4) complete an office review by the Practice Management Assistance Program of the South Carolina Bar. In addition, Respondent was prohibited from resuming practice before the Bankruptcy Court, even after one year from the date of the order, unless Respondent provided the United States Trustee with an affidavit summarizing his compliance with the terms of the consent order.

Respondent failed to comply with the provisions of the consent order and, in fact, continued to accept new bankruptcy clients.

In October 2003, one of Respondent's partners terminated her relationship with the Firm. Subsequently, Respondent hired an associate attorney to handle the Firm's Columbia bankruptcy practice. Between December 2003 and February 2004, Respondent continued to accept bankruptcy clients with the intention that the new associate would file these clients' petitions. Apparently unable to manage the Firm's caseload, this associate submitted her resignation on February 27, 2004, which became effective on March 5, 2004.

In March 2004, with over 2000 cases pending before the Columbia Division of the Bankruptcy Court, Respondent informed the Firm's employees that the office would be closing. Respondent took no further action to close his practice or notify his clients.

Due to the numerous grievances filed against Respondent and concerns over the management of his trust account, this Court placed Respondent on interim suspension on March 18, 2004. On February 4,

2005, the Commission on CLE suspended Respondent for failure to comply. In turn, this Court suspended Respondent on April 12, 2005.[4]

Subsequently, the ODC went forward with formal charges on the grievance matters.[5] With respect to each of these matters, Respondent failed to file the requisite bankruptcy documents, failed to communicate with his clients regarding the status of their cases, and failed to inform his clients of his decision to discontinue his bankruptcy practice. Respondent also failed to refund the fees paid by these clients and did not take reasonable steps to protect his clients' interests. Respondent did not respond to the notice of full investigation on any of these matters.

In addition to the above-listed client matters, an investigation also revealed that in 2003 the Firm's trust account was "out of balance." Specifically, there was evidence that a $15,000 shortfall existed in July 2003 and that client funds had been commingled with the Firm's operating account funds. According to the investigation, the Firm had

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[4] During the pendency of these complaints, Respondent was represented by counsel. Subsequently, counsel withdrew and was relieved from representation.

[5] These eight complaints involved the following: (1) the Murray Matter, in which Respondent's failure to file the required bankruptcy documents resulted in the dismissal of Murray's case; (2) the Cagle Matter, in which Respondent's failure to file adequate documentation and appear on Cagle's behalf at a hearing resulted in the dismissal of her case; (3) the Kinard Matter, in which Respondent failed to file a bankruptcy petition on behalf of the Kinards despite the Firm's representation that the petition had been filed and a hearing was scheduled; (4) the Price Matter, in which Respondent failed to file a bankruptcy petition for Price; (5) the Moseley Matter, in which Respondent failed to file a bankruptcy petition despite the Firm's representation that a petition had been filed and that a hearing would be scheduled; (6) the Snelling Matter, in which Respondent failed to file a bankruptcy petition; (7) the Abell Matter, in which the Respondent failed to communicate with the Abells after an associate, who filed the Abells' bankruptcy petition, left the firm and failed to return bankruptcy documents to the Abells; and (8) the Baird Matter, in which Respondent failed to file an emergency bankruptcy petition on behalf of the Bairds resulting in the foreclosure of their home.

failed to maintain journals, ledgers, checkbook registers, reconciliations, and other required records prior to July 2003.

Based on its investigation, the ODC filed formal charges against Respondent on April 14, 2009 with the Commission. By certified mail, the ODC sent notification of these charges to a West Columbia address on file with the South Carolina Bar as well as Respondent's last known address in Atlanta and a San Francisco address that was obtained by an ODC investigator.[6] Because Respondent failed to respond or file an Answer to the formal charges, the Commission found Respondent in default and the charges were deemed admitted by order dated July 16, 2009.

On August 27, 2009, the Panel conducted a hearing for the purpose of determining the appropriate sanction to recommend to this Court. Respondent did not appear for this hearing.

In prefacing her case, disciplinary counsel outlined her office's failed attempts to contact Respondent via certified mail and electronic mail. In support of her claim, counsel offered into evidence four exhibits that documented this correspondence. Counsel testified her office had not heard from Respondent since an e-mail exchange in February 2006.

