OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

January 8, 2001

ADVANCE SHEET NO. 1

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William Arthur Kelly, Appellant.

Appeal From Lexington County
Gary E. Clary, Circuit Court Judge

Opinion No. 25226
Heard September 20, 2000 - Filed January 8, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

JUSTICE WALLER: A jury convicted appellant William Kelly of

murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime. Kelly was sentenced to death for murder, thirty years consecutive for armed robbery, and five years consecutive for possession of a knife during the commission of a violent crime. This case consolidates his direct appeal with the mandatory review provisions of S.C. Code Ann. § 16-3-25 (1985). We affirm.

FACTS

On the night of January 5, 1996, police officer Stephen Clare drove by the Batesburg KFC and noticed in the parking lot a car running with the driver's door open. Knowing that it was after the restaurant's usual closing time and recognizing the car as belonging to Shirley Shealy, the manager of the KFC, Officer Clare pulled in to investigate. Officer Clare discovered Shealy's body in the KFC; her hands were taped behind her back, and money was strewn all over the floor and stuck to her bloody body.

Kelly, a former KFC employee, had visited the KFC earlier that day. After interviewing KFC employees, Batesburg-Leesville Chief of Police William Oswald attempted to locate Kelly. On January 8, 1996, Kelly's mother called Chief Oswald and told him that Kelly was in Lowell, Massachusetts. Lowell police detectives found Kelly at his sister's residence in Lowell. Kelly, who was seventeen years old at the time, was advised of his Miranda[1] rights and made a statement to the detectives admitting that he killed Shealy and stole money from the KFC. Kelly had in his possession money stained with Shealy's blood. In addition, the Lowell detectives retrieved Kelly's bloodstained clothing from his car.

Kelly was indicted for murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime. At trial, the forensic pathologist who performed the autopsy testified that Shealy was stabbed thirty-one times and her neck was cut from ear to ear. She bled to death. At the time of her death, Shealy was 23 weeks pregnant. The jury convicted Kelly on all charges.

In the sentencing phase, the trial court instructed the jury on five

[1]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

statutory aggravating circumstances, to wit, that the murder was committed while in the commission of: (1) kidnapping; (2) burglary; (3) robbery while armed with a deadly weapon; (4) larceny with use of a deadly weapon; and (5) physical torture. See S.C. Code Ann. § 16-3-20(C) (Supp. 1999). The jury was charged on three statutory mitigating circumstances: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the age of the defendant at the time of the crime; and (3) the defendant was below the age of eighteen at the time of the crime. Id. The jury found all five aggravating circumstances and recommended the death penalty. Accordingly, the trial court imposed a sentence of death for the murder conviction.

ISSUES

1. Did the trial court err by refusing to redact from Kelly's statement references to Shealy's pregnancy?

2. Did the trial court err by refusing to charge the jury on parole ineligibility?

3. Did the trial court err by refusing to charge the jury that future dangerousness was not at issue?

4. Was the testimony of Matthew McCormack improperly bolstered by the State?

5. Did the trial court err by allowing testimony from Shealy's sister about statements made by Shealy's son?

1. FAILURE TO REDACT REFERENCES TO VICTIM'S PREGNANCY

Kelly raises only one issue regarding the guilt phase of his trial. He argues that the trial court erred by not redacting from his confession references to Shealy's pregnancy. We disagree.

Kelly gave the Lowell police a written statement which the State introduced at trial. In his statement, Kelly confessed to slitting Shealy's throat and stabbing her repeatedly. Basically, Kelly's explanation for why he killed Shealy was that his attack was in response to Shealy's request for sex. He

stated that while he worked at the KFC, Shealy would "always" proposition him sexually. Kelly stated that on January 5, 1996, he went to the KFC after closing time and saw Shealy in the office. According to Kelly, Shealy again propositioned him for sex, grabbed him, and asked him not to leave. He stated that he duct-taped Shealy's hands behind her back so she would not touch him. Kelly said that as he went to leave, Shealy got her hands free, grabbed him and started hitting him. Kelly stated that he then took out his knife, slit her throat and continued to stab her while she kept grabbing at him. Kelly told the Lowell police that Shealy then fell to the floor and was gasping for air. To keep her from getting up, Kelly said that he again taped her hands behind her back.

Kelly made two references to Shealy's pregnancy in his statement. First, he stated that he "did know that Shirley was pregnant." Second, Kelly stated that Shealy asked him "to stay and have sex with her" and that she told him "since she was pregnant already" he could not get her pregnant if they had sex.

At the outset of the guilt phase, Kelly moved to exclude any evidence that Shealy was pregnant. The State informed the trial court that it planned on introducing Kelly's statement which, as detailed above, included references to the pregnancy. Kelly then moved to redact those references. The trial court denied the motion. With the exception of Kelly's statement, the State did not introduce any evidence about Shealy's pregnancy during the guilt phase of the trial. Kelly presented no witnesses in his defense. At Kelly's request, the jury was instructed on voluntary manslaughter.

In the State's guilt phase closing argument, Shealy's pregnancy was mentioned twice without objection. The State argued that Kelly had "the perfect victim. He's got a pregnant lady. Is she going to do what he says? Yes, ma'am. Yes, sir." The State noted the pathologist's testimony that there were no defensive wounds and no blood on Shealy's hands. The State therefore argued that Kelly's statement that Shealy's hands were free during the attack was not credible. Specifically, the State argued that if her hands were free, "What is she going to do? She's going to be covering up. She's going to be trying to avoid it. She's pregnant."

Kelly contends that the trial court should have redacted his statement to remove the references to Shealy's pregnancy because the evidence was not relevant, or, alternatively, the probative value of this evidence was

outweighed by its unfairly prejudicial impact. We disagree.

Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. Nevertheless, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (citation omitted). The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion. Id. at 380, 401 S.E.2d at 148.

The jury was instructed on both murder and voluntary manslaughter.[2] Thus, there was an issue on the presence or absence of malice. See State v. Gandy, 283 S.C. 571, 573, 324 S.E.2d 65, 66-67 (1984) (voluntary manslaughter is distinguished from murder because "the vital element of malice is missing") implicitly overruled on other grounds by Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); S.C. Code Ann. §§ 16-3-10, 16-3-50 (1985 & Supp. 1999). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

We believe the evidence of Shealy's pregnancy was relevant to the issue of intent, i.e., whether Kelly acted with malice. The State's theory of the case was that Kelly planned his crimes.[3] Because Kelly knew Shealy was pregnant, and thus, particularly vulnerable, the jury could infer that Kelly had

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[2]Murder is "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (1985). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. E.g., State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998); see also S.C. Code Ann. § 16-3-50 (1985) (manslaughter is "the unlawful killing of another without malice").

[3]For example, the State established that the type of latex gloves and duct tape used in the attack were not used by the KFC and that they were used at the McDonald's where, at the time of his crimes, Kelly was working as a cook.

consciously selected a "perfect victim." Such evidence of planning certainly negates voluntary manslaughter which requires a showing of provocation. Additionally, although the evidence of Shealy's pregnancy came directly from Kelly's own statement, this evidence tended to refute Kelly's version of how the attack occurred. Therefore, Kelly's references to the pregnancy made it less probable that he committed voluntary manslaughter. See Rule 401, SCRE. Moreover, the fact that Kelly killed a pregnant woman, in our opinion, "indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, supra. The evidence was, therefore, probative on the issue of whether Kelly acted with malice.

Kelly argues that this evidence undeniably had an emotional impact on the jury, and thus should have been excluded because it was unfairly prejudicial. As discussed above, the evidence was relevant to the only real issue in the guilt phase–the presence or absence of malice. Accordingly, we believe the probative value of the evidence outweighed its prejudicial effect. Compare State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991) (prejudicial effect of evidence of other crimes outweighs its probative value when purpose for which it is admitted is not a contested issue) with State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) (probative value of other-crimes evidence outweighed its prejudicial effect where the issue of intent was a contested one), reversed on other grounds by Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).[4]

We hold that the trial court did not abuse its discretion in admitting evidence of Shealy's pregnancy in the guilt phase. State v. Alexander, supra. Accordingly, Kelly's convictions are affirmed.

2. REFUSAL TO GIVE PAROLE INELIGIBILITY INSTRUCTION

Kelly argues that the trial court erred in the sentencing phase when

[4]Additionally, we note that the manner in which the evidence was introduced minimized its prejudicial effect. The State did not elicit testimony about Shealy's pregnancy from any witness in the guilt phase. The only evidence admitted on the fact came in through Kelly's statement. Likewise, in the State's guilt phase closing argument, Shealy's pregnancy was mentioned only twice.

it refused to instruct the jury that he would be ineligible for parole if sentenced to life. Kelly contends that since the State presented evidence of Kelly's future dangerousness, due process and Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), required the parole ineligibility charge. We hold that Simmons does not apply to this case, and therefore, the trial court correctly declined to give the instruction.

In the sentencing phase, the State presented several witnesses who testified about Kelly's actions while he was incarcerated at the Lexington County Detention Center. The jail administrator testified that an attempted escape charge had been filed against Kelly because a mortar joint around a cinder block in his cell had been gouged out.[5] Matthew McCormack, who had twice been Kelly's cellmate at the jail, testified that he and Kelly often spoke of escaping and that Kelly had, at one point, taken action on an escape plan. McCormack stated that Kelly made a shank and planned to take a female correctional officer hostage. Although Kelly called the correctional officer to their cell, McCormack stated that Kelly backed out of going through with the plan. The State also questioned correctional officer Mark Wharton who testified that he discovered a shank in Kelly's possession. Finally, Edward Bryant, who had been in jail with Kelly, testified that he heard Kelly talk about escape. In addition, Bryant testified that Kelly bragged about his crime, requested that he be called "KFC," and walked around with a cup which had a drawing of a chicken with its head cut off and a knife on it.

At the conclusion of the sentencing phase, Kelly requested the following jury charge:

> I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

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[5]On cross-examination, Kelly emphasized he was only one of three inmates housed in that cell and it had not been proven he was the one who actually had dug out the mortar around the cinder block.

See S.C. Code Ann. § 16-3-20 (Supp. 1999). The State objected to the charge and stated that because it was not going to argue future dangerousness, the charge was not required by Simmons. Ruling that the State's evidence went to Kelly's character and characteristics and not to future dangerousness, the trial court denied the request to charge.[6]

In closing argument, the State argued that the death penalty was "the punishment that fits the crime." The State argued that Kelly had planned his crime and that he was a "master murderer." Because Kelly had no prior record, the State argued that a person who commits "an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal. . . . You kind of trust them a little bit." Further, the State argued that Kelly was intelligent, quick-witted and did not have any mental illness. Thus, the State argued that made Kelly "a little more dangerous . . . for this lady, this crime on January the 5th, doesn't that make him more unpredictable for Shirley Shealy." Finally, the State recounted, over objection, the evidence regarding Kelly's attempted escapes from jail and that he had a shank. The State then argued that "murderers will be murderers. And he is the cold-blooded one right over there."

On appeal, Kelly contends that: (1) the State's evidence about escape attempts, possession of a shank, and his behavior in jail raised the issue of future dangerousness; (2) the State argued future dangerousness in its closing; and therefore, (3) the trial court erred in refusing to charge the jury regarding Kelly's parole ineligibility. Kelly argues he was denied due process because the jury instruction was mandated by Simmons.

In Simmons, a plurality of the United States Supreme Court held that when a capital defendant would be ineligible for parole if sentenced to life in prison and the State argues the defendant's future dangerousness as a basis for imposing the death penalty, the defendant is entitled to have the jury informed of his parole ineligibility through either defense argument or instruction by the trial judge. Simmons, supra.[7] The Simmons Court explained

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[6]The jury was given a plain meaning charge.

[7]Shortly after Simmons was decided, this Court held that the trial judge must charge a capital defendant's parole ineligibility when future dangerousness is at issue and either the defendant requests such a charge or the jury inquires

that the "Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" Id. at 161, 114 S.Ct. at 2192, 129 L.Ed.2d at 141 (quoting Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393, 404 (1977)). Thus, the Court ruled that the "State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." Id. at 171, 114 S.Ct. at 2198, 129 L.Ed.2d at 147.

To be entitled to a Simmons charge, two prongs must be met. First, the State must put the defendant's future dangerousness in issue. Second, the only available alternative sentence to death is life imprisonment without possibility of parole. Id. at 178, 114 S.Ct. at 2201, 129 L.Ed.2d at 151 (O'Connor, J., concurring); see also State v. McWee, 322 S.C. 387, 391-92, 472 S.E.2d 235, 238 (1996), cert. denied, 519 U.S. 1061, 117 S.Ct. 695, 136 L.Ed.2d 618 (1997) (due process requires parole ineligibility charge "only if appellant's future dangerousness was an issue and only if appellant would have been ineligible for parole upon the imposition of a life sentence"). Kelly has not met either prong of the Simmons test.

First, we agree with the trial court that the State's evidence at sentencing did not implicate future dangerousness. Evidence that Kelly took part in escape attempts and carried a shank simply is not the type of future dangerousness evidence contemplated by Simmons.[8] The underlying principle of the Simmons holding is that if evidence of future dangerousness is presented by the State, the defendant must be allowed to rebut this evidence by showing that he will never be eligible for parole, i.e., that he will never legally be let out of prison. In the instant case, however, Kelly argues that the evidence he is an escape threat (and thus a risk to the general public) required that the jury be

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about the meaning of "life imprisonment." State v. Southerland, 316 S.C. 377, 387, 447 S.E.2d 862, 868 (1994), cert. denied, 513 U.S. 1166, 115 S.Ct. 1136, 130 L.Ed.2d 1096 (1995), overruled on other grounds State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995).

[8]When the State argues future dangerousness, it "urge[s] the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison." Simmons, 512 U.S. at 163, 114 S.Ct. at 2193, 129 L.Ed.2d at 142 (emphasis added).

instructed on parole ineligibility. The flaw in Kelly's argument is that a Simmons charge would not rebut this evidence. Telling a jury that a convicted murderer will never be eligible for parole simply does not respond to the State's evidence that he presents an escape risk.

In our opinion, the evidence presented by the State in the penalty phase was designed to show that Kelly would not adapt to prison life because in jail he had been caught carrying a weapon and planning or participating in escape attempts. Kelly was allowed to rebut this evidence, through both cross-examination of the State's witnesses and the witnesses presented in his defense.[9] Thus, Kelly was given the opportunity to deny or explain the State's evidence, in accordance with due process requirements.

Kelly further contends that the State argued future dangerousness to the jury and thus misled the jury in violation of his due process rights. Specifically, Kelly argues that the State's argument that Kelly is worse than a serial killer and that "murderers will be murderers" constituted argument on future dangerousness. We disagree. A fair reading of the State's closing argument shows that the State consciously avoided any implication of future dangerousness. Not once did the State suggest to the jury that it should impose the death penalty because Kelly would be a future danger to the general public. Cf. Simmons, supra (where the Court found the following arguments to be generalized argument of future dangerousness: "what to do with [petitioner] now that he is in our midst" and that the death penalty would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense"). Instead, the State argued Kelly should be given the death penalty primarily as retribution for the heinous nature of the murder and because of the status of Shealy, the pregnant victim.

