The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF K. DOUGLAS THORNTON, PETITIONER

On September 25, 2000, Petitioner was suspended from the practice of law for a period of six months and one day, retroactive to February 15, 2000. In the Matter of Thornton, 342 S.C. 440, 538 S.E.2d 4 (2000). On May 15, 2000, Petitioner was suspended from the practice of law for a period of ninety days, retroactive to February 15, 2000. In the Matter of Thornton, 340 S.C. 392, 532 S.E.2d 282 (2000). On April 8, 2002, Petitioner was suspended from the practice of law for a period of nine months. In the Matter of Thornton, 349 S.C. 55, 562 S.E.2d 316 (2002). He has now filed a petition to be reinstated.

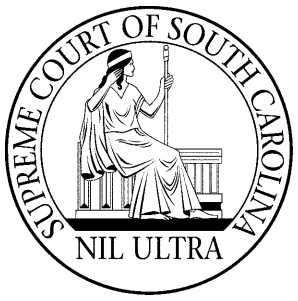
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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

These comments should be received no later than June 16, 2003.

Columbia, South Carolina

April 16, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 21, 2003

ADVANCE SHEET NO. 15

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Redwend Limited Partnership, Wendswept, Inc., and Ron W. McDaniel, Individually,

Appellants,

v.

William Ralph Edwards, a/k/a W. Ralph Edwards, a/k/a William R. Edwards, Ralph Edwards & Associates, Inc., William A. Edwards, Long Point Farms, LLC, and John and Jane Doe, Co-conspirators Known and Unknown,

Respondents.

Appeal From Charleston County
Gerald C. Smoak, Jr., Circuit Court Judge

Published Opinion No. 3629
Heard March 13, 2003 – Filed April 14, 2003

REVERSED and REMANDED

Timothy W. Bouch and G. Hamlin O'Kelley, III, both of Charleston, for Appellants.

Arthur G. Howe, Barry Krell, and Jerry N. Theos, all of Charleston; and John P. Freeman, of Columbia, for Respondents.

ANDERSON, J.: Redwend Limited Partnership (the Partnership), Wendswept, Inc., and Ron McDaniel (collectively referred to as "McDaniel") filed suit against William Ralph Edwards (Edwards), Ralph Edwards & Associates, Inc., William A. Edwards, and Long Point Farms, LLC, (collectively referred to as "Edwards") alleging breach of fiduciary duty, fraud, breach of contract, negligent misrepresentation, constructive fraud, constructive trust, unjust enrichment, tortious interference with contractual relations, breach of contract accompanied by a fraudulent act, violations of the South Carolina Unfair Trade Practices Act, civil conspiracy, and rescission or reformation of the contract. The causes of action arise from the withdrawal of Edwards from the Partnership and his subsequent purchase of property believed by McDaniel to be a partnership opportunity. McDaniel appeals the trial court's grant of summary judgment to Edwards. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

The Partnership was formed on December 16, 1996, by filing a Certificate of Limited Partnership in the Office of the Secretary of State. The formal agreement of Redwend Limited Partnership is dated February 6, 1997. The Partnership planned to acquire and develop land for resale.

Edwards and McDaniel were both active in the Partnership. At the outset, McDaniel and another partner, Wendswept,[1] contributed property to the Partnership for development. According to McDaniel, Edwards agreed, as his contribution, to acquire for the Partnership two specific tracts of land, the Boone Tract and the Eddy Farm, which could be developed by the

[1] Wendswept is a company solely owned by McDaniel's wife. Wendswept owned property for development prior to the formation of Redwend.

Partnership. The purpose of the Partnership is delineated in paragraph 3.1 of the Partnership Agreement:

> 3.1 **Purpose**. The character of the business and the purposes of the Partnership are:
>
> a) To acquire, own, develop and sell the Rhett's Crossing Tract, the Stono Tract and the Boone Tract . . . and in connection therewith to lease and/or acquire or deal with such real and personal property as necessary for the conduct of its business and to engage in all other lawful activity in support of its business; and
>
> b) To reinvest the proceeds of sales and proceeds of capital contributions and/or loans in additional tracts of land or real estate of any nature or other property of any nature or kind, real or personal, tangible or intangible as is deemed to be in the best interest of the Partners as determined in good faith by the General Partner; and
>
> c) To conduct any business and engage in any other activity whatsoever deemed to be lawful and desirable by the General Partner.

The Partnership purchased the Boone tract and developed it as planned. During the Partnership, McDaniel and Edwards traveled together to the Eddy Farm on numerous occasions. Edwards, using John W. Patrick[2] as a straw man buyer, made an offer for the Eddy Farm property. The contract to buy the Eddy Farm was dated July 21, 1997. Patrick was listed as the buyer. Drayton Hastie, the attorney for the Partnership, was listed on the contract as the closing attorney. The contract was executed during the course of the

[2] According to J. Drayton Hastie, the Partnership's attorney, Edwards used Patrick as the agent for the Partnership to acquire property so people would not know the property was being sold to a developer.

Partnership. However, the property was not purchased for the Partnership. McDaniel declared Edwards told McDaniel that he submitted a contract to procure the Eddy Farm property on behalf of the Partnership in 1997. McDaniel professed: "We were trying to purchase the [Eddy Farm] property as a partnership. That's what I thought we were doing." Edwards disagreed with this assertion, claiming there was no effort by the Partnership to buy the Eddy Farm.

On August 4, 1997, Edwards and his father created Long Point Farms, LLC, which was in the business of acquiring property for development. In June 1998, Long Point Farms, along with John W. Patrick, entered into an agreement to purchase the Eddy Farm property. Edwards stated the "actual buyer" was "[p]robably Long Point Farms."

In July 1998, Edwards approached McDaniel about withdrawing from the Partnership. These discussions resulted in a handwritten agreement of withdrawal. The agreement included a provision that the Eddy Farm property would remain a partnership opportunity and asset after Edwards' withdrawal. Yet, according to McDaniel's deposition testimony, at the August 5, 1998, meeting where Edwards signed the withdrawal agreement, Edwards told McDaniel the Eddy Farm property was lost to other purchasers and should be omitted from the August 5 withdrawal agreement. McDaniel stated that Edwards told him "**the lawyers from the estate got it.**" McDaniel averred he relied on what Edwards told him and agreed to strike through the provision establishing the Eddy Farm property as a partnership opportunity and prohibiting Edwards from competing for the property. The scratched-through provision in the agreement then referenced "only [the] Folly Beach Tract" as a Partnership opportunity. The August 5 withdrawal agreement contained no merger clause.

On August 6, 1998, the day after Edwards withdrew from the Partnership, Long Point Farms became the sole purchaser of the Eddy Farm. The day after informing McDaniel the Eddy Farm had been "lost," Edwards finalized the purchase of the property. McDaniel was not aware that Edwards and his father had purchased the Eddy Farm property until around April of 1999.