After summarizing the formal charges, counsel called Olean Murray, one of Respondent's former bankruptcy clients to testify regarding the basis of her grievance against Respondent. Murray testified that she paid Respondent to file a bankruptcy petition on her behalf. Under the impression that the petition had been filed, Murray went to the Bankruptcy Court to resolve the matter, but instead discovered that the petition had not been filed. On a second occasion, Respondent failed to appear at a hearing in the Bankruptcy Court on behalf of Murray. Concerned about her case, Murray repeatedly attempted to contact Respondent. According to Murray, Respondent could never be reached at his office. Ultimately, Murray discovered

[6] The ODC also delivered a copy of the formal charges to our Clerk's Office in the event Respondent inquired about the status of this matter.

that Respondent was no longer handling bankruptcy cases. Although her case was "discharged" after several years of bankruptcy proceedings, Murray stated that her credit had been "ruined." She further testified that as a result of her bankruptcy and resultant credit problems, she had to refinance her $20,000 home for $60,000.

Counsel then relayed to the Panel the following aggravating circumstances: (1) Respondent's demonstrated pattern of misconduct; (2) Respondent's failure to respond to the formal charges and disciplinary proceedings; and (3) Respondent's prior disciplinary history, which included a letter of caution issued on June 21, 2002 regarding his failure to supervise associates and non-lawyer employees in the Firm.

At the conclusion of her case, counsel requested that the Panel issue a report in which it recommended that Respondent be disbarred and ordered to pay the costs of the proceedings and restitution to the Lawyers' Fund for Client Protection.

The Panel issued a report on August 27, 2009 that was filed with the Commission on the same day. As a threshold matter, the Panel clarified that Respondent had been found in default and had failed to appear for the hearing despite attempts by the ODC and the Commission to contact him. Specifically, the Panel noted that the ODC had complied with Rule 14(c) of the South Carolina Rules for Lawyer Disciplinary Enforcement (RLDE)[7] in that it had sent by certified mail a copy of the formal charges to Respondent's last known address in Atlanta and to an alternate address in San Francisco. Additionally, the Panel concluded Respondent was provided sufficient notice of the Panel hearing given the Commission served Respondent

[7] Rule 14(c) provides that "[s]ervice upon the lawyer of formal charges in any disciplinary or incapacity proceedings shall be made by personal service upon the lawyer or the lawyer's counsel by any person authorized by the chair of the Commission or by registered or certified mail to the lawyer's last known address. Service of all other documents shall be made in the manner provided by Rule 262(b), SCACR." Rule 14(c), RLDE, Rule 413, SCACR.

with notice of the hearing by certified mail to the Atlanta and San Francisco addresses.

Having found Respondent in default, the Panel reiterated that the Formal Charges were deemed admitted.[8] Based on the admitted allegations of misconduct, the Panel concluded that Respondent violated the following South Carolina Rules of Professional Conduct (RPC), Rule 407, SCACR: Rule 1.1 (competence); Rule 1.2 (scope of representation); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.5 (fees); Rule 1.15 (safekeeping of property); Rule 1.16 (terminating representation); Rule 3.2 (expediting litigation); Rule 5.1 (responsibilities of partners); Rule 5.3 (responsibilities regarding non-lawyer assistants); Rule 5.5 (unauthorized practice of law); and Rule 8.4(e) (conduct prejudicial to the administration of justice). Based on this misconduct, the Panel found Respondent was subject to discipline pursuant to Rules 7(a)(1), (5), and (6) of the RLDE.[9]

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[8] See Rule 24(a), RLDE, Rule 413, SCACR (stating that lawyer's failure to answer formal charges shall constitute an admission of the factual allegations); Rule 24(b), RLDE, Rule 413, SCACR (stating that lawyer's failure to appear when specifically ordered by the hearing panel or the Supreme Court shall constitute an admission of the factual allegations that were the subject of such appearance).

[9] Rule 7 provides in relevant part that it shall be a ground for discipline for a lawyer to:

> (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers;
>
> . . .
>
> (5) engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law;
>
> (6) violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR.

Rules (7)(a)(1), (5), (6), RLDE, Rule 413, SCACR.

Additionally, the Panel found Respondent "exacerbated his misconduct by failing to respond to disciplinary inquiries." In reaching this conclusion, the Panel pointed to Respondent's failure to communicate with the ODC regarding the investigation, noting his last communication was on February 21, 2006. Due to Respondent's lack of cooperation, the Panel determined Respondent had violated Rule 8.1 of the RPC, Rule 407, SCACR, and, thus, subject to discipline for this misconduct pursuant to Rule 7(a)(3), RLDE.[10]

The Panel found the following aggravating circumstances: (1) Respondent demonstrated a significant pattern of misconduct; (2) Respondent failed to fully cooperate in the disciplinary investigations; (3) Respondent's prior disciplinary history includes a letter of caution with a finding of minor misconduct; and (4) Respondent did not answer the Formal Charges or appear at the hearing.