We hold that future dangerousness was not an issue in this case. It was neither a logical inference from the evidence nor was it injected into the case through the State's closing argument.

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[9]Kelly presented expert testimony from a clinical psychologist, Dr. Steven Shea, and a correctional management consultant, James Aiken. Dr. Shea testified that Kelly could adjust to prison. Aiken testified that Kelly could be "adequately managed, housed and secured without endangerment in a correctional facility within the South Carolina Department of Corrections."

Additionally, the second prong of the Simmons test was not met. The Simmons rule is applicable when the only alternative to a death sentence is life imprisonment without parole. See Simmons, 512 U.S. at 178, 114 S.Ct. at 2201, 129 L.Ed.2d at 151 (O'Connor, J., concurring); State v. McWee, 322 S.C. at 391-92, 472 S.E.2d at 238. Because Kelly was tried under the new sentencing scheme which became effective on January 1, 1996, he could have been sentenced to either (1) death; (2) life without the possibility of parole; or (3) a mandatory minimum thirty year sentence. See S.C. Code Ann. § 16-3-20 (Supp. 1999). The mandatory minimum sentence of thirty years is available only if the jury returns with no finding of aggravating circumstances. Id.

This Court recently held that Simmons is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000), cert. granted, 2000 WL 1057649 (Sept. 26, 2000). The logic behind this holding is that a Simmons charge is designed to answer the State's evidence that the defendant will be a future danger to society by telling the jury that if sentenced to life in prison, the defendant will never be paroled. In other words, a Simmons charge informs the jury that by rejecting the death penalty, the defendant will spend the rest of his natural life in prison. However, if another sentence other than life without parole is available to the defendant as an alternative to the death penalty, then a Simmons charge would actually mislead the jury by representing that the defendant would never be released from prison, when in fact, a thirty-year sentence is a potential sentence for the defendant. See Starnes, 340 S.C. at 329, 531 S.E.2d at 916 ("Contrary to a sentence of life imprisonment without parole, a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society."). Accordingly, Simmons should not, and does not, apply when as a matter of law another sentence other than death or life without parole is available to a capital defendant.[10]

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[10]We note that the second prong of the Simmons test may be satisfied under certain circumstances. For example, if the recidivist statute is applied, there will be no third alternative sentence as a matter of law. See S.C.Code Ann. § 17-25-45 (Supp. 1999) (imposing mandatory sentence of life imprisonment without parole where defendant has prior convictions of a most serious nature). If section 17-25-45 is invoked and future dangerousness is argued, Simmons is

Nonetheless, Kelly contends that the thirty-year minimum sentence was not available to him because the jury would have violated its oath if it had not found at least one aggravating circumstance. Thus, Kelly argues that Simmons applies to the instant case. In Starnes, however, we stated that it is "inappropriate to assume the jury will find a statutory aggravating circumstance." Id. at 330, 531 S.E.2d at 917. Although we granted Kelly's motion to argue against the recent precedent set in Starnes and Shafer, we adhere to that precedent and hold it is not appropriate to presume that in certain cases a jury will always find particular statutory aggravating circumstances. Cf. State v. Riddle, 301 S.C. 68, 71, 389 S.E.2d 665, 667 (1990) (where this Court found error in submitting to resentencing jury convictions from previous trial as evidence of aggravating circumstances; the Court stated that the convictions from the guilt phase were not "binding upon the resentencing jury" as it was the sentencing "jury's responsibility to find the existence, or not, of a statutory aggravating circumstance") (emphasis added). Therefore, Kelly cannot satisfy the second prong of the Simmons test.

We hold the trial court correctly refused to give the jury a Simmons charge.[11]

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applicable because the only available sentences are life without parole or death. In the instant case, however, Kelly had no previous convictions, and therefore, section 17-25-45 does not affect our analysis of this issue.

[11]Kelly also contends that the requested instruction was required because of James Aiken's testimony regarding good time credits. Aiken, Kelly's expert witness on prison management, testified on direct examination that prisoners may be sanctioned for disciplinary infractions by "taking good time away." On cross-examination, the State questioned Aiken further, and Aiken stated that he was speaking hypothetically, not about this particular case.

Kelly argues that the testimony about good time credits raised the inference that he would be released from prison, and therefore, he should have been able to rebut the evidence with the parole ineligibility charge. We believe Kelly's contention is without merit. Aiken's testimony merely discussed, in general terms, internal prison procedures for dealing with disciplinary violations committed by inmates. Kelly was not denied the opportunity to rebut this evidence; therefore, his due process rights were not compromised. Moreover, we note his own counsel elicited this testimony on direct examination. State v.

3. REFUSAL TO CHARGE THAT FUTURE DANGEROUSNESS WAS NOT AT ISSUE

After his request on the parole ineligibility charge was denied, Kelly requested the following jury charge:

> I have instructed you on the "aggravating" factors that you may consider as reasons to impose the death penalty. I tell you now that you may not consider, as a reason to impose the death penalty, any possibility that the defendant may be dangerous in the future unless he is executed. In this case, there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment. The state does not contend that he will be dangerous in the future. Therefore, any consideration about future dangerousness is not a legal factor for you to consider as a reason to sentence the defendant to death. This subject may not be considered by you at all in deciding whether the death penalty should be imposed, and should not even be mentioned by you during you deliberations as to the sentence to be imposed.
>
> At the same time, you should understand that your consideration of reasons not to impose the death penalty is unlimited. Thus, if you find from the evidence that the defendant's future behavior is likely to be good, that would be a proper factor for you to consider as a reason to sentence him to life imprisonment rather than the death penalty.

Because the State agreed not to argue future dangerousness, Kelly maintains that the trial court erred in failing to give the charge. We disagree.

"The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). The law to be charged to the jury is determined by the evidence presented at trial. E.g., State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989).

Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992) (appellant may not complain about the admission of evidence elicited by his own counsel).

Furthermore, a trial court should not give jury instructions which do not fit the facts of the case as such charges may tend to confuse the jury. Id.; see also State v. Leonard, supra (a trial court commits error when it provides instructions which are calculated to confuse or mislead the jury).

We hold that the trial court correctly denied the requested charge because the evidence did not support the charge as written. The State is permitted to argue that a capital defendant might pose a future danger to those within prison. This type of evidence and argument is distinguishable from what is considered "future dangerousness" under Simmons, i.e., a future danger to society. Cf. State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (1996) (where the Court indicated that if prosecution had argued only that defendant posed a danger to other prison inmates, and had not included danger to society argument, then Simmons would not apply); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108, 115. S.Ct. 1959, 131 L.Ed.2d 851 (1995) (where the court noted that Simmons is inapplicable where the State argues that the defendant poses a danger to everybody, including fellow inmates) (citing Simmons, 512 U.S. at 165 n.5, 114 S.Ct. at 2194 n.5). Therefore, the requested charge was clearly incorrect because it instructed the jury "there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment." This charge thus would have precluded the jury from considering evidence of Kelly's future danger to others within prison, evidence which was clearly presented by the State and appropriate for the jury to consider.

Moreover, the charge as written is extremely confusing. It simply would not have aided the jury in making its sentencing determination. State v. Leonard, supra.

Accordingly, the trial court did not err by denying this request to charge.

4. BOLSTERING OF STATE'S WITNESS

Kelly argues that the State improperly bolstered Matthew McCormack's testimony thereby impermissibly vouching for McCormack's credibility. We agree.

As recounted above in Issue 2, McCormack had been Kelly's

cellmate. McCormack testified about Kelly making a shank and how he said he was going to use it to abduct a female correctional officer. In addition, McCormack testified that Kelly had frequently spoken about his crimes. McCormack stated that Kelly told him that he and Shealy had planned to rob the KFC but that Shealy had turned on him during the robbery. McCormack testified that Kelly told him that he came up behind Shealy and cut her throat and had tried to decapitate her.

Toward the end of McCormack's direct examination, the following colloquy took place:

> [Assistant Solicitor]: What did I tell you that I absolutely required regarding your testimony to this jury today?
>
> [McCormack]: Uh – excuse me?
>
> [Assistant Solicitor]: Did I tell you to tell the truth to this jury –
>
> [McCormack]: Of course.

At that point, Kelly objected on the grounds that the assistant solicitor was bolstering the witness's testimony and was making himself a witness. After the trial court overruled the objection, the assistant solicitor continued:

> [Assistant Solicitor]: What did I tell you regarding your testimony to this jury today? The only thing the State wanted from your testimony was what?
>
> [McCormack]: The truth.

On cross-examination, Kelly questioned McCormack about his prior criminal record which included grand larceny, burglary and forgery convictions. Kelly also elicited testimony from McCormack, who was a federal inmate, regarding how in the federal system an inmate could get a sentence reduction if he provides helpful testimony to the government. McCormack acknowledged that the potential for a sentence reduction was "one of [his] main reasons for"

testifying against Kelly.

Kelly argues that the State's questioning impermissibly bolstered McCormack's credibility because it placed the prestige of the government behind McCormack, a jailhouse informant. Kelly also maintains that the assistant solicitor effectively became a witness in the case and vouched for McCormack's credibility.

In United States v. Walker, 155 F.3d 180 (3d Cir. 1998), the Court of Appeals for the Third Circuit discussed generally the concept of vouching:

> Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 184 (citations omitted).

Typically, vouching occurs when the prosecution comments on a witness's credibility in its opening statement or closing argument. See id. at 185-87 (discussion of Third Circuit case law on vouching). In the instant case, however, Kelly's argument is targeted at the State's questioning of McCormack. At least one court has held that this type of questioning is improper. See Mitchell v. State, 549 P.2d 96 (Okla. 1976) (where the prosecutor asked witness whether they had "talked about this case" and witness responded "Yes, sir. You instructed me to tell the truth," the court found improper bolstering).

In our opinion, the State's questions served to improperly bolster McCormack's credibility. Id. Although perhaps not technically vouching, the

manner of questioning[12] by the State raises the second concern outlined by the Walker court: the jury could have perceived that the assistant solicitor held the opinion that McCormack was, in fact, telling the truth. Thus, McCormack's testimony carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about McCormack. Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility. Accordingly, the trial court erred in overruling Kelly's objection.

Nevertheless, we believe that this error was harmless beyond a reasonable doubt. See State v. Gaskins, 284 S.C. 105, 127, 326 S.E.2d 132, 145 (erroneous admission of evidence in sentencing phase reviewed for harmless error), cert. denied, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985), overruled in part on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In our opinion, Kelly's cross-examination effectively impeached McCormack's credibility by eliciting information about his motive for testifying. Moreover, given the overwhelming evidence of aggravation in this case, we do not believe that the State's bolstering of McCormack materially influenced the jury's decision to impose the death penalty.

Accordingly, because the error was harmless, Kelly is not entitled to resentencing on this issue.

5. TESTIMONY FROM VICTIM'S SISTER

Kelly argues that the trial court erroneously admitted hearsay testimony from Shealy's sister Cynthia Slade. We disagree.

During the sentencing phase, the State called Slade who presented victim impact testimony. The State questioned Slade about Shealy's son Alex, who was six years old when Shealy was killed:

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[12]Although the assistant solicitor did not comment that he had personal knowledge McCormack was telling the truth or had outside evidence indicating the truthfulness of McCormack's testimony, the assistant solicitor improperly phrased his questions in the first person. ("What did I tell you that I absolutely required regarding your testimony to this jury today?" and "Did I tell you to tell the truth to this jury?") (emphasis added).

[Solicitor]: Have you seen Alex since his mother was murdered?

[Slade]: Yes, sir.

[Solicitor]: Has there been a change in him?

[Slade]: Oh, yeah.

[Solicitor]: Does he talk about it?

[Slade]: Yeah. He talks about it a lot [sic]. We were at a wedding and he told basically everybody–

Kelly's attorney objected on the basis of hearsay. The trial court overruled the objection. When the State asked what Alex had said, Slade responded:

> He told everybody in the – at the wedding that a bad man had killed his mommy.

Kelly argues Slade's testimony that Alex said "a bad man had killed his mommy" was impermissible hearsay and should have been excluded.

The South Carolina Rules of Evidence define hearsay as "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. By that definition, we believe Slade's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. That is, the evidence was not introduced to prove that a bad man killed Shealy. Instead, the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family. As such, it was properly offered as victim impact evidence. See, e.g., State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (victim's sister's testimony about the effect of the victim's death upon herself and the victim's three children was relevant for the jury to meaningfully assess appellant's moral culpability and blameworthiness).

Accordingly, the trial court correctly allowed this evidence to be admitted.

Kelly's remaining issue[13] is affirmed pursuant to Rule 220(b)(2) and the following authorities: State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, cert. denied, 2000 WL 697435 (2000) (autopsy photograph may be relevant to showing physical torture); State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998) (the determination of the relevancy, materiality, and admissibility of a photograph is left to the sound discretion of the trial judge); State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987) (photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them are admissible in sentencing phase of capital trial).

CONCLUSION

Kelly's convictions and sentences are affirmed. We have conducted the proportionality review required by S.C. Code Ann. § 16-3-25(C) (1985). The death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, cert. denied, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998); State v. Powers, 331 S.C. 37, 501 S.E.2d 116, cert. denied, 525 U.S. 1043, 119 S.Ct. 597, 142 L.Ed.2d 539 (1998).

AFFIRMED.

TOAL, C.J., MOORE and BURNETT, JJ., concur. PLEICONES, J., dissenting and concurring in part in a separate opinion.

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[13]Kelly argues that the trial court erred in admitting two of the State's photographic exhibits. As to Exhibit 116, an autopsy photograph, we note Kelly maintains that the exhibit "shows the fetus in the decedent's stomach." On the contrary, it is clear from both the photograph and the testimony at trial that this exhibit depicts Shealy's gaping neck wound.

Justice Pleicones: I concur in the majority opinion with the exception of that portion which affirms the trial judge's refusal to give the requested parole ineligibility instruction. I would, therefore, affirm the convictions of the appellant, and reverse and remand for a new sentencing proceeding. It is my view that a *per se* rule should be adopted, requiring that, when requested, a parole ineligibility instruction be given to the jury deciding sentencing in a capital case.