McDaniel and Edwards sent the August 5 agreement to Hastie, the Partnership attorney, who telephoned McDaniel and asked him about the scratched-out portion of the agreement. McDaniel responded: "[D]on't worry about it, that's a piece of property the partnership was trying to get and it was sold to somebody else . . . so if it's been sold to somebody else there's no point in dealing with it." Hastie declared "[t]he contention was that the only reason [the Eddy Farm] was marked out was that [Edwards] said that the partnership opportunity had been lost because it had been sold to somebody else."

A more formalized agreement was drafted by Hastie and presented to the partners on October 6, 1998, in connection with the distribution of some Partnership assets to Edwards. This agreement, which was signed by the partners, left out any provision regarding the Eddy Farm property. The contract included a non-competition clause which read:

> 3. No Competition. Edwards agrees that for a period of three (3) years from the date hereof that he shall not, directly or indirectly, on his own behalf, or as a partner, officer, executive, manager, employee, director, consultant, shareholder or otherwise, engage in any activity which is in competition with the Partnership's attempt to acquire the Folly Beach Tract, develop the Folly Beach Tract and sell property from the Folly Beach Tract. It is agreed that Edwards may compete with the Partnership with respect to the acquisition and development of any other tract wherever located.

The October 6 withdrawal agreement included a merger clause.

On October 7, 1998, Edwards and Long Point Farms closed on the purchase of the Eddy Farm property. The owners of the Eddy Farm tract executed deeds to Long Point Farms prior to the October 6 withdrawal agreement being signed. Edwards had two lots in the Eddy Farm property "already under contract to sell" prior to withdrawing from the Partnership.

McDaniel brought this suit alleging Edwards misappropriated a partnership opportunity. He asserted Edwards fraudulently concealed the

truth regarding the Eddy Farm property in order to have any provision related to it excluded from the withdrawal agreement. Finally, McDaniel maintained he relied on Edwards' misrepresentations in agreeing to remove the Eddy Farm property from the terms of the withdrawal agreement. After filing an answer and counterclaim, Edwards moved for summary judgment.

The trial court found the October 6, 1998 withdrawal agreement contained both a merger clause and a non-reliance clause. The judge concluded McDaniel contracted away the right to rely on the representation from Edwards regarding the status of the Eddy Farm property. The court ruled McDaniel did not have the right to rely on the representation. The court granted summary judgment to Edwards based on the merger clause in the October 6 withdrawal agreement.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Russell v. Wachovia Bank, N.A., Op. No. 25599 (S.C. Sup. Ct. filed February 24, 2003) (Shearouse Adv. Sh. No. 7 at 28); Smith v. South Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002).

In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002); McNair v. Rainsford, 330 S.C. 332, 499

S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Young v. South Carolina Dep't of Corr., 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below."). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001).

LAW/ANALYSIS

McDaniel contends the trial court erred in finding the October 6, 1998 withdrawal agreement contained a non-reliance clause. He maintains the trial court erred in finding that, by signing the agreement with or without a non-reliance clause, he was not justified in relying upon the representations by Edwards regarding the loss of the Eddy Farm property.

A. "Entire Agreement" Clause

The October 6 withdrawal agreement contained the following paragraph:

> 9. Entire Agreement. This Agreement contains the entire agreement and understanding by and between Edwards and the Partnership with respect to the subject matter hereof. All prior agreements and negotiations are merged herein, and if not set forth herein are duly waived. Each party agrees that representations, promises, agreements or understandings, written or oral, not contained herein shall be of no force or effect. No change or modification of this Agreement shall be valid or binding unless the same is in writing or signed by the party intended to be bound. . . . (Emphasis added.)

The trial court found the emphasized language above was a non-reliance clause. The court determined the clause was intended to waive the right of either party to complain regarding the representations of the other party which were not specifically set forth in the agreement. We disagree.

The trial court relied on One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283 (D.C. Cir. 1988), for the proposition that one may not reasonably rely on prior representations where the agreement "'supersede[s] any and all previous understandings and agreements.'" Id. at 1286. The District of Columbia Circuit Court of Appeals stated that because 1) the provision in question was excluded in the final agreement and 2) the final agreement had a merger clause, the parties could not reasonably rely upon alleged promises, which were directly contradicted by the terms of the subsequent agreement. Id.

In One-O-One, the parties, in a preliminary agreement, included a provision "incorporating defendants' prior representations regarding their long-term commitment to the Rustler business." Id. at 1284. In the final agreement, after vigorous negotiations regarding the provision and others, the parties agreed to exclude the provision. Id. In the instant case, however, the provision was not a negotiated position eliminated from the contract. Any reference to the Eddy Farm property was eliminated due to the representations by Edwards.

Additionally, the court in One-O-One did not hold the clause was a non-reliance clause, but that it was an integration or merger clause, which barred resort to prior agreements. In this case, the trial court found the clause to be a non-reliance clause. We hold the provision is not a non-reliance clause, but merely an extension of the merger clause.

In the cases cited by Edwards regarding non-reliance clauses, the language is much different from the clause in the instant case. The typical language of a non-reliance clause can be found in Rissman v. Rissman, 213 F.3d 381 (7th Cir. 2000). The language used in that agreement stated: "The parties further declare that they have not relied upon any representation of any party hereby released . . . or of their attorneys . . ., agents, or other representatives concerning the nature or extent of their respective injuries or damages." Id. at 383 (emphasis added). In Rissman, the parties expressly agreed they did not rely. The contract provided:

> (a) no promise or inducement for this Agreement has been made to him except as set forth herein; (b) this Agreement is executed . . . freely and voluntarily, and without reliance upon any statement or representation by Purchaser, the Company, any of the Affiliates or O.R. Rissman or any of their attorneys or agents except as set forth herein; (c) he has read and fully understands this Agreement and the meaning of its provisions; (d) he is legally competent to enter into this Agreement and to accept full responsibility therefor; and (e) he has been advised to consult with counsel before entering into this Agreement and has had the opportunity to do so.

Id. (emphasis added). The parties in Rissman wrote the above language into the contract to insure it was perspicuous to all involved that no representations were relied upon by either party.

The language used in the case sub judice neither includes the words "rely" or "reliance," nor does it set forth any statement that the parties did not, or could not, rely on the representations of the other party. The clause merely provides that the prior "representations, promises, agreements or understandings, written or oral, not contained herein shall be of no force or

effect" within the contract, thereby accomplishing the same purpose as a merger clause. See Black's Law Dictionary 989 (6th ed. 1990) (defining a merger clause as "[a] provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document."). We conclude the provision is not a non-reliance clause, but is merely a portion of the merger clause.

B. Parol Evidence Rule/Merger Clause

We now turn to South Carolina law to determine whether the parol evidence rule or the merger clause bars the admission of extrinsic evidence regarding fraud and negligent misrepresentation. We find extrinsic evidence is not barred by the parol evidence rule or the merger clause.

The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. See Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000); Crafton v. Brown, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001).