In view of these findings, the Panel recommended Respondent be disbarred "given Respondent's failure to answer the formal charges and appear at the hearing, coupled with his multiple instances of client neglect, repeated sanctions imposed upon him by the Bankruptcy Court, his trust account mismanagement, and his failure to respond to Disciplinary Counsel." Additionally, the Panel recommended that Respondent be ordered to pay the costs of the proceedings and to reimburse the Lawyers' Fund for Client Protection for any amount paid to clients as a result of his misconduct.

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[10] Rule 7(a)(3) provides that it shall be a ground for discipline for a lawyer to:

> willfully violate a valid order of the Supreme Court, Commission or panels of the Commission in a proceeding under these rules, willfully fail to appear personally as directed, willfully fail to comply with a subpoena issued under these rules, or knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response or appearance under Rule 19(b)(1), (c)(3) or (c)(4).

Rule 7(a)(3), RLDE, Rule 413, SCACR.

DISCUSSION

Because Respondent has been found in default and, thus, is deemed to have admitted to all of the factual allegations, the sole question before the Court is whether to accept the Panel's recommended sanction. See In re Tullis, 375 S.C. 190, 652 S.E.2d 395 (2007) (recognizing that the Court need only determine the appropriate disciplinary sanction where attorney was found in default and, thus, deemed to have admitted all factual allegations of the formal charges).

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." In re Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight." In re Marshall, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998). "However, this Court may make its own findings of fact and conclusions of law." Id. Furthermore, a disciplinary violation must be proven by clear and convincing evidence. In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

We find the Panel's recommended sanction of disbarment is warranted. By his default, Respondent has admitted to committing multiple acts of serious misconduct. Respondent's conduct also indicates an obvious disinterest and indifference to the practice of law given he has left this jurisdiction and has not responded to this disciplinary action. Furthermore, Respondent has an extensive disciplinary history involving: a suspension from practicing in the Bankruptcy Court, a letter of caution from the Commission, a suspension by the Commission on CLE for failure to comply, and a suspension from this Court for failure to comply with CLE.

In cases involving similar instances of attorney misconduct, this Court has found disbarment to be the appropriate sanction. See In re

Okpalaeke, 374 S.C. 186, 194, 648 S.E.2d 593, 597-98 (2007) (holding disbarment was appropriate sanction where evidence established that attorney had committed "several different acts of serious misconduct," had left "this jurisdiction with the knowledge that disciplinary action against him was imminent," and had failed to answer formal charges or appear at hearings before the Panel or this Court); In re Tullis, 375 S.C. at 193, 652 S.E.2d at 395 (concluding disbarment was warranted where attorney: failed to adequately communicate with his clients; failed to act with diligence and competence; misused and mismanaged trust account funds; failed to respond to Disciplinary Counsel inquiries and notices of full investigation regarding these matters; and had an "extensive disciplinary history"); In re Murph, 350 S.C. 1, 4, 564 S.E.2d 673, 675 (2002) (holding disbarment was warranted where attorney: failed to answer the formal charges and appear at the hearing before the sub-panel; admitted that he committed criminal acts; failed to respond to Disciplinary Counsel; practiced law on two occasions while on suspension; failed to earn or return over $7,000 in fees; and failed to represent clients competently and diligently in several cases; stating "[a]n attorney's failure to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law. Such an attorney is likely to face the most severe sanctions because a central purpose of the disciplinary process is to protect the public from unscrupulous or indifferent lawyers."); In re Hall, 341 S.C. 98, 533 S.E.2d 588 (2000) (concluding disbarment was warranted where evidence established that attorney neglected legal matters, practiced law while under suspension, and failed to respond to disciplinary authority); In re Wofford, 330 S.C. 522, 500 S.E.2d 486 (1998) (finding disbarment was justified where attorney: failed to answer formal charges or appear at Panel Hearing or hearing before this Court; failed to provide competent representation, to keep clients reasonably informed, and to promptly deliver funds to third person; and attorney misappropriated client funds and committed criminal acts); In re Meeder, 327 S.C. 169, 488 S.E.2d 875 (1997) (determining disbarment was justified where attorney, who responded initially, failed to answer formal charges or ask for panel hearing and continued to represent client after he was suspended for multiple counts of misconduct); In re Edwards, 323 S.C. 3, 448 S.E.2d 547 (1994)

(holding disbarment was appropriate sanction where attorney failed to keep clients informed, misappropriated or improperly used client funds, knowingly presented false testimony, and failed to cooperate in the investigation of disciplinary charges against him); In re Sifly, 279 S.C. 113, 302 S.E.2d 858 (1983) (concluding disbarment was appropriate sanction where attorney failed to appear before the disciplinary panel or the Court and attorney mishandled two cases and wrote "bad" checks).