In this case, appellant requested the following charge at the end of the sentencing phase:

> I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

The majority affirms the trial judge's denial of this legally correct charge which is taken virtually verbatim from S.C. Code Ann. § 16-3-20(A) (Supp. 1999). The majority relies upon our decisions in State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000), and State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000),[14] which hold that most capital defendants in South Carolina are no longer entitled to a parole ineligibility charge under Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed. 2d 133 (1994). Under State v. Starnes, supra, and State v. Shafer, supra, Simmons did not apply because appellant would not necessarily have received a sentence of life imprisonment had the jury

[14] Appellant was granted permission to argue against these precedents. The United States Supreme Court has granted certiorari in State v. Shafer, supra, 2000 WL 1057649 (Sept. 26, 2000).

failed to find a statutory aggravating circumstance.[15] Appellant, as the majority points out, could have received a mandatory minimum sentence of at least thirty years without the possibility of parole.

Further, the majority adheres to this Court's recent ruling in State v. Starnes, supra, that it is inappropriate to presume that juries will always find the existence of aggravating circumstance.

I propose a rule that is not dependent upon the shifting grounds of constitutional interpretation, is simple to apply, and has the result of fully informing the jury of its options. We have taken great pains to advise the jury that it is the final sentencing authority in a capital case.[16] That being the case, the jury should be equipped with the same knowledge in terms of sentencing as a sentencing judge. In my opinion, we should take this opportunity to clarify and simplify the rule for charging capital juries on the defendant's ineligibility for parole or early release.

Under our current capital sentencing scheme, if the defendant has been previously convicted of a "serious" or "most serious" offense[17] he faces only two possible sentences: death, or life imprisonment without possibility of parole. S.C. Code Ann. § 17-25-45 (Supp. 1999).

If the defendant has not been previously convicted of a "serious" or "most serious" offense, the potential sentences depend upon the jury's finding of at least one statutory aggravating circumstance. If the jury finds a statutory

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[15]Appellant had no previous convictions of either "serious" or "most serious" offenses. See S.C. Code Ann. § 17-25-45 (Supp. 1999) (defining these offenses).

[16]A trial judge must, of course, still make an affirmative finding that the death penalty was warranted under the evidence, and that it was not the result of passion, prejudice, caprice, or any other arbitrary factor. S.C. Code Ann. § 16-3-20(C)(b) (Supp. 1999).

[17]S.C. Code Ann. § 17-25-45(C)(1) and (2) (Supp. 1999).

aggravating circumstance, the only sentencing choice to be made is whether to impose the death penalty or life imprisonment without possibility of parole. Should the jury fail to find the existence of a statutory aggravating circumstance, the sentence rests in the discretion of the trial judge. Her choices are life imprisonment, or a mandatory minimum term of at least thirty years. The defendant is parole ineligible in either circumstance.[18]

In my opinion, the unique circumstances of a capital case require that the sentencing authority - whether judge or jury - be fully informed with regard to sentencing options, including the convicted offender's parole ineligibility.

I would hold that where requested by the defense, a properly phrased parole ineligibility charge must be given to the jury in a capital case.

The jury would be instructed that should they find the existence, beyond a reasonable doubt, of one of more aggravating circumstances, there would be but two potential punishments: life imprisonment or the death penalty. The jury would further be informed that life imprisonment means until death, and that the defendant would be ineligible for parole or other early release. This is the charge requested by appellant here.

The jury would also be informed that should it fail to find the existence, beyond a reasonable doubt, of at least one statutory aggravating circumstance, the punishment would be solely within the province of the trial judge. The jury would be told that the sentencing options would be limited to life imprisonment without the possibility of parole, or, assuming the defendant were a non-recidivist, a mandatory minimum of at least thirty years, also without the possibility of parole.

I agree with Justice Blackmun's plurality opinion in Simmons v. South Carolina, supra, wherein he discussed the perceptions of most jurors regarding parole:

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[18] § 16-3-20(A) and (C)(b) (Supp. 1999).

> It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States. . . . An instruction directing juries that life imprisonment should be understood in its 'plain and ordinary' meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment'.

Id. at 169-70, 114 S.Ct. at 2197, 129 L.Ed. 2d at 146. The Simmons plurality noted that, at the time it was decided, twenty-six states empowered juries in capital sentencing and provided for life imprisonment without parole as an alternative punishment. Of those states, seventeen required that the jury be expressly informed of the defendant's parole ineligibility. See id. at n. 7. The Commonwealth of Virginia recently joined that number with its Supreme Court's decision in Yarborough v. Commonwealth, 519 S.E.2d 602 (Va. 1999). In my opinion, this State should likewise adopt the practice.

In its search for an appropriate sentence, the jury should have the benefit of clear and accurate instructions regarding its options. A "plain meaning" instruction does not adequately inform the jury. Without the knowledge that, if aggravators are found, a life sentence is not subject to being reduced by parole, or any other method of early release, the jury is likely to speculate unnecessarily on the possibility of early release, and impose a sentence of death based upon "fear rather than reason." Yarborough v. Commonwealth, supra, *citing* Farris v. Commonwealth, 209 Va. 305, 307, 163 S.E.2d 575, 576 (1968). A parole ineligibility charge would eliminate any speculation. Since such a charge was not given in this case despite appellant's request, I would reverse the sentence and remand for a new sentencing proceeding.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sam Brown, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Williamsburg County
M. Duane Shuler, Trial Judge
Paula H. Thomas, Post-Conviction Judge

Opinion No. 25227
Submitted November 15, 2000 - Filed January 8, 2001

REVERSED

John B. Shupper, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General G. Robert Deloach, III, and Assistant Attorney General Douglas Leadbitter, all of Columbia, for respondent.

JUSTICE WALLER: We granted certiorari to address petitioner's claim that the trial court lacked subject matter jurisdiction to accept his guilty

pleas on three counts of distribution of crack cocaine within proximity of a school. We reverse the dismissal of petitioner's post-conviction relief (PCR) application and vacate his convictions on these counts.

FACTS / PROCEDURAL HISTORY

In 1993, petitioner pled guilty to three counts of distribution of crack cocaine, three counts of distribution of crack cocaine within proximity of a school, and one count of trafficking in crack cocaine. He was sentenced as a second offender to twenty years on each distribution count, ten years on each distribution within proximity of a school count, and twenty-five years on the trafficking count. The trial court ordered all sentences to run concurrent. Petitioner did not directly appeal.

The instant matter concerns petitioner's second PCR application wherein one allegation was lack of subject matter jurisdiction. Initially, the application was summarily dismissed as successive. On petition for certiorari, petitioner argued that there was no subject matter jurisdiction because of erroneous code sections listed in the indictments. This Court stated that the PCR court should not have dismissed the application as successive because subject matter jurisdiction may be raised at any time. The Court found no prejudice, however, and denied certiorari.

Because of some procedural irregularities in the initial handling of petitioner's application, the PCR court ordered a hearing after this Court issued its denial of certiorari. At the hearing, petitioner again raised a subject matter jurisdiction argument regarding the erroneous code sections in the indictments. The PCR court dismissed the application as successive, and specifically found that this Court had ruled on the subject matter jurisdiction argument that petitioner raised at the hearing.

Petitioner then filed another petition for certiorari and raised a new subject matter jurisdiction argument. For the first time, petitioner questioned whether the trial court lacked subject matter jurisdiction to accept his guilty pleas to the three counts of distribution within proximity of a school where the indictment alleged that petitioner distributed crack cocaine while within the grounds of "Anne's Day Care Center." The Court granted the petition on that question.

The indictments state that petitioner distributed a quantity of crack cocaine "while within a radius of one-half mile of the grounds of Anne's Day Care Center, in violation of § 44-53-445."

ISSUE

Did the trial court lack subject matter jurisdiction on the charges for distribution within proximity of a school?

DISCUSSION

Petitioner argues that the trial court lacked subject matter jurisdiction to accept his guilty pleas to the three counts of distribution of crack cocaine within proximity of a school because the indictments stated that the distribution took place within proximity of "Anne's Day Care Center." Petitioner contends that because day care centers are not schools, the indictments fail to state the necessary elements of the offense. We agree.

Initially, we note that the State argues petitioner is precluded from raising a subject matter jurisdiction argument because the issue of subject matter jurisdiction has been litigated once before and ruled upon by this Court. We are unpersuaded by the State's procedural argument.

The jurisdiction of a court over the subject matter of a proceeding is fundamental. Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." Id. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal in this Court. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972). Furthermore, "[t]he acts of a court with respect to a matter as to which it has no jurisdiction are void." Funderburk, 259 S.C. at 261, 191 S.E.2d at 522.

While it is true that both this Court and the PCR court have addressed subject matter jurisdiction arguments related to the code sections in the indictments, neither this Court nor the PCR court has addressed the precise challenge now at issue. Since subject matter jurisdiction is an issue which is fundamental and may be raised at any time, we decline to find that our review of this issue is precluded on procedural grounds. Carter v. State, supra;

Anderson v. Anderson, supra.[1]

Turning to the merits of petitioner's argument, we hold that the trial court lacked subject matter jurisdiction over the three counts of distribution within proximity of a school.

The circuit court does not have subject matter jurisdiction to hear a guilty plea unless: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the charge is a lesser included charge of the crime charged in the indictment. Carter v. State, supra. "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) (emphasis added).

The statute criminalizing distribution of a controlled substance within proximity of a school provides in pertinent part:

> It is a separate criminal offense for a person to unlawfully distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance while in on or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university.

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[1]The State couches its procedural argument in terms of res judicata. However, in a PCR action, the doctrine of res judicata does not apply to issues of subject matter jurisdiction. Accord State v. Parham, 2000 WL 1176529, *2 (Ohio Ct. App. Aug. 17, 2000) ("A petitioner for post-conviction relief is not precluded by res judicata where the claim is that the conviction is void for lack of subject matter jurisdiction.") (citing State v. Wilson, 652 N.E.2d 196, 200 n.6 (Ohio 1995)).

S.C. Code Ann. § 44-53-445 (Supp. 1992).[2] To prove distribution of crack cocaine under this section, the State must establish the following elements: (1) the defendant had actual control, or the right to exercise control over the crack cocaine; (2) he knowingly distributed or delivered the crack cocaine; (3) the substance upon analysis was, in fact, crack cocaine; and (4) the distribution occurred within a one-half mile radius of the grounds of an elementary, middle, secondary or vocational school; public playground or park; or college or university. See id.; State v. Watts, 321 S.C. 158, 168, 467 S.E.2d 272, 278 (Ct. App. 1996).

The State maintains that the indictments conferred subject matter jurisdiction on the trial court because section 44-53-445 includes day care centers. Specifically, the State contends that day care centers (1) are encompassed by the term "elementary school," and (2) include playgrounds. Basic rules of statutory construction, however, refute the State's arguments.

First and foremost, a penal statute must be construed strictly against the State and in favor of the defendant. Williams v. State, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991). "'The rule that penal laws are to be construed strictly . . . is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. . . .'" Id. (quoting United States v. Wiltberger, (18 U.S.) 5 Wheaton 76, 95-96, 5 L.Ed. 37, 42 (1820)).

The Court's primary function in interpreting a statute is to ascertain the intention of the legislature. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). When the terms of a statute are clear and unambiguous, the Court must apply them according to their literal meaning. Id. Furthermore,

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[2]Initially, section 44-53-445 covered only "elementary, middle, or secondary" schools. See 1984 S.C. Acts No. 504. An amendment in 1990 expanded the statute very specifically to cover drug violations within proximity of a "public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university." See 1990 S.C. Acts No. 579 (emphasis on added terms). Subsequent amendments to the statute in 1994 and 1996 do not impact this case.

"in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Id.

Looking at the clear and unambiguous terms of section 44-53-445, day care centers are not covered by the statute. The plain and ordinary meaning of "elementary school" simply does not encompass a day care center. Cf. State v. Roland, 577 So. 2d 680 (Fla. Dist. Ct. App. 1991) (where the court held that a statute prohibiting drugs within 1,000 feet of a "public or private elementary, middle or secondary school" did not apply to a kindergarten/preschool).

In Roland, the Florida court found that the common meaning of the term "elementary school" is a school including the first through the sixth or the eighth grades. Id. at 681 (citing Webster's New Collegiate Dictionary (1981)). Thus, the court held that the statute did not apply to kindergartens or preschools. We agree with the reasoning in Roland. To hold otherwise and find that a day care center is encompassed by the term elementary school would amount to a "forced construction" which would improperly expand the statute's operation. Blackmon, supra.

Moreover, section 44-53-445 does not simply criminalize distribution within proximity of a "school," but instead very specifically lists the types of schools covered. See § 44-53-445 (criminalizing distribution of drugs within "public or private elementary, middle, or secondary school; . . . a public vocational or trade school or technical educational center; or a public or private college or university"). Thus, the maxim of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another) applies to exclude day care centers from falling within the statute since day care centers are not expressly included. Accord State v. Roland, supra. Certainly, if the Legislature had intended day care centers to be covered, it could have amended the statute to include such facilities. See Blackmon, supra (in interpreting a statute, the Court's primary function is to ascertain the intention of the legislature).[3]

We are similarly unpersuaded by the State's argument that day care centers include a playground or park. Listing a day care center in an indictment

[3]See also footnote 2, supra, detailing the relevant legislative history of § 44-53-445.

does not put a defendant on notice of the element of proximity within a public playground or park. See § 44-53-445.

It is the Legislature, not this Court, which defines a crime under a penal statute, and thus, we are bound to construe section 44-53-445 strictly against the State and in favor of the defendant. Williams v. State, supra. We hold that section 44-53-445 does not apply to day care centers. Hence, the indictments on their face failed to include a necessary element of the offense, and the trial court lacked subject matter jurisdiction to accept petitioner's pleas to these charges. See Browning, 320 S.C. at 368, 465 S.E.2d at 359 (an indictment is sufficient only when it contains the necessary elements of the offense intended to be charged).

Accordingly, petitioner's convictions and sentences on the three counts of distribution in violation of section 44-53-445 must be vacated. See Funderburk, 259 S.C. at 261, 191 S.E.2d at 522 ("The acts of a court with respect to a matter as to which it has no jurisdiction are void.").

CONCLUSION

We reverse the PCR court's order of dismissal and vacate petitioner's convictions on the three counts of distribution within proximity of a school.[4]

REVERSED.

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

[4]Because certiorari was granted only on this issue, petitioner's other convictions are unaffected.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Roy A. Pruitt, R.
Anthony Pruitt, and
Pamela Hatcher, Petitioners,

v.

South Carolina Medical
Malpractice Liability
Joint Underwriting
Association, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Marlboro County
James E. Lockemy, Circuit Court Judge

Opinion No. 25228
Heard November 1, 2000 - Filed January 8, 2001

REVERSED

Louis D. Nettles, of Nettles, McBride, Hoffmeyer, P.A., of Florence, for petitioners.

William L. Pope, of Pope & Rodgers, P.A.; and Andrew F. Lindemann, of Davidson, Morrison & Lindemann, P.A., all of Columbia, for respondent.

JUSTICE MOORE: This case involves a dispute over a settlement agreement. The Court of Appeals reversed the trial court's finding that respondent (JUA) remained obligated under the agreement.[1] We granted a writ of certiorari and now reverse.