It is axiomatic that there exists a well established exception to the parol evidence rule which allows extrinsic evidence by the party attacking an instrument on the ground of fraud. Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978); Allen-Parker Co. v. Lollis, 257 S.C. 266, 185 S.E.2d 739 (1971); see also Restatement (Second) of Agency § 257 cmt. c (1958) ("Although parol evidence cannot be introduced to vary or contradict the terms of a written contract, it can be introduced for the purpose of proving that the contract was obtained by means of untrue statements."); Pinken v. Frank, 704 F.2d 1019, 1023 (8th Cir. 1983) (finding "the fraudulent inducement exception to the parol evidence rule is not rendered inapplicable by a contract merger provision that all agreements between the parties are contained therein or a provision that no verbal agreement affecting the validity of the written contract will be recognized.").

The South Carolina Supreme Court examined whether the parol evidence rule is applicable to a cause of action for negligent misrepresentation in Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990):

> Gilliland argues that either the parol evidence rule or the merger clause in the parties' contract precludes Elmwood's negligent misrepresentation claim. We do not agree. We have previously held that parol evidence is generally admissible to show fraud in the inducement of a writing. See Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978), appeal after remand, 277 S.C. 327, 287 S.E.2d 140 (1982). In Bradley we did not decide whether this is true for negligent misrepresentation as such was not alleged or proved in that case. The applicability of the parol evidence rule to a cause of action for negligent misrepresentation is apparently a novel issue in this state.
>
> "In a majority of jurisdictions the parol evidence rule bars oral testimony in certain contract cases, but is not applicable in misrepresentation cases." Rempel v. Nationwide Life Ins. Co., 471 Pa. 404, 370 A.2d 366, 370 (1977). The parol evidence rule has been held inapplicable to tort causes of action (including negligent misrepresentation) since the rule is one of substantive contract law. Formento v. Encanto Business Park, 154 Ariz. 495, 744 P.2d 22 (App. 1987). Furthermore, it has been held that "a seller should not be allowed to hide behind an integration clause to avoid the consequences of a misrepresentation, whether fraudulent or negligent." Id., 744 P.2d at 26. We follow the reasoning of the Formento court and hold that neither the parol evidence rule nor the merger or integration clause in the parties' contract prevents Elmwood from proceeding on its negligent misrepresentation theory.

Id. at 301-02, 391 S.E.2d at 580-81; see also Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999) (noting that in South Carolina, as in the majority of jurisdictions, parol evidence rule bars oral testimony in certain

contract cases; however Supreme Court has held parol evidence rule is not applicable in cases involving tort of negligent misrepresentation).

We find Edwards should not be allowed to hide behind the merger clause in the withdrawal agreement. "[T]he parol evidence rule was designed to prevent frauds, not to promote frauds by immunizing a party from claims arising out of his fraudulent misrepresentations." Pinken, 704 F.2d at 1023. Accepting as true the facts as presented by McDaniel, Edwards knew he was misrepresenting the status of the Eddy Farm property. He had already submitted an agreement to purchase the property and was able to close on the property on October 7, one day after signing the October 6 withdrawal agreement. We find the trial court erred in ruling the merger clause barred the admission of parol evidence regarding the causes of action for fraud and negligent misrepresentation.

C. Reliance as Question of Fact

McDaniel's claims are based on fraud and negligent misrepresentation. The elements of an action for fraud based on a representation include: (1) a representation; (2) falsity; (3) its materiality; (4) knowledge of the falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance upon the truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. First State Sav. & Loan v. Phelps, 299 S.C. 441, 385 S.E.2d 821 (1989); Moorhead v. First Piedmont Bank & Trust Co., 273 S.C. 356, 256 S.E.2d 414 (1979).

In a claim for the tort of negligent misrepresentation where the damage alleged is a pecuniary loss, the essential elements include: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996); Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999).

The Supreme Court, in Gilliland v. Elmwood Props., 301 S.C. 295, 391 S.E.2d 577 (1990), discussed the tort of negligent misrepresentation:

> In South Carolina, one may bring an action sounding in tort for negligent misrepresentation. "A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." Winburn v. Insurance Co., 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985). "The recovery of damages may be predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation." Id. These general rules have been applied, in every case this Court has located, to support the recognition of a negligent misrepresentation claim where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction. See, e.g., Winburn, supra (recognizing that under appropriate facts, negligent representations inducing the signing of an endorsement could be actionable); Pittman v. Galloway, 281 S.C. 70, 313 S.E.2d 632 (Ct. App. 1984) (negligent representation inducing the plaintiff's purchase of land is actionable); and First Federal Sav. Bank v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988) (recognizing that under appropriate facts, negligent representations inducing property purchase could be actionable).

Id. at 301, 391 S.E.2d at 580.

Edwards contends McDaniel had no right to rely, nor could he have justifiably relied, on the representation regarding the Eddy Farm tract because McDaniel agreed in the withdrawal agreement not to rely. Even if the clause in the withdrawal agreement is considered a non-reliance clause, then the precedent in South Carolina is to look to the totality of circumstances to determine whether reliance was justified. See West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000). "Whether reliance is justified in a given situation requires an evaluation of the circumstances involved, including the positions and relations of the parties." Elders v. Parker, 286 S.C. 228, 233, 332 S.E.2d 563, 567 (Ct. App. 1985); see also Parks v. Morris

Homes Corp., 245 S.C. 461, 467, 141 S.E.2d 129, 132 (1965) ("What constitutes reasonable prudence and diligence with respect to reliance upon a representation in a particular case and the degree of fault attributable to such reliance will depend upon the various circumstances involved, such as the form and materiality of the representation, the respective intelligence, experience, age, and mental and physical condition of the parties, the relation and respective knowledge and means of knowledge of the parties, etc."). "The general rule is that questions concerning reliance and its reasonableness are factual questions for the jury." Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991); see also Starkey v. Bell, 281 S.C. 308, 313, 315 S.E.2d 153, 156 (Ct. App. 1984) ("Issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the triers of the facts.").

Here, the circumstances involved a person who had a fiduciary duty to disclose all relevant facts and refrain from taking advantage of the other partners by the slightest misrepresentation or concealment. See Lawson v. Rogers, 312 S.C. 492, 435 S.E.2d 853 (1993); Few v. Few, 239 S.C. 321, 122 S.E.2d 829 (1961).

McDaniel claims Edwards violated his duties as a partner. McDaniel argues that, as a partner, Edwards owed McDaniel the highest degree of good faith in his dealings with reference to any matter concerning the business.

Partners are fiduciaries each to the other and their relationship is one of mutual trust and confidence, imposing upon them requirements of loyalty, good faith and fair dealing. Few, 239 S.C. at 336, 122 S.E.2d at 836; see also Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000) (noting that one of the paramount duties of partners among themselves, if not the primary duty, is their fiduciary duty, universally recognized as including a duty to exercise good faith and maintain the highest integrity in dealing with other partners).

