OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

July 2, 2001

ADVANCE SHEET NO. 24

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Grady Berry, Respondent,

Opinion No. 25315
Heard June 5, 2001 - Filed July 2, 2001

DISBARRED

Attorney General Charles M. Condon, and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

William Grady Berry, pro se.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct filed formal charges against respondent,[1] which respondent did not answer. A hearing, which respondent did not attend, was held regarding the charges. The Panel recommended respondent be disbarred.

[1]Respondent was placed on interim suspension on August 12, 1998. Matter of Berry, 332 S.C. 323, 504 S.E.2d 590 (1998).

FACTS

Nancy Christensen Matter

Respondent was retained to represent Nancy Christensen, who was involved in an automobile accident. Christensen signed a Fee Agreement which provided respondent would receive different fees depending on whether the matter was settled prior to filing a lawsuit or settled after a lawsuit had been filed. The agreement also stated no fee would be due if a recovery was not obtained.

Over the course of the representation, Christensen had trouble communicating with respondent. Her only personal meeting with respondent was when she retained him. Thereafter, she had only two telephone conversations with him, one of which was an attempt by her to retrieve her client file. Christensen also attempted to communicate with respondent by sending him a letter that included a list of questions she had about her case, which respondent did not answer. As a result of the lack of communication, Christensen requested her client file, but was told she could not have the file.

Christensen sent a letter of termination to respondent, who refused to promptly relinquish her file. A few days later, she spoke with respondent, who told her she would never find another lawyer to represent her interests and that he was going to put a lien on her file, so that "nobody would touch it." Christensen later retrieved her file and signed a "Statement of Receipt," which included the statement: "lien placed on my file for $4,672.83 which includes time and costs."

Respondent prepared a document entitled "Attorney Time," which set forth the total lien amount, and stated the lien was based upon one-third of a settlement offer by the insurance company, but which Christensen had rejected, plus costs. However, a review of respondent's client file did not show any supporting documentation for the costs.

During the representation, respondent attempted to settle Christensen's

case twice, without her knowledge or authorization.

In response to an inquiry by the Office of Disciplinary Counsel (the ODC), respondent submitted a reply that offered a Statement for Services rendered to Christensen, which differed from the Statement in Christensen's file. The Statement submitted to the ODC set forth entries for services that had not occurred.

The Panel found respondent's lien amount of $4,672.83 to be in excess of the Statement of Services prepared by respondent. The Panel further found that respondent failed to cooperate with the ODC's investigation into this matter. The ODC set up an appointment to meet with respondent; however, he did not appear for the appointment, nor did he reschedule it. Thereafter, the ODC notified respondent and his attorney of a new time for the appointment; however, neither respondent nor his attorney appeared for the appointment or attempted to reschedule it.

Disciplinary Counsel (Edward King) Matter

Edward King signed a Fee Agreement, which was similar to the agreement signed by Christensen, hiring respondent on a contingency fee basis to represent him in an automobile accident matter.

Respondent never met with King, and King attempted without success to contact respondent on numerous occasions. King attempted to terminate the representation and request his file on three occasions. He finally retrieved his file from the court-appointed Attorney to Protect Clients' Interests after respondent had been placed on interim suspension.

King later settled his automobile accident case for $40,000. The insurance company paid him $40,000, less $4,284.67, the amount respondent claimed as a lien. The lien was based upon a settlement offer of $12,810, which King had rejected. Respondent had informed the insurance company's claims representative he no longer represented King and that he was placing a lien on the case. King's file was reviewed and little information was found to

document any work done on behalf of King.[2]

Diane Creel Matter

Respondent represented Diane Creel in a probate court matter (Action I), in which a hearing was held and an order later filed. There was also a separate action brought by the personal representative against Creel, docketed under the same civil action number, but seeking a different remedy (Action II). Specifically, Action II was against Creel for the wrongful removal of certain household furnishings from the decedent's residence.

In Action II, prior to a July 1997 hearing, respondent, as attorney for Creel, asked for a continuance on the ground of Creel's physical disability, and, by an order, consented to the continuance of the hearing. Although respondent in fact represented Creel, he did not file an answer when Action II was filed, and he did not answer the personal representative's affidavit of default.

Due to the default, a hearing was held on December 1, 1997, to ascertain damages in Action II. A notice of the hearing was served by mail on both respondent and his co-counsel. By letter dated November 26, 1997, via facsimile, respondent notified the personal representative's attorney that neither he nor his co-counsel were ever attorneys of record with regard to the hearing scheduled for December 1st. The letter further stated, "however, I have just been retained by Diane Creel in regard to representation in this matter." Respondent also falsely stated in a letter that the hearing should be continued because he had a conflict in the Court of Common Pleas.

Thereafter, the personal representative's attorney wrote respondent a letter, with copies to the probate court and respondent's co-counsel. The

[2]The lien respondent placed on King's file is a nullity. The insurance company has the authority to pay the $4,284.67 directly to King.

attorney advised respondent that the probate judge had continued the hearing to January 13, 1998. The letter further stated,

> I do not understand your saying you do not represent Ms. Creel in this matter. We have a letter from you dated July 16, 1997, in which you ask for a continuance . . . If you or [co-counsel] do not represent Ms. Creel in this matter, I will have Notice served upon Ms. Creel of the new hearing date. If I do not hear from you within the next five days, I will assume you or [co-counsel] will be representing Ms. Creel in this matter. I am forwarding a copy of this letter to [co-counsel].

Neither respondent nor co-counsel responded to the letter.

However, on January 13, 1998, respondent faxed a letter to the probate court, again falsely stating he did not represent Creel in Action II. He stated: "Please be advised that my office has not been retained to represent Ms. Creel in connection with the proceedings to be heard this afternoon. However, this matter comes before the Court premature and the Probate Court lacks jurisdiction to hear this matter at this time . . . ." The probate judge found respondent had represented to the probate court that he represented Creel on at least three occasions. The probate judge further found there had been no motion filed by respondent or Creel relieving respondent as attorney. Creel was found to be in default in Action II.

The Panel found respondent represented Creel and neglected her case by failing to file an Answer or otherwise respond on her behalf, and by failing to appear at the January 13th probate court hearing. The Panel further found that Creel had advanced a sum of money to respondent for costs, but never received an accounting from him as to how those funds were expended.

Domestic Violence Matter

The Panel found respondent had pled guilty to simple assault in magistrate's court after having been arrested for criminal domestic violence.

Criminal Convictions

Respondent pled guilty to numerous narcotics offenses[3] and to the offense of criminal domestic violence. The Panel found the convictions for those crimes constituted convictions of serious crimes as defined by Rule 2 of Rule 413, SCACR, as well as crimes of moral turpitude.

Notice to Appear

The Panel found respondent failed to appear at a Notice to Appear, which was scheduled for April 13, 2000.

Panel's Findings

Regarding all matters, the Panel[4] found the following violations of Rule 7(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: (1) violating a Rule of Professional Conduct; (2) willfully failing to appear personally for a Notice to Appear as directed, and knowingly failing to respond to a lawful demand from a disciplinary authority; (3) being convicted of crimes of moral turpitude and serious crimes; (4) engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law; and (5) violating the oath of office taken upon admission to practice law in this state.

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[3]Respondent pled guilty to: (1) simple possession of marijuana; (2) possession of Schedule II narcotics; (3) possession of Schedule III narcotics; (4) possession of Schedule IV narcotics; (5) possession of Schedule V narcotics; (6) possession with intent to distribute Schedule III narcotics; (7) possession with intent to distribute Schedule IV narcotics; and (8) possession with intent to distribute Schedule V narcotics.

[4]The full panel adopted the report of the sub-panel.

The Panel further found respondent violated certain rules from the Rules of Professional Conduct, Rule 407, SCACR. The Panel found, regarding all matters, violations of Rule 8.4, misconduct, subsections (a), (b), (c), (d), and (e). The Panel further found violations of the following: (1) Rule 1.2, scope of representation; (2) Rule 1.3, diligence; (3) Rule 1.4, communication; (4) Rule 1.5, fees; (5) Rule 3.3, candor toward a tribunal; (6) Rule 3.4, fairness to opposing party and counsel; (7) Rule 4.1, truthfulness in statements to others; (8) Rule 4.2, communication with person represented by counsel; and (9) Rule 8.1(b), failure to respond to a demand from a disciplinary authority. The Panel recommended respondent be disbarred from the practice of law.

DISCUSSION

Respondent's failure to answer the formal charges against him constitutes an admission of the factual allegations. Rule 24(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. Further, because respondent failed to appear at the hearing before the sub-panel, he is deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any recommendation to be considered at the hearing. Rule 24(b) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. As a result, we have only to determine the appropriate sanction for respondent. See In re Hamer, 342 S.C. 437, 537 S.E.2d 552 (2000) (judge who failed to respond to disciplinary charges was deemed to have admitted all allegations in the complaints served upon her); In re Rast, 337 S.C. 588, 524 S.E.2d 619 (1999) (attorney's failure to answer the formal charges against him constitutes default; the only issue is the proper sanction for attorney's neglect of his duties).

We have deemed disbarment the appropriate sanction in similar cases involving multiple acts of misconduct, including criminal violations. See, e.g., In re Trexler, 343 S.C. 608, 541 S.E.2d 822 (2001); In re Courtney, 342 S.C. 617, 538 S.E.2d 652 (2000); In re Gibbes, 323 S.C. 80, 450 S.E.2d 588 (1994).

Accordingly, we disbar respondent from the practice of law. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of the Rules for Lawyer Disciplinary Enforcement.

DISBARRED.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

s/Thomas W. Cooper, Jr. A.J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Franklin A. Benjamin, Appellant.

Appeal From Calhoun County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 25316
Heard January 24, 2001 - Filed July 2, 2001

AFFIRMED

Chief Attorney Daniel T. Stacey, 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, Senior Assistant Attorney General William E. Salter, III, all of Columbia, and Solicitor Walter M. Bailey, of Summerville, for respondent.

JUSTICE WALLER: Benjamin was convicted of murder and armed robbery and respectively sentenced to life and thirty years. We affirm.

FACTS

On May 7, 1997, Benjamin and a co-defendant, Tyrone Aiken, robbed the Sweetwater Citgo convenience store in Calhoun County. Aiken shot and killed the store's employee, Dale Walker, and the two stole approximately $100.00 from the register. Benjamin and Aiken then went, along with several accomplices who had waited in the car during the robbery, and bought alcohol and drugs with the stolen money. Several hours later, they robbed Dodger's Convenience store in Orangeburg County. Benjamin was arrested the following day and gave a statement to police in which he admitted his participation in the robberies but claimed Aiken had shot Walker. Benjamin was tried and convicted for the robbery and murder at Sweetwater Citgo.[1]

ISSUES

1. Was the trial court's jury instruction concerning duress misleading?

2. Was Benjamin's statement to police taken in violation of his right to remain silent?

3. Was evidence of the subsequent robbery of Dodger's store improperly admitted?

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[1] He was separately tried for the Dodger's robbery. His conviction and sentence were affirmed in State v. Benjamin, 341 S.C. 160, 533 S.E.2d 606 (Ct. App. 2000).

1. DURESS INSTRUCTION

At trial, Benjamin testified he only participated in the robbery because Aiken threatened to shoot him if he didn't. Accordingly, the trial court charged the jury on the defense of duress, as follows:

> And there's some talk about duress or coercion in this case. Let me tell you what coercion or duress is. Coercion means to excuse a criminal act coercion must be present, eminent, and of such a nature as to induce a reasonable apprehension of death or serious, serious bodily harm if the act is not done. There must be no reasonable way other than committing the crime to escape the threat of harm but I do charge you, Mr. Foreman, members of the jury, that under the law of South Carolina duress is not a defense to the charge of murder.[2] It could be a defense to the charge of robbery or armed robbery.

Defense counsel objected to the language that duress **could be** a defense to robbery, asserting duress **is**, in fact a defense. The trial court declined further instructions, finding the jury had understood the charge as given.

A jury instruction must be viewed in the context of the overall charge. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. Id.

Here, it is patent the judge's statement that duress "could be" a defense was simply an attempt to clarify for the jury that, although duress could not be a defense to murder, it could be a defense to robbery and armed robbery. We find reasonable jurors would have interpreted the charge this way, such that the

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[2] See State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Robinson, 294 S.C. 120, 363 S.E.2d 104 (1987)(holding duress is not a defense to murder).

trial court committed no error.[3]

2. STATEMENT TO POLICE

Benjamin next asserts his statement to SLED Agent Mears was taken in violation of his right to remain silent contrary to Michigan v. Mosley, 423 U.S. 96 (1975). We disagree.

At a Jackson v. Denno[4] hearing, Sheriff Jones testified that Benjamin was arrested at approximately 1:30 pm on May 8, 1997 and taken to the sheriff's office. According to Jones, when they got there, he asked Benjamin if "he wanted to talk with me," and Benjamin said "No." Jones did not question Benjamin anymore, nor did he advise Benjamin of his Miranda[5] rights. Jones testified Benjamin never requested an attorney.

Jones contacted SLED Agent Mears, who was investigating the case, and advised Mears to meet them at the sheriff's office. Mears arrived at the sheriff's office at approximately 2:30 pm and was advised that Sheriff Jones had not interviewed Benjamin. Benjamin then agreed to talk to Mears and was advised of his Miranda rights. Benjamin gave oral and written statements confessing to

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[3] Although we find no error, the better practice is to refrain from the use of terms such as "could be" or "might be" a defense. We suggest the following instruction in cases in which the defense of duress is raised:

> To establish duress which will excuse a criminal act, the degree of coercion must be present, imminent, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Coercion is no defense if there is any reasonable way, other than committing the crime, to escape the threat of harm. The fear of injury must be reasonable.

[4] 378 U.S. 368 (1964).

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

the crime. At no time, according to Mears, did Benjamin request counsel.

Benjamin asserts his statement was taken in violation of his right to remain silent because it was taken by Agent Mears after Benjamin had indicated he did not wish to talk to Sheriff Jones.