FACTS

Petitioners (the Pruitts) are the family members of Linda Faye Pruitt who died as the result of allegedly negligent medical care. In December 1984, the Pruitts settled their medical malpractice case against defendants who were insured by JUA. The Pruitts agreed to release defendants and JUA in exchange for a lump sum payment of $293,000 plus monthly payments for thirty years or life, whichever was longer, in the following amounts: Roy Pruitt, the deceased's husband, $510 per month; and Anthony and Pamela Pruitt, the deceased's children, $500 per month each. The release includes a provision that JUA would purchase a single premium annuity policy from Executive Life Insurance Company (Executive) for the benefit of each of the Pruitts to guarantee these monthly payments.

In 1991, Executive was placed in conservatorship and its assets ultimately transferred to Aurora Life Insurance Company (Aurora). While in conservatorship, Executive sent JUA an election package to choose whether to continue the same monthly payments originally promised by Executive or to opt-out of the policy. The election package indicated that annuitants would receive 100% of the originally scheduled payments if electing to continue under a new contract with Aurora. The election decision would be irrevocable once received by Executive. In order to opt out, both the owner of the policy (JUA) and the annuitants (the Pruitts) had to consent. No action was required to continue the policy.

JUA forwarded the election package to each of the Pruitts along with a letter advising: "You may remain in the plan under the current terms of the annuity contract or you may choose the 'opt out' option and receive a lump sum distribution in cash." In response, counsel for the Pruitts wrote JUA:

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[1]335 S.C. 118, 515 S.E.2d 544 (Ct. App. 1999).

> The letter you wrote [the Pruitts] seemed to imply that they were under some obligation to make an election regarding the Executive Life Plan. My review of the Executive Life/Aurora documents convinces me that the owner of these annuities . . [is the one] to make this election. . . . [The Pruitts] continue to look to you for payment of the sums promised them.
>
> I further note that the election documents sent to [the Pruitts] do require their consent. Please be advised [the Pruitts] will not stand in the way of whatever election [you] wish to make. They will, however, not accept any modification of your obligation to them and their actions should not be taken by you as any agreement to any modification of the obligation of the JUA to them.

JUA responded only that it had no obligation to make an election for the Pruitts but would endorse whatever option they chose.

Shortly thereafter, JUA received completed opt-out forms from the Pruitts which it forwarded to Executive on January 18 and 27, 1994. Each opt-out form signed by the Pruitts includes the underscored language: "I understand that once I elect to opt out and this form is received by [Executive], my decision is irrevocable." On February 25, 1994, the Pruitts sought to revoke their election decision. Although JUA attempted to intervene on their behalf, the Pruitts' request to change their election was denied under Executive's court-ordered election plan.

In 1996, the Pruitts commenced this action against JUA asserting that JUA had disclaimed any further liability under the settlement agreement and seeking a declaration that JUA remained obligated to them. The Pruitts claimed that although the payouts they had received from the Executive opt-out amounted to more than was presently due them under the settlement agreement, ultimately they would receive less than they would have had the monthly payments continued.[2]

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[2]According to JUA's agent, annuitants opting out of the new Aurora policy received at most 84% of the policy's value.

JUA raised several defenses asserting the Pruitts had voluntarily agreed to the Executive opt-out. The trial court rejected JUA's arguments and held it remained obligated under the settlement agreement. On appeal, the Court of Appeals reversed finding the Pruitts had waived any right to the monthly payments by electing the Executive opt-out.

ISSUE

> Is there any evidence to support the trial court's finding that JUA remained obligated under the settlement agreement?

DISCUSSION

The Pruitts claim the Court of Appeals misconstrued their cause of action as one for specific performance and erred in applying an equitable standard of review. The Pruitts contend their action was actually one at law and therefore the scope of review on appeal was limited to determining whether there was any evidence to support the trial court's decision.

We agree the Court of Appeals applied the wrong standard of review in this case. According to the Pruitts' complaint, they were asking for a determination of JUA's liability under the settlement agreement and not specific performance. An action to construe a contract is an action at law reviewable under an "any evidence" standard. Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991).

Further, we find there is evidence to support the trial court's finding that JUA remained obligated to the Pruitts under the settlement agreement. The settlement agreement recites as consideration for the Pruitts' release "the payments specified herein below." The agreement then itemizes the monthly amounts that "shall hereafter be paid" the Pruitts and states that these payments:

> are to be guaranteed by the Executive Life Insurance Company throught *(sic)* its issuance of appropriate companion instruments in the form of a single premium annuity policy, the original of such policy to be owned and retained by [JUA]. . . .

(emphasis added).

Read as a whole, the agreement provides that JUA is released from liability by payment of the specified monthly amounts and not upon simply purchasing the annuity policy. The provision that these payments were to be "guaranteed" by Executive is not an essential term of the agreement between the Pruitts and JUA but is a collateral undertaking with Executive. *See* In re: W.B. Easton Const. Co., 320 S.C. 90, 463 S.E.2d 317 (1995) (guaranty of payment is separate from original obligation to pay); Carroll County Sav. Bank v. Strother, 28 S.C. 504, 6 S.E. 313 (1888) (guaranty is collateral undertaking). Since the settlement agreement obligates JUA to pay these monthly amounts, the question then becomes whether the Pruitts' acceptance of the Executive opt-out waived their right to these payments under the settlement agreement. *See* Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 415 S.E.2d 384 (1992) (waiver is a voluntary and intentional abandonment or relinquishment of a known right); Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994) (waiver may be expressed or implied from a party's conduct).

In finding a waiver, the Court of Appeals focused on the Pruitts' execution of the opt-out forms and summarily concluded:

> Even though [the Pruitts'] counsel's letter to [JUA] purported to impose some continuing obligation on JUA, [the Pruitts'] actions in executing the opt-out forms clearly waived their right to monthly payments.

The Court of Appeals' analysis discounts the impact of counsel's letter which stated that the Pruitts were not obligated to make an election, they would continue to look to JUA for the monthly payments, and they would accept no modification of JUA's obligation. By this letter, the Pruitts expressly stated their intent not to waive any rights under the settlement agreement.

Further, the Pruitts' subsequent conduct in executing the opt-out forms was not so inconsistent with this assertion of their rights under the settlement agreement that waiver can be implied. *See* Mende v. Conway Hosp., Inc., 304 S.C. 313, 404 S.E.2d 33 (1991) (waiver may result from action inconsistent with intent to insist on right); Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994). Before the Pruitts executed the opt-out forms, JUA never responded to counsel's disclaimer of

any waiver. Further, JUA had previously treated the Pruitts as if it were obligated under the settlement agreement for the monthly payments irrespective of the status of the annuity policy when it supplemented Executive's reduced monthly annuity payments during Executive's conservatorship.[3] JUA's silence in the face of the Pruitts' disclaimer of any waiver and the parties' course of dealings support the conclusion the Pruitts had no reason to believe their execution of the opt-out forms would be a waiver of their rights under the settlement agreement. Under these circumstances, an intentional waiver cannot fairly be implied.

In conclusion, we find there is evidence to support the trial court's ruling the Pruitts did not waive their right to monthly payments under the settlement agreement and that JUA remained obligated to them for such payments. Accordingly, the decision of the Court of Appeals is reversed and the trial court's order is reinstated.[4]

REVERSED.

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

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[3]In fact, in subsequent correspondence between Executive and JUA, JUA indicated it considered itself legally obligated for the monthly payments to the Pruitts even after the opt-out.

[4]In light of its conclusion on the waiver issue, the Court of Appeals found it unnecessary to address JUA's other grounds for reversal. We find these grounds without merit and affirm the trial court's rulings under Rule 220(b), SCACR. *See* Brading v. County of Georgetown, 327 S.C. 107, 490 S.E.2d 4 (1997) (elements of estoppel include false representation or concealment and prejudicial change in position in reliance thereon); Adams v. B & D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989) (no novation unless both parties so intend); Fanning v. Hicks, 284 S.C. 456, 327 S.E.2d 342 (1985) (no accord without a meeting of the minds).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

April M. Rogers, Petitioner,

v.

Sidney Rogers, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Marion County
Arthur E. Morehead, III, Family Court Judge

Opinion No. 25229
Submitted November 15, 2000 - Filed January 8, 2001

REVERSED AND REMANDED

April M. Hall, *pro se* petitioner.

John Sidney Rogers, *pro se* respondent.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' memorandum decision affirming the denial of an increase in child support. We reverse.

FACTS

Petitioner (Mother) and respondent (Father) married in 1976. They lived in Marion with their three minor children until they separated in June 1995. By order filed October 2, 1996, the family court granted a divorce on the ground of Mother's post-separation adultery, awarded Mother custody of the children, and ordered Father to pay child support in the amount of $678.00 per month.[1]

Mother appealed the divorce decree but did not challenge the child support award. She then filed this action in June 1997 seeking an increase in child support and various other relief. By order filed December 10, 1997, the family court dismissed Mother's complaint and ordered her to pay Father's attorney's fees in the amount of $4,000.00. Mother appealed. The Court of Appeals affirmed pursuant to Rule 220(b), SCACR.

ISSUES

1. Did the family court err in denying an increase in child support on the ground of Father's misrepresentation of income and subsequent increase in income?

2. Did the family court err in denying an increase in child support on the ground of increased childcare costs?

3. Did the family court err in awarding Father attorney's fees in the amount of $4,000.00?

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[1]This amount was ordered by supplemental order dated November 8, 1996, amending the original amount due to a scrivener's error.

DISCUSSION

1. Father's income

At the 1996 divorce hearing, Father submitted a financial declaration indicating his monthly income was $2,960.99, or $35,531.88 annually, which the family court relied on in computing child support.[2] At the hearing in the present case, Mother introduced into evidence Father's 1995 W-2 form indicating his annual income at the time of the divorce hearing was actually $38,553.55.

Further, although Father testified his current annual income was $3,224.00 monthly, which equals an annual income of $38,688.00, his 1996 W-2 form indicates his annual income had actually risen to $42,267.43. In addition, Father testified he received a 2.5% raise in October 1997. His annual income would then have been $43,112.78. In other words, the evidence indicates that at the time of the hearing in this case, Father's annual income was $7,580.90 more than the amount originally used by the family court to calculate child support in 1996.[3]

The family court found the evidence insufficient to show Father attempted to mislead the court by his financial declaration since Mother had subpoenaed Father's earnings records at the time of the original hearing. Further, it found Mother's income had also increased and the ratio between the parties' respective incomes (Father 60% and Mother 40%) had remained the same. Accordingly, the court denied an increase on this ground.

First, as the family court found, Mother subpoenaed Father's earnings records, including his tax returns, at the time of the original hearing. Mother could have contested the amount of Father's income in the original proceeding and she is not entitled to a retroactive increase to the time of the original divorce decree. *Cf.* Harris v. Harris, 307 S.C. 351, 415 S.E.2d 391 (1992)

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[2]Mother's monthly income was $1,967.00.

[3]Our figures are slightly higher than those stated in Mother's brief because she relied on the amount of wages in box 1 of the federal W-2 forms. Actually, the greater amount of wages in box 5 (medicare wages) reflects the taxpayer's total gross income.

(family court has jurisdiction to order retroactive increase in child support where party misrepresented income). On the issue of a prospective increase, however, whether Father misled the family court in the original proceeding is irrelevant. Our inquiry is simply whether Father's income has increased from the figure used in the original order to calculate child support.

The difference between the amount of Father's annual income used to calculate child support in 1996 ($35,531.88) and the amount of his annual income at the time of the hearing in this case ($43,112.78) represents an increase of 21%. Since Mother's income increased by only 8%,[4] the actual ratio of their 1997 incomes is: Father 63% and Mother 37%.

The increase in the parties' combined income also impacts the calculation of child support under the Child Support Guidelines, 27 S.C. Code Ann. Reg. 114-4720 (Supp. 1999).[5] Under these guidelines, using the correct

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[4]Mother's annual income at the time of the original hearing was $23,607. Her annual income at the time of the hearing in this case was $25,416.00.

[5]These guidelines govern child support awards as provided in S.C. Code Ann. § 20-7-852 (Supp. 1999):

> (A) In any proceeding for the award of child support, there is a rebuttable presumption that the amount of the award which would result from the application of the guidelines required under Section 43-5-580(b) is the correct amount of child support to be awarded. A different amount may be awarded upon a showing that application of the guidelines in a particular case would be unjust or inappropriate. When the court orders a child support award that varies significantly from the amount resulting from the application of the guidelines, the court shall make specific, written findings of those facts upon which it bases its conclusion supporting that award. Findings that rebut the guidelines must state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

See Woodall v. Woodall, 322 S.C. 7, 471 S.E.2d 154 (1996).

1997 income figures for both parties,[6] and factoring in the allowable offsets for $65.00 in monthly insurance premiums paid by Father and $130.00 monthly childcare paid by Mother,[7] Father's monthly child support obligation would be $817.00, or $139.00 more per month than the original amount ordered.[8]

Application of the child support guidelines results in a significant increase in monthly child support based on the evidence of Father's increased income. We find the family court abused its discretion in denying Mother's request for an increase on this ground. Accordingly, we reverse and remand for a recalculation of child support. *See* Cudd v. Arline, 277 S.C. 236, 285 S.E.2d 881 (1981) (family court order denying increase will be reversed for abuse of discretion).

2. Childcare costs

Mother introduced evidence she was paying monthly childcare costs of $420.00 for the two younger children. The family court noted Mother had incurred a "substantial increase" in childcare costs, which were originally calculated at $130.00 per month in the 1996 divorce decree,[9] but denied an increase in child support. The only reason given for this denial is that

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[6]Father's monthly income is $3,592.73; Mother's monthly income is $2,118.00.

[7]The 1996 divorce decree ordered Father to carry health insurance for the three children and found Mother's childcare expenses were $130.00 per month.

[8]We used the Child Support Obligation Calculator on the Department of Social Services website to obtain this figure. The calculator is located at: http://www.state.sc.us/dss/csed/calculator.htm.

[9]Apparently, this amount was erroneously calculated since the evidence indicates Mother was actually paying $400.00 per month at the time. Since we are concerned here only with the family court's denial of a prospective increase, however, the question is simply whether Mother has shown an increase in the cost of childcare over that allowed in the divorce decree, regardless of whether she challenged the original calculation.

"Mother's own mother is not working, lives close by, and admittedly cares for the children at times."

Mother testified her mother was receiving Social Security disability checks for crippling arthritis and could not handle the children. Further, there is no obligation that a grandparent provide free childcare. The family court's conclusion that these costs were avoidable is unsupported by the evidence.