The duty owed by partners to each other is further detailed in S.C. Code Ann. § 33-41-540(1) (1990):

> Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

"A 'fiduciary relationship' is founded on trust and confidence reposed by one person in the integrity and fidelity of another." Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). It exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Id.; see also Landvest Assocs. v. Owens, 276 S.C. 22, 274 S.E.2d 433 (1981) (observing that partners were fiduciaries to each other). The fiduciary relationship of partners is discussed in 59A Am. Jur. 2d Partnership § 420 (1987):

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. It is a fundamental characteristic of partnership that the partners' relationship is one of trust and confidence when dealing with each other in partnership matters.
>
> Partners are held to a standard stricter than the morals of the marketplace, and their fiduciary duties should be broadly construed, connoting not mere honesty but the punctilio of honor most sensitive. In all matters connected with the partnership every partner is bound to act in a manner not to obtain any advantage over his copartner in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. A partner cannot act too quickly to protect his own financial position at the expense of his partners, even in the absence of malice.

59A Am. Jur. 2d Partnership § 420 (1987) (footnotes omitted).

South Carolina case law recognizes the fiduciary duty owed between partners:

> The law holds each member of a partnership to the highest degree of good faith in his dealings with reference to any matter which concerns the business of the common engagement, and each partner, being the agent of the firm, must be held to the same accountability as other trustees, in all matters which affect the common interest. The relationship of a partnership is fiduciary in character and imposes on the members the obligation of refraining from taking any advantage of one another by the slightest misrepresentation or concealment.

Lawson, 312 S.C. at 498-99, 435 S.E.2d at 857 (emphasis added) (citations omitted); see also Edwards v. Johnson, 90 S.C. 90, 72 S.E. 638 (1911) (stating that each member of a partnership is held to the highest degree of good faith in his dealings with reference to any matter concerning the business of the common engagement, and each partner, being an agent of the firm, must be held, during the existence of the relation, to the same accountability as other trustees in all matters affecting the common interest).

Apodictically, Edwards was in a fiduciary relationship with McDaniel and owed McDaniel the highest loyalty. The nature of the partnership relationship imposed a fiduciary duty upon Edwards to refrain from taking any advantage of McDaniel by even the slightest misrepresentation or concealment. Such a relationship imposes "the duty of the finest loyalty[,] . . . [n]ot honesty alone, but the punctilio of an honor the most sensitive." Kuznik, 342 S.C. at 597, 538 S.E.2d at 24 (quoting Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928)). Edwards cannot act to protect his own financial interests at the expense of the interests of the other partners and the Partnership. See 59A Am. Jur. 2d Partnership § 420.

When asked why the provision was struck through, McDaniel responded:

> Because when I brought this up, Mr. Edwards told me that we had lost the Eddy tract, the lawyers from

> the estate got it and we could no longer get it. I go, shoot, if it's gone, it's gone. I thought that's the way we were doing it. And I scratched through it.

McDaniel was then asked: "Why not put it in there just in case that particular deal that you claim Mr. Edwards told you about fell through?" He answered: "Hindsight is 40/40. I had no reason to doubt my partner. He told me. I did it. And that's the way it is. I have no reasons to – any other motive." (emphasis added).

In the instant case, the misrepresentation was allegedly made for the distinct purpose of taking a partnership opportunity for Edwards' own financial benefit. The representation was made in response to the inclusion of the Eddy Farm tract in the August 5 handwritten withdrawal agreement as a property on which Edwards could not compete with the Partnership. McDaniel averred that if Edwards had not represented that the Eddy Farm was "lost," the property would have remained in the agreement as a Partnership opportunity. It was a question for the jury to determine whether McDaniel had the right to rely on Edwards' representation after considering the relationship of the parties, the nature and materiality of the representation, and the clause in the contract. See Epstein v. Howell, 308 S.C. 528, 419 S.E.2d 379 (Ct. App. 1992).

CONCLUSION

The trial court erred in concluding the October 6, 1998 withdrawal agreement contained a non-reliance clause. We rule the October 6 agreement is subject to parol evidence on the issues of fraud and negligent misrepresentation. South Carolina precedent allows parol evidence to show fraud. The parol evidence rule is not applicable to a cause of action for negligent misrepresentation. Additionally, the court erred in finding the merger clause barred the admission of parol evidence to show the agreement was entered into only after Edwards' allegedly fraudulent representations and/or negligent misrepresentation. Finally, we conclude that because the clause is **not** a non-reliance clause, the question of whether McDaniel's reliance was reasonable was a question of fact for the jury after consideration

of the totality of the circumstances. The trial court erred in granting summary judgment, as there were genuine issues of material fact remaining. Accordingly, the decision of the trial court is

REVERSED AND REMANDED.

HUFF, J., and MOREHEAD, Acting Judge, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Danny Ray Tutton, Appellant.

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

Published Opinion No. 3630
Submitted January 10, 2003 – Filed April 21, 2003

REVERSED

Assistant Appellate Defender Aileen P. Clare, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, of Columbia; Solicitor William Townes Jones, of Greenwood; for Respondent.

HEARN, C.J.: Danny Ray Tutton was indicted for second-degree criminal sexual conduct (CSC) with a minor, and two counts of lewd act on a minor. A jury found him guilty as charged, and he was sentenced to twenty years confinement on the CSC charge, a consecutive term of fifteen years for the first lewd act, and an additional consecutive term of fifteen years for the second lewd act, which was suspended upon the service of five years probation. Tutton appeals, arguing the trial judge erred by admitting evidence of uncharged criminal conduct under the common scheme or plan exception to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE.

I. FACTS AND PROCEDURAL HISTORY

In July of 2000, Tutton's live-in girlfriend, Tammy, invited thirteen-year old Mary and her younger sisters, Jane[1] and Tanya,[2] to Tutton's home for several days to play with Tammy's daughter, Sarah. During the stay, the girls, Tammy, and Tutton spent the days picnicking, washing Tutton's truck, and swimming in the river and in Tutton's pool. The charges facing Tutton arose out of the following contested facts.

The first night, all four girls slept on the floor by Tutton's bed. Jane testified that while she was sleeping, Tutton began rubbing her "butt." She alleged that after she rolled over, Tutton was able to reach under the covers and put his hands inside her shorts to rub her private parts. Jane further stated "He stuck his fingers inside of me." After Tutton fell asleep, Jane left the room.

On the second night, Tutton was sleeping on the couch while the girls were sleeping on a pallet of blankets placed on the floor nearby. Mary testified that while Tutton was lying on the couch, he began to touch her "butt" outside the covers. When she turned over, he touched her "private

[1] Jane is approximately one year younger than Mary.

[2] The names of these three children have been changed in this opinion to protect their identities.

part." Mary stated she kept the blankets tightly around her, and therefore, Tutton was unable to reach underneath them. After Mary pinched her sister to move over, she moved out of Tutton's reach and the touching stopped.

The allegations surfaced after the girls' father, Chris, became suspicious that something might have happened during their stay at Tutton's home. He became concerned because the girls were acting quiet and withdrawn upon returning home and did not kiss him goodnight as they always had done. Chris testified that the next day, he asked the girls if "anybody bothered [them] or did anything they shouldn't have?" The girls both indicated that Tutton had "put his hands" on them. Thereafter, the authorities were notified.