In Michigan v. Mosley, supra, the United States Supreme Court held that the fact that a suspect invokes his right to remain silent is not a permanent bar to police reinitiating contact with the suspect. The Court stated:

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored. . . ." **The critical safeguard identified in the passage at issue is a person's "right to cut off questioning."** Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on **whether his "right to cut off questioning" was "scrupulously honored."**

423 U.S. at 102-104 (citations omitted, emphasis supplied).

Courts interpreting Mosley have set forth five factors to analyze to ascertain whether the defendant's right to cut off questioning was "scrupulously honored": (1) whether the suspect was given Miranda warnings at the first interrogation; (2) whether police immediately ceased the interrogation when the suspect indicated he did not want to answer questions; (3) whether police resumed questioning the suspect only after the passage of a significant period of time; (4) whether police provided a fresh set of Miranda warnings before the

second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation. Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000). See also Roundtree v. Commonwealth, 2000 WL 724026 (Va. App. 2000); Wisconsin v. Badker, 2000 WL 1790013 (Wis. App. 2000); State v. Brooks, 505 So.2d 714, 722 (La.), cert. denied, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987).

However, the Mosley factors are not exclusively controlling, nor do they establish a test which can be woodenly applied. State v. Koput, 396 N.W.2d 773, 776 (Wis. Ct. App. 1986). Rather, the factors provide a framework for determining whether, under the circumstances, an accused's right to silence was scrupulously honored. Id.

"[A] second interrogation is not rendered unconstitutional simply because it involves the same subject matter discussed during the first interview." Jackson v. Wyrick, 730 F.2d 1177, 1180 (8th Cir.), cert. denied, 469 U.S. 849 (1984) (unless police wear down defendant by repeatedly questioning on same subject after invocation of rights, no violation of Miranda to reinterrogate); United States v. Finch, 557 F.2d 1234 (8th Cir.) (as long as new Miranda warnings are given and initial request to remain silent is scrupulously honored, statements from subsequent interrogations on same subject are admissible), cert. denied, 434 U.S. 927, 98 S.Ct. 409, 54 L.Ed.2d 285 (1977); Mills v. Commonwealth, 996 S.W.2d 473 (Ky 1999), cert. denied, 120 S.Ct. 1182 (2000) (no Miranda violation where defendant spoke with second officer, after invoking right to remain silent with first officer, though encounter with second officer came only about 20 minutes after invocation of right and involved same crime); State v. Pierce, 364 N.W.2d 801 (Minn. 1985) (suspect reinterrogated 2 hours after initial attempt about same crime. . . . no undue pressure and defendant's right to cut off questioning was scrupulously honored); People v. Foster, 518 N.E.2d 82 (1987), cert. denied, 486 U.S. 1047 (1988) (resumption of questioning 3 hours later about same crime); State v. Isaac, 465 So.2d 1384 (Fla. Dist. Ct. App. 1985)(questioning resumed 1hour, 40 minutes later about same crime). See also United States v. Schwensow, 151 F.3d 650, 659 (7th Cir.1998) (constitutionality of subsequent police interview depends not on its subject matter, but rather on whether the police in conducting the interview

sought to undermine the suspect's resolve to remain silent.), cert. denied, 525 U.S. 1059 (1998).

Here, under the totality of the circumstances, we find Benjamin's right to remain silent was "scrupulously honored," such that he had the "right to cut off questioning at any time." No Miranda warnings were given by Sheriff Jones because Benjamin indicated he did not wish to speak to him. Upon being told Benjamin didn't want to talk to him, Sheriff Jones immediately ceased talking to him. Further, there was no immediate resumption of questioning by police. At least one hour later,[6] Agent Mears arrived and read Benjamin his Miranda rights, having him initial after each sentence. Benjamin signed all the waivers, and gave both oral and handwritten confessions.

We concur with those courts, cited above, which hold that a subsequent interrogation concerning the same crime does not, in and of itself, violate an accused's right to remain silent. What is paramount is that police, under the totality of the circumstances,"scrupulously honor" the suspects's right to remain silent. We find, under the totality of the circumstances presented here, police fully complied with the mandates of Michigan v. Mosley. Accordingly, we find the trial court properly admitted Benjamin's statement.

3. EVIDENCE OF DODGER'S ROBBERY

Finally, Benjamin asserts the trial court improperly admitted evidence of the armed robbery of Dodger's Convenience Store which occurred several hours after the robbery/murder at Sweetwater Citgo. We disagree.

The robbery and murder at Sweetwater Citgo occurred between midnight and 1:00 am on May 7, 1997. Benjamin and his cohorts stole approximately

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[6] The suspect in Mosley was approached by police approximately two hours after his initial invocation of his right to remain silent. Here, Agent Mears approached Benjamin approximately 1hour and 15 minutes after Benjamin told Sheriff Jones he didn't wish to speak with him.

$100.00 from the store and used the money to buy cocaine and marijuana. At approximately 4:30 am, they drove to Orangeburg where Aiken and Benjamin robbed Dodger's Convenience Store; however, they inadvertently stole the wrong part of the cash register and obtained no money. As they left the store with the register, Aiken dropped the gun which had been used in the Sweetwater Citgo robbery and murder. Aiken testified they robbed Dodger's in order to obtain money for more drugs.

At trial, the State presented the testimony of the Dodger's clerk, Cecily McMillan. She positively identified Benjamin, testifying that when she attempted to run from her assailants, Benjamin was screaming at her telling her to "get [your] ass back here before [I] have to come back and get [you]." She also testified Benjamin looked like he was "up pretty bad mood, like was angry about something."

Benjamin asserts the probative value of McMillan's testimony was outweighed by its prejudicial value. We disagree. We find McMillan's testimony was properly admitted for numerous reasons.[7]

First, Benjamin's defense to the charges here was that, although he participated in the crimes, he did so under duress, fearing Aiken would harm him if he did not go along. McMillan's testimony tended to demonstrate that

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[7] The concurrence contends McMillan's testimony was admissible only insofar as it demonstrated identity. However, as Benjamin admitted his participation in the robberies, identity was not an issue in this case, and McMillan's testimony was not admissible for this purpose. See Carter v. State, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996) (testimony of other bad acts not admissible to prove identity under Lyle where identity not in issue); cf. State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (where victim's identity not an issue, evidence not admissible for that purpose); State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997) (same). Moreover, we fail to see that McMillan's description of the robbers as "one short and one tall" is sufficient to demonstrate identity.

Benjamin was a willing participant, thereby rebutting Benjamin's claim that he acted under duress.[8] Accordingly, this testimony was properly admitted to demonstrate Benjamin's intent pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). See also State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000)(evidence of other bad acts is admissible when it tends to establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent).

Moreover, we find testimony concerning the subsequent robbery was admissible as part of the *res gestae*.

As noted by this Court in Hough, supra:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged

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[8] The concurrence asserts evidence of Benjamin's conduct during the robbery of Dodger's is not relevant to his claim of duress during the earlier robbery of Sweetwater Citgo. We disagree. Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). All that is required is that the fact shown tends to make **more or less probable** some matter in issue and to bear directly or indirectly thereon. It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence. State v. Hamilton, 543 S.E.2d 586, 591(Ct. App. 2001) (*citing* Jon P. Thames & W.M. Von Zharen, A Guide to Evidence Law in South Carolina 28 (1987)).

Here, the fact that Benjamin was a willing, active participant in the Dodger's robbery tends to make less probable his claim that he acted under duress just a few hours earlier during the robbery of the Sweetwater Citgo. Accordingly, we find it was properly admitted to rebut his claim of duress.

> against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . [and is thus] part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

325 S.C. at 92, 480 S.E.2d at 79.

Here, the weapon used, and left behind at the Dodger's store, was also the weapon used in the robbery/murder at Sweetwater Citgo such that testimony concerning the weapon was necessary to a full presentation of the State's case.[9] Accordingly, we find evidence of the subsequent robbery was properly admitted.[10]

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[9] In his appeal of the robbery of Dodger's, Benjamin maintained the robbery was "merely part of a single continuous crime spree." 341 S.C. at ___, 533 S.E.2d at 607. If, as Benjamin claims, the crimes were one continuous spree, then they are clearly "so linked together in point of time and circumstances" that one cannot fully be shown without proving the other. Hough, supra.

Contrary to the concurrence's assertion, our notation of Benjamin's argument in the Dodger's appeal in no way constitutes an estoppel of his ability to challenge the contested evidence in this case. We simply highlight his argument to demonstrate the applicability of the *res gestae* exception.

[10] Finally, notwithstanding its view that much of Cecily McMillan's testimony was improperly admitted, the concurrence finds the error was harmless "in light of the competent evidence presented by the State." If, however, McMillan's testimony as to what Benjamin said inside the Dodger's store were excluded, then there was no testimony rebutting his claim of duress.

CONCLUSION

Benjamin's remaining issue is affirmed pursuant to SCACR Rule 220(b)(1) and the following authority: State v. Locke, 341 S.C. 54, 533 S.E.2d 324 (2000). Benjamin's convictions and sentences are

AFFIRMED.

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

Accordingly, it simply cannot be said that the jury would necessarily have rejected Benjamin's claim of duress, such that any error could not be deemed harmless. See Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), cert. denied, 507 U.S. 927 (1993) (error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained).

JUSTICE PLEICONES: I agree with the result reached by the majority in this case. However, because I would analyze ISSUE 3 differently, I write separately.

I would hold that Cecily McMillan's testimony recounting the events of the Dodger's robbery was admissible under Rule 404(b) SCRE only to show identity. McMillan testified that two men, one very tall and the other much shorter, robbed Dodger's. She testified that the taller man was armed with a pistol while committing the offense. Tyrone Aiken, who is much taller than Benjamin, testified that he and Benjamin robbed both the Sweetwater Citgo and Dodger's, and that only he had been armed during the crimes. He further testified that, while fleeing Dodger's, he lost the pistol used in the robberies. Police found a pistol on the ground outside of Dodger's. The State's ballistics expert testified that the gun found outside of Dodger's was the gun used in the Sweetwater Citgo killing. Eyewitnesses testified to seeing two men, one very tall and one very short, walking across the parking lot, towards the Sweetwater Citgo shortly before the robbery. The clerk in the Sweetwater Citgo testified that two men, one armed and much taller than the other, committed the Sweetwater Citgo robbery. In light of this evidence, McMillan's testimony concerning the descriptions of the Dodger's perpetrators was admissible under SCRE 404(b) to show the identity of the Sweetwater Citgo robbers.

In my opinion, it was error to allow McMillan to repeat what was said inside Dodger's because the prejudicial impact of the statement substantially outweighed its probative value. See Rule 403, SCRE. Nevertheless, in light of the overwhelming evidence presented against Benjamin, the error in admitting the statement was harmless.

The majority finds that McMillan's testimony was admissible because McMillan's testimony rebutted Benjamin's defense of duress, and was admissible as part of the *res gestae*.

Because the Dodger's robbery occurred after the Sweetwater Citgo robbery, I am not persuaded that Benjamin's actions at Dodger's were

inconsistent with his claim that he was acting under duress when he committed the Sweetwater Citgo robbery.

Were he on trial for the Dodger's robbery, the statements attributed to Benjamin by McMillan would be admissible to rebut Benjamin's defense of duress, assuming Benjamin proffered such a defense. That is not the case here. Benjamin was not on trial for the Dodger's robbery. The majority superimposes Benjamin's claim that he was acting under duress when he entered the Sweetwater Citgo over his participation in the Dodger's robbery. It then finds that evidence admissible to rebut the latter claim, i.e., evidence suggesting Benjamin was not acting under duress during the Dodger's robbery, is likewise admissible to rebut his claim of duress in the Sweetwater Citgo robbery. I would hold that evidence of Benjamin's participation in the Dodger's robbery is not admissible to rebut his claim that he acted under duress in committing the Sweetwater Citgo robbery.

In my opinion, the evidence of the Dodger's robbery was not "necessary to a full presentation of the State's case"[11] in the Sweetwater Citgo crime, such as to make the challenged evidence admissible under a *res gestae* exception to Rule 404(b), SCRE. The majority, in footnote 9, employs an estoppel analysis and finds that because Benjamin, in his appeal in the Dodger's case, argued that the crimes were part of a single continuous crime spree, he cannot now challenge a finding that the evidence was admissible, under a *res gestae* exception, since the crimes "would be 'so linked together in point of time and circumstances' that one could not be shown without proving the other." While I agree that one cannot advance conflicting factual arguments simply because his interests have changed,[12] I do not agree that Benjamin has somehow lost his right to challenge the contested evidence because he has asserted, on appeal in a different case, that the acts were part of a single crime spree.

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[11]See State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997).

[12]See Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997).

I do, however, agree with the result reached by the majority, and would affirm the trial court's decision because, in my opinion, evidence of the Dodger's incident was admissible to establish the identity of the Sweetwater Citgo perpetrators. Because its prejudicial impact substantially outweighed its probative value, the content of Benjamin's statement directed toward the Dodger's clerk was not admissible. Nonetheless, in light of the competent evidence presented by the State, the error in admitting the statement was harmless.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
. . . . . Respondent,

v.

Larry B. Basnight, ... Appellant.

Appeal From Horry County
Haskell T. Abbott, III, Family Court Judge

ORDER WITHDRAWING AND SUBSTITUTING OPINION

PER CURIAM: Pursuant to Appellant's Petition for Rehearing, it is ordered that the opinion heretofore filed, Opinion No. 3282, heard December 13, 2000 and filed January 8, 2001, be withdrawn and the attached Opinion be substituted. Appellant's Petition for Rehearing is denied.

IT IS SO ORDERED.

s/Jasper M. Cureton, J.

s/C. Tolbert Goolsby, Jr., J.

s/Carol Connor, J.

Columbia, South Carolina

June 28, 2001.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
. . . . . Respondent,

v.

Larry B. Basnight, ... Appellant.

Appeal From Horry County
Haskell T. Abbott, III, Family Court Judge

Opinion No. 3282
Heard December 13, 2000 - Filed January 8, 2001
Withdrawn and Refiled June 28, 2001

AFFIRMED

Steven G. Mikell, of Florence; and H. Mac Tyson, II, of Fayetteville, North Carolina, for appellant.

Gus C. Smith, of the South Carolina Department of Social Services, of Conway, for respondent.