Under the Child Support Guidelines, based on Father's increased income discussed in Issue 1 above, factoring in Mother's increased childcare in the amount of $420.00, and allowing an offset for Father's monthly insurance premium of $65.00, the child support owed by Father would be $953.00 monthly, a total increase of $275.00 over the amount he is presently obligated to pay. Mother's increased childcare costs substantially affect the calculation of Father's child support obligation under the guidelines. Accordingly, we direct the family court to consider these increased costs in recalculating child support.

3. Attorney's fees

The family court awarded Father $4,000.00 on his counterclaim for attorney's fees based on the observation that "this action should not have been initiated."

First, we note the amount of attorney's fees awarded here represents approximately 16% of Mother's annual income at the time this case was heard. A party's ability to pay is an essential factor in determining whether an attorney's fee should be awarded, as are the parties' respective financial conditions and the effect of the award on each party's standard of living. Sexton v. Sexton, 310 S.C. 501, 427 S.E.2d 665 (1993). This award is excessive in light of these factors.

Further, since the beneficial result obtained by counsel is a factor in awarding attorney's fees, when that result is reversed on appeal, the attorney's fee award must also be reconsidered. *Id.* In light of our remand on the issue of child support, we remand the issue of attorney's fees for reconsideration as well.

Mother's remaining arguments are without merit and we affirm the remainder of the family court's order under Rule 220(b), SCACR. *See* Smith v. Smith, 272 S.C. 294, 275 S.E.2d 797 (1980) *and* Hatfield v. Hatfield, 327 S.C. 360, 489 S.E.2d 212 (Ct. App. 1997) (issue must be raised to and ruled on by family court to be preserved for review); Miller v. Miller, 299 S.C. 307, 384 S.E.2d 715 (1989) (generally, changes in circumstances within the contemplation of the parties at the time of the initial decree do not provide a basis for modifying a child support award); Shambley v. Shambley, 296 S.C. 405, 373 S.E.2d 689 (Ct. App. 1988) (family court order requiring maintenance of health insurance will not be reversed absent an abuse of discretion).

REVERSED AND REMANDED.[10]

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

[10]We are aware that Mother has remarried and moved since the hearing in this case. The family court retains jurisdiction to consider any new request for modification by either party in light of these changed circumstances. *See* Miller v. Miller, 299 S.C. 307, 384 S.E.2d 715 (1989) (family court has the authority to modify the amount of child support upon a showing of substantial or material change of circumstances).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jerry A. Pressley, ... Appellant,

v.

Lancaster County, a political subdivision of the State of South Carolina, ... Respondent.

Appeal From Lancaster County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3274
Heard November 8, 2000 - Filed January 2, 2001

AFFIRMED AS MODIFIED

J. Edward Bradley and S. Jahue Moore, both of Wilson, Moore, Taylor & O'Day, of West Columbia; and Don S. Rushing, of Rushing & Griffith, of Lancaster, for appellant.

Melvin B. McKeown, Jr., of McKeown Law Firm, of York, for respondent.

PER CURIAM: Jerry A. Pressley filed a petition for judicial review of the Lancaster County Council's refusal to issue a Letter of Consistency (LOC). He also filed a petition for a writ of mandamus compelling Lancaster County, through its administrator, to issue the LOC. The trial court affirmed the County Council (Council) and denied Pressley's petition for a writ of mandamus. Pressley appeals. We affirm as modified.

FACTS

Pressley owns and operates an open pit gravel mine in Lancaster County, near the North Carolina-South Carolina border. Pressley applied for a permit to operate a construction and demolition (C&D) landfill on the property. On July 15, 1996, the Lancaster County Zoning Board of Appeals granted Pressley a special exception allowing him to establish the landfill. Pressley purchased additional land as a buffer zone, installed monitoring wells, and purchased landfill equipment.

The Department of Health and Environmental Control (DHEC) requires an applicant for a C&D landfill permit to obtain a LOC from the county prior to reviewing the applicant's request for approval. As a last step in fulfilling DHEC's requirements, Pressley attempted to obtain the LOC from the Lancaster County administrator. The administrator notified Pressley the LOC required Council's approval.

Council does not have a written policy, ordinance, or other resolution governing the issuance of LOCs. The Lancaster County Solid Waste Plan does not require the County to provide a separate C&D landfill. The Catawba Regional Plan on Solid Waste Management, which Lancaster County joined in February, 1996, recommends the use of a separate C&D landfill but does not require it.

Pressley presented his request at the May 5, 1997 Council meeting. Council recognized it would have to reconsider a moratorium it previously placed on the issuance of LOCs. The issues of the reconsideration of the moratorium and consideration of Pressley's request were placed on the agenda of the next meeting.

At the May 27, 1997 meeting, Council repealed the moratorium. Council then considered Pressley's request. Pressley stated the landfill would handle approximately 300,000 tons of C&D waste per year. According to the minutes of the May 27 meeting, several members commented that Council's decision should be based upon the need in Lancaster County and the best interests of Lancaster County citizens. Council denied Pressley's request.

Pressley requested a reconsideration. J. Chappel Hurst, Jr., the Lancaster County Administrator, informed Pressley that his request could only be honored

if a Council member who voted against the LOC moved to reconsider the issue. Although a member asked that reconsideration of the denial of Pressley's request for a LOC be placed on the agenda of the next meeting, the record on appeal does not indicate the matter was ever reconsidered.[1] At the time of Pressley's request, seven sites were seeking LOCs for C&D landfills.

On June 26, 1998, Pressley filed a complaint seeking judicial review of Council's decision. Pressley also sought a declaratory judgment of the constitutionality of the moratorium and of Council's decision. He subsequently filed a petition for a writ of mandamus compelling Lancaster County to issue the LOC.

The trial court found Pressley's constitutional argument, that Council's action violated the Commerce Clause of the United States Constitution, was without merit. It also noted Pressley neither alleged nor proved that The South Carolina Solid Waste Policy and Management Act[2] was unconstitutional. It held Pressley was not entitled to a writ of mandamus because Pressley failed to prove the ministerial nature of the act of issuing a LOC and the unavailability of any other remedy. The trial court found Pressley had not exhausted his administrative remedies because he had not pursued a final ruling from DHEC. The court dismissed the petition for judicial review and denied the petition for a declaratory judgment, an injunction, and a writ of mandamus.

LAW/ANALYSIS

1. The LOC

Pressley argues Council's denial of his request for the LOC was arbitrary and capricious because Council did not follow its previous unwritten practice or any written criteria. We disagree.

The South Carolina Solid Waste Policy and Management Act requires planning for solid waste disposal at the state and local or regional level. S.C. Code Ann. § 44-96-80(A)(Supp. 1999). Lancaster County participated with Chester, Union, and York Counties to develop the Catawba Regional Plan, which

[1] At the June 16, 1997 meeting Council voted to amend the County's Solid Waste Plan to include a statement of the County's need for 40,000 tons per year of C&D waste. It also voted to amend the plan to include a statement of the need for two C&D landfills, one each in the southern and northern ends of the County.

[2] S.C. Code Ann. § 44-96-10 et seq. (Supp. 1999).

DHEC approved. The Act requires a person to obtain a permit from DHEC before operating a solid waste management facility. S.C. Code Ann. § 44-96-290(A) (Supp. 1999).

Permits are issued based on the local need for the requested facility and the consistency of the proposed facility with local zoning and other ordinances. Accordingly, the Act provides:

> No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department. . . . In determining if there is a need for new or expanded solid waste disposal sites, the department shall not consider solid waste generated in jurisdictions not subject to the provisions of a county or regional solid waste management plan pursuant to this chapter.

S.C. Code Ann. § 44-96-290(E) (Supp. 1999).

The Act further mandates that DHEC cannot issue a permit unless the proposed facility "is consistent with local zoning, land use, and other applicable local ordinances, if any; that, eighteen months after the date of enactment of this chapter, the proposed facility or expansion is consistent with the local or regional solid waste management plan and the state solid waste management plan." S.C. Code Ann. § 44-96-290(G)(Supp. 1999).

The Act does not specify how such determinations of need and consistency are to be made. DHEC's practice has been to delegate to the counties the authority to determine consistency through their issuance of the LOCs.[3] According to the regulation, DHEC determines the allowable rate of disposal based on the Region/County Solid Waste Management Plans, the LOCs, the facility's design capacity, the expected operational life, and the area to be served by the facility as outlined in the permit application. S.C. Reg. 61-107.11(IV)(A)(5) (Supp. 1999). Art Braswell, of DHEC, stated DHEC essentially delegated the authority to the local governments to determine whether the proposed landfills

[3] In its order, the trial court commented: "This delegation of approval . . . may be impermissible. However, this Court offers no opinion on this issue."

are consistent with the local plans.

Braswell also asserted DHEC believed a county's need for a new C&D landfill should be determined by the county. He explained, "As far as whether the need [exists], you're looking at transportation cost, amounts of waste generated in the county, whether it's a regional facility, things like that."

In requiring an applicant to procure a LOC from the host county, DHEC intends for the local government to evaluate the same factors which the Act requires DHEC to consider. Although Lancaster County has not passed an ordinance outlining criteria for the issuance of a LOC, the criteria may be found in state statutes and regulations and in the Catawba Regional Plan. As Hurst explained, the county did not adopt a written policy regarding the County's determination of need because the requirement for need is already set forth in state law and is implicitly part of the local plan.

At the time of Pressley's request for a facility with a 300,000 ton capacity, the Mining Road Landfill in Lancaster County, an industrial waste landfill in Lancaster County permitted to receive C&D waste, had a capacity of 100,000 tons per year of C&D waste and of another 100,000 tons of industrial waste. Lancaster County produced only 3,998.70 tons of C&D waste in 1996. According to Hurst, Lancaster County's plan at the time of Pressley's request called for only one facility.

A governmental body's decision "is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. South Carolina State Bd. of Dentistry, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985). The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary. See Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999)(stating an applicant seeking a variance from a zoning board bears the burden of proof). In light of the Act, DHEC's regulations, and the excess capacity existing in Lancaster County, we find Council did not act arbitrarily and capriciously in denying Pressley's request for a LOC.

Pressley also argues Council did not follow its prior procedure because Council rather than the county administrator considered his request for the LOC. "The governing body of a county has the responsibility and authority to

provide for the operation of solid waste management facilities to meet the needs of all incorporated or unincorporated areas of the county." S.C. Code Ann. § 44-96-80(J) (Supp. 1999). As the governing body of the county, Council certainly had the authority to consider Pressley's request.

In addition, Pressley asserts Council erred in not following the decision of the Zoning Board. He contends the Zoning Board is the only body with authority to approve a landfill. The County's Zoning Board has authority to determine land use issues and grant special exceptions. The Zoning Board was acting within this authority when it found that Pressley's prospective landfill complied "with all development standards of the Lancaster County Land Use Ordinance subject to a C&D landfill." However, compliance with the land use ordinance is not equivalent to compliance with the Catawba Regional Solid Waste Management Plan or state statutes. As stated above, Council has the responsibility and authority to provide for the operation of solid waste management facilities. S.C. Code Ann. § 44-96-80 (Supp. 1999). Therefore, Council was not bound by the Zoning Board's decision.

2. The Petition for a Writ of Mandamus

Pressley argues the trial court erred in denying his petition for a writ of mandamus. We disagree.

In order to obtain a writ of mandamus requiring the performance of an act, the applicant must show (1) a duty of the opposing party to perform the act, (2) the ministerial nature of the act, (3) the applicant's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy. Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 519 S.E.2d 567 (1999). If the duty to perform the act is doubtful, the responsibility is not imperative and the applicant will be left to other remedies. Where the duty is not clearly and directly prescribed, the writ will not lie. Id.

Pressley asserts the only discretionary action regarding the landfill was made by the Zoning Board. As stated above, however, the Zoning Board's decision was not determinative of Pressley's entitlement to a LOC. Council acted within its discretion in determining that Pressley's proposed landfill was not consistent with its local and/or regional plans. In addition, Pressley's remedy for the alleged wrongful denial was to seek judicial review of Council's decision. Accordingly, we find the trial court did not err in denying the petition for a writ of mandamus.

3. The Commerce Clause

Pressley argues the trial court erred in concluding Council did not discriminate against North Carolina waste producers in violation of the Commerce Clause of the United States Constitution. We disagree. The Commerce Clause limits the authority of the states to discriminate against interstate commerce. New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988). "The critical commerce clause inquiry is whether the practical effect of the regulation is to control conduct beyond boundaries of the state." United Techs. v. South Carolina Second Injury Fund, 318 S.C. 213, 218, 456 S.E.2d 901, 904 (1995)(quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 109 (1989)).

Pressley estimated that at least 60 percent of the waste he handled would come from North Carolina. At the June 2, 1997 meeting, a Council member "pointed out that during the discussion [of Pressley's request at the previous meeting], 5 out of 7 members thought that most of the debris would be coming from North Carolina."

The trial court concluded Pressley's commerce clause argument was irrelevant because Pressley did not argue the Solid Waste Policy and Management Act was unconstitutional. Pressley again raised the issue in a Rule 59(e), SCRCP, motion. The trial court summarily denied the motion.[4]

Pressley admits he does not challenge the constitutionality of the Act. Rather, he argues Council's denial of his request for a LOC was unconstitutional based on Council's improper motive; ie., Council did not want to issue a permit to a landfill owner that would accept the majority of its waste from North Carolina.

A governmental body's decision on the use of land is a legislative function. Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1987). Judicial inquiry into legislative motivation is to be avoided. South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir. 1989). "Such inquiries endanger the separation of powers doctrine, representing a substantial judicial 'intrusion into the workings of other branches of government.'" Id. at 1257 (quoting Village

[4] See Coward Hund Constr. Co., Inc. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999)(citing James F. Flanagan, South Carolina Civil Procedure 475 (2d ed. 1996) for the proposition that "[o]nce the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.").

of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 n.18, (1977)).

The Act prohibits consideration of solid waste from jurisdictions outside the plan area in determining need. S.C. Code Ann. § 44-96-290(E)(Supp. 1999). Council unquestionably considered Lancaster County's needs in denying Pressley's request. Thus, Council followed the dictates of the Act when making its decision. In light of Pressley's failure to challenge the constitutionality of the Act, we affirm the trial court's ruling that Pressley failed to prove a violation of the Commerce Clause arising from Council's underlying motives.

4. Exhaustion of Administrative Remedies

Pressley argues the trial court erred in holding he failed to exhaust his administrative remedies. We agree.

The trial court held Pressley had not exhausted his administrative remedies because DHEC had not ruled on his permit application and Pressley had not pursued a final ruling from DHEC. However, when Council refused to issue a LOC, the effect of DHEC's policy of delegating authority was to deny a request for a permit without further DHEC consideration. DHEC's refusal to accept Pressley's application without the LOC was an effective ruling on his application. Accordingly, it is unnecessary for Pressley to seek administrative review of Council's action. Pressley was entitled to seek judicial review of Council's decision. Although we find the trial court erred in this issue, this error does not affect our decision on Pressley's other issues.