Because of the alleged penetration, Jane saw a pediatrician trained in sexual abuse cases. The doctor performed a genital examination with the aid of a colposcope. The exam revealed no evidence of trauma. However, the doctor testified that while the results of the exam could not prove penetration had occurred, it was possible that digital penetration could have occurred without Jane's hymen showing any evidence of trauma.

The issue in this case arose during Jane's testimony before the court. During its direct examination, the State sought to elicit testimony that Tutton had sexually assaulted Jane on another occasion several years prior to the events in question. Counsel for Tutton objected, arguing the testimony amounted to inadmissible character evidence. Outside the presence of the jury, the State proffered Jane's testimony as to the prior occurrence.

Jane testified that four or five years prior to the time of trial, Tutton sexually assaulted her. The assault allegedly occurred when she and Mary were staying with Tutton and Tammy while their parents were on vacation. Jane testified that Tutton forced her to lie on her back and take off her panties. She stated Tutton then performed oral sex on her and forced her to perform oral sex on him. She alleged that Tutton threatened to tell her parents she was misbehaving if she spoke of the incident. Jane never told anyone about this incident prior to the investigation into the current charges facing Tutton.

The trial court ruled this evidence was admissible under the common scheme or plan exception to Lyle. Specifically, the trial court found that Jane's testimony regarding the past misconduct was clear and convincing, and that the prior acts bore a close similarity to the crimes charged; thus the probative value of the evidence was not outweighed by its prejudicial effect. The testimony was thereafter presented to the jurors, who ultimately convicted Tutton.

II. LAW/ANALYSIS

Evidence of prior crimes or misconduct is inadmissible to prove the specific crime charged unless the evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. See Lyle, 125 S.C. at 416, 118 S.E. at 807; Rule 404(b), SCRE. To be admissible, a prior bad act must first be established by clear and convincing evidence. State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999) (stating if a prior bad act is not the subject of a conviction, proof thereof must be by clear and convincing evidence).

If the trial judge finds there is clear and convincing evidence that the defendant committed the uncharged acts, it must next be determined whether the prior acts fall within the common scheme or plan exception to Lyle. "A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). The connection must be more than just a general similarity. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). "A common scheme or plan involves more than the commission of two similar crimes; some connection between the two is necessary." Id. Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the

evidence so as to outweigh its prejudicial effect, it is admissible. Weaverling, 337 S.C. at 468, 523 S.E.2d at 791. However, even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Id.

A. Clear and Convincing Evidence

When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) (finding the appellate court committed error by basing its ruling on its own view of the witness's credibility). In this case, there is evidence in the record in the form of Jane's proffered testimony that the prior assault occurred. The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity. State v. Rosier, 312 S.C. 145, 149, 439 S.E.2d 307, 310 (Ct. App. 1993). Accordingly, the determination as to whether Jane's testimony clearly and convincingly established that the prior assault occurred is a matter well within the trial court's discretion. We find no abuse of that discretion in light of Jane's proffered testimony. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

B. Common Scheme or Plan Exception

Having found that the record supports the trial judge's ruling that Tutton committed the prior bad act, we must next determine whether the evidence falls within the common scheme or plan exception to Lyle. Initially, we note that no South Carolina cases expressly state the standard of review for determining whether the evidence presented at trial is sufficient to establish the existence of a common scheme or plan. Ordinarily, questions concerning the admissibility of evidence are treated as questions of fact. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. However, there are several cases in which the trial judge's admission of evidence under the common scheme or plan exception was reversed after the appellate courts in South Carolina found that the similarities between the charged and uncharged acts were

insufficient to establish the existence of such a plan or design. See State v. Timmons, 327 S.C. 48, 53, 488 S.E.2d 323, 326 (1997) ("Reviewing this list of similarities, we disagree with the trial judge. The only point of similarity with any merit is the alleged similar clothing worn by the robbers."); State v. Berry, 332 S.C. 214, 503 S.E.2d 770 (Ct. App. 1998) (cert. denied, June 24, 1999) (reversing the trial judge's admission of the evidence under the common scheme or plan exception after finding insufficient similarities between the separate attacks); State v. Davenport, 321 S.C. 134, 467 S.E.2d 258 (Ct. App. 1996) ("We cannot clearly perceive the connection between the [separate] acts based on these criteria, and we therefore conclude [the witness's] testimony should have been excluded."). Certainly, the factual determination as to whether the prior assault occurred in this case is left to the discretion of the trial judge. However, in light of these authorities, we believe the determination of whether the facts surrounding that assault sufficiently evidence a common scheme or plan is a question of law. In Lyle, our supreme court stated:

> Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. . . . Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected.

Lyle, 125 S.C. at 416-17, 118 S.E. at 807.

The trial judge ruled the prior sexual assault on Jane was sufficiently similar to the charged crimes to justify admitting evidence of the prior assault under the common scheme or plan exception. We hold this was error.

1. Common scheme or plan in sex crime cases

When he ruled on the admissibility of the uncharged conduct, the trial judge expressly relied on the reasoning in State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984), and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). These cases support the contention that the common scheme or plan exception to Lyle is often satisfied in criminal sexual conduct cases because the evidence tends to prove the defendants engaged in patterns of continuous illicit conduct.

In Weaverling, the court stated, "[t]he common scheme or plan exception 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties.'" 337 S.C. at 469, 523 S.E.2d at 791 (quoting State v. Whitener, 28 S.C. 244, 265, 89 S.E.2d 701, 711 (1955)) (emphasis added). In Weaverling, the defendant allegedly performed fellatio on the same victim almost every time the two were together for a period of five or six years. The victim testified that he had been assaulted by the defendant in excess of one hundred times. This court found the defendant's pattern of continuous sexual abuse satisfied the common scheme or plan exception. Id. at 469, 523 S.E.2d at 791.

Likewise, in McClellan, the defendant repeatedly engaged in sexual misconduct with each of his three daughters. All of the assaults began around the girls' twelfth birthdays, the defendant always quoted Bible verses to the girls, and he always gave the same excuses for his actions. The trial judge found the evidence in the case established a pattern of continuous illicit conduct, and admitted the evidence under the common scheme or plan exception. McClellan, 283 S.C. at 392, 323 S.E.2d at 774.

We interpret these cases to suggest that common scheme or plan evidence in criminal sexual conduct cases will be admitted on a generalized basis only where there is a pattern of continuous illicit conduct. Sex crimes may be unique in this respect because they commonly involve the same victims engaged in repeated incidents occurring under very similar circumstances. The reason for the general admissibility of such evidence under these circumstances is self evident – where there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion.