PER CURIAM: Larry B. Basnight appeals from an order of the family court adjudicating him the father of a minor child and awarding child support. We affirm.

FACTS/PROCEDURAL HISTORY

Helen Point is the natural mother of the minor child, the subject of this action. In January of 1986, the mother initiated an action in South Carolina, pursuant to the Uniform Reciprocal Enforcement of Support Act (the Act),[1] to establish support for the minor child, born December 14, 1984.

The State of North Carolina, as the responding state, proceeded with the action pursuant to the Act and Basnight was notified to appear before a North Carolina district court. On April 11, 1986, the State of North Carolina filed a voluntary dismissal of the action because it had information that Point no longer lived in South Carolina. Point, however, did still reside in South Carolina and the State of North Carolina thereafter filed a motion to reopen the case, which was granted. Basnight filed a motion to dismiss the action, which was denied.

Basnight appealed this denial and, by order dated July 6, 1987, the North Carolina Court of Appeals reversed and remanded the action to the trial court on the ground that "a party cannot make any motions, and the court cannot enter any order, in a cause after a voluntary dismissal has been taken in the cause." On remand, the North Carolina district court dismissed the case with prejudice.

On August 16, 1994, the South Carolina Department of Social Services (DSS), as assignee of support payments due the child, instituted this action against Basnight in South Carolina. The complaint alleged, inter alia, personal jurisdiction over Basnight, a resident of Texas, pursuant to South Carolina Code Annotated Section 20-7-953(A)(1985).

By amended answer, Basnight denied DSS's allegations as to personal jurisdiction, and asserted the claim was barred by the doctrine of res judicata. Basnight also filed a motion to dismiss for, among other things, lack of personal jurisdiction. After a December 7, 1994 hearing, the family court denied the motion to dismiss. Basnight filed "exceptions" to the order with the family court, objecting to "any and all findings of fact, conclusions of law, [and] the

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[1] Formerly codified at S.C. Code Ann. §§ 20-7-960 et seq. (1985); replaced by the Uniform Interstate Family Support Act, S.C. Code Ann. §§ 20-7-960 et seq. (Supp. 2000), by 1994 Act No. 494, eff. July 1, 1994.

entry and signing of a 'Final Order.'"

The family court held a hearing on the exceptions and reaffirmed the prior order denying Basnight's motion to dismiss. Basnight filed an appeal, which was dismissed by our Supreme Court as an unappealable interlocutory order.

Following a hearing on the merits, the family court issued its final order concluding Basnight was the natural father of the minor child, and establishing his child support obligation at $474.09 per month. The court found the support obligation should be made retroactive to the date of the December 7, 1994 hearing, and thereby established Basnight's arrearage at $22,282.23, to be repaid at a rate of $25.00 per week. This appeal followed.

LAW/ANALYSIS

Personal Jurisdiction[2]

Basnight argues the family court should have dismissed the action for lack of personal jurisdiction. We disagree.

The party seeking to invoke personal jurisdiction against a nonresident defendant via a long-arm statute has the burden of establishing jurisdiction. White v. Stephens, 300 S.C. 241, 387 S.E.2d 260 (1990). The determination of whether a trial court may exercise personal jurisdiction over a nonresident defendant involves a two step analysis. Id. First, the defendant's conduct must meet the requirements of the applicable long-arm statute. Id. Second, the defendant must have sufficient contacts with South Carolina so that the constitutional standards of due process are not violated. Id.

Long-Arm Statute

We find Basnight's conduct met the requirements of the long-arm statute applied by the family court. The family court exercised personal jurisdiction over Basnight pursuant to South Carolina Code Annotated Section 20-7-953(A) (1985). Section 20-7-953(A) provides, in pertinent part:

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[2] Basnight's first, second, and seventh through tenth issues on appeal.

> Any person who has sexual intercourse in this State thereby submits to the jurisdiction of the courts of this State as to an action brought under this subarticle with respect to a child who may have been conceived by that act of intercourse.

S.C. Code Ann. § 20-7-953(A)(1985). The mother testified she and Basnight had sexual intercourse in South Carolina the weekend of March 16, 1984, which resulted in the conception of the minor child.

Basnight argues the long-arm statute does not apply as it was not enacted until after the date of the minor child's conception. We disagree.

Section 20-7-953(A) became effective on March 22, 1984, approximately six days after the minor child's conception. See 1984 Act No. 307, § 1. In Thompson v. Hofmann, our Supreme Court considered the application of a long-arm statute to actions commenced after the passage of the statute. Thompson, 263 S.C. 314, 210 S.E.2d 461 (1974). Distinguishing long-arm statutes from implied consent statutes, the court concluded the long-arm statute applied "regardless of when the cause of action may have arisen." Id. at 320, 210 S.E.2d at 463. See E.H. Schopler, Annotation, Retrospective Operation of State Statutes or Rules of Court Conferring in Personam Jurisdiction Over Nonresidents or Foreign Corporations on the Basis of Isolated Acts or Transactions, 19 A.L.R.3d 138, 141-42 (1968) (comparing long-arm statutes that base jurisdiction on certain acts or transactions specified therein to implied consent statutes that provide that certain acts or transactions are deemed to be the consent to the appointment of a local agent for the purpose of service of process; concluding the former operate retrospectively but the latter do not as it is not possible to retroactively imply consent); see also Johnson v. Baldwin, 214 S.C. 545, 53 S.E.2d 785 (1949) (refusing to permit the retrospective operation of an implied consent statute).

We conclude the long-arm statute acted retrospectively to confer personal jurisdiction over Basnight although the minor child was conceived prior to the enactment of the statute. Accordingly, we affirm the family court's application of the long-arm statute to Basnight.

Sufficient Minimum Contacts

In analyzing the second step necessary to exercise personal jurisdiction over a nonresident defendant, we find Basnight had sufficient minimum contacts with South Carolina to meet the constitutional standards of due process. In determining whether a finding of minimum contacts comports with the due process requirements of traditional notions of fair play and substantial justice, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's act; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the state's interest in exercising jurisdiction. Clark v. Key, 304 S.C. 497, 405 S.E.2d 599 (1991).

The mother testified she met Basnight in late 1982 when he was stationed at the United States Army post in Columbia, South Carolina. Basnight and the mother engaged in sexual relations in early 1983 and again in March, 1984. We find Basnight's tour of duty in South Carolina and continuing relationship with the mother from 1983 to early 1984 sufficient under the first and second factors.

In analyzing the third factor, the inconvenience to the parties, we recognize that Basnight is now stationed outside the state and defending a suit in South Carolina is inconvenient for him. However, we must weigh this against the final factor, South Carolina's interest in exercising personal jurisdiction over Basnight. We conclude South Carolina's interest in the support of a minor child residing within its borders is compelling. Accordingly, we find the state's interest in exercising personal jurisdiction over Basnight outweighs any hardship or inconvenience created by haling Basnight into the courts of this state.

Res Judicata[3]

Basnight also argues the family court erred in failing to find that the North Carolina order of dismissal barred this action under the doctrine of res judicata. We disagree.

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[3] Basnight's third and fourth issues on appeal.

"The doctrine of *res adjudicata* (or *res judicata*) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction, without fraud or collusion, is conclusive as to the rights of the parties and their privies. Griggs v. Griggs, 214 S.C. 177, 51 S.E.2d 622 (1949).

Res judicata precludes the parties from relitigating issues actually litigated and those that might have been litigated in the first action. Town of Sullivan's Island v. Felger, 318 S.C. 340, 457 S.E.2d 626 (Ct. App. 1995). In order for the doctrine of res judicata to apply, the following elements must be shown: (1) the identities of the parties are the same as the prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998); Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975); Wold v. Funderburg, 250 S.C. 205, 157 S.E.2d 180 (1967).

Basnight has failed to establish the third element. A North Carolina court never issued a final order adjudicating the issues of paternity or the minor child's entitlement to support. Res judicata, therefore, does not apply to bar the subsequent suit on the merits. See Garris, 333 S.C. 432, 511 S.E.2d 48 (noting restraint in the application of the doctrine of res judicata is warranted when the prior action was dismissed on procedural grounds); Allen v. Southern Ry. Co., 218 S.C. 291, 62 S.E.2d 507 (1950) (plaintiff's voluntary dismissal of first action leaves situation as though no suit had ever been brought); Gault v. Spoon, 168 S.C. 160, 167 S.E. 229 (1932) (rejecting defendant's plea of res judicata against the plaintiff in the plaintiff's second action in claim and delivery, where the first action failed because the plaintiff failed to execute the bond required by statute, because the first action was not allowed to proceed to a conclusion and therefore decided nothing). See also McEachern v. Black, 329 S.C. 642, 496 S.E.2d 659 (Ct. App. 1998) (concluding a dismissal without prejudice is not an adjudication upon the merits and does not have res judicata effect). Accordingly, we affirm the family court's finding that the action was not barred by res judicata.

At oral argument, Basnight argued for the first time that the family court erred in failing to apply Rule 41(b) of the North Carolina Rules of Civil Procedure to dismiss this action based on the prior North Carolina proceedings. This issue is not preserved for appellate review. See In the Interest of Bruce O., 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993) (An appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.). Even on the merits, however, we conclude Basnight is not entitled to relief.

On April 11, 1986, the State of North Carolina, on behalf of the minor child, entered a voluntary dismissal of the North Carolina proceedings because Point and the minor child no longer resided in South Carolina. On July 1986, the State filed a motion to reopen the action. The trial court granted the motion. Basnight appealed. The North Carolina Court of Appeals reversed the trial court concluding the court could not grant any motions or enter any orders "after a voluntary dismissal has been taken in the cause." North Carolina v. Basnight, Op. No. 8712DC214, filed June 16, 1987. The Court of Appeals remanded the action for entry of an order in accordance with the opinion. Id. On remand, the trial court entered a July 23, 1997 order of dismissal with prejudice relying on the one year limitation in Rule 41(a) of the North Carolina Rules of Civil Procedure.

Basnight argues the dismissal order, pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, operates as an adjudication of the matter. We disagree.

North Carolina's Rule 41(b) addresses the effect of involuntary dismissals. However, the North Carolina action at issue was voluntarily dismissed. Rule 41(a) addresses voluntary dismissals and states "[u]nless otherwise stated in the notice of dismissal . . . the dismissal is without prejudice. . . . If an action commenced . . . is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal. . . ." Rule 41(a)(1), N. C. Rules Civ. Proc.

However, the one year period to reinstitute the claim is stayed pending appellate action over the voluntary dismissal. West v. Reddick, Inc., 274 S.E.2d 221 (N.C. 1981). Furthermore, a trial court has no authority to exceed the mandate of the appellate court on remand. 5 Am. Jur. 2d Appellate Review §

784, at 453 (1995) (Once a mandate is issued from an appellate court to a trial court, the trial court "is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate."). The North Carolina appellate court concluded the trial court did not have subject matter jurisdiction to entertain the motion to reopen the case and remanded the action for dismissal according to that finding. The North Carolina trial court did not have subject matter jurisdiction to go beyond that mandate to apply Rule 41 to the action. A foreign judgment is not entitled to full faith and credit if the rendering court lacked subject matter jurisdiction over the action. Gregoire v. Byrd, 338 S.C. 489, 527 S.E.2d 361 (Ct. App. 2000).

Furthermore, this action was initiated under the Uniform Reciprocal Enforcement of Support Act. The Act's remedies are in addition to, and not in substitution for, any and all other remedies existing within the states. 67A C.J.S. Parent & Child § 90 (1978). "Thus, it has been held that an award for support under the Act does not preclude a later statutory action for support . . . ." Id. § 90, at 441.

Finally, Rule 41(a) of our rules of civil procedure does not include a one year limitation. See Rule 41(a), SCRCP. We view North Carolina's one year limitation as a procedural docket-clearing mechanism rather than a rule of substantive law. Under South Carolina's public policy, the best interests of minor children prevail over procedural impediments to obtaining support for minor children. See Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000) (stating procedural rules are subservient to the court's duty to zealously guard the rights of minors); Ex parte Roper, 254 S.C. 558, 563, 176 S.E.2d 175, 177 (1970) ("[W]here the rights and best interests of a minor child are concerned, the court may appropriately raise, *ex mero motu*, issues not raised by the parties."); Galloway v. Galloway, 249 S.C. 157, 153 S.E.2d 326 (1967) (concluding the court's duty to protect the rights of minors has precedence over procedural rules).

Our family court did not err by not applying North Carolina's Rule 41(b) to this action. Thus, even if Basnight had preserved his argument that the action should be dismissed pursuant to North Carolina's Rule 41(b), we would not find him entitled to relief.

Rule 60(b), SCRCP[4]

Basnight next argues the family court erred in refusing to allow a record hearing on the merits of his Rule 60(b), SCRCP, motion for relief from judgment and/or in failing to issue a stay pending a hearing on the motion. DSS avers Basnight filed his Rule 60(b) motion, then requested, in chambers, the family court hold an emergency hearing. The court refused, and allegedly advised Basnight to file a written request for a hearing with the clerk of court. Basnight instead filed this appeal.

The issue Basnight relies on in support of his Rule 60(b) motion has not yet been presented to or ruled upon by the family court.[5] DSS admits the issue "may have been collateral" and does not object to the matter being raised post-trial. We find the issue is not ripe for review by this Court. See Baber v. Greenville County, 327 S.C. 31, 488 S.E.2d 314 (1997) (finding an issue not yet presented to the Tax Commission not ripe for appellate review).

Error Preservation[6]

In his brief, Basnight finally argues the family court erred in: (1) failing to dismiss this action because there exists no affidavit of proof of service of process on Basnight; and (2) failing to dismiss the action where no guardian ad litem was appointed for the child. Neither issue was raised to or ruled upon by the family court, and they are therefore not properly before this court for review. McDavid v. McDavid, 333 S.C. 490, 511 S.E.2d 365 (1999) (holding an issue not raised to or ruled on by the family court should not be considered by the appellate court).

For the foregoing reasons, the order on appeal is

AFFIRMED.

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[4] Basnight's eleventh issue on appeal.

[5] Basnight argues the determination of his child support must take into account his obligation to his other children.