Accordingly, the decision of the trial court is

AFFIRMED AS MODIFIED.

CURETON, GOOLSBY and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Trevis Johnson,

Appellant.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 3275
Submitted December 11, 2000 - Filed January 2, 2001

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Robert E. Bogan, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for respondent.

PER CURIAM: A jury convicted Trevis Johnson of possession of crack cocaine. Because he had a prior conviction for distribution of crack cocaine, the trial court sentenced him to ten years imprisonment, suspended upon service of eight years and five years probation. Conditions of Johnson's probation included random urinalysis every sixty days during the first eleven months of probation,

no drug or alcohol use during probation, and completion of a drug rehabilitation program while on probation. Johnson timely moved to amend the sentence. The trial court denied Johnson's motion, and Johnson appeals. We reverse and remand.[1]

DISCUSSION

On appeal, Johnson argues that pursuant to S.C. Code Ann. § 44-53-375(D) (Supp. 1999) the court lacked the authority to suspend any part of his sentence and order a probationary term. We agree.

Section 44-53-375(D) provides in pertinent part:

> Except for a first offense, as provided in subsection (A) of this section [for possession or attempt to possess less than one gram of ice, crank, or crack cocaine], sentences for violation of the provisions of this section [for possession, distribution and manufacture of ice, crank, and crack cocaine] may not be suspended and probation may not be granted.

S.C. Code Ann. § 44-53-375(D) (emphasis added).

Johnson contends the plain language of this section mandates that an individual convicted under this statute for anything other than a first offense for possession or an attempt to possess less than one gram must serve the entire court-imposed sentence, with no part suspended nor probation granted. The trial court, however, apparently relying on its general authority to suspend sentences, suspended part of Johnson's sentence and ordered probation. See S.C. Code Ann. § 24-21-410 (Supp. 1999) (granting the court the authority to suspend imposition of sentence for probation except in death or life imprisonment cases).

Although under section 24-21-410 the trial court has the general authority to suspend sentences and impose probation, we have already addressed the relationship between this section and more specific statutory sections in similar circumstances. See State v. Taub, 336 S.C. 310, 519 S.E.2d 797 (Ct. App. 1999) (trafficking in cocaine); State v. Tisdale, 321 S.C. 153, 467 S.E.2d 270 (Ct. App. 1996) (driving under the influence). In both Taub and Tisdale, this court held that the provisions of a specific statute prevailed over the general application of

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

section 24-21-410. Taub, 336 S.C. at 316-17, 519 S.E.2d at 801; Tisdale, 321 S.C. at 157, 467 S.E.2d at 272. Adopting the analysis used in those decisions, we hold that the more specific provision of section 44-53-375(D) controls.

We now turn to the specific language of section 44-53-375(D). When interpreting a statute, our primary role is to ascertain the intent of the legislature. State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 671-72 (1993). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Id. at 512, 427 S.E.2d at 672. Moreover, words should be given their plain and ordinary meaning, and we should not look for or try to impose another meaning. State v. Smith, 330 S.C. 237, 240, 498 S.E.2d 648, 649-50 (Ct. App. 1998). Here, the plain language of the statute is clear and unambiguous: a term of imprisonment "may not be suspended and probation may not be granted." S.C. Code Ann. § 44-53-375(D).

We read State v. Clifton,[2] to be dispositive of the issue before us. In Clifton, the appellant was convicted of possession of cocaine and possession with intent to distribute crack cocaine. 302 S.C. at 432, 396 S.E.2d at 832. For the distribution charge, the trial court sentenced appellant to fifteen years imprisonment, as required by statute, even though the court indicated it would not have done so had S.C. Code Ann. § 44-53-375 (Supp. 1989), not disallowed a suspended sentence. Clifton, 302 S.C. at 436, 396 S.E.2d at 834. Although appellant argued the statute was ambiguous, this court found to the contrary. Id. Citing subsection (C),[3] which contained language identical to that of our current subsection (D), this court found the trial court correctly interpreted the statute to proscribe the suspension of any sentence except for a first offense when the amount is less than one gram. Clifton, 302 S.C. at 436, 396 S.E.2d at 834. Our understanding of this case leads us to conclude that section 44-53-375(D) disallows a split sentence as the court imposed here.

Accordingly, we reverse the trial court and remand for re-sentencing consistent with this opinion.

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[2] 302 S.C. 431, 396 S.E.2d 831 (Ct. App. 1990), cert. dismissed, 305 S.C. 85, 406 S.E.2d 337 (1991), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

[3] The pertinent language provides: "sentences for violation of the provisions of this section may not be suspended and probation may not be granted." S.C. Code Ann. § 44-53-375(C) (Supp. 1989).

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, ... Appellant,

v.

Florence Robinson Evans, ... Respondent.

Appeal From Chesterfield County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3276
Heard October 10, 2000 - Filed January 2, 2001

REVERSED AND REMANDED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney Generals Donald J. Zelenka and David K. Avant, and Assistant Attorney General S. Creighton Waters, all of Columbia, for appellant.

Senior Assistant Appellate Defender Wanda H. Haile, of SC Office of Appellate Defense, of Columbia, for respondent.

CURETON, J.: A Chesterfield County grand jury indicted Florence Robinson Evans for the murder of her three children.[1] At a pretrial hearing, the trial court suppressed Evans's oral and written confessions. The State appeals.

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[1] Throughout the record, the defendant is referred to as both Florence Evans and Florence Robinson. For the sake of clarity, Evans is used exclusively in this opinion.

We reverse and remand.

FACTS

On the morning of March 4, 1994, a fire destroyed the Pageland trailer-home of Evans and killed her three small children. Evans survived as she was visiting her sister's nearby home at the time of the fire. Later that day, arson investigator Terry Alexander of the South Carolina Law Enforcement Division (SLED) obtained Evans's permission to search the burned-out trailer, but she refused to give Alexander a written statement. An initial test of the site revealed the presence of a flammable substance in the debris. Samples were collected for later analysis at SLED's laboratory to determine the type of accelerant present at the commencement of the fire.

Agent Alexander did not return to Pageland until after the children's funerals. Around lunchtime on March 14, 1994, he attempted to contact Evans at the home of her cousin where she had been staying since the fire, but Evans was not there. He left word with an occupant of the house to ask Evans to "come to the Pageland Police Department for the purposes [sic] of talking to me about the fire." Between 3:00 and 4:00 p.m, Evans's cousin, Inez Robinson, drove Evans to Pageland's police station.[2] Alexander and his supervisor, SLED Lieutenant Doug Ross, escorted Evans back to a detective's office in the station which they had borrowed to conduct the interview. Robinson and several other family members who had accompanied Evans to the station were left in the station's waiting room. Robinson asked if she could accompany Evans because "she's quiet," and Robinson wanted to be with her, but the officers refused.

Once inside the detective's small office, Evans agreed to talk with Agent Alexander and Lt. Ross. She told them that on the morning of the fire, she arose just before 9:00 a.m., lit a kerosene heater, then left her children asleep in the trailer while she went next door to visit her sister. Minutes after her arrival, Evans's sister said she smelled smoke, so Evans looked out the window and saw her trailer in flames. Evans testified that she rushed back to the trailer and attempted to gain entry, but was barred by the flames. When asked what caused the fire, Evans opined that it could have been caused by either dogs under the trailer, her sister's son playing with matches, or a faulty electrical

[2] Inez Robinson is married to Evans's first cousin; she raised Evans and her siblings after their mother died. At the hearing, Robinson testified she took Evans to the police station after Evans told her "the law" was looking for her.

outlet. During the interview, Alexander took notes on a "Voluntary Statement" form, but he neither asked Evans to read the form nor advised her of the Miranda[3] rights contained thereon.

Agent Alexander testified that although Evans was "very cooperative" during the interview, she was also upset and sobbing. At times, Evans would speak so softly that Alexander could barely understand her. She would also clutch the agent's hands and ask him for help. Although Alexander repeatedly asked her what type of help she required, Evans never responded with a specific request. Alexander testified that he felt the interview was very unproductive and tried to end it on several occasions, but claimed that Evans would respond with tears and repeat her request for help.

Lieutenant Ross confirmed Alexander's account of the interview. He testified that "the interview seemed to be -- you know -- basically no help at all" and "was a very long drawn out event" which lasted two or three hours. Ross also claims to have been unsuccessful in ending the interview.

After more than an hour of questioning, the two agents stepped into the hall outside the interview room to confer about Evans's statement. Ross testified that he suggested to agent Jennifer Edwards of SLED's child fatality unit to "go in and talk to [Evans], see if [Edwards] could – you know – get anything different than we already had." Edwards testified she spent "approximately 45 minutes to an hour" alone with Evans trying to comfort her. Edwards maintains she was just "having a conversation" with Evans the whole time and "was not on a fact-finding mission." On at least one occasion, Edwards escorted Evans to the bathroom and "stood outside the door" because, according to her, she thought Evans may try to harm herself. When they returned to the interview room, Evans continued to plead for help. Edwards responded: "Florence, I don't know what kind of help you need until you tell me." Evans then whispered, "I dropped a lit piece of paper on the floor. . . .I walked next door and waited until somebody saw the fire." Edwards immediately summoned Ross and asked Evans to repeat what she had said. Evans complied. Ross called in Alexander and Evans again repeated the statement. As a result, Alexander added another paragraph to his notes on the Voluntary Statement form:

> I dropped a lit piece of paper on the floor. I rolled it up

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

> and lit it. It was writing paper. I dropped the paper on a rug. The rug caught on fire and I went out the front door. I went next door to my sisters [sic] house and just waited. I waited about two hours until someone saw the fire. I got some kerosene in a cup and poured it on the rug. The fire got bigger and as I left it was burning a lot [sic]. I was hurting inside about seeing people do people wrong. Please get me some help. Please get me some help. I lit the fire with a match. I don't remember who found the fire. I got the kerosene out of the blue jug and put it back on the porch.

The interview ended at 6:01 p.m. Alexander read his notes back to Evans and she subsequently signed and initialed the "Voluntary Statement." As a result, the officers immediately placed her under arrest.

A Chesterfield County grand jury indicted Evans on three counts of murder on April 13, 1994. On May 1-4, 1998, the trial court held a Jackson v. Denno[4] hearing to determine the admissibility of Evans's oral and written statements of March 14, 1994. During that hearing, agents Alexander, Edwards and Ross testified to the aforementioned version of events. Evans also testified and offered a slightly different description of the interview. Although she acknowledged asking for help and signing a paper during the interview, she claimed she thought her signature was required to "get me some help." She also claimed to have repeatedly asked to speak with her cousin, Inez Robinson, during the interview, but the agents prevented her from doing so.

Robinson also testified. She described how she had attempted to speak with Evans during the interview, but was restricted to the station's waiting room until after Evans's arrest. Robinson testified that "[w]hen [Evans] saw me, she just run [sic] to me and held me. She said she told them she wanted to get to me. . . . She kept crying out to see me. They would not let her see me." Additionally, Robinson claimed that Evans told her the officers "pushed her to sign some papers."

The trial court suppressed Evans's oral and written statements to the police. This appeal followed.

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[4] Jackson v. Denno, 378 U.S. 368 (1964).

LAW/ANALYSIS

A criminal defendant is entitled to an independent evidentiary hearing outside the presence of the jury to challenge the introduction of evidence "that was allegedly obtained by conduct violative of the defendant's constitutional rights." State v. Patton, 322 S.C. 408, 410, 472 S.E.2d 245, 247 (1996) (quoting State v. Blassingame, 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978) (citing Jackson v. Denno, 378 U.S. 368 (1964))); see also State v. Patton, 322 S.C. 408, 411, 472 S.E.2d 245, 247 (1996) (requiring a criminal defendant to "articulate specific factual and legal grounds to support his contention that evidence was obtained by conduct violative of his constitutional rights."). Where the State seeks to introduce a defendant's statement into evidence, the touchstone of the evidentiary hearing is whether the statement was voluntarily produced. State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988). A trial judge determines the voluntariness of a defendant's statement by looking to the totality of the circumstances surrounding its production including the defendant's background, experience, and conduct. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989).

Custody is not a prerequisite of a voluntariness inquiry, but it is a factor to be considered. Franklin, 299 S.C. 133, 382 S.E.2d 911; State v. Creech, 314 S.C. 76, 441 S.E.2d 635 (Ct. App. 1994). If the statement occurred while the defendant was in custody, then in addition to a voluntariness inquiry, a court must ensure the police complied with the dictates of Miranda and its progeny. Id.

"Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting Miranda, 384 U.S. 436, 444 (1966)). Unlike the subjective nature of a voluntariness inquiry, custody is determined by an objective analysis of "whether a reasonable man in the suspect's position would have understood himself to be in custody." Id. at 128, 489 S.E.2d at 621.

In this case, the trial court determined that Evans was entitled to Miranda warnings because she experienced "the functional equivalent of interrogation and . . . custody." Although the court articulated the appropriate objective standard of custody, it went on to comment that "[y]ou have to also take into account that she was at the time in her mid-20s, mildly retarded, no evidence of any record so, therefore, no real evidence of exposure." It is unclear from the record whether the court addressed its comment to the objective custody

determination or the subjective voluntariness analysis.[5]

It is not the province of a reviewing court to weigh competing testimony and arrive at a custody determination. That is left to the trial court. State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994). Our review of the trial court's custody ruling "is limited to a determination of whether the ruling by the trial court is supported by the testimony." State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct. App. 1996), modified on other grounds, 327 S.C. 121, 489 S.E.2d 617 (1997) (citing Primus, 312 S.C. 256, 440 S.E.2d 128). We are unable to discern from the appellate record whether the trial court's comments on Evans's personal characteristics were part of its custody determination or merely a reminder to defense counsel that the court had yet to determine the voluntariness of Evans's statement. We therefore reverse and remand this case to the trial court for entry of a more definite order setting forth the factual findings which support its custody determination.

REVERSED AND REMANDED.

HUFF and HOWARD, JJ., concur.

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[5] Although the trial court did not determine whether Evans's statement was the product of coercion, it cautioned the defense that it would revisit the issue of voluntariness if Evans testified at trial and the State sought to impeach her testimony with the excluded statement.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tom Drake Kisling,

Respondent.

v.

Donna Joan Allison,

Appellant,

and

David Allison and Yvette Kisling,

Third Party Defendants.

Appeal From Greenville County
James F. Fraley, Jr., Family Court Judge

Opinion No. 3277
Heard December 12, 2000 - Filed January 2, 2001

AFFIRMED

Adam Fisher, Jr., of The Fisher Law Firm, of Greenville, for appellant.

Timothy E. Madden, of Wilkins & Madden, of Greenville, for respondent.

ANDERSON, J.: Donna Joan Allison ("Mother") appeals an order of the Family Court transferring custody of her daughter, Jessica Lynn Kisling,[1] to Tom Drake Kisling ("Father"). We affirm.