However, Weaverling and McClellan do not lower the bar for admissibility under Lyle simply because sexual crimes are involved. Regardless of the nature of the charges facing the defendant, there must be evidence that the defendant employed a common scheme or plan in the commission of the crimes. Where there is a pattern of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan. Presumably, this is so because the same evidence that establishes the continuous nature of the assaults will generally suffice to prove the existence of the common scheme or plan as well. In Weaverling and McClellan, the sheer volume of repeated occurrences, together with the close similarities in the assaults, evidenced a pattern of continuous illicit conduct. Accordingly, these cases fall squarely within the plain meaning of common scheme or plan evidence. McClellan, 283 S.C. at 392, 323 S.E.2d at 774 (stating it would be difficult to conceive of evidence more within the common scheme or plan exception); Weaverling, 337 at 469, 523 S.E.2d at 791 (stating the pattern of sexual abuse represented "quintessential common scheme or plan evidence").

Weaverling and McClellan involved longstanding histories of continuous abuse between the same parties. However, such is not necessary to find common scheme or plan evidence. For example, in Whitener, the defendant had nonconsensual intercourse with the victim at a hotel room, left the scene with the victim, and returned with the victim shortly thereafter to perform oral sex on her in the same room. In the State's prosecution for rape, the court allowed testimony regarding the subsequent oral sex act on the basis

that this uncharged act was part of the same "continued illicit intercourse between the same parties." Whitener, 228 S.C. at 265, 89 S.E.2d at 711. The continuous nature of the illicit conduct in Whitener is established by the fact that the separate assaults occurred during the same series of continuous events on the day in question. The court found the evidence tended to "establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tend[ed] to establish the other[]." Id. (finding that the oral sex act performed shortly after the rape was relevant to the proof of the rape charge because it tended to explain the absence of spermatozoa on the victim).

However, the suggestion that common scheme or plan evidence will generally be admitted in cases involving patterns of continuous misconduct is misleading. The court must still clearly perceive the same logical relevance of the extraneous acts to the charged offense. Where the evidence discloses a pattern of continuous illicit conduct, as in Weaverling, for example, the logical relevance is apparent and the evidence will generally be admitted. In Whitener, the uncharged act was logically relevant to the charged offense because both acts arose from a single, continuous series of events, and proof of one act tended to establish that the other had occurred.

Here, we are compelled to find there is no pattern of continuous illicit conduct similar to that found in Weaverling and McClellan. Therefore, we believe the trial judge erred to the extent he based his ruling on the reasoning of these cases. Furthermore, Whitener does not reconcile the trial judge's reasoning because there is no continuous series of events tying the uncharged act to the charged offenses in the present case. To the extent we find there is no continuous illicit conduct in this case, we do so only to distinguish the present case from the authorities relied on by the trial judge. It goes without saying that the conduct need not be continuous to fall within the common scheme or plan exception. In this case, there is no continuous conduct, but that fact, standing alone, does not preclude the existence of a scheme or plan. Instead, the determination of the admissibility of the uncharged act rests solely on whether the requisite degree of similarity between the separate acts is present in this case. Lyle, 125 S.C. at 416-17, 118 S.E. at 807; see also State v. Rogers, 293 S.C. 505, 362 S.E.2d 7 (1987)

(rev'd on other grounds by State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)) (refusing to allow testimony regarding uncharged sexual intercourse under the common scheme or plan exception where the charged assault involved only "touching").

2. The logical relevance of Tutton's uncharged acts

In this case, as with many criminal sexual conduct cases, the question before the jury is not whether the State has charged the correct person with the crime; instead, the question is whether the charged crime actually occurred. The purpose of admitting evidence of other instances of sexual misconduct under the common scheme or plan exception is to bolster the probability that the charged acts occurred. See 2 Wigmore on Evidence § 304 (Chadborne rev. ed. 1979) (stating that where the evidence is introduced to prove the existence of a plan, the purpose "is to show (by probability) a precedent design which in turn is to evidence (by probability) the doing of the act designed."). Here, if the evidence suggests Tutton's prior abuse of Jane was part of an overall plan or scheme devised by him to perpetuate the type of misconduct that occurred, it is relevant to prove the charged assaults on Jane and Mary occurred. Id.

Where such a plan exists, the charged and uncharged acts represent individual achievements of the purposes for which the plan was established. See 2 Wigmore, § 304 (stating that where separate offenses are sufficiently similar, there is an inference that they are manifestations of a common scheme or plan). Accordingly, the evidence in such cases speaks to the existence of the defendant's plan, not to the defendant's character. This is so because the jury is not asked to draw an inference that the prior bad acts would evince the defendant's propensity to commit the charged offenses; instead, the jury is asked to infer that the defendant developed a criminal scheme and employed that scheme as probative evidence that the charged acts occurred. People v. Sabin, 614 N.W.2d 888, 900, n. 10 (Mich. 2000). "The logical relevance of the evidence is based on the system, as shown through the similarities between the charged and uncharged acts, rather than on [the] defendant's character, as shown by the uncharged act." Id.

For purposes of analyzing evidence of prior misconduct under the common scheme or plan exception, we believe it is crucial to distinguish similarities that merely link the two crimes from those similarities that tend to paint the broader, more relevant picture. Where, for example, the similarities are used to prove only the defendant's intent, very little is required because the charged act in such cases is assumed done. 2 Wigmore, § 304. However, "where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test." Id. "The added element, then, must be, not merely a similarity in the results, but such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations." Id. (emphasis in original).

In this case, there are similarities between the charged offenses and the prior alleged assault. First and foremost, the incidents involve the same parties. Also, both the prior uncharged assault on Jane and the charged offenses took place while she and her sisters were staying at Tutton's residence.[3]

Importantly, however, the separate offenses are dissimilar in several significant ways. First, the uncharged assault on Jane is dissimilar in that it was more egregious than the assaults for which Tutton was charged. In Rogers, the victim and her sister both testified that the defendant had "touched" them. In addition, the sister testified that the accused had sexual intercourse with her. Our supreme court held the testimony regarding the alleged intercourse was inadmissible. The court stated, "Even if the common

[3] Regarding the charged offenses, there was detailed testimony as to where the victims and Tutton were lying and as to how Tutton commenced the assaults. This evidence was completely lacking as to the prior uncharged assault. Accordingly, there is little to aid this court in finding that similar tactics were employed by Tutton as to that incident.

scheme exception would have permitted the evidence of the prior touching,[4] the evidence of sexual intercourse would not have been within the scope of the common scheme. Its introduction was highly prejudicial." Rogers, 293 S.C. at 507, 362 S.E.2d 8. Likewise, we hold Jane's testimony regarding the alleged incidents of oral sex is highly prejudicial in light of the nature of the charged offenses. See Weaverling, 337 S.C. at 468, 523 S.E.2d at 791 (stating that even if the evidence falls within a Lyle exception, it must be excluded it if its probative value is substantially outweighed by its prejudicial effect).

The dissimilarities also include the fact that after the uncharged incident, Tutton allegedly threatened Jane that she would be in trouble if she told anyone. Neither girl received a similar warning after the charged assaults. In addition, unlike in the present case, Tutton apparently attempted no other assaults against the others at the time of the uncharged act. Moreover, there was a substantial period of time between the prior uncharged assault and the charged offenses.[5] The girls stayed with Tutton on several occasions during this interim, apparently without incident.