[6] Basnight's fifth and sixth issues on appeal.

CURETON, GOOLSBY and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gary Johnson,

Plaintiff,

v.

Mohammad B. Arbabi and Akram Arbabi,

Defendants/Third Party Plaintiffs,

v.

Beaufort County Treasurers Office and Joy Logan, Treasurer,

Third Party Defendants.

Of whom

Gary Johnson is,

Respondent,

and

Mohammad B. Arbabi is,

Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Special Circuit Court Judge

Opinion No. 3362
Heard November 9, 2000 - Filed June 25, 2001

REVERSED

Thomas J. Finn, of Mullen Law Firm, of Hilton Head Island, for appellant.

J. Ray Westmoreland, of Hilton Head Island, for respondent.

ANDERSON, J.: Dr. Mohammad B. Arbabi appeals the trial court's decision confirming title in Gary Johnson for a condominium Johnson purchased at a tax sale. We reverse.

FACTS/PROCEDURAL BACKGROUND

In January 1981, Dr. Arbabi and his wife, Akram Arbabi, as tenants in common, executed a contract to purchase a condominium in the Island Club Horizontal Property Regime on Hilton Head Island from the Island Club Investment Company ("ICIC"). The sale price was $90,000. ICIC financed the transaction. Title to the property was to remain in ICIC's name until the Arbabis paid their debt in full.

The Arbabis decided in 1989 or 1990 to pay off the balance due ICIC. Prior to recording the deed in the Arbabis' names, Dr. Arbabi's attorney requested copies of the property tax bills for 1988, 1989, and 1990 from the Beaufort County Tax Assessor. The attorney additionally asked the Tax Assessor's office to send all future tax bills to the Arbabis' primary address at 3739 White Trillium Drive East in Saginaw, Michigan. The Beaufort County authorities never responded to this letter. On September 3, 1991, the Arbabis

recorded their deed in the names of "Mohammad B. Arbabi and Akram Arbabi."

The property taxes for 1990 were not paid. The Beaufort County Treasurer issued a warrant of execution against ICIC. On May 1, 1991, Herschel J. Evans, Jr., the Deputy County Treasurer, sent a notice of the delinquent tax sale to ICIC. Evans seized the property on July 2, 1991, and the County took exclusive possession. The County Treasurer advertised the tax sale in the name of ICIC. Johnson bought the property at the tax sale for $7,000.

Dr. Arbabi moved out of the couple's White Trillium Drive East home in July 1992 due to marital difficulties. By letter dated September 1, 1992, which was addressed jointly to Dr. and Mrs. Arbabi, the County Treasurer stated the property had been sold and could be redeemed by paying $2,329.40 by October 7, 1992. The notice was sent to the White Trillium Drive East address.

In November 1992, the County Treasurer issued Johnson a tax deed, which indicated the defaulting taxpayer was ICIC. The deed additionally stated the tax collector mailed "to the owner of record on February 1, 1992 (year of expiration of redemption period) a Notice addressed to Mohammed B. and Akrem Arabi [sic] (owner of record on February 1, immediately preceding the end of the redemption period)."

Johnson commenced an action to quiet title in January 1993. Dr. Arbabi filed an answer and brought a third-party complaint against the Beaufort County Treasurer's Office and the County Treasurer, individually, seeking to have the tax deed voided.[1] Mrs. Arbabi did not make a return. Both Johnson and Dr. Arbabi moved for summary judgment. The Circuit Court held the County had

[1] Dr. Arbabi's claims against Beaufort County and the treasurer are not part of this appeal.

complied with S.C. Code Ann. § 12-51-40(d)[2] in advertising the property in the name of ICIC, the delinquent taxpayer for the 1990 taxes. Dr. Arbabi's motion was denied upon this ground. The court decided, however, the County did not comply with § 12-51-120.[3]

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[2] Section § 12-51-40(d) stated, in part:

> The property must be advertised for sale at public auction. The advertisement must be in a newspaper of general circulation within the county or municipality, if applicable, and must be entitled "Delinquent Tax Sale." It shall include the delinquent taxpayer's name and the description of the property, a reference to the county auditor's map-block-parcel number being sufficient for a description of realty. The advertising must be published once a week prior to the legal sales date for three consecutive weeks for the sale of real property, and two consecutive weeks for the sale of personal property.

[3] When the County Treasurer sent the redemption notice to the Arbabis, § 12-51-120 read, in part:

> Neither more than forty-five days nor less than twenty days prior to the end of the redemption period for real estate sold for taxes, the person officially charged with the collection of delinquent taxes shall mail a notice by "certified mail, return receipt requested — deliver to addressee only" to the owner of record immediately preceding the end of the redemption period at the best address of the owner available to the person officially charged with the collection of delinquent taxes that the real property described on the notice has been sold for taxes and if not redeemed by paying taxes, assessments, penalties,

The judge found: "Each owner had an interest in the property and the statute requires that each owner receive notice by 'certified mail return receipt requested — deliver to addressee only.' One notice addressed to two owners does not comply with the notice requirements of S.C. Code Ann. § 12-51-120." Consequently, the court granted summary judgment to Dr. Arbabi and the tax deed was declared invalid. Upon Johnson's motion to alter or amend the judgment, the court modified its order. The judge declared Mrs. Arbabi to be in default. He additionally granted Johnson the relief requested in the complaint, but only as to the undivided half-interest of Mrs. Arbabi. Dr. Arbabi was ordered to pay Johnson one-half of the bid price and other amounts associated with the sale.

Dr. Arbabi appealed the Circuit Court's decision. In an unpublished opinion, Johnson v. Arbabi, Op. No. 96-UP-008 (S.C.Ct.App. filed January 8, 1996), this Court deemed the trial court's issuance of relief to Dr. Arbabi was erroneous: "Dr. Arbabi did not state as a ground for his motion the County's failure to comply with § 12-51-120 …. Hence, the circuit court should not have addressed this ground." This Court determined the parties were back to the respective positions they occupied before the summary judgment order and the case would continue as if the ruling on Dr. Arbabi's motion had not been made.

On remand, the trial court found the County Treasurer complied with § 12-51-40(d) when it advertised the property in the name of ICIC because: (1) ICIC was the defaulting taxpayer; and (2) the County Treasurer was not aware of the unrecorded land contract between ICIC and the Arbabis. The judge additionally ruled the County Treasurer satisfied § 12-51-120 when it sent only one notice via restricted delivery to the White Trillium Drive East address. Mrs.

> costs and eight percent interest on the bid price in the total amount of _____ dollars on or before _____ (twelve months from date of sale) … a tax title will be delivered to the successful purchaser at the tax sale.

Arbabi signed for the notice, which was addressed jointly to Dr. and Mrs. Arbabi; however, Dr. Arbabi no longer lived at the residence. The court decreed Mrs. Arbabi acted as Dr. Arbabi's agent; thus, her knowledge of the proceedings in Beaufort County was imputed to him. Further, Dr. Arbabi was found to have ratified the actions of his wife: "[Dr.] Arbabi made Mrs. Arbabi his agent by not returning to the White Trillium address after they separated … [Dr.] Arbabi did not stop Mrs. Arbabi from receiving his mail … [Dr.] Arbabi ratified the actions of his wife that were done on his behalf and the conduct of the parties establishes the agency relationship." Dr. Arbabi's argument regarding the County Treasurer's lack of adherence to § 12-51-130,[4] a provision that in part specifies the recital of certain procedural information in the issuance of a tax deed, was rejected. The judge noted the issue was not raised in Dr. Arbabi's pleadings and asseverated he would have ruled against Dr. Arbabi even if the issue had been properly before the court. Johnson was declared to hold a valid title to the condominium.

STANDARD OF REVIEW

This is an action in equity. See Godfrey v. Webb, 277 S.C. 246, 285 S.E.2d 883 (1982) (ruling suit to set aside a tax deed is in equity); Bryan v. Freeman, 253 S.C. 50, 168 S.E.2d 793 (1969) (holding an action to quiet title is equitable in nature). Therefore, this Court may find facts according to our own view of the preponderance of the evidence. Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). In addition, this appeal presents novel issues of law. In such a circumstance, we are free to decide

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[4] When this dispute arose, § 12-51-130 propounded, in part:

> The tax title shall include, among other things, the name of the defaulting taxpayer, the date of the execution, the date the realty was posted and by whom, and the dates each certified notice was mailed to the party or parties of interest, to whom mailed and whether or not received by the addressee.

issues presented to us with no particular deference to the trial court's findings. S.C. Const. art. V, §§ 5 & 9; S.C. Code Ann. §§ 14-3-320 & -330 (1976 & Supp. 2000); S.C. Code Ann. § 14-8-200(a) (Supp. 2000); I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

ISSUES

I. Did the trial court err by declaring Mrs. Arbabi was Dr. Arbabi's agent when she received the notice of the right to redeem from the Beaufort County Treasurer?

II. Did the trial court err in holding the Beaufort County Treasurer complied with the provisions of § 12-51-120 by mailing only one notice of the right to redeem to Dr. and Mrs. Arbabi?

LAW/ANALYSIS

I. Agency Relationship Between Dr. and Mrs. Arbabi

Dr. Arbabi argues the trial court erred in holding Mrs. Arbabi was his agent at the time she received the redemption notice and that consequently, her knowledge of the tax sale was imputed to him. We agree.

In 1992, the law required tax authorities to send property owners notice of the redemption period's approaching end by "certified mail, return receipt requested — deliver to addressee only." S.C. Code Ann. § 12-51-120 (Supp. 1991). The General Assembly amended the statute in 1996 to substitute "restricted delivery" for "deliver to addressee only" to conform with postal regulation terminology. Act No. 431, 1996 Acts 2622. The United States Postal Service describes "restricted delivery" service as permitting "**a mailer to deliver only to the addressee or addressee's authorized agent**." In re Ryan Inv. Corp., 335 S.C. 392, 394-95, 517 S.E.2d 692, 693 (1999) (quoting United States Postal Services Domestic Mail Manual § S916.1.1) (emphasis added).

On remand, the trial court concluded an agency relationship could be implied from the relationship that existed between Dr. Arbabi and Mrs. Arbabi. This Court holds an implied agency cannot satisfy the requirements relating to the receipt of a redemption notice. An addressee's "authorized agent" can only be a person acting pursuant to the express authority of the addressee. See United States Postal Services Domestic Mail Manual § S916.3.1 ("Mail marked 'Restricted Delivery' is delivered only to the addressee or to the person authorized in writing as the addressee's agent to receive the mail ….").

During the trial, the following colloquy occurred:

> Counsel for Dr. Arbabi: I would ask that there is certainly no evidence here that there was [an] agency relationship.
>
> The Court: Well, let me ask you this. A husband is always an agent for a wife and a wife is always an agent for her husband in a situation like this. I mean ——
>
> . . . .
>
> The Court: I'm just thinking. You know, just like you have parents are natural guardians[,] so you've got natural agents ….

The court's pronouncement on this facet of agency law was incorrect.

A spouse, whether husband or wife, is not the agent of the other by virtue of the marital relationship that exists between them. Restatement (Second) of Agency § 22, cmt. b (1957). In Barber v. Carolina Auto Sales, 236 S.C. 594, 115 S.E.2d 291 (1960), the wife traded in the husband's car for a new automobile while the husband was stationed in Germany with the Army. The

wife did not have permission, express or otherwise, to dispose of the husband's car. Upon his return, the husband brought a conversion action against the dealership. A nonsuit was granted by the trial court upon the grounds, inter alia, the husband's absence created the implied authority in the wife to act on his behalf and trade the automobile. The Supreme Court disagreed with the trial court's assessment:

> Where the wife is left in possession of the husband's property during his absence, as where he has absconded and his whereabouts are unknown, the law will imply or presume that she is acting as his agent and that she has authority to exercise the usual and ordinary control over the property. **However, the mere fact that the husband is absent does not give rise to a presumption that the wife is his agent generally**; her authority springs from and is limited to what can be reasonably presumed to be the intention of the husband; it does not extend beyond the authority which is usually and customarily conferred by husbands under the same or similar circumstances.

Id. at 598, 115 S.E.2d at 293 (citations omitted) (emphasis added); see also 41 C.J.S. Husband & Wife § 56 (1991) ("A spouse may constitute the other spouse as an agent either expressly or impliedly; but, if agency is implied, it must be by conduct, and not merely from a party's position as a spouse. Moreover, agency of a spouse should not be implied lightly, especially when the other spouse may be prejudiced seriously.") (footnotes omitted); Annotation, 41 Am. Jur. 2d Husband and Wife § 155 (1995) ("Agency between spouses does not automatically arise from the marital relationship itself.") (footnote omitted); S.C. Jur. Agency § 6 (1994) ("No presumption arises from the fact of the marital relationship, without more, that [a spouse] is the agent of [the other spouse].") (footnote omitted).

A spouse is not jure mariti the agent of the other spouse. Pitt v. Speight, 24 S.E.2d 350 (N.C. 1943). If such an agency is relied upon, it must be proven. Id.; see also Hinson v. Roof, 128 S.C. 470, 475, 122 S.E. 488, 490 (1924) ("The marriage relation of the parties … is not necessarily enough to establish the fact

that the one is the agent of the other. There must be other proof.") (quoting Lunge v. Abbott, 95 A. 942, 943 (Me. 1915)). The existence of agency between husband and wife is governed by the same rules that apply to other forms of agencies. True v. Cudd, 106 S.C. 478, 91 S.E. 856 (1917). At trial, Dr. Arbabi denied authorizing his wife to accept certified mail on his behalf. Concomitantly, there is no evidence in the record indicating Dr. Arbabi permitted Mrs. Arbabi to act upon his behalf regarding management of the Beaufort County property. We hold the trial court erred in finding Mrs. Arbabi was Dr. Arbabi's agent when she received the notice of the right to redeem.

II. Sufficiency of Single Notice

Dr. Arbabi argues the trial court erred in finding the County Treasurer complied with § 12-51-120 when it mailed a joint redemption notice to Dr. Arbabi and Mrs. Arbabi. We agree.