CONCLUSION

Based on the foregoing, we disbar Respondent effective the date of this opinion. We further order Respondent to pay the costs of these disciplinary proceedings in the amount of $552.37 and to reimburse the Lawyers' Fund for Client Protection for any amount paid to clients as a result of Respondent's misconduct. Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jarod Wayne Tapp, Appellant.

Appeal From Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 4529
Heard January 6, 2009 – Filed April 9, 2009
Reheard September 1, 2009
Withdrawn, Substituted and Refiled February 18, 2010

REVERSED and REMANDED

Timothy Clay Kulp, of Charleston, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III,

all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

THOMAS, J.: Jarrod W. Tapp appeals his convictions for murder, criminal sexual conduct in the first degree, and first degree burglary. Tapp alleges the trial court erred in: (1) allowing the introduction of DNA evidence, (2) allowing expert testimony of a crime scene analyst and victimologist, (3) failing to grant a mistrial based on undisclosed exculpatory evidence, and (4) failing to grant a directed verdict at the close of the State's case. We reverse and remand in light of our supreme court's recent decision in State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

FACTS

On Friday, May 16, 2003, Julie Jett (hereinafter Jett or Victim) failed to appear for work. Concerned, Jett's parents contacted Mrs. Mumpower, the property manager at Jett's apartment complex, and requested she check on Jett. Mumpower knocked several times at Jett's door and then, using a key,[1] opened the door slightly. She saw a great deal of blood on the living room floor and immediately closed the door and contacted police.

Investigators arrived at the scene around 5:30 p.m. and initially noticed a large blood stain near the television, some spatter in different places in the living room, and blood trailing off toward the hallway. Police then discovered Jett's nude body in the hallway bathroom, kneeling on the floor, doubled over the rim of the tub. She had noticeable stab wounds about the face and neck, as well as abrasions akin to carpet burns on her knees and face. Police collected trace evidence and lifted several latent prints from various locations throughout the apartment but found none in the bathroom. Further examination of the doors and windows showed no indication of forced entry.

[1] Mrs. Mumpower made no attempt to open the door without the key and therefore could not determine whether the door was locked or unlocked when she arrived.

An autopsy determined Jett's death to be a homicide, occasioned by two perforations to the jugular vein, causing excessive blood loss. The autopsy revealed "battle signs" including a broken nose and jaw,[2] a black eye, and bruises to both ears. The coroner also conducted a "rape kit," and swabs of Victim's vaginal and rectal cavities yielded the protein p30, indicating the presence of semen, although no sperm cells were recovered.

Authorities conducted DNA testing on the swabs; however, this testing produced only a "mixture" or "partial profile" of Jett and another individual.[3] Due to the mixed nature of the profile and the ability of female DNA, in such situations, to mask the presence of male DNA, only a minimum number of loci could be matched. While these matches did not rule out Tapp, the statistical probability of a randomly selected and unrelated individual being the source of the evidence was only one in twenty-three.

In order to conduct a more thorough DNA analysis, samples were sent to ReliaGene laboratories in New Orleans, Louisiana, for Y-STR testing, which has the capability of producing a more accurate DNA profile when there is a mixture of male and female DNA present in the sample. The test compared the "male extract" from the vaginal swab against the Y-STR profile, which extracts only those loci along the Y chromosome unique to men. Tapp's standard sample matched the "male extract" from the vaginal swab on all 10 loci that the Y-STR test examines. This test could not exclude Tapp, and at the time of trial, the statistical probability of a randomly selected

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[2] Jett's jaw was broken in two places.

[3] Although the swabs revealed the presence of semen, the test for semen looks for a particular protein called p30. According to the State's expert: "[the test] is sensitive for the presence of p30 at extremely low levels. [However, t]he amount of DNA necessary to develop a DNA profile is greater than the minimum threshold amount of p30 that's needed for [the] test to be positive. So it is not uncommon for a positive p30 semen presence test [to] yield no DNA profile other than the individual source, in this case, the victim."

and unrelated individual being the source of the DNA was one in 17,800 among white males.