When ruling on the evidence, the trial judge expressed his initial concern about the substantial gap in time between the incidents, but apparently put his concerns to rest in light of his understanding that Tutton had moved away during the interim. However, the trial judge apparently based this ruling on incomplete facts – it was more than two years after the first incident occurred when Tutton moved away from the neighborhood. Significantly, the victims stayed with Tutton several times during the period

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[4] We note the court also found insufficient similarities between the charged and uncharged offenses. Rogers, 293 S.C. at 507, 362 S.E.2d at 8. The only connection between the assaults, which were ten years apart, is that the accused touched both of his daughters. Id.

[5] Remoteness in time, however, is not dispositive. State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 440 (Ct. App. 1994) (cert. denied, March 9 1995) (admitting testimony from sufficiently similar assaults that occurred seven to eight years prior).

between the alleged assaults. The fact that no other incidents occurred during these interim visits weakens the State's contention that Tutton acted pursuant to a plan of sexually assaulting the victims when they spent the night at his house. Certainly, it is not necessary that Tutton assaulted the victims on every occasion to establish a common scheme or plan, but there must be sufficient evidence connecting the overnight stays to the alleged assaults to clearly indicate that a scheme or plan is in use.

The balancing of the similarities in cases concerning the admission of common scheme or plan evidence is a difficult task. While inferential leaps are at the heart of such decisions, we are compelled to find that the similarities in this case are insufficient to support the inference that Tutton employed a common scheme or plan to commit the assaults alleged in this case. As stated in Lyle, "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected." Lyle, 125 S.C. at 417, 118 S.E. at 807; see also State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993) (cert. dismissed as improvidently granted) (stating the defendant must be given the benefit of the doubt regarding the introduction of common scheme testimony where the admissibility was a close question).[6] Because we do not clearly perceive the required connection, we hold the trial judge erred by admitting Jane's testimony about the uncharged assault under the common scheme or plan exception to Lyle.

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[6] In Sabin, the Michigan Supreme Court gave deference to the trial judge's decision to admit the evidence because it believed reasonable minds could differ on the issue of its admissibility in what it considered to be a close case. South Carolina does not follow this approach. Lyle demands that the defendant be given the benefit of the doubt where the connection is not clearly perceived. Lyle, 125 S.C. at 417, 118 S.E. at 807. See also, Henry, 313 S.C. 106, 432 S.E.2d 489 (giving the accused the benefit of the doubt where the admissibility of the evidence is a close case). In any event, we find the common features in Sabin, especially the defendant's tactic of playing on the victims' fears of breaking up the family in order to silence them, far more compelling than in the instant case. See Sabin, 614 N.W.2d at 901.

Moreover, we believe the error in admitting this evidence was not harmless. Whether the improper introduction of evidence is harmless requires us to look at the other evidence admitted at trial in order to determine whether the defendant's guilt is conclusively established by competent evidence such that no other rational conclusion could be reached by the jury. Berry, 332 S.C. at 220, 503 S.E.2d at 773. Here, the evidence at trial consisted entirely of the victims' accusations against the defendant. The defendant vehemently denied the accusations and the medical evidence was inconclusive. Considering this contested evidence and the fact that the prior uncharged assault on Jane was more egregious than the charged offenses, we cannot say that without this testimony, the evidence before the jury was so overwhelming that a guilty verdict was the only rational conclusion. Id. at 221, 503 S.E.2d at 774. Accordingly, we reverse Tutton's conviction and remand for a new trial.

REVERSED.

GOOLSBY and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Michael Dunbar,

Appellant.

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

Opinion No. 3631
Heard September 11, 2002 – Filed April 21, 2003

AFFIRMED IN PART AND
REVERSED IN PART

Assistant Appellate Defender Tara S. Taggart, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and

Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

CONNOR, J.: Michael Dunbar was indicted for trafficking in cocaine 100 to 200 grams, trafficking in cocaine 200 to 400 grams, and trafficking in crack cocaine 200 to 400 grams. A jury convicted Dunbar of all three charges. The trial court sentenced him to concurrent twenty-five-year sentences for the trafficking in cocaine offenses, and a consecutive fifteen-year sentence for trafficking in crack cocaine. Dunbar appeals, arguing the trial court erred in failing to suppress evidence obtained as a result of two allegedly impermissible searches. We affirm in part and reverse in part.

FACTS

Acting on information from a confidential informant, investigators from the Lexington County Sheriff's Department initiated an undercover drug bust. In Officer Rainwater's presence, the informant contacted Dunbar and another individual to set up a drug transaction. The informant arranged to purchase five ounces of cocaine. The two men arrived in their car to meet the informant and deliver the drugs at the pre-designated time and place.

Police officers approached the car upon receiving the informant's signal that drugs were present in the vehicle. The driver of the vehicle, Jonathan Small, fled on foot. The defendant, Dunbar, remained seated in the vehicle until the officers asked him to step out. The officers searched the car and found a paper bag containing approximately five ounces of cocaine. The officers also noticed a hotel room key on the key chain left in the car's ignition. Dunbar informed Rainwater that he and Small were staying at the Ramada Inn in West Columbia.

Rainwater sought a warrant to search the hotel room. The search of the room turned up $3,795.00 in cash, digital scales, a 9-millimeter pistol, powder cocaine, and crack cocaine.

Prior to trial, Dunbar moved to suppress the evidence obtained as a result of the warrantless search of the car and the search of the hotel room pursuant to the execution of the search warrant. The trial court denied Dunbar's motion to suppress the evidence. This appeal follows.

LAW/ANALYSIS

I. Warrantless Search of Vehicle

Dunbar argues the trial court erred in failing to suppress the cocaine found in the vehicle because it was obtained as a result of an unreasonable warrantless search.

Generally, warrantless searches are per se unreasonable unless an exception to the warrant requirement is present. State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). Recognized exceptions to the warrant requirement include: (1) a search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) automobile exceptions; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981). Dunbar argues the warrantless search of the vehicle was not pursuant to any of the possible exceptions.

As noted, one possible exception to the warrant requirement is a search incident to a lawful arrest. Once probable cause exists for an arrest, "[p]olice officers may make a search of an arrestee's person and the area within his immediate control for weapons and destructible evidence." State v. Ferrell, 274 S.C. 401, 405, 266 S.E.2d 869, 871 (1980). Dunbar's motion to suppress the evidence stated his "arrest was made absent probable cause."

Thus, we focus on whether probable cause existed to arrest Dunbar.

"The fundamental question in determining whether an arrest is lawful is whether there was 'probable cause' to make the arrest." Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). Probable cause for an arrest "generally exists 'where the facts and circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested.'" State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994) (quoting United States v. Miller, 925 F.2d 695, 698 (4th Cir. 1991)). Stated otherwise, "[a] police officer has probable cause to arrest without a warrant where he, 'in good faith, believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise . . . .'" State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979) (quoting State v. Swilling, 249 S.C. 541, 558, 155 S.E.2d 607, 617 (1967)).