The South Carolina Supreme Court and this Court have held the enforcing agencies of government to strict compliance with all the legal requirements surrounding tax sales. E.g., Dibble v. Bryant, 274 S.C. 481, 265 S.E.2d 673 (1980); Manji v. Blackwell, 323 S.C. 91, 473 S.E.2d 837 (Ct. App. 1996). Because notice to landowners, as required by the tax sales statutes, is constructive rather than actual, the courts requires strict compliance with these statutes. Southern Region Indus. Realty, Inc. v. Timmerman, 285 S.C. 142, 328 S.E.2d 128 (Ct. App. 1985); Taylor v. Jennings, 233 S.C. 600, 106 S.E.2d 391 (1958); Osborne v. Vallentine, 196 S.C. 90, 12 S.E.2d 856 (1941); Dickson v. Burckmyer, 67 S.C. 526, 46 S.E. 343 (1903); see also 72 Am. Jur. 2d State and Local Taxation § 1019 (1974) (stating the requirements of the statute as to the service and proof of service of the notice required to terminate an owner's right to redeem from a tax sale are considered mandatory and required to be strictly followed). "The sound view is that all requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are regarded to be mandatory, and are to be strictly enforced." Aldridge v. Rutledge, 269 S.C. 475, 478, 238 S.E.2d 165, 166 (1977) (quoting Osborne, 196 S.C. at 94, 12 S.E.2d at 858); see also Marx v. Hanthorn, 148 U.S. 172, 180, 13 S. Ct. 508, 510, 37 L.Ed. 410 (1893) ("As there

must be express statutory authority for selling lands for taxes, and as such sale is in the nature of an ex parte proceeding, there must be, in order to make out a valid title … compliance with the provisions of the law authorizing the sale. A statutory power, to be validly executed, must be executed according to the statutory directions.").

A taxing authority's failure to give the required notice is not excused regardless of whether the taxpayer received actual notice. Manji, 323 S.C. at 93, 473 S.E.2d at 838 (citing Aldridge, 269 S.C. at 478, 238 S.E.2d at 166); see also South Carolina Fed. Sav. Bank v. Atlantic Land Title Co., 314 S.C. 292, 295, 442 S.E.2d 630, 632 (Ct. App. 1994) ("Statutory requirements protecting against tax sale forfeiture of real property are strictly construed, and statutory notice requirements may not be circumvented simply by establishing actual notice of a tax sale.") (citation omitted). Failure to give proper notice is a fundamental defect that renders the proceedings absolutely void. Donohue v. Ward, 298 S.C. 75, 378 S.E.2d 261 (Ct. App. 1989); see also 72 Am. Jur. 2d State and Local Taxation § 916 (1974) ("Statutory requirements of notice of a tax sale are imperative and must be complied with; in the absence of notice to the tax delinquent, a sale passes no title to the tax purchaser.") (footnote omitted).

It is well established "[w]hen … land is owned in fee by tenants in common, notice to one of them [of the impending tax sale] is not sufficient, and if notice is not given to all of them, the sale is void, at least against those who have not been notified." 72 Am. Jur. 2d State and Local Taxation § 924 (1974) (footnote omitted). The same rule applies regarding redemption notices: each co-tenant is equally entitled to separate notice. Without proper notice, the entire transaction is void. As a practical matter, we find one notice addressed to two or more tenants in common cannot meet the requirements of § 12-51-120. In sending a single notice, a tax authority assumes the co-tenant who receives the notice will share it with the other co-tenants. Such an assumption does not comport with our case law requiring strict compliance with the notice requirements to afford each co-tenant protection against surprise or the sacrifice of his property. Accordingly, we find the trial court erred in holding the County

Treasurer complied with § 12-51-120.[5]

This Court has promulgated: "[W]here a statute requires as a condition precedent to foreclosing a taxpayer's rights in property sold for taxes that he be given notice of his right to redeem, such a requirement is 'generally regarded as jurisdictional, and therefore, the owner's right of redemption cannot be cut off unless the required notice is given.'" Good v. Kennedy, 291 S.C. 204, 207, 352 S.E.2d 708, 711 (Ct. App. 1987) (quoting 72 Am. Jur. 2d State and Local Taxation § 1010 (1974)).

Courts in other jurisdictions have recognized or held the statutory provisions regarding notice to redeem are mandatory, and that strict compliance with these requirements is essential to the validity of a tax proceeding. Nora A. Uehlein, Annotation, Right of Interested Party Receiving Due Notice of Tax Sale or of Right to Redeem to Assert Failure or Insufficiency of Notice to Other Interested Party, 45 A.L.R.4th 447 (1986). In many circumstances, the failure to rigidly observe the notice procedures governing tax sales has resulted in the nullification of an entire transaction. See, e.g., Montgomery v. Gipson, 69 So.2d 305 (Fla. 1954) (holding notice of right to redeem to one spouse was insufficient and tax deed was void); Brousseau v. Conklin, 3 N.W.2d 260, 261 (Mich. 1942) ("Until the statutory notice is served upon all parties entitled thereto and proof thereof is made and filed, the right of redemption remains to all." (citation omitted)); Bodinger v. Garrison, 294 N.Y.S. 916 (N.Y. App. Div. 1937) (ruling failure of holder of tax deed to give notice to redeem to all

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[5] In its prior opinion, this Court stated:

> "[E]ven if the issue of notice under §12-51-120 [had been properly presented to] the trial court, we hold the statute does not require separate notices to have been sent to the Arbabis. A joint notice was sufficient if the statue was otherwise complied with and both Dr. and Mrs. Arbabi signed the certified mail receipt for the joint notice." This statement was obiter dictum and is not binding on our present consideration of the issue.

interested parties, as required by law, vitiates tax deed); Teslovich v. Johnson, 406 A.2d 1374 (Pa. 1979) (concluding tax sale was voided where separate and individual notice was not provided to each named owner of the property, per the mandate of the state law).

In contrariety, other tribunals have held the failure to provide notice to a party having an interest in property renders the sale as to that party's interest invalid, but does not prevent the sale from being valid and effective as to the parties duly served. 72 Am. Jur. 2d State and Local Taxation § 925 (1974); see also, e.g., Hatcher v. Howes, 128 S.W. 335 (Ky. 1910) (holding while sale of interest of a property owner was void for lack of notice, it does not invalidate the sale of remaining interests); In re Interstate Land Co., 43 So. 173 (La. 1906) (finding adult co-owner was not entitled to relief when he received notice; however, notice to adult was not binding on minor co-owners); Nugent v. Lindsley, 135 A. 271 (N.J. Ch. 1926) (voiding sale of interests of owners who had not been served, but upholding sale of interests of those who had received notice).

South Carolina's tax sales laws were promulgated to protect the government against wilful, persistent, and long standing delinquents. They were not created to punish taxpayers who have failed to pay their taxes because of legitimate mistake or error. The divestiture of a person's property due to outstanding tax obligations is a drastic and serious measure. When government issues notices relating to tax sales and redemption, it must do so in punctilious compliance with the procedures outlined within the 1976 Code. Failure to assiduously follow the delineated processes may result in the inequitable deprivation of an owner's rights in his property. Therefore, we hold any material deviation from the notice requirements will eventuate in the complete abrogation of a transaction granting title to a tax sale purchaser.

CONCLUSION

We rule § 12-51-120 requires the notice of the right to redeem to be mailed to the owner of record or the owner's "authorized agent." The law of implied agency is **not** applicable to the notice requirements of a tax sale. Under

the statute and the regulations of the United States Postal Service, an addressee's "authorized agent" is an agent acting with **express** authority of the addressee.

Finally, given this state's mandate that all proceedings leading to a tax sale must strictly fulfill the statutory requirements to avoid a forfeiture of the taxpayer's property, we hold a taxing authority's failure to provide a co-tenant with notice of redemption voids the entire sale. As the County Treasurer failed to provide Mr. Arbabi notice as required by § 12-51-120, we find the entire tax sale is void. The trial court thus erred in quieting title to the condominium in Johnson.

REVERSED.[6]

HEARN, C.J., concurs.

STILWELL, J., dissents in a separate opinion.

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[6] In light of this disposition, we need not examine Dr. Arbabi's remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling appellate court need not review remaining issues when disposition of prior issues are dispositive) (citing Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993)).

This Court declines to address Johnson's additional sustaining grounds. Rule 220(c), SCACR; I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420 n.9, 526 S.E.2d 716, 723 n.9 (2000) (holding appellate court may decline addressing respondent's additional sustaining grounds when it reverses prior court's decision) (citing Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 472 S.E.2d 612 (1996)).

STILWELL, J. (dissenting): While I agree with the majority's analysis and result on the question of the agency relationship between Dr. and Mrs. Arbabi, under the peculiar circumstances of this case I respectfully disagree with their conclusion on the question of the sufficiency of the legal notice. Therefore, I dissent.

The critical issue is whether the tax collector of Beaufort County strictly complied with the requirements of S.C. Code Ann. § 12-51-120 (2000 & Supp. 2000) in sending only one written notice addressed to co-tenants at their home address rather than two notices to the same address.

While the law of this state unquestionably requires the taxing authorities to strictly comply with all the legal requirements surrounding tax sales,[7] I think those requirements were met in this case. First, there is no question but that the correct method of mailing was employed. That is the factual distinction between this case and Manji v. Blackwell,[8] where the notice was sent certified mail only and not "deliver to addressee only." That deviation from the requirement of the statute was the sole reason the tax sale was held to be invalid in Manji.

Second, the correct and appropriate address was utilized. That is the distinguishing factor between this case and the cases of Benton v. Logan,[9] and Good v. Kennedy.[10] In Benton, it was determined that the tax official failed to exercise due diligence in determining the best address available when a notice was returned to him marked "Forwarding Order Expired." No such return was made in this case. In Good, the tax collector used an address other than the one on the deed and a tax sale was set aside for that reason. There is no question but

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[7] Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999).

[8] 323 S.C. 91, 473 S.E.2d 837 (Ct. App. 1996).

[9] 323 S.C. 338, 474 S.E.2d 446 (Ct. App. 1996).

[10] 291 S.C. 204, 352 S.E.2d 708 (Ct. App. 1987).

that the correct address of Dr. and Mrs. Arbabi was utilized in this case, as it was the address they put on their deed and was additionally confirmed by letter from Dr. Arbabi's personal attorney directing any and all notices to him be sent to the address utilized by the county treasurer.

Under the circumstances, the sole question then is whether the county treasurer should have sent two separate notices to the same address. If so, should he have sent two notices, both addressed to both people, or should he have sent the two notices addressed individually? It is respectfully submitted either way the result would have been identical to the result in this case.

It is as important to point out what this case does not involve as what it does involve. It does not involve failing to send the required notice to the delinquent taxpayer. The notice was sent to Dr. Arbabi at his best address. It does not involve multiple owners who each provide separate addresses for tax notice purposes. Both owners provided the same address. It does not involve a failure to exercise due diligence. There was no reason for the treasurer to believe that Dr. Arbabi was not being appropriately noticed pursuant to the statute. It makes little sense to me that where multiple owners provide only one address for notice purposes each one must be sent a separate notice but all to the same address.

Had the statute in question been worded so as to provide that the mailing must be made to "each owner of record," I would have no complaint with the result reached by the majority. However, the statute merely requires notice be sent "'to the owner of record' . . . at the best address of the owner available." The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.[11] Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.[12]

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[11] Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993).

[12] Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

Under the circumstances of this case, I would hold that the specific requirements of the statute have been met and, while it is regrettable that Dr. Arbabi did not receive actual notice, that is not required by the statute and his failure to receive notice is not attributable to any omission on the part of the treasurer, but is solely due to his own unfortunate situation. I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Keith Watts,

Respondent,

v.

Metro Security Agency, a/k/a Metro Security, Elite Ghana, a/k/a Sloans Incorporated, Blue Morocco Cocktail Lounge, Anne G. Pinson, Joseph King and Abraham Jeter,

Defendants,

of which Anne Pinson is the,

Appellant.

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

Opinion No. 3363
Submitted June 4, 2001 - Filed July 2, 2001

AFFIRMED

Clifford F. Gaddy, Jr., of Greenville; and James C. Cothran, Jr., of Spartanburg, for appellant.

Fletcher N. Smith, Jr., of Greenville, for respondent.

GOOLSBY, J.: In this premises liability action, Anne Pinson appeals the denial of her motion to vacate a default judgment awarding Keith Watts $95,000.00 in actual and $5,000.00 in punitive damages. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Keith Watts filed this action alleging that on August 8, 1992, he was shot by Victor Maceo Riley on the premises of the Elite Ghana Lounge. Watts claimed the defendants, including Pinson, inter alia negligently failed to protect him and other customers from Riley; negligently served Riley alcohol while he was intoxicated; failed to employ competent security; failed to promptly summon police; and failed to immediately aid him after the shooting.

Watts served Pinson with the complaint on February 3, 1995. When Pinson failed to answer within thirty days, Watts filed an affidavit of default. On May 21 and 27, 1998, Watts's counsel hand-served Pinson with notice that a hearing to determine damages had been set for May 28, 1998.

Pinson went to the courthouse on the scheduled date to attend the damages hearing but left before it began. When Pinson arrived, she asked the clerk of court if she had to be present for the hearing. The clerk responded, "Well, no, you don't have to be here if you don't want to be here." Pinson then left.

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decided this case without oral argument pursuant to Rule 215, SCACR.

At the hearing, Watts testified he went to the Elite Ghana nightclub with his cousin on August 8, 1992. Elite Ghana security later escorted Watts and his cousin from the club (apparently after an altercation). Within minutes, security broke up a confrontation involving Watts and his cousin outside the club. Security then "disappeared." Before Watts and his cousin could get to their car, Riley appeared and shot Watts in the right kneecap.

Watts missed two years from work, lost his car, and incurred medical bills of $20,000.00. Watts characterized the Elite Ghana as being in a "high crime" area and stated there had been prior shootings at the club. The court entered judgment against Pinson and one other defendant in favor of Watts for $95,000.00 in actual damages and $5,000.00 in punitive damages.

In a motion dated May 3, 1999, Pinson sought to set the judgment aside pursuant to Rule 60(b)(4), SCRCP, arguing the judgment was void due to improper service and lack of notice of the damages hearing.