FACTS/PROCEDURAL BACKGROUND

Mother and Father were divorced in May 1994. Pursuant to an earlier Family Court order and written agreement of the parties, Mother was granted custody of Jessica.

In April 1997, Father filed an action to modify visitation and child support. Father additionally requested the appointment of a guardian ad litem for the benefit of Jessica. In June 1998, after the guardian's investigation, Father amended his complaint to request custody of Jessica, alleging a substantial and material change in circumstances.

STANDARD OF REVIEW

On appeal from the Family Court, this Court has jurisdiction to find the facts in accordance with its view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). This tribunal, however, is not required to disregard the Family Court's findings. Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Neither are we mandated to ignore the fact the Family Court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997). Concomitantly, because the appellate court lacks the opportunity for direct observation of witnesses, it should give great deference to the Family Court's findings where matters of credibility are involved. Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996). This is especially true in cases involving the welfare and best interests of children. Id.; see also Cook v. Cobb, 271 S.C. 136, 245 S.E.2d 612 (1978) (the welfare and best interests of children are the primary, paramount, and controlling considerations of the court in all child custody controversies).

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[1] Jessica was born December 12, 1991.

ISSUE

Did the Family Court err in finding changed circumstances existed that warranted the transfer of custody to Father?

LAW/ANALYSIS

CUSTODY

In South Carolina, in custody matters, the father and mother are in parity as to entitlement to the custody of a child. When analyzing the right to custody as between a father and mother, equanimity is mandated. We place our approbation upon the rule that in South Carolina, there is no preference given to the father or mother in regard to the custody of the child. The parents stand in perfect equipoise as the custody analysis begins.

Mother argues the Family Court abused its discretion in granting Father custody of the child. She maintains there was no substantial change of circumstances materially affecting Jessica's welfare. We disagree.

Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000), articulates, with specificity, the general rules governing change of custody cases:

> In all child custody controversies, the controlling considerations are the child's welfare and best interests. In reaching a determination as to custody, the family court should consider how the custody decision will impact all areas of the child's life, including physical, psychological, spiritual, educational, familial, emotional, and recreational aspects. Additionally, the court must assess each party's character, fitness, and attitude as they impact the child. There exist no hard and fast rules for determining when to change custody and the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed.
>
> In order for a court to grant a change of custody based on changed circumstances, the party seeking the change must meet the burden of showing changed circumstances occurring subsequent to the entry of the

> order in question. A change in circumstances justifying a change in the custody of a child simply means that sufficient facts have been shown to warrant the conclusion that the best interests of the child will be served by the change. The change of circumstance relied on for a change of custody must be such as would substantially affect the interest and the welfare of the child, not merely the parties, their wishes or convenience. The circumstances warranting a change in custody must occur after the date of the original custody order. Custody decisions are matters left largely to the discretion of the trial court. Furthermore, the appellate court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the trial court.

Id. at ___, 536 S.E.2d at 430 (citations and quotation marks omitted).

Mother and Father have both remarried.[2] While the parents' new relationships have impacted this case, the circumstances warranting a change of custody began soon after Mother and Father divorced.

I. Mother's Circumstances

A. Mother's Judgment

Mother has exercised poor judgment regarding Jessica's best interests and welfare. Shortly after her divorce from Father, Mother and Jessica resided with a man named Chad Brannon. Mother was not married to Brannon; however, she engaged in a sexual relationship with him while Jessica was in the home. Mother testified she terminated her relationship with Brannon because she felt "guilty" and knew "it was not the right thing to be doing."

Nevertheless, Mother again employed a lack of good judgment when she and Jessica moved in with Step-Father before Mother married him. Mother testified she thought she was putting Jessica first when deciding to live with Step-Father. When asked at the custody hearing whether she put Jessica first when she engaged in sexual relations while her daughter was in the next bedroom, Mother stated: "Well, I didn't think about Jessica when I thought about sex. So, I feel like I always put Jessica first,

[2] David Allison ("Step-Father") and Yvette Kisling ("Step-Mother") were named as third party defendants in this action.

yes."

Mother's imprudent judgment has extended into Jessica's school attendance. Jessica has had excessive absences and tardies while in Mother's care. Many of these absences and tardies have been un-excused. Mother explained one absence to Father by stating Jessica stayed home from school because she had not done her homework. At trial, Mother testified some of the other absences and tardies were caused by "some counseling sessions that interfered with school."

B. Mother's Home Life

Mother's relationship with Step-Father is not stable. They have separated twice — once before they married and once after. During the first separation, Step-Father attempted to commit suicide. Step-Father has "flashes of anger and … uses inappropriate words and actions around Jessica." Mother has stated she is not comfortable leaving Jessica alone with Step-Father because of his temper, inability to get along with Jessica, and lack of parenting skills. Mother and Step-Father have had many arguments, mostly about Jessica. On one occasion, their argument became violent — Mother slapped Step-Father and the police were summoned. Step-Father admitted Mother is "emotional," "moody," and "high-strung." He additionally testified she is a loud talker and has a quick temper.

In addition to Jessica, Mother and Step-Father have two young daughters. The family resides in a rented three-bedroom home. Living space is limited — Jessica and Kendall, her oldest half-sister, share a bedroom. At the time of the custody hearing, it was the fifth home Mother and Jessica had lived in since 1993.

A child's regular attendance in a house of worship arguably suggests the child lives in a home where moral development is fostered. Regarding the spiritual climate in Mother's home, Mother and Step-Father are members of a church; however, Step-Father testified the family's attendance "varies."

C. Mother's Attitude Toward Father and Step-Mother

Mother began exhibiting hostility toward Father when he and Step-Mother began dating seriously and got married. Mother's own expert witness, Dr. Joanne

Armstrong,[3] testified Mother is consumed with anger toward Father and Step-Mother. Mother does not handle visitation exchanges well. She has quarreled with Father in Jessica's presence, where she called him a liar, cursed at him, and threatened to sue him for sexual harassment.

Mother's problems with Step-Mother have also been extreme. Mother admitted feeling intimidated by Step-Mother's relationship with Jessica. Mother insisted Step-Mother not engage in activities with Jessica such as cooking, fingernail painting, and bathing. She once accused Step-Mother of being evil, deceitful, and trying to take Jessica away from her. Mother has threatened Step-Mother and once issued a trespass notice against her. Based upon this Court's review of the record, Step-Mother does not appear to be the source of these difficulties. Mother says she is no longer shaken by Step-Mother's presence and influence, but admittedly does nothing to encourage Jessica's relationship with her.

Additionally, there is evidence that Mother has discouraged Jessica from visiting Father. In some instances, Mother emotionally manipulated Jessica by allowing Kendall to call Jessica at Father's to tell her she misses her. Mother has attempted to limit Father and Step-Mother's access to Jessica at school functions, publically insisting Jessica spend time with her rather than them. These episodes clearly show Mother is daunted not only by Step-Mother's relationship with Jessica, but by Father's relationship with her as well.

D. Affect on Jessica

Although by all accounts Jessica is a bright child with good grades, the tension between Mother's and Father's households has affected her. When Mother is stressed, Jessica is stressed as well. Jessica is very sensitive in reacting to problems between her parents. She has suffered nightmares, stomachaches, and headaches following their disagreements. Father testified Jessica has become upset and depressed after she has received phone calls from Mother or Kendall. During a counseling session, Jessica described to Dr. Armstrong fun things she liked to do at each home, but asked the counselor not to tell the other parent. Dr. Armstrong surmised that Jessica is "very protective of her parents' feelings" and did not want to hurt them.

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[3] Dr. Armstrong is a psychologist who counseled Jessica, Mother, and Father pursuant to the court appointed psychologist's recommendation and a consent order filed on September 23, 1998. Dr. Armstrong testified she did not believe there was a "substantive reason" for a change of custody.

Dr. Greg Horn, a psychologist appointed by the court to perform psychological evaluations on Jessica and her parental figures, reported Jessica, a naturally anxious child, has developed "separation" problems in being apart from Mother. These difficulties are primarily the result of Mother's behavior and the messages Mother sends concerning the distress she has in being away from Jessica. Mother has promoted this separation anxiety. Mother described visitation exchanges where both she and Jessica were crying. Jessica feels the need to take care of Mother and worries about her while visiting with Father.

II. Father's Circumstances

A. Father's Judgment

Father has exercised better judgment concerning Jessica's best interests. Approximately six months after the divorce, Father became acquainted with Step-Mother at church and began dating. Unlike Mother, he chose not to expose Jessica to his new relationship. Step-Mother recalled:

> He told me [about Jessica] the very first night we talked. He said that he had been in a divorcé Sunday school and said that I have a daughter and she's three years old .... And as we started dating he said, you know, she comes first in my life and she's the most important thing to me. So I don't - - I've never introduced her to anyone and I'm not going to introduce her to you.

Jessica and Step-Mother met only after Father and Step-Mother became serious, which was approximately six months into their relationship.

B. Father's Home Life

Unlike Mother and Step-Father, Father and Step-Mother have a good and stable relationship. They have never separated or experienced marital difficulties.

In the Mother's home, Jessica shares a room with one of her half-sisters. She has her own bedroom in Father and Step-Mother's new home. Father and Step-Mother's schedules permit them to spend much quality time with Jessica. Father and Step-Mother are active members and leaders of their church. Father is a deacon in the church. Step-Mother teaches Jessica's Sunday School class. They stimulate Jessica's

spiritual development by encouraging daily Bible reading and devotionals.

Jessica and Step-Mother have a good relationship. Step-Mother testified she has no intention of trying to take over Mother's role. Step-Mother is good with children and enjoys reading with and telling stories to Jessica.

C. Father's Attitude Toward Mother and Step-Father

Father encourages Jessica's relationship with Mother and Step-Father. Father contended at trial he does not disparage Mother or Step-Father to Jessica or in her presence. He professed he wants Jessica to have a loving and mature relationship with Mother and that he does not desire to impede that relationship.

III. Guardian ad Litem's Recommendations

Although Dr. Armstrong stated she did not see a need for a change of custody, the guardian ad litem appointed to represent Jessica's best interests recommended the court transfer custody of Jessica to Father. The guardian averred that in making recommendations, he looks at what is in the child's best long term interests. He concluded Father has the more stable home and marriage. By contrast, he saw Mother as volatile. She treated visitations as crises and thought arguments in front of Jessica were "no big deal."

A guardian ad litem is a representative of the court appointed to assist it in properly protecting the interests and welfare of an incompetent person. Shainwald v. Shainwald, 302 S.C. 453, 395 S.E.2d 441 (Ct. App. 1990). The role of the guardian in making custody recommendations is to aid, not direct, the court. Dodge v. Dodge, 332 S.C. 401, 505 S.E.2d 344 (Ct. App. 1998). The custody decision lies ultimately with the Family Court judge. Clear v. Clear, 331 S.C. 186, 500 S.E.2d 790 (Ct. App. 1998).

The court accepted the guardian's recommendations and agreed with them. However, the Family Court made its own assessment of what was in Jessica's best interest.

CONCLUSION

While in her custody, Mother has exposed Jessica to inappropriate moral surroundings and an unstable home environment. Jessica's absences and tardies suggest

Mother has not prioritized the child's life properly. Jessica has been permitted to experience several negative interactions between Mother and Father and Step-Mother. Mother has additionally thwarted Jessica's independence and development, discouraging her from building relationships with Father and Step-Mother.

By contrast, Father has not placed Jessica in any immoral settings. He put Jessica's needs before his own when he began his relationship with Step-Mother. He offers Jessica a more stable environment than Mother. Father is more capable than Mother of acting in Jessica's best interest. He promotes Jessica's independence, while encouraging her relationship with Mother and Step-Father. Finally, Father and Step-Mother have taken an active role in Jessica's spiritual development.

Father has demonstrated sufficient facts to warrant the Family Court's conclusion that Jessica's best interests will be served by the change of custody. The Family Court did not abuse its discretion. Accordingly, the Family Court's order, awarding Father custody is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Q. Brunson, Jr., Employee,

Respondent,

v.

Wal-Mart Stores, Inc., Employer, and The Insurance Company of the State of Pennsylvania, Carrier,

Appellants.

Appeal From Sumter County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3278
Heard November 7, 2000 - Filed January 8, 2001

REVERSED AND REMANDED

David M. Yokel and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for appellants.

John C. Land, III and William Ceth Land, both of Land, Parker & Reaves, of Manning, for respondent.

STILWELL, J.: In this workers' compensation action, Wal-Mart Stores, Inc. appeals the order of the circuit court affirming the full commission's calculation of John Brunson's weekly compensation rate. We reverse and remand.

BACKGROUND

This action arises out of an admitted injury by accident Brunson sustained on December 6, 1997, while employed by Wal-Mart. Brunson was working in Wal-Mart's maintenance room when a hot water tank exploded, causing first to third degree burns to over twenty-seven percent of his body. Brunson also suffered visible disfigurement as well as damage to his lungs.

At the time of the accident, Brunson was employed by Osteen Publishing Co. in addition to his employment with Wal-Mart.[1] Brunson only planned to work at both Wal-Mart and Osteen for a brief period of time in order to make extra money over the holiday season. A senior at the University of South Carolina, Brunson intended to return to school after the holidays and to then work solely for Osteen. At the time of his injury, Brunson had already given notice of his resignation to Wal-Mart.

Wal-Mart admitted Brunson suffered compensable injuries. The single commissioner determined Brunson's average weekly wage to be $571.28, resulting in a compensation rate of $381.04. The single commissioner arrived at this amount by adding Brunson's wages from Wal-Mart ($371.28 per week) to one-half the wage he found Brunson would earn at Osteen ($200 per week).

Wal-Mart appealed this decision to the full commission, contending the single commissioner erred in adding half of Brunson's weekly Osteen salary to his average weekly wage at Wal-Mart. The full commission affirmed and

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[1] According to the single commissioner's order, Brunson contends that he began working at Osteen on December 4, 1997, two days before the accident at Wal-Mart on December 6, 1997.

adopted in toto the single commissioner's order. The circuit court affirmed on appeal.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The reviewing court may not substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact, but may reverse if the decision is affected by an error of law. See S.C. Code Ann. § 1-23-380(A)(6) (Supp. 1999); Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 516, 526 S.E.2d 725, 728 (Ct. App. 2000). "A reviewing court should affirm a decision by the Full Commission unless it is clearly erroneous in view of the substantial evidence on the whole record." Gray v. Club Group, Ltd., 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct. App. 2000) (relying on Lark, 276 S.C. 130, 276 S.E.2d 304). Substantial evidence is evidence which, viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached. Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994).