PROCEDURAL BACKGROUND

Tapp filed a motion *in limine* with the trial court to suppress the DNA evidence because the State did not demonstrate that it was going to offer evidence that the DNA sample was deposited in Victim during the time frame between when she was last seen alive and when her body was discovered. Tapp also argued, *in limine*, to introduce a second statement he made to the police, in which he admitted to having had previous sexual encounters with Jett. The trial court allowed the DNA testimony but did not allow the statement. However, it left open the opportunity for Tapp to testify about his prior sexual relationship with Jett.

Among its various expert witnesses, the State qualified Michael Prodan, a special agent with the State Law Enforcement Division (SLED), over Tapp's objection, as an expert in crime scene analysis and victimology. Prodan, through a review of crime scene photos, autopsy reports, and other information provided by the police and prosecution, developed an opinion as to Victim's particular risk level and gave an opinion as to the possible ways in which the altercation between Victim and the perpetrator transpired.

Some time during the investigation, the State discovered Ryan Wheatley, Jett's roommate's boyfriend, may have had a key to the apartment. The State's witnesses, Solveig Heintz, and Prodan both testified that Ryan may have had a key. Tapp alleges the State withheld this information, and after Prodan testified to it, he unsuccessfully moved for a mistrial.

At the close of the State's case, the trial court denied Tapp's motion for a directed verdict. Tapp offered no evidence in his defense, and the jury convicted him on all charges. This appeal followed.

ISSUES ON APPEAL

I. Did the fact that the State did not provide evidence to demonstrate the DNA sample was deposited in Victim sometime between the time she was last seen alive and when her body was discovered render the evidence irrelevant?

II. Did the trial court err in qualifying Prodan as an expert witness and allowing his testimony?

III. Did the trial court err in denying Tapp's motion for a mistrial because the State allegedly withheld exculpatory evidence?

IV. Did the trial court err in failing to grant a directed verdict at the close of the State's case?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

Because we find it dispositive of the matter at hand, we address only Tapp's allegation of error as to the qualification of Prodan as an expert witness.

Qualification of an Expert Witness

Tapp first alleges that it was error to qualify Prodan as an expert witness. We agree.

When this court first heard this case we reversed the trial court and remanded the matter for a new trial. Subsequently, we granted the State's

petition for rehearing to reevaluate our apprehension of the rules of issue preservation. However, in the interim the South Carolina Supreme Court addressed the issue of the qualification of non-scientific expert witnesses in State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). In our original opinion, we affirmed the qualification of Prodan, relying on very specific language from State v. Morgan, which stated in the context of nonscientific expert testimony, issues of reliability go to the weight of the evidence, rather than its admissibility. 326 S.C. 503, 513, 485 S.E.2d 112, 118 (Ct. App. 1997). However, in State v. White, the South Carolina Supreme Court overruled Morgan and declared this specific proposition an "incorrect statement of law." White, 382 S.C. at 273, 676 S.E.2d at 688. Accordingly, on rehearing, we find White necessitates we revisit the issue of Prodan's qualification as an expert.[4]

In White, the appellant was convicted of armed robbery and kidnapping. State v. White, 372 S.C. 364, 375, 642 S.E.2d 607, 612 (Ct. App. 2007). White appealed, arguing expert dog tracking evidence must satisfy the standard for "scientific based" expert testimony under the State v. Jones[5] reliability test. Id. at 375, 642 S.E.2d at 612. This court affirmed White's convictions, noting a distinction between scientific testimony and nonscientific, or experience based, expert testimony, and held questions about the reliability of the evidence in nonscientific areas of expertise go only to the weight to be given the testimony and not its admissibility. Id. Our decision in White relied on Morgan for the proposition that " '[i]f the expert's opinion does not fall within [the] Jones [standard for scientific expert testimony], questions about the reliability of an expert's methods go only to the weight, but not admissibility, of the testimony.' " Id. at 376, 642 S.E.2d at 613 (citing Morgan, 326 S.C. at 513, 485 S.E.2d at 118).

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[4] Initially, we note both parties concede this matter is governed by the South Carolina Supreme Court's recent decision in State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), issued while this appeal was pending before this court.

[5] State v. Jones, 273 S.C. 723, 732, 259 S.E.2d 120, 124-25 (1979).

On appeal, the supreme court, although affirming White's convictions on other grounds, rejected the rationale and analytical framework of the court of appeals. The supreme court emphatically declared the Morgan rule to be an incorrect statement of the law. White, 382 S.C. at 273-74, 676 S.E.2d at 688. The White court explicitly overruled Morgan "to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission into evidence." Id. at 273, 676 S.E.2d at 688.

The foundation of the White decision is that *all* expert testimony must satisfy Rule 702, SCRE, including the trial court's gatekeeping function of ensuring the proposed expert testimony meets a threshold level of reliability, regardless of whether it is scientific or nonscientific. Id. White holds that in discharging this gatekeeping role, "a trial court must assess the threshold foundational requirements of qualification and reliability and further find that the proposed evidence will assist the trier of fact[, and] . . . only after the court has vetted the matters of qualifications and reliability and admitted the evidence" may challenges be dismissed as going to the weight rather than admissibility. Id. at 274, 676 S.E.2d at 688. The White court stated the tenant of evidence law in which a challenge goes to the weight and not the admissibility of the evidence "has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." Id. at 273, 676 S.E.2d at 688. Both scientific and nonscientific expert testimony is subject to Rule 702, "both in terms of expert qualifications and reliability of the subject matter." Id. Thus, the trial court must make an initial finding that the nonscientific expert's methods meet a threshold level of reliability. See id. at 272-73, 676 S.E.2d at 688 (stating the Morgan rule that "[i]f the expert's opinion does not fall within [the] Jones [standard for scientific expert testimony], questions about the reliability of an expert's methods go only to the weight, but not admissibility, of the testimony" is an incorrect statement law).

Although the White court held the foundational reliability of nonscientific testimony must be tested prior to the qualification of an expert,

it further stated that such a requirement does not lend itself to a "one-size-fits-all approach." Id. at 274, 676 S.E.2d at 688. Rather, the court only created a six part test for the reliability of expert canine tracking evidence,[6] and made no attempt to derive a formulaic approach for all nonscientific experts, as it could "not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence." Id. Consequently, this court is left with no guidance on what test or elements must be satisfied to establish the foundational reliability necessary to qualify an expert in the fields of crime scene analysis and victimology.

As an initial matter, the parties agree that crime scene analysis and victimology are nonscientific areas of expertise. Further, the parties also concede the trial court's ruling that Tapp's challenges went only to the weight of the evidence rested on the very same rationale that the supreme court specifically overruled in White. Therefore, although proper at the time it was made, the ruling does not comport with White's requirement that the trial court first make a threshold determination of reliability before dismissing such attacks as going only to the weight of the evidence rather than its admissibility. Accordingly, the only issue remaining is whether the record in this matter is sufficient for this court to determine, on its own, if the requirements of the White decision could have been met.

The State argues the record in this case is sufficient for this court to determine whether Prodan should have been qualified under White. We disagree.

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[6] The supreme court's six part test for the reliability of expert dog tracking evidence requires: (1) the evidence shows that the dog handler has the requisite qualifications of an expert under Rule 702; (2) the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a scent trail; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to be within a reasonable time; and (6) the trail was not otherwise contaminated. White, 382 S.C. at 272, 676 S.E.2d at 687.

In support of its position, the State highlights: (1) Prodan's credentials, education and experience, (2) his ability to rule out various scenarios of how or why the crime transpired, and (3) the process's relative success as an investigative tool to law enforcement. While these arguments are relevant, we find they go to the other White elements, (i.e., the expert's credentials, education, or experience and the ability of the expert to assist the trier of fact) rather than the element of reliability. See id. at 274, 676 S.E.2d at 689 (indicating that under Rule 702 the State must establish: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact). Moreover, we are not convinced that the process's relative success as an "investigative tool" renders it *per se* reliable in the context of qualifying an expert. See, e.g., Lorenzen v. State, 376 S.C. 521, 533, 657 S.E.2d 771, 778 (2008) (stating that the South Carolina Supreme Court " 'has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable.' " (quoting State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999))).

Further, although the State initially indicated the Council factors for the reliability of scientific testimony[7] are wholly irrelevant in the context of nonscientific experts, it nonetheless proposes this court could find White is satisfied based on (1) the inherent reliability of the photos and reports Prodan used to derive his opinion, because such information is of the type other experts in the field rely upon; and (2) the fact that some of Prodan's cases have been peer reviewed. We disagree.

We do not agree with the State's position that the Council factors are wholly irrelevant. As the State's discrepant argument implies, some of the

[7] When evaluating expert scientific testimony under the Jones standard, several factors are considered: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 517 (1999); State v. Ford, 301 S.C. 485, 488, 392 S.E.2d 781, 783 (1990).

Council factors may be quite relevant. The fact that some of Prodan's cases have been peer reviewed could be significant. However, the record indicates that only *some* cases have been peer reviewed. The record does not indicate that this particular case was subject to peer review, nor does it demonstrate Prodan's rate of success or accuracy in predicting what actually occurred at a crime scene. Furthermore, much of the State's position neglects that of manifest concern to the trial court's threshold determination is not only the reliability of the information Prodan used, but also the reliability of the process by which that information is synthesized and analyzed in order to develop a final opinion. For instance, in White, the inquiry did not focus solely on the reliability of the expert dog handler, but also on the reliability of his method of tracking: that is, the use of a particular dog and how that dog's skills were employed under the given circumstances. Similarly, the inquiry in this case cannot focus solely upon how reliable Prodan himself is, but must assess the reliability of the process by which he derives his opinion, whatever that process may be.

Accordingly, without the guidance of the White decision, Tapp was not able to sufficiently develop and pursue theories upon which to challenge Prodan's qualification; nor was the trial court given the opportunity to address the issue. We find that given the deficient nature of he record on this issue it would be imprudent of this court to attempt to fashion a test or rule for the qualification of a crime scene analyst or victimologist. Rather, justice demands this burden first be placed upon the trial court after allowing the parties to fully develop the issue.

In light of our decision on this issue, we need not address Tapp's allegation that Prodan's testimony was improperly admitted, or the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that an appellate court need not address remaining issues when a decision on a prior issue is dispositive); Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (need not address all issues when decision on a prior issue is dispositive).

CONCLUSION

The trial court could not have evaluated the qualification of Prodan in light of State v. White, and the record is insufficient for this court to do the same. Accordingly the ruling of the trial court is

REVERSED and REMANDED for a new trial.

HUFF, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Victor M. S. Hernandez, Appellant.

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

Opinion No. 4651
Heard February 9, 2010 – Filed February 25, 2010

AFFIRMED

Chief Appellate Defender Robert M. Dudek, 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 Alphonso

Simon, Jr., all of Columbia; and Solicitor I. McDuffie Stone, III, of Bluffton, for Respondent.

PER CURIAM: Victor M. Sandoval-Hernandez appeals his conviction and sentence for murder, arguing the trial court erred in refusing to charge the jury on the lesser included offense of voluntary manslaughter. We affirm.

FACTS

On January 28, 2006, Rogelio Garcia hosted an engagement party in honor of a neighbor's son. Hernandez and his friends attended the party. After Hernandez tried to kiss a woman at the party, Garcia became angry and physically ejected Hernandez from his home, grabbing Hernandez by the neck and throwing him toward the porch.

Hernandez left the party and went home. He retrieved his gun, intending to use it against Garcia if Garcia "messed with him again."[1] Hernandez returned to the party, where he began to drink and enjoy himself again. Another party guest, Raul Garcia-Gallegos, characterized Hernandez as "tranquil" and "calm" after he returned to the party. Hernandez enjoyed

[1] Hernandez gave the police a statement in Spanish, which the interpreter translated into English. Hernandez stated:

> And later we started to drink. And a little more later, [Garcia] came out and he was insulting me with words. And later we went to the house, and my brother stayed behind sleeping, and we returned to the party. And that is when I took the pistol. In case [Garcia] continued insulting me, I was going to shoot at him. And later on [Garcia] came out and [Garcia] began to insult me, and that is when I shot at him.

Later, Hernandez stated, "[I]f I had been about my senses, I would have – I wouldn't [have] done it."

the party without incident until one of his friends began fighting with another party guest. After assisting in breaking up the fight, Hernandez encountered Garcia again. When Garcia insulted him, Hernandez drew his gun and shot Garcia.[2] Garcia re-entered his home, where he died.

Hernandez was indicted and tried for murder and possession of a firearm during the commission of a violent crime. At trial, he requested a jury instruction on voluntary manslaughter as a lesser included offense of murder. The trial court denied his request, finding the evidence insufficient to support the presence of sudden heat of passion and sufficient legal provocation. In so ruling, the trial court observed that no testimony indicated a physical confrontation occurred between Hernandez and Garcia after Hernandez returned to the party.[3] Hernandez was found guilty and sentenced to thirty-five years' imprisonment for murder, along with a consecutive five years' imprisonment for possession of a firearm during the commission of a violent crime. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Generally, the trial judge is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

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[2] Garcia's autopsy revealed he was shot four times in the torso as he faced the gun. Only one of the bullets caused a fatal injury.