On July 1, 1999, Pinson made a second motion to set aside the judgment, this time arguing the verdict was not supported by the evidence, the judgment constituted a fraud, and the complaint failed to state a cause of action. At the hearing, the two motions to set aside the judgment were consolidated into a single motion.

The trial court denied the motion.[2] Pinson appeals.

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[2] The court noted Pinson did not make a timely motion for relief under Rule 55(c). Pinson did not make any motion until after the default judgment; therefore, Rule 55(c) is not applicable. See Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987) (applying Rule 55(c) standard when party moved to set aside entry of default prior to default judgment).

LAW/ANALYSIS

Pinson argues that Watts's complaint fails to allege a cause of action upon which a judgment can be granted and, that as such, the default judgment against her should be set aside. We disagree.

The determination of whether Watts's complaint states a valid cause of action must be made solely upon the allegations set forth in the complaint.[3] The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief.[4]

The elements for a cause of action in negligence are: 1) a duty of care owed to the plaintiff by the defendant; 2) a breach of that duty by some negligent act or omission; and 3) damage proximately resulting from that breach.[5] All three elements must be present or the cause of action will fail.[6]

We find the complaint was sufficient to state a cause of action against Pinson.[7] Watts's complaint alleged that Pinson, as an agent, servant, board

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[3] Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999).

[4] Washington v. Lexington County Jail, 337 S.C. 400, 523 S.E.2d 204 (Ct. App. 1999).

[5] Stevens v. Allen, 342 S.C. 47, 536 S.E.2d 663 (2000).

[6] Washington, 337 S.C. at 405, 523 S.E.2d at 206.

[7] See Parks v. Characters Night Club, Op. No. 3342 (S.C.Ct.App. filed May 21, 2001) (Shearouse Adv.Sh. No. 18 at 29) (stating if the place or character of a land owner's business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection); see also Jeffords v. Lesesne, 343

member, or employee of the Elite Ghana,[8] owed a duty to Watts and negligently failed to prevent Riley from shooting Watts,[9] negligently failed to employ adequate security,[10] and negligently served Riley alcohol while he was

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S.C. 656, 541 S.E.2d 847 (Ct. App. 2000) (finding the place and the character of the business raised a factual issue concerning the reasonable foreseeability of criminal conduct of a third party and the necessity of taking reasonable precautions, such as providing security or a reasonably sufficient number of servants, to afford protection).

[8] Watts's complaint alleges in Paragraph 3:

> 3) That Defendant Ann Pinson, Joseph King and Abraham Jeter are agents, servants, Board members, and employees of the Defendant business concerns [i.e., Metro Security, a/k/a Metro Security Agency, Elite Ghana Lounge, Sloans Incorporated and Blue Morocco Cocktail Lounge & Club, Inc.].

[9] Watts's complaint alleges in Paragraphs 6 and 7:

> 6) That Defendants did or should have foreseen that the assault against the Plaintiff would occur because Victor Maceo Riley had been involved in similar altercations on Defendants' premises on prior occasions and has a reputation in the community for violent behavior, particularly when intoxicated.
>
> 7) That Despite Defendants' notice of the danger that Victor Maceo Riley would commit an assault, Defendant negligently failed to adopt and enforce a policy of barring Victor Maceo Riley from the premises and negligently failed to remove Victor Maceo Riley from the premises when his behavior warranted such action on the date of the assault against Plaintiff.

[10] Watts's complaint alleges in Paragraph 9:

> 9) That Defendant negligently failed to employ competent

intoxicated and disorderly.[11] The complaint further stated that Pinson's negligence in these regards caused Watts's injury.[12]

Pinson maintains the complaint was insufficient because Watts failed to allege necessary facts such as: 1) why Watts was at the Elite Ghana; 2) how long he had been at the club prior to the shooting; 3) Watts was a customer; and 4) Pinson was the landlord. We disagree. "The purpose of a pleading is fair notice to the opponent and the court."[13] In this state, Rule 8, SCRCP, mandates that a pleading contain "ultimate facts" rather than "evidentiary facts" to state a cause of action.[14] "Ultimate facts fall somewhere between the verbosity of 'evidentiary facts' and the sparsity of 'legal conclusions.'"[15] The complaint here

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security guards or "bouncers" who could have controlled Victor Maceo Riley and thereby prevented the assault.

[11] Watts's complaint alleges in Paragraph 8:

> 8) That on the date of the assault, Defendants negligently served intoxicating liquor to Victor Maceo Riley when he was intoxicated, even though Defendants knew or should have known that doing so increased the danger that Victor Maceo Riley would act in a violent manner.

[12] Watts's complaint alleges in Paragraph 12:

> 12) That the Plaintiff's injuries were the direct, proximate and foreseeable results of the carelessness, gross negligent, reckless, willful and wanton acts and/or omissions of the Defendants.

[13] James F. Flanagan, South Carolina Civil Procedure 59 (2d ed. 1996).

[14] Id. at 58-59.

[15] Id. at 59.

gave fair notice of Watts's claim, alleging as it did what we consider to be "ultimate facts."

AFFIRMED.

HEARN, C.J., and CONNOR, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Department of Social Services,

Respondent,

v.

Mrs. H and Mr. H,

Appellants.

Appeal From Sumter County
R. Wright Turbeville, Family Court Judge

Opinion No. 3364
Heard May 8, 2001 - Filed July 2, 2001

AFFIRMED

Charles T. Brooks, III, of Sumter, for appellants.

Sharon Baker Clark, of Sumter, for respondent.

HUFF, J.: Mrs. H and Mr. H appeal from an order of the family court terminating their parental rights to two minor children, the older child and the younger child. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Mrs. H is the natural mother of the older child and the younger child. Mr. H is the younger child's natural father and the older child's stepfather.

Law enforcement officers took the older child into emergency protective custody on June 2, 1992, after the Department of Social Services (DSS) received a report alleging she had been sexually abused, had bruises on her legs, and had head lice. The younger child was taken into emergency protective custody pursuant to an ex parte order dated August 28, 1992, due to risk of sexual abuse.

After a merits hearing in October of 1992, the family court, by its order dated December 15, 1992, continued custody with DSS. In its order, the court found: (1) Mr. H had inappropriately touched the older child in her vaginal area; (2) Mrs. H would be unable or unwilling to protect the child from such abuse because she did not believe the abuse occurred; and (3) Mr. H's conduct with the older child placed the younger child in danger "until such time as Mr. H and Mrs. H can be rehabilitated . . . ." In the same order, the court approved a treatment plan for Mr. H and Mrs. H and directed both parents to comply with its terms.

Mrs. H and Mr. H filed a pro se motion dated December 29, 1992, seeking reconsideration of the December 15, 1992 order pursuant to Rule 60(b)(1), (2), (3), (4), and (5), based on newly discovered evidence.[1] A hearing on the motion was set for September 23, 1993, but was subsequently continued. Mr. H and Mrs. H through their attorney, filed an amended motion to reconsider on November 30, 1993, and the court rescheduled the hearing for December 14, 1993. On the same day, DSS filed a return opposing the motion, and the hearing was rescheduled for December 17, 1993. After the December 17th hearing, the

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[1] In response to the court's questioning at oral argument, Mrs. H's and Mr. H's counsel acknowledged the motion was made pursuant to Rule 60, rather than Rule 59, SCRCP.

court issued an order dated January 24, 1994, continuing the hearing and finding the motion should be heard by the judge who issued the December 15, 1992 order.

Subsequent to the December 15, 1992 order and up until April 1998, the family court held numerous review and motion hearings. In September of 1993, the family court continued custody of the children with DSS and ordered Mrs. H and Mr. H to continue counseling and "cooperate with the professionals." Following an August 1994 review hearing, the court found a "significant aspect of the Treatment Plan," that Mr. H and Mrs. H receive individual counseling, had not materialized, and that the children should remain in foster care. The court ordered Mrs. H and Mr. H to promptly arrange to begin counseling and noted, if Mrs. H and Mr. H failed to attend counseling, it would be an indication to the court that they "did not wish to remediate the problems which necessitated the removal of the children." In February of 1995, the court suspended Mr. H's visitation with the older child and encouraged Mrs. H and Mr. H to cooperate with the treatment plan. In May of 1995, the court held two hearings, one on the issue of evaluation of the children by Mrs. H's and Mr. H's counselor and another on the issue of whether Mr. H should be allowed to resume visitation with the older child. By order dated June 21, 1995, the court found that the detriment to the older child in allowing such visitation outweighed any benefit therefrom, and the order suspending that visitation should remain in force. The court further urged Mrs. H and Mr. H to be faithful to the treatment plan.

In 1995, Mrs. H and Mr. H filed a complaint, and in 1996 an amended complaint, seeking to regain custody of the children. On September 11, 1997, DSS filed this action for termination of parental rights. By order dated October 2, 1998, the family court consolidated all of the pending actions, including Mrs. H's and Mr. H's action to regain custody, and all issues were preserved for a final hearing on the merits.

The family court held the final hearing on the consolidated actions on November 17, 18, and 19, 1999. By order dated January 4, 2000, the court terminated Mr. H's parental rights as to the younger child, and terminated Mrs.

H's parental rights as to both the younger child and the older child.[2] The court also directed DSS to devise a permanent placement plan for the children. Regarding Mr. H, the court specifically found, despite identification by DSS of the conditions leading to removal and meaningful efforts of the agency to provide appropriate rehabilitative services, clear and convincing evidence indicated Mr. H failed to complete his treatment plan and, therefore, never remedied the conditions which caused the younger child's removal from the home. The court further found that termination of Mr. H's parental rights was proper based on the undisputed evidence that the younger child had been in foster care for fifteen of the twenty-two months preceding trial. As to termination of Mrs. H's parental rights, the court found that she too had failed to remedy the conditions which caused removal of the children, inasmuch as she continued to believe Mr. H had not committed the alleged abuse and, therefore, she continued to be unable or unwilling to protect them from the risk of abuse. As well, the court found termination of Mrs. H's parental rights proper on the ground the children had been in foster care for fifteen of the most recent twenty-two months preceding trial of the case. Mrs. H and Mr. H filed a post trial motion for reconsideration, which was denied. This appeal followed.

STANDARD OF REVIEW

Grounds for termination of parental rights must be proved by clear and convincing evidence. S.C. Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999); Greenville County Dep't of Soc. Servs. v. Bowes, 313 S.C. 188, 193, 437 S.E.2d 107, 110 (1993). On appeal of a termination of parental rights case, this court may review the record and make its own finding of whether clear and convincing evidence supports the termination. S.C. Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 54, 413 S.E.2d 835, 839 (1992) ("The appellate court may review the record on appeal on the issue of termination of parental rights and make its own finding as to whether such termination is supported by clear and convincing evidence."). Statutes involving the termination of parental rights "must be liberally construed in order

[2] Pursuant to the same order, the family court terminated the parental rights of the older child's natural father, who is not a party to this appeal.

to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent child relationship. The interests of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 20-7-1578 (Supp. 2000); Joiner ex rel Rivas v. Rivas, 342 S.C. 102, 108, 536 S.E.2d 372, 375 (2000).

LAW/ANALYSIS

I.

On appeal, Mrs. H and Mr. H assert the family court lacked jurisdiction to proceed with the termination of parental rights action because their December 29, 1992 motion for reconsideration of the court's December 15, 1992 order was never heard. We disagree.

At the onset of the final hearing on November 17, 1999, Mrs. H's and Mr. H's attorney brought to the court's attention the fact that the court had never held a hearing on Mrs. H's and Mr. H's Rule 60 motion for reconsideration of the family court's order of removal dated December 15, 1992. The court found it had "directed back in 1993 that [the Rule 60 motion hearing] be scheduled in front of the [trial judge who held the removal hearing], and it was not done." It determined "[t]hat it should have been heard and it is incumbent upon the moving party to see that it is heard . . . in conjunction with . . . the trial judge." Noting the numerous review and motion hearings conducted over the seven year period since the initial filing of the motion to reconsider, the court determined, having participated in these hearings, Mrs. H and Mr. H waived and abandoned the opportunity to have the Rule 60 motion heard.

The family court has exclusive jurisdiction over all proceedings involving the termination of parental rights. S.C. Code Ann. § 20-7-1562 (Supp. 2000); S.C. Dep't of Soc. Servs. v. Smith, 343 S.C. 129, 538 S.E.2d 285 (Ct. App. 2000). Mrs. H and Mr. H assert, however, the TPR court was divested of jurisdiction until such time as the motion for reconsideration of the removal order could be heard.

We recognize, as noted by Mrs. H and Mr. H on appeal, that the family court in its January 24, 1994 order continued the hearing on their Rule 60 motion and found the motion should be heard by the judge who issued the December 15, 1992 order, but this hearing never actually occurred. There is no indication in the record, however, that Mrs. H and Mr. H sought to have the hearing rescheduled at any time after the January 24, 1994 order, even though several subsequent hearings were conducted and approximately six years elapsed between the time Mrs. H and Mr. H filed the amended motion in 1993 and the final hearing was held in 1999. It was incumbent on Mrs. H and Mr. H to reschedule the motion for hearing before the removal judge, as directed by the January 24, 1994 order. Under these circumstances, we are inclined to agree with the trial court's treatment of Mrs. H's and Mr. H's Rule 60 motion as having been waived. Accord Johnson v. Hampton Indus., Inc., 83 N.C. App. 157, 158, 349 S.E.2d 332, 333 (1986) (where the North Carolina Court of Appeals held defendant waived its right to change of venue where it failed to press the motion until some ten months after it was filed, although the motion "could have been calendared for hearing at many earlier court sessions").

Moreover, Mrs. H and Mr. H have not appealed the December 15, 1992 order. Rule 60(b) specifically provides that "[a] motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." Rule 60(b), SCRCP. In addition, our Supreme Court has held that "any order issued as a result of a merit hearing, as well as any later order issued with regard to a treatment, placement, or permanent plan, is a final order that a party must timely appeal." Hooper v. Rockwell, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999). Based on the operation of Rule 60 and the applicable case law, the December 15, 1992 order is the law of the case.