DISCUSSION

Wal-Mart argues the circuit court erred in affirming the full commission's decision that Brunson's temporary dual employment at Wal-Mart and Osteen was an "exceptional reason" justifying deviation from the standard method of calculating a claimant's average weekly wage under S.C. Code Ann. § 42-1-40 (1985 & Supp. 1999). Wal-Mart also contends that even if such deviation from the standard calculation was warranted under section 42-1-40, the full commission's alternative calculation is unfair to Wal-Mart since Brunson did not intend to continue working both jobs after the holidays.

The computation of a claimant's "average weekly wages" is statutorily determined by section 42-1-40. This section provides in pertinent part:

> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury,
>
> . . . .
>
> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. Code Ann. § 42-1-40 (emphasis added).

Our appellate courts have upheld the full commission's decision to deviate from the statutory method based on the "exceptional reasons" language in the latter part of the statute, including the circumstance of an employee's dual employment. See Boles v. Una Water Dist., 291 S.C. 282, 284, 353 S.E.2d 286, 287 (1987) ("Generally, . . . when an employee works at concurrent jobs, the employee's wages from his multiple jobs may be combined to compute his average weekly wages."); Foreman v. Jackson Minit Mkts., Inc., 265 S.C. 164, 217 S.E.2d 214 (1975) (upholding the full commission's decision for exceptional reasons to combine an employee's wages earned concurrently from two separate employers in calculating the average weekly wage under the statutory predecessor to section 42-1-40); McCummings v. Anderson Theater Co., 225 S.C. 187, 81 S.E.2d 348 (1954) (affirming the commission's deviation due to the exceptional reason of dual employment under a statutory predecessor to section 42-1-40, but limiting its decision to the facts of the case); Booth v. Midland Trane Heating & Air Cond., 298 S.C. 251, 379 S.E.2d 730 (Ct. App. 1989) (finding an employee's substantial salary increase over a short period of time was a sufficient exceptional reason to justify calculating the average weekly wage at the higher wage rate the employee was earning at the time he was injured).

Wal-Mart contends Brunson was not really a dual employee because he intended to work only for Osteen after the holiday season, and that the two-day overlap in employment, coupled with Brunson's stated intention not to return to Wal-Mart, is not an exceptional reason sufficient to justify a deviation from the standard statutory scheme. In the face of this argument, the full commission adopted the single commissioner's reasoning that Brunson's employment at both Wal-Mart and Osteen was an exceptional circumstance requiring deviation from the standard method of calculating a claimant's average weekly wage pursuant to section 42-1-40. We find the commission was justified in so ruling.

However, we agree with Wal-Mart the full commission erred as a matter of law in the method utilized in computing Brunson's average weekly wage. Section 42-1-40 "obviously takes into consideration the fact that unusual circumstances relative to employment may occur. An elasticity or flexibility is permitted with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978) (emphasis added) (reversing the lower court's calculation of claimant's average weekly wage as a full-time, year-round employee "as grossly unfair to the employer" since it would require the employer to pay almost twice what the employee, who only worked three to four months out of the year, actually earned). See § 42-1-40 ("When for exceptional reasons the [standard calculation] would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to . . . ." (emphasis added)).

Obviously, the amount which Brunson would have earned during the holiday season while he was employed with both Wal-Mart and Osteen would have been greater than his average weekly wage from Wal-Mart alone. However, it is grossly unfair to Wal-Mart to require payments based on Brunson's dual employment status since he did not intend to work both jobs after the holidays. Therefore, we remand this case to the full commission for the purpose of making a factual finding as to how long Brunson would have worked both jobs during the holidays. Upon making this factual determination, the full commission should reconsider the calculation of Brunson's average weekly wage in light of the exceptional reason of his temporary dual employment solely

over the holiday season. We believe this method of calculating Brunson's average weekly wage and compensation rate will bring about a more fair result for both Brunson and Wal-Mart.

Additionally, Wal-Mart contends the circuit court erred in failing to remand this case to the full commission for sufficient findings of fact. Because the full commission adopted the order of the single commissioner in toto, Wal-Mart asserts the full commission failed to make a concise and explicit statement of the underlying facts supporting its findings under Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (reversing the full commission for making only conclusory findings of fact instead of providing a specific and definite statement of the factual findings underlying its decision). This argument is not preserved for our review as Wal-Mart did not raise this issue to the circuit court. Rodney v. Michelin Tire Corp., 320 S.C. 515, 517, 466 S.E.2d 357, 358 (1996) ("Arguments not raised to the workers' compensation commission or to the circuit court are not preserved for appeal.").

For the foregoing reasons, this case is reversed and remanded to the circuit court for the purpose of remanding to the full commission to amend its award in keeping with the views expressed herein.

REVERSED AND REMANDED.

HEARN, C.J., concurs.

ANDERSON, J., dissents in a separate opinion.

ANDERSON, J. (dissenting): I respectfully dissent. The result reached by the majority imposes an improper judicial limitation upon S.C. Code Ann. § 42-1-40 (1985 & Supp. 1999) and the Full Commission. This decision threatens the right and duty of the Commission to factually analyze and apply the statute.

The procedural posture of this case reveals a decision by the Single Commissioner, affirmed in toto by the Full Commission, and validated by the Circuit Court. The only issue in this case is the interpretation and application of S.C. Code Ann. § 42-1-40 (1985 & Supp. 1999):

> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . . .
>
> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. (Emphasis added).

This statute squarely places upon the Commission the authority to determine if "exceptional circumstances" exist justifying a deviation.

The cases of Boles v. Una Water Dist., 291 S.C. 282, 353 S.E.2d 286 (1987); Foreman v. Jackson Minit Mkts., Inc., 265 S.C. 164, 217 S.E.2d 214 (1975); McCummings v. Anderson Theater Co., 225 S.C. 187, 81 S.E.2d 348 (1954); and Booth v. Midland Trane Heating & Air Cond., 298 S.C. 251, 379 S.E.2d 730 (Ct. App. 1989), are cited by the majority. Consistently, the holding in all the cases is that the Full Commission's factual determination of deviation due to "exceptional circumstances" is a matter left to the sound discretion of the Commission under the statute.

The majority invades the province of the Workers' Compensation Commission by injecting an appellate court formula. The formula devised by the majority eviscerates the language of the statute. I disagree with the mathematical recipe approved by the majority. There is no fairness in the judicial windfall bestowed upon Wal-Mart. The majority emphasizes the temporal status of the Osteen employment.

Such reliance skews the mathematical calculation and renders the statute nonefficacious.

Here, the Commission has exercised sound discretion in deciding the factual issue of deviation. I believe it is error to conclude as a matter of law that the Commission incorrectly computed the employee's wages. I would affirm the order of the Circuit Court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Claude Roy Dodd,

Respondent,

v.

Bruce A. Berlinsky, As Trustee for Kristen Leigh Cook Kerrison,

Appellant.

Appeal From Charleston County
Roger M. Young, Master-in-Equity

Opinion No. 3279
Heard December 12, 2000 - Filed January 8, 2001

REVERSED

Harold A. Oberman, of Oberman & Oberman; and Barry I. Baker, both of Charleston, for appellant.

Mendel J. Davis, of Mt. Pleasant, for respondent.

STILWELL, J.: Claude Roy Dodd brought an action to terminate a trust he established in favor of Kristen Leigh Cook Kerrison in settlement of a civil

lawsuit. The trial court terminated the trust and ordered the trustee to reconvey to Dodd the real property which was a portion of the trust's corpus. The trustee, Bruce A. Berlinsky, appeals. We reverse.

BACKGROUND

In March 1984, Dodd was indicted for assault with intent to commit criminal sexual conduct in the first degree, criminal sexual conduct with a minor in the first degree, and lewd act on a minor.[1] Kerrison was the alleged victim. On October 17, 1984, Dodd entered into an agreement with Kerrison's father, who was acting on behalf of himself and as Kerrison's guardian ad litem, to settle their civil claims.

As part of the settlement, Dodd created a trust in favor of Kerrison. Dodd conveyed three tracts of improved real property to the trust, retaining for himself a life estate. He also paid a total of $12,000 into the trust in three installments. In addition, he was required to pay $200 a month into the trust.

The trust was to terminate upon Dodd's death if Kerrison was at least twenty-five years old at the time. If Kerrison had not yet turned twenty-five at the time of Dodd's death, the property and funds were to remain in trust until she reached age twenty-five. The trust agreement included a spendthrift provision, providing "[t]he interest of any beneficiary in the corpus or income of this trust shall not be subject to assignment, alienation, pledge, attachment, or claims of creditors, and may not otherwise be voluntarily or involuntarily alienated or encumbered by any such beneficiary." In addition, the trust agreement stated, "This trust is irrevocable, and neither the Grantor nor any other person shall have the right to alter, amend, revoke, or terminate it." The circuit court issued an order authorizing and approving the settlement.

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[1] Dodd subsequently pled guilty to lewd act on a minor, receiving an eight year sentence suspended upon four years of probation.

On May 17, 1993, Kerrison signed an affidavit denying Dodd ever fondled her or attempted to have sex with her. She asserted her desire for Dodd to stop paying into the trust and for his property to be returned to him. Kerrison, who was nineteen years old when she executed the affidavit, stated she signed the affidavit without any threats or promises.

After Kerrison executed the affidavit, Dodd stopped making monthly payments into the trust. At a hearing held pursuant to a rule to show cause brought by Berlinsky, Kerrison stated under oath that the statements she made in her affidavit were not true. Kerrison explained she had made the statements in the affidavit because Dodd was more kind to her than anyone, including her family, and she hoped Dodd would respond by providing her with gifts, money, and a car as he had done in the past.

The master in equity decided a ruling on the matter based on a motion hearing was inappropriate and a trial on the merits was warranted. In view of Kerrison's conflicting statements, the master held Dodd would be relieved of making the monthly payments into the trust until there was a final decision.

Dodd brought this action in August 1995. The matter was referred to the master in equity for a final decree with appeal directly to the supreme court. Dodd failed to subpoena Kerrison, and she did not appear at the trial. Over Berlinsky's objection, Kerrison's May 1993 affidavit was admitted into evidence. The trial court held Berlinsky provided no evidence to refute Dodd's testimony or the contents of Kerrison's affidavit. The trial court further held that in the interest of justice, the trust should be dissolved. Based upon Dodd's request, the court ordered the funds remaining in the trust disbursed to Kerrison and the real property returned to Dodd. In denying Berlinsky's motion to alter or amend the judgment, the trial court held the evidence at trial was clear and convincing that the trust was induced by fraud.

DISCUSSION

I. Admission of Kerrison's Affidavit

Berlinsky argues the trial court erred in admitting the affidavit into evidence under the hearsay exception of Rule 804(b)(3), SCRE, since Dodd did not show Kerrison's "unavailability" under Rule 804(a)(5), SCRE. We agree.

A trial judge's determination of whether a statement is admissible under Rule 804(b)(3) will not be disturbed absent an abuse of discretion. See State v. Kinloch, 338 S.C. 385, 388, 526 S.E.2d 705, 706 (2000); State v. Prioleau, 339 S.C. 605, 610, 529 S.E.2d 561, 563 (Ct. App. 2000). Rule 804(b)(3), SCRE, provides an exception to the hearsay rule for a statement against a declarant's pecuniary or proprietary interest, or one that would subject the declarant to civil or criminal liability, when the declarant is unavailable as a witness. According to the rule, "unavailability as a witness" includes a situation in which the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." Rule 804(a)(5), SCRE (emphasis added).

The party offering the statement bears the burden of establishing unavailability. Kinloch, 338 S.C. at 391 n.6, 526 S.E.2d at 708 n.6; Eldridge v. City of Greenwood, 331 S.C. 398, 431-32, 503 S.E.2d 191, 208-09 (Ct. App. 1998). The mere absence of the declarant from the hearing does not establish unavailability. Kinloch, 338 S.C. at 391 n.6, 526 S.E.2d at 708 n.6. Even though in Kinloch the primary issue was whether the out of court statement was sufficiently corroborated, the supreme court was troubled by the proponent's failure to offer any reason for the witness' unavailability and the lack of any evidence of efforts to locate the witness. Id. (stating "some effort at locating the witness is necessary"). The supreme court noted that even though the State acknowledged at oral argument it was likewise unable to locate the witness prior to trial, the State's concession did not relieve the party offering the testimony of the burden of demonstrating unavailability. Id.

At the hearing, Dodd's attorney stated neither he nor opposing counsel was able to find Kerrison. Dodd's counsel explained that he had spoken with Kerrison's mother about her daughter's whereabouts, but "[Kerrison] . . . roams, and has no definite place that we could ever locate her." However, Dodd did not attempt to subpoena Kerrison. After the trial court admitted the affidavit, Dodd testified "I have contact with [Kerrison] all the time, but I don't know where she is now." In response to a question about where Kerrison lives, Dodd said he knew where Kerrison was and explained she was on probation and had to report approximately once a week. He also stated she could be found in "two minutes."

Berlinsky immediately moved to exclude the affidavit based on Dodd's testimony, but the trial court refused. We find this refusal to be in error. Although Dodd's attorney claimed he could not find Kerrison, he did not try to obtain her presence by process. While Dodd argues on appeal that he used "all reasonable means to contact" Kerrison, Dodd himself testified she could be located through her probation reports. In addition, the fact that Berlinsky had been unable to locate Kerrison does not relieve Dodd of the burden of demonstrating she was unavailable under Rule 804(a)(5), SCRE. We find Dodd failed to meet his burden of establishing Kerrison was unavailable to testify. Accordingly, the trial court erred in admitting Kerrison's affidavit pursuant to Rule 804(b)(3), SCRE.

II. Termination of the Trust

Berlinsky argues the trial court erred in terminating the trust, which by its explicit and unequivocal terms is irrevocable, based on a finding of fraud. We agree.

As a general rule, a trust cannot be revoked unless such a power is reserved in the trust agreement. Chiles v. Chiles, 270 S.C. 379, 384, 242 S.E.2d 426, 429 (1978). However, a court in equity can terminate even an irrevocable trust where the trust was procured through fraud, undue influence, duress, or coercion. 76 Am. Jur. 2d Trusts §§ 101, 119 (1992). Whether any of these grounds for termination exists is ordinarily a question of fact. Id. § 119. As this is an action in equity tried by a master alone, this court may take its own view

of the preponderance of the evidence. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

Dodd executed the trust as part of the overall settlement agreement reached with Kerrison through the offices of her guardian ad litem. In return for the creation of the trust, Kerrison released Dodd from any and all civil claims she may have had arising from the incidents that led to his indictment for the criminal charges. In the settlement agreement, Dodd did not admit any wrongdoing. Whether he was guilty of the wrongdoing or not is immaterial because, as do many defendants in civil cases, he chose to settle rather than risk the unknown. Accordingly, we find the trust agreement was the result of Dodd's desire to settle civil claims and avoid the uncertainty of trial rather than any fraud perpetrated upon him.

We conclude the trial court erred in terminating the trust. The decision of the trial court is, therefore,

REVERSED.

HEARN, C.J., and ANDERSON, J., concur.