[3] In addressing this issue again during sentencing, the trial court stated "there had been a sufficient cooling-off period after [Hernandez] was put out of the trailer."

LAW/ANALYSIS

Hernandez asserts the trial court erred in refusing to charge the jury on the lesser included offense of voluntary manslaughter despite the presentation of evidence Garcia physically and verbally assaulted Hernandez before Hernandez shot him. We disagree.

The evidence presented at trial determines the law to be charged to the jury. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). "A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). In determining whether the evidence requires a charge of voluntary manslaughter, the trial court views the facts in a light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). However, "[a]n instruction should not be given unless justified by the evidence." State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002).

Voluntary manslaughter requires proof of two elements, a sudden heat of passion and sufficient legal provocation:

> Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing.

State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (internal citations omitted).

> "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence."

Id. at 101-02, 525 S.E.2d at 513 (quoting Byrd, 323 S.C. at 322, 474 S.E.2d at 432).

An overt, threatening act or a physical encounter may constitute sufficient legal provocation. State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). Sufficient legal provocation must include more than "mere words" or a display of a willingness to fight without an overt, threatening act. State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362-63 (1996); State v. Johnson, 324 S.C. 38, 40-41, 476 S.E.2d 681, 682 (1996). Neither the exercise of a legal right nor a victim's attempts to resist or defend himself from crime constitute sufficient legal provocation. State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997); State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

However, even when a person's passion is "sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved. State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969).

We affirm the trial court's decision not to charge the jury on voluntary manslaughter because the evidence demonstrated Hernandez cooled off between his ejection from the party and the shooting. The sole physical altercation between the accused and the victim in this case occurred when Garcia argued with and then physically removed Hernandez from Garcia's home.[4] Furthermore, evidence demonstrated Hernandez experienced a period of cool reflection after he left the party and went home. According to Hernandez's statement to police, he took the gun to Garcia's party not to avenge a wrong already done to him but in case Garcia insulted him again. Upon returning to the party, Hernandez did not seek out Garcia. Instead, he "began to drink and have a good time again." This evidence indicates Hernandez shot Garcia because Garcia verbally insulted him after he returned to the party and not because Garcia threw him out of the party earlier in the evening.

Hernandez argues the existence of a single piece of evidence that might conceivably support a finding of voluntary manslaughter instead of murder created a question for the jury. Historically, a question concerning the existence of a cooling-off period fell within the province of the jury. State v. Goodson, 140 S.C. 357, 361, 138 S.E. 816, 817 (1927) ("Whether, under the facts disclosed by the uncontradicted testimony as to the defendant's physical, mental, and nervous condition, and the testimony tending to show the nature of the provocation, etc., a reasonable cooling time had elapsed, that is, time in which an ordinary man, in like circumstances, would have cooled, was a question of fact for the jury and not one of law to be determined by the court."). However, more recent jurisprudence permits the trial court to make that determination:

> While the law has not defined a bright-line rule for what constitutes a sufficient time for cooling off, this Court has determined that whether the defendant's actions during the intervening time between the provocation and the killing indicates the absence of

[4] In fact, Hernandez did not report to police that a physical altercation took place between him and Garcia at all.

> sudden heat of passion is an appropriate question for the court. See State v. Walker, 324 S.C. 257, 261, 478 S.E.2d 280, 281-82 (1996) (finding that the defendant demonstrated cool reflection through his actions between the alleged provocation and the killing); and State v. Byrd, 323 S.C. 319, 322-23, 474 S.E.2d 430, 432 (1996) (holding that the defendant's actions between the alleged provocation and killing did not support a finding of sudden heat of passion).

State v. Pittman, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007). According to Hernandez, his presence at the "continuous violent drunken party" prevented him from regaining control over himself following his ejection. However, evidence indicates Hernandez left the party, drove home, and retrieved his gun, thereby removing himself from any influence the ongoing party might have exerted. Moreover, when Hernandez returned to the party, he calmly resumed drinking and enjoying himself. Hernandez's intervening actions and demeanor upon returning to the party support a finding that he cooled off after being ejected. No evidence indicates a second physical confrontation between him and Garcia after his return. Consequently, the trial court did not err in declining to charge the jury on voluntary manslaughter.

CONCLUSION

We find the trial court did not err in refusing to issue a jury instruction on voluntary manslaughter. Accordingly, the decision of the trial court is

AFFIRMED.

PIEPER and GEATHERS, JJ., and CURETON, A.J., concur.