Accordingly, we find no error in the family court's decision to proceed with the action for termination of parental rights despite the fact that no hearing took place on Mrs. H's and Mr. H's Rule 60 motion.

II.

Next, Mrs. H and Mr. H assert the family court erred in determining they failed to remedy the conditions which caused removal. We disagree.

Mrs. H's and Mr. H's parental rights were terminated pursuant to, inter alia, § 20-7-1572(2), which provides for termination of parental rights if "[t]he child has been removed from the parent pursuant to Section 20-7-610 or Section 20-7-736, has been out of the home for a period of six months following the adoption of a placement plan by court order or by agreement between the department and the parent, and the parent has not remedied the conditions which caused the removal." S.C. Code Ann. § 20-7-1572(2) (Supp. 2000).

Here, the children were removed pursuant to S.C. Code Ann. § 20-7-736(B) (Supp. 2000) which provides, in relevant part:

> (B) Upon investigation of a report received under Section 20-7-650 or at any time during the delivery of services by the department, the department may petition the family court to remove the child from custody of the parent, guardian, or other person legally responsible for the child's welfare if the department determines by a preponderance of evidence that the child is an abused or neglected child and that the child cannot be safely maintained in the home in that he cannot be protected from unreasonable risk of harm affecting the child's life, physical health, safety, or mental well-being without removal.

The record shows Mr. H failed to complete his treatment plan. One of the provisions of the plan was that he acknowledge the incident of sexual abuse and seek counseling for sexual offenders. The plan also provided for Mrs. H to successfully complete a therapy program, acknowledging Mr. H as the perpetrator of the sexual abuse, so that she could provide protection for her daughters. Although Mr. H attended counseling sessions, the sessions geared toward sexual abuse treatment were discontinued because he refused to admit the abuse occurred. It is further uncontested Mrs. H has steadfastly denied any abuse on the part of Mr. H.

Mrs. H and Mr. H assert that in devising a treatment plan, DSS expanded the family court's December 15, 1992 finding of "inappropriate

touching" to allege sexual abuse when there had been no such finding. The crux of Mrs. H's and Mr. H's argument is, therefore, that their failure to complete the treatment plan should not serve as grounds for termination because the treatment plan was inappropriately designed for sexual abusers/molesters.

We disagree with Mrs. H's and Mr. H's characterization of the family court's December 15, 1992 order as not including a finding of sexual abuse. Although the court did not expressly describe Mr. H's behavior as sexually abusive, the court did find "inappropriate touching of [the older child's] vaginal area by her stepfather," and the court went on to characterize the behavior as abuse. In our view, even though the court did not employ the term "sexual abuse," the court's finding of an abusive, inappropriate touching of the child's vaginal area is tantamount to a finding of sexual abuse. See S.C. Code Ann. § 20-7-490(2) (Supp. 2000) ("'Abused or neglected child' means a child . . . whose physical or mental health or welfare is harmed or threatened with harm as defined by items (3) and (4), by the acts or omissions of the child's parent, guardian, or other person responsible for his welfare."). See also, S.C. Code Ann. § 20-7-490(3) (Supp. 2000) ("'Harm' to a child's health or welfare can occur when the parent, guardian, or other person responsible for the child's welfare: . . . (b) commits or allows to be committed against the child a sexual offense as defined by the laws of this State."). See also S.C. Code Ann. § 16-3-655(1) (1985) ("A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age."); S.C. Code Ann. §16-3-651(h) (1985) ("'Sexual battery' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."); S.C. Code Ann. § 16-15-140 (Supp. 2000) ("It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child."); S.C. Code Ann. § 17-25-135 (Supp. 2000) (Entry of sex offenders on Central Registry of Child Abuse and Neglect upon conviction of certain crimes. . . . (B) " For purposes

of this section: . . . (2) "Sexual abuse" means: (a) actual or attempted sexual contact with a child . . . .").

Further, we are compelled to agree with the family court that Mrs. H's and Mr. H's failure to complete the treatment plan precluded them from remedying the conditions which caused removal. Pursuant to the treatment plans, both Mr. H and Mrs. H were to attend counseling. Mr. H was to attend a program for sex offenders "to work through his denial and learn appropriate behavior with children." Mrs. H was also to attend counseling and work on the obstacle that she "had not dealt with her own physical and sexual abuse or that of the older child, and would not be able to protect her children until she did so." Without an acknowledgment of the incident on the part of Mrs. H and Mr. H, DSS considered placement of the children back in the home infeasible, because the children would not be safe.

DSS's expert witness testified the older child had been sexually abused and her healing process could not continue absent an admission from her abuser. She further testified that, where the abuser refuses to acknowledge the abuse, it would be detrimental to the child's well-being to be exposed to her abuser. Further, the family court noted in its order of termination that "several psychological experts . . . agreed that sexual offender counseling could never be successful without an admission on the part of the perpetrator that the abuse had taken place." See Dep't of Soc. Servs. v. Pritchett, 296 S.C. 517, 520, 374 S.E.2d 500, 501 (Ct. App. 1988) ("It is significant to note the statute allows for termination of parental rights where the parent has *not remedied* the conditions causing removal. This does not suggest that an *attempt* to remedy alone is adequate to preserve parental rights. Otherwise, the statute would be couched in such terms. The attempt must have, in fact, remedied the conditions."). Under the facts and circumstances, we affirm the family court's decision that Mrs. H and Mr. H failed to remedy the conditions which caused removal and termination is proper on that ground.

III.

Mrs. H and Mr. H next assert the family court erred in affording S.C. Code Ann. § 20-7-1572(8) (Supp. 2000)[3] retroactive effect in reaching its determination as to termination of parental rights on this ground. Because we have determined termination of parental rights was properly accomplished pursuant to § 20-7-1572(2), we decline to address the issue of whether the family court properly applied § 20-7-1572(8) retrospectively.

For the foregoing reasons, the decision of the family court is

AFFIRMED.

ANDERSON and SHULER, JJ., concur.

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[3] Section 20-7-1572(8) provides for termination upon a finding that termination is in the best interest of the child and "[t]he child has been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months." This subsection was added by 1998 Act No. 391, with an effective date of June 15, 1998.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Laterrance Ramone Dunlap,

Appellant.

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

Opinion No. 3365
Heard June 6, 2001 - Filed July 2, 2001

AFFIRMED

Stephen D. Schusterman, of Rock Hill, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and Assistant Attorney General Toyya Brawley Gray, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

ANDERSON, J.: Laterrance Ramone Dunlap appeals his conviction for distribution of crack cocaine. Dunlap argues he was prejudiced by comments made by the Circuit Court judge who presided over qualification of the entire jury panel for the week. Dunlap additionally contends the trial judge erroneously admitted evidence of his prior convictions. We affirm.

FACTS/PROCEDURAL BACKGROUND

On the evening of April 2, 1999, undercover police officers observed Dunlap outside his family's home engaged in a transaction with two individuals who had stopped by to visit with him. The police detained one of the visitors and found crack cocaine. The detainee informed police that Dunlap sold him the crack cocaine. Dunlap was arrested and charged with distribution of crack cocaine. A trial was held and Dunlap was convicted of the charge. The trial court sentenced Dunlap to nineteen years in prison and ordered him to pay a $100,000 fine.

ISSUES

I. Did the trial judge err in failing to dismiss the jury because of comments made by the Circuit Court judge who qualified the entire jury panel for the week concerning defendants and their decisions to plead or continue to trial?

II. Did the trial judge err by permitting evidence of Dunlap's prior convictions?

LAW/ANALYSIS

I. Prejudice Stemming from Comments Made by Qualifying Judge

Dunlap claims that comments made by the qualifying judge tainted the entire jury panel. He further alleges the trial judge erred in failing to dismiss the jury. We disagree.

Dunlap avers in his brief that the Circuit Court judge who qualified the entire jury panel for the week stated some defendants will enter a courtroom, take a look at "everything," including the prospective jurors, and decide "to fess up" and plead guilty. Dunlap asserts these remarks were prejudicial. He maintains:

> This comment could certainly be interpreted by potential jurors that everyone that comes to court is, in fact, guilty of the crime they are charged with. It is a well known premise that many people believe that if someone is charged with a crime and brought to trial, they must be guilty. The role of the court should be to reject this popular assumption and explain the "innocent until proven guilty" theory. In the instant case, remarks made by the . . . judge [who qualified the entire jury panel for the week] only reinforced the assumption that most, if not all, Defendants are guilty.

It is important to understand the qualification procedure of the entire jury panel for the week encompasses queries in regard to the general qualification of jurors. See S.C. Code Ann. §§ 14-7-810 to -870 (Supp. 2000). Under our statute, certain individuals are disqualified or exempted from serving as a juror in any court. In State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), the Supreme Court explained that South Carolina recognizes a difference between "**exemptions**" and "**disqualifications**" from jury duty:

> An exemption from jury duty is not a disqualification to act as a juror, but is a personal privilege that the juror may claim or waive. 50A C.J.S. Juries § 304 (1955); see also 15A Words and Phrases

Exempt; Exemption (1950)("A person exempted from jury services is not thereby disqualified to serve on a jury."). This Court has held an exemption from jury duty is not a disqualification. See State v. Matthews, 291 S.C. 339, 343, 353 S.E.2d 444, 447 (1986)("An exemption under [S.C. Code Ann. § 14-7-850] is a privilege and not a disqualification."); State v. Toland, 36 S.C. 515, 521, 15 S.E. 599, 600 (1892)("exemption was a personal privilege which [jurors] might or might not claim, but it did not disqualify them as jurors.").

Hughey, 339 S.C. at 448-49, 529 S.E.2d at 726.

The following is a list of persons disqualified from jury service:

(1) Persons who do not come within at least one of the following categories: (a) registered voter; (b) possessor of a valid South Carolina driver's license; or (c) possessor of an identification card issued by the South Carolina Department of Public Safety. S.C. Code Ann. § 14-7-130;
(2) Persons convicted in a state or federal court of a crime punishable by imprisonment for more than one year whose civil rights have not been restored by pardon or amnesty. S.C. Code Ann. § 14-7-810(1);
(3) Persons unable to read, write, speak, or understand the English language. S.C. Code Ann. § 14-7-810(2);
(4) Persons incapable by reason of mental or physical infirmities to render efficient jury service. S.C. Code Ann. § 14-7-810(3);
(5) Persons with less than a sixth grade education or its equivalent. S.C. Code Ann. § 14-7-810(4);
(6) "No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer, or any person employed within the walls of any courthouse is eligible as a juryman in any civil or criminal case." S.C. Code Ann. § 14-7-820;

(7) "No member of the grand jury which has found an indictment may be put upon the jury for the trial thereof." S.C. Code Ann. § 14-7-830;
(8) "No person is liable to be drawn and serve as a juror in any court more often than once every three calendar years and no person shall serve as a juror more than once every calendar year, but he is not exempt from serving on a jury in any other court in consequence of his having served before a magistrate." S.C. Code Ann. § 14-7-850.

The following is a list of persons exempted from jury service:

(1) Persons over the age of sixty-five may be exempted from serving as jurors. S.C. Code Ann. § 14-7-840;
(2) "Any woman having a child under seven years of age of whom she has legal custody and the duty of care, who desires to be excused from jury duty, shall furnish an affidavit to the clerk of court stating that she is unable to provide adequate care for the child while performing jury duty and shall be excused from such duty." S.C. Code Ann. § 14-7-860;
(3) If a student selected for jury service during the school term requests, his service must be postponed to a date that does not conflict with the school term. If a school employee selected for jury service during the school term requests, his service must be postponed to a date that does not conflict with the school term. S.C. Code Ann. § 14-7-845.

Ordinarily, the qualifying judge's comments to the jury panel involve general questions to determine if any members of the panel would be statutorily disqualified, exempted, or excused from service as a juror. The trial judge, on the other hand, poses a different set of questions to the jury panel concerning qualification to sit on a specific case.

In the instant case, the comments by the judge qualifying the entire jury panel for the week are at issue. We find the qualifying judge's comments to the

general jury panel did not prejudice Dunlap. Here, there is no contest in regard to questions posed by the trial judge concerning juror qualification for the trial jury.

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), provides guidance in disposing of this issue. The Council Court determined "[t]he ultimate consideration [of the judge concerning juror qualification] is that the juror be unbiased, impartial and able to carry out the law as explained to him." Id. at 10, 515 S.E.2d at 513.

In the present case, before opening arguments began, the trial judge asked the trial jury pool several questions regarding their fairness and impartiality, including the succeeding questions:

- "Is there any member of the jury panel who has any religious belief or any emotional belief that you would not be able to carry out [the function of being a juror]? If so, please say so."
- "Is there any member of the jury panel who has formed or expressed any opinion as to the guilt or innocence of the defendant, Mr. Dunlap? If so, please stand."
- "I[s] there any member of the jury panel aware of any bias or any prejudice in connection with this case? If so, and you have an opinion, we just need to know what it is."
- "[D]oes any member of the jury panel know of any reason whatsoever why he or she cannot give the State of South Carolina or the defendant, Mr. Laterrance Ramone Dunlap, a fair and impartial trial? If so, please say so."

No jury member responded in the affirmative to the trial judge's queries. The trial judge, convinced a fair and impartial jury was empaneled, permitted the trial to begin. In this circumstance, without evidence to the contrary, we must conclude the jury members followed the trial judge's instructions to notify him of bias or prejudice any of them possessed. See Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999)("A jury is presumed to [have

followed the trial judge's] instructions."). The record and Dunlap's brief are devoid of any evidence refuting the trial judge's conclusions. The trial judge, therefore, did not err by failing to dismiss the jury panel as previously qualified.

Quoting State v. Britt, 235 S.C. 395, 425, 111 S.E.2d 669, 685 (1959), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 1991), Dunlap asserts he is entitled to reversal because "[w]hen it is made to appear that anything has occurred which may have improperly influenced the

action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law." Dunlap incorrectly applies this proposition.

Britt was tried for murder and the State was seeking the death penalty. Before trial, the police offered Britt the opportunity to take a polygraph exam. He refused. These facts were introduced at trial via the testimony of Chief Strom of the South Carolina Law Enforcement Division (SLED). The trial judge initially permitted the admission of this testimony; however, after Chief Strom completed his testimony, the trial judge changed his mind regarding the admissibility of these facts and instructed the jury to disregard what was said.