In determining whether probable cause exists, "all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received." Roper, 274 S.C. at 17, 260 S.E.2d at 706; see Moultrie, 316 S.C. at 552, 451 S.E.2d at 37 ("In assessing whether an officer has probable cause, the totality of the circumstances surrounding the information at the officer's disposal must be considered.").

Here, the confidential informant told Officer Rainwater he had previously purchased cocaine from two men who traveled to Columbia from Florida. The informant told Rainwater that he had dealt with the two men on several occasions when they had been in the Columbia area. The informant agreed to set up a "sting" operation in which these persons would deliver cocaine to him at a gas station. Rainwater met with the informant and

listened as the informant telephoned his drug sources[1] and requested that they deliver the drugs to him. The informant told Rainwater the men would be driving a blue Cadillac with wire rims. Acting on this information, the police set up surveillance and waited for the men to arrive at the gas station. The officers observed a blue Cadillac with wire rims drive into the gas station. They watched as the informant approached the car and sat down in the back seat. The informant then immediately exited the vehicle. The informant's act of getting out of the car was the cue for the officers to move in based on the presence of drugs in the car. Based on these facts and observations, Rainwater and the other surveilling officers then moved in to arrest the car's occupants. After removing Dunbar from the passenger seat, Rainwater retrieved a bag of cocaine from the passenger-side floorboard.

The informant's description of the vehicle was corroborated when the informant approached the car immediately upon its arrival at the gas station. Moreover, Rainwater listened while the informant called to arrange the drug transaction. When viewed under the totality of the circumstances, the information provided by the informant, together with Rainwater's observations and verification of the information, was sufficient to give rise to probable cause that the occupants of the car were conducting a drug transaction, and that drugs could be found in the car. See Moultrie, 316 S.C. at 552, 451 S.E.2d at 37-38 (recognizing the validity of warrantless arrests based on an informant's tip where arresting officers conduct no independent investigation and corroboration consists of nothing more than observing predictions supplied by the tip); cf. Roper, 274 S.C. at 16-19, 260 S.E.2d at 706-707 (finding probable cause existed to stop an automobile matching a witness's description of two black males driving a late model, green Thunderbird with a red and white license tag bearing the letters "MVB" or "MVF"); Peters, 271 S.C. at 504, 248 S.E.2d at 478 (finding an informant's tip that a yellow Grand Prix with a white top and South Carolina

[1] Rainwater testified he was unaware at the time of the telephone conversation whether the informant was speaking with the defendant, Dunbar, or with Jonathan Small.

tags bearing the digits "308" would be leaving Folly Beach shortly and transporting marijuana was sufficient to constitute probable cause to stop the vehicle).

Therefore, the warrantless arrest of Dunbar, as well as the search incident to Dunbar's arrest, was proper. The trial court did not err in refusing to suppress the cocaine found inside the car.

II. Validity of Search Warrant

Dunbar argues the trial court erred in failing to suppress the evidence obtained as a result of the search of the hotel room. Dunbar contends the affidavit is deficient and cannot form the basis for a search warrant because the affiant admittedly had no direct knowledge of numerous facts recited in the affidavit.

After retrieving the cocaine from the vehicle, Officer Rainwater noticed a hotel room key on the key chain left in the car's ignition. The key was inscribed with a room number. Based on the confidential informant's previous dealings with Dunbar, he knew Dunbar stayed at a hotel while in Columbia. The informant had alerted Rainwater to this fact and told Rainwater to look for a hotel key. Upon being asked, Dunbar informed Rainwater that he and Small were staying at the Ramada Inn in West Columbia.

Based on the seizure of the cocaine and the information concerning the hotel room, Rainwater sought a warrant to search the room. Rainwater telephoned the magistrate and discussed the probable cause to issue the search warrant. Rainwater did not, however, proceed to the magistrate's office to obtain the warrant, but instead sent Officer O'Quinn.

When O'Quinn arrived at the magistrate's office the magistrate was on the telephone with Rainwater. O'Quinn testified the magistrate

drafted the affidavit based on information received over the telephone from Rainwater.[2] O'Quinn stated he "merely signed" the affidavit after reviewing it and did not offer any information to the magistrate involving the probable cause for the search. O'Quinn admitted he had no "personal knowledge" of the facts contained in the affidavit other than an awareness that five ounces of cocaine had been delivered to undercover agents. O'Quinn was stationed in a marked patrol car during the surveillance of the gas station and testified that "it would not have been conducive for me to be within a line of sight of the suspects or where the deal was taking place." O'Quinn did not speak with the confidential informant nor with Dunbar, and was not present and did not observe Rainwater retrieve the cocaine from the car. There is no evidence the magistrate even inquired concerning O'Quinn's knowledge of the facts stated in the affidavit. O'Quinn stated the facts in the affidavit came from "no place else" but Rainwater. After signing the affidavit and obtaining the search warrant, O'Quinn delivered the warrant to the officers waiting at the hotel.

In State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000), our Supreme Court stated the constitutional and statutory requirements for issuing a search warrant:

> The General Assembly has imposed stricter requirements than federal law for issuing a search

[2] The affidavit stated:

> That a confidential informant stated that the subject stays at motel while in the area, that Co Def stated that the subject left Ramada Inn at I-26 [at] 378 after Co-Def called subject in that room, that Co Def saw subject leave location to pick him up at location across from Ramada, that subject had on his possession a key to said room, that subject delivered approx. 5oz. of cocaine to undercover agents.

> warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record . . . ." S.C. Code Ann. § 17-13-140 (1985).

Id. at 128, 536 S.E.2d at 678.

"An affidavit is a voluntary *ex parte* statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation." State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987); see also Black's Law Dictionary 58 (7th ed. 1999) (defining an affidavit as a "voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths").

In McKnight, our Supreme Court found a warrant defective where a sworn officer orally recited facts upon which the warrant was based but never executed an affidavit.[3] The Supreme Court found that such a

[3] The record does not indicate Rainwater was sworn. The magistrate placed O'Quinn under oath before he signed the affidavit. However, O'Quinn was unaware whether Rainwater was under oath during the telephone conversation with the magistrate. See State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967) (finding a sheriff's testimony that he had a "conversation" with a magistrate was insufficient to establish that the sheriff furnished information under oath or affirmation). Assuming, as we must, given the lack of evidence on this point in the record, the magistrate did not place Rainwater under oath, the search warrant issued in this case offends even the less stringent

sworn, oral statement may be sufficient to satisfy constitutional requirements, but the statement would not satisfy the statutory requirement of an affidavit. McKnight, 291 S.C. at 113, 352 S.E.2d at 472. McKnight required an affiant to execute a written affidavit. Similarly, in this case Officer Rainwater orally recited facts relating to the probable cause for the warrant but did not execute an affidavit. Instead, Rainwater