On appeal, Britt claimed the SLED Chief's testimony concerning the polygraph prejudiced him, notwithstanding the trial judge's instruction to the court reporter to strike the testimony and the judge's subsequent instruction to the jury to disregard the testimony. The Supreme Court, though recognizing errors concerning incompetent testimony may be mitigated by curative instructions, concluded typical approaches to correcting errors were not necessarily suitable in death penalty trials. The Court clarified: "The power of the law to take the life of human beings for a violation of the law is one which should be and is exercised with extreme caution. The frailties of human nature are so manifold and manifest until the law should and does place around the defendant, whose life will be taken for a violation of the law, every safeguard

to enable such defendant to secure a fair and impartial trial." Id. at 424, 111 S.E.2d at 684.

The rule articulated in Britt is arguably unique to death penalty trials. The case sub judice is not a death penalty matter. If any error was created by the qualifying judge in her remarks, it was cured by the trial judge's subsequent polling of the jury panel before the trial began to determine if any bias or prejudice existed.

II. Evidence of Prior Convictions

Before presenting a defense, Dunlap requested an in limine ruling as to the admissibility of his prior convictions. Dunlap complains the trial court erred in ruling that evidence of his prior convictions could be used for the purpose of impeachment. We disagree.

In 1994, Dunlap was convicted of distribution of an imitation substance. Thereafter, in 1997, Dunlap was convicted of "conspiracy of intent to distribute crack cocaine."

During opening arguments, defense counsel stated the following to the jury:

> You are going to hear from a young man who has been in trouble with the law from the time he was fifteen years old.
>
> You are going to hear from a young man who was addicted to drugs and was sent to a rehab center because he was hooked on marijuana. And you are also going to hear that he has been clean ever since.
>
> That's what you are going to hear about. And it is very easy to say, my guy, if he was involved with drugs years ago, then he should be guilty today. Look where he was. Look now where he is. Look at all the evidence and all the witness[es]. . . .

. . . .

> . . . [W]e could convict him right now because he is a young man who was hooked on crack and had a problem with it. **He never sold it, but he used it**. And now, he has got his life straight.

(Emphasis added).

At the close of the State's case, Dunlap made a motion objecting to the admissibility of his prior convictions based on the prejudicial effect they would have on the jury. The trial court found Dunlap waived his right to challenge the admission of the prior convictions by commenting on his previous behavior during opening arguments. The court further ruled the convictions were admissible under Rule 609 of the South Carolina Rules of Evidence. After the trial court ruled on the admissibility of the evidence, Dunlap took the stand and testified on direct examination as to his prior convictions.

A. Rule 609 Analysis

Under the South Carolina Rules of Evidence, a defendant's prior convictions may be admitted for purposes of impeachment. Rule 609(a)(1), SCRE, provides a two-part test for determining whether a defendant's prior convictions can be used by the prosecution to impeach him: (1) the prior crime must have been punishable by death or imprisonment in excess of one year; and (2) the court must determine that the probative value of admitting the evidence outweighs its prejudicial effect to the accused. The trial court must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in its discretion, whether to admit the evidence. Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000). The following factors should be considered by the trial judge when undertaking this analysis:

> (1) The impeachment value of the prior crime;
> (2) The point in time of the conviction and the witness' subsequent history;
> (3) The similarity between the past crime and the charged crime;

(4) The importance of the defendant's testimony; and
(5) The centrality of the credibility issue.

Id. at 433-34, 527 S.E.2d at 101; see also State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000)(setting out the above five factors).

The record demonstrates the trial judge performed the examination required by Green v. State and State v. Colf:

> All right, I find that pursuant to State versus Green [sic] and Colf versus the State [sic], I have done, I am now doing the 403 analysis as required and the admissibility of evidence under 609. I considered the fi[v]e factors and I understand what the defendant will offer is that he was not on drugs at the time, that he had shed himself of that type of conduct and he was just in the wrong place at the wrong time. That makes the credibility a central issue in this case.
>
> First of all, I find the right to challenge prejudice has been waived. And that he will, in fact, by his admission of drug use and so forth will also have waived any claim to prejudice. That's not necessary, the conviction to give rise to the prejudice, but it's the actual use of it as well.
>
> These convictions are not so remote in time. This occurred in '99 and he has a prior record in '97 and '94. I can see there is some similarity between the past crimes and the crime charged. . . . But I will . . . instruct the jury at the time that the testimony is being allowed solely on the issue of credibility. . . .
>
> I first find the waiver, that it was waived. And secondly, I find there was significant value to the testimony for impeachment purposes. Credibility is certainly a central issue in this case.

Though the trial judge arguably did not expressly address each Colf factor, his omissions, if any, did not constitute error. The Colf factors are adopted from federal case law. See Colf, 337 S.C. at 627, 525 S.E.2d at 248 (citing Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 609.05 [3][a] (2d ed. 1999) and Stephen A. Saltzburg, Federal Rules of Evidence Manual 1040 (7th ed. 1998)). In United States v. Jimenez, 214 F.3d 1095 (9th Cir. 2000), the Ninth Circuit Court of Appeals held a trial judge is not required to state his analysis of each of the five factors with special precision. Yet, the Court emphasized the record should reveal, at a minimum, that the trial judge was aware of the requirements of Rule 609(a)(1). Id. at 1098. By the trial judge's acknowledgment of the rule while performing his analysis, it is clear the judge in the case at bar was aware of Rule 609's requirements.

The trial court noted the prior crimes were closely related in time to the current charge. The criminal activity involved in this case occurred in April of 1999 and Dunlap's prior convictions occurred in 1994 and 1997. The previous convictions occurred well within the ten year limit of Rule 609.[1]

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[1]Rule 609(b), SCRE, provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

The trial court found there was some similarity between the prior convictions and the current charge, but ruled the evidence was admissible on the limited, but critical, issue of Dunlap's credibility. While noting that federal courts have held convictions for the same or similar crimes are highly prejudicial and should be admitted sparingly, our Supreme Court has declined "to hold similar prior convictions inadmissible in all cases." State v. Green, 338 S.C. at 433, 527 S.E.2d at 101.

Dunlap argues his past conviction for distribution of an imitation substance is almost identical to the charged crime. This contention is meritless. Distribution of an imitation substance is a far cry from the crime with which Dunlap was charged, distribution of crack cocaine. Distribution of an imitation substance involves elements and sanctions which are significantly distinguishable from the crime of distribution of crack cocaine. Compare S.C. Code Ann. § 44-53-390 (Supp. 2000)(distribution of imitation substance statute) with S.C. Code Ann. § 44-53-375(B) (Supp. 2000)(distribution of crack cocaine statute). The crimes are not so similar as to render the admission of Dunlap's previous conviction prejudicial.

The trial court determined Dunlap's credibility was a central issue in the case and that the introduction of Dunlap's prior convictions was necessary for impeachment purposes. Throughout the trial, Dunlap contended he had used drugs in the past but that he had never sold drugs. In refutation of Dunlap's contention, it was necessary and proper for the State to introduce evidence of his prior convictions.

The admission of evidence concerning past convictions for impeachment purposes remains within the trial judge's discretion, provided the judge conducts the analysis mandated by the evidence rules and case law. Green, 338 S.C. at 432-34, 527 S.E.2d at 100-01. Here, the trial judge conducted the required analysis. The judge's findings were based on fact and sensible reasoning. Thus, the court's admission of Dunlap's prior convictions was not an abuse of discretion. See State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997) (recognizing admission of evidence falls within trial court's discretion and will not be reversed on appeal absent abuse of that discretion.)

However, even if the trial court abused its discretion in ruling the prior convictions were admissible under Rule 609, SCRE, any error would be harmless due to comments made by Dunlap's counsel during his opening argument.

B. Waiver/Error Preservation

Dunlap maintains he did not waive his right to challenge the admissibility of his prior convictions. We disagree.

Dunlap relies on State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995), for the proposition that he did not waive his right to challenge the admissibility of the prior convictions. Dunlap avers that, because he obtained a final ruling on the admissibility of the prior convictions, he did not lose his right to challenge the admissibility on appeal merely because the evidence was elicited during direct examination. See id. at 269, 460 S.E.2d at 411 (finding that "if a party has obtained a final ruling on the admissibility of impeachment evidence, that party does not lose his right to challenge on appeal the admissibility of the evidence by eliciting the evidence during direct examination."); but see Ohler v. United States, 529 U.S. 753, 760, 120 S.Ct. 1851, 1855, 146 L.Ed.2d 826 (2000)(holding that "a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error").

Dunlap's reliance on Mueller is misplaced. Mueller involved whether or not the issue of the admissibility of a prior conviction was preserved for appellate review when the defendant introduced the evidence on direct examination. Unlike Mueller, Dunlap first introduced the existence of his prior criminal convictions during opening statements before a final ruling was made regarding the admissibility of the evidence.

During opening arguments, defense counsel specifically stated Dunlap had been "in trouble with the law from the time he was fifteen years old." In addition, defense counsel discussed Dunlap's addiction to drugs. Dunlap's

opening argument introduced to the jury the fact that he had prior convictions and a history of drug involvement.

"[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999); see also State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984)(holding where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially). A party cannot complain of prejudice from the admission of evidence if he opened the door to its admission. Beam, 336 S.C. at 52, 518 S.E.2d at 397; see also State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991)(concluding where appellant opened door to evidence, he cannot later complain of prejudice from its admission).

We rule Dunlap waived his right to argue that the admission of his prior convictions for impeachment purposes would be prejudicial by informing the jury of the existence of his prior criminal record during his opening statement.

CONCLUSION

We hold the Circuit Court judge did not err in qualifying the jury panel. In addition, the trial judge fully and completely queried the trial panel as to their qualification to serve on the jury and extensively covered any bias or prejudice. Further, we find the trial judge did not abuse his discretion in ruling Dunlap's prior convictions were admissible under Rule 609, SCRE, for impeachment purposes. Moreover, Dunlap waived his right to argue that the admission of his previous convictions for impeachment purposes would be prejudicial. Accordingly, Dunlap's conviction is

AFFIRMED.

HUFF, J., concurs.

SHULER, J., concurs in result only in a separate opinion.

SHULER, J., concurring in result only: While I concur in the judgment of the Court, I write separately because I believe the sole reason the trial court did not abuse its discretion in admitting Dunlap's prior convictions was because he waived any right to complain when his attorney stated in opening argument that he had "never sold" crack cocaine. See State v. Trotter, 317 S.C. 411, 453 S.E.2d 905 (Ct. App. 1995), *aff'd as modified by* State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996) (a trial court commits no error in allowing the State to introduce evidence where the defendant opened the door to its admission). As a defendant cannot complain of error induced by his own conduct, see State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct. App. 2000) (citing State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996)), I would find Dunlap's decision to "open the door" precluded any showing of prejudice and affirm his conviction.

However, because I disagree with the opinion's further analysis of this issue on the merits, I am compelled to concur in result only. Dunlap's criminal history included convictions, obtained when he was a juvenile, for distributing an imitation controlled substance and conspiracy to distribute crack cocaine. Although distributing an imitation drug is a separate, distinctly punishable crime from the distribution of crack cocaine, I do not believe the resulting disparity in any way reduces the potential for prejudice. To the contrary, I would find any dissimilarity between the crimes merely renders the prior conviction less probative. See, e.g., Green, 338 S.C. at 434, 527 S.E.2d at 101 ("Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him.") (quoting United States v. Beahm, 664 F.2d 414, 418 (4th Cir. 1981)). In other words, if the prior crime is indeed a "far cry" from the crime charged herein, it becomes irrelevant and therefore inadmissible to rebut Dunlap's claim that he never sold drugs.

Moreover, I believe the apparent similarity between the prior convictions for distributing what appeared to be crack and conspiracy to distribute the actual drug, and the distribution of crack cocaine, the crime for which Dunlap stood trial, served to place the jury in a position where they could "hardly avoid drawing the inference that the past conviction suggest[ed] some probability" that Dunlap committed the later offense. Id. (quoting Beahm, 664 F.2d at 419). Our

courts have recognized that the impeachment value of introducing evidence of the same or similar crimes is minimal when compared to the potential for prejudice. See State v. Colf, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000) (finding the trial court "erred in treating the prior crimes as if their similarity heightened their probative value when it actually increased their prejudicial effect"); State v. Bryant, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992) (noting that where the State offers prior convictions for similar crimes the "prejudice is even more egregious"); State v. Scriven, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct. App. 2000) (stating that where prior crimes "are either similar or identical" to the offense with which the defendant is charged, "the likelihood of a high degree of prejudice to the accused is inescapable").

Here, the trial court stated that although there was "some similarity" between Dunlap's earlier convictions and the crime charged, his prior record had "significant value" for impeachment purposes because "[c]redibility is certainly a central issue in this case." In my view, this was error.

Without question, Dunlap's testimony was crucial to his defense, and his credibility was therefore of paramount importance. Certainly, in instances where a prior conviction is probative of *truthfulness* it should be admitted, as such evidence bears directly on credibility. See Rule 609(a)(2), SCRE ("[E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment."); State v. Colf, 332 S.C. 313, 318, 504 S.E.2d 360, 362 (Ct. App. 1998), *aff'd as modified by* State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) (stating courts have affirmed the introduction of prior convictions for "theft-related crimes," because they "were highly probative where the jury faced a choice between the State's and the defendant's opposing versions of the facts").

Contrary to the trial court, however, I read our supreme court's opinion in Green as indicating that, in the absence of a prior conviction for a crime of dishonesty, when a defendant's credibility is key it is the prejudice from the conviction that is heightened, not its probative value. See Green, 338 S.C. at 434, 527 S.E.2d at 101 (affirming finding of the PCR court that counsel was ineffective when he failed to object when the State impeached Green with two

convictions for cocaine possession). Accordingly, but for Dunlap's tactical mistake in "opening the door," I would otherwise find the trial court erred in balancing the prejudicial nature of Dunlap's prior convictions with their limited probative value, as drug offenses generally are not considered probative of truthfulness. See State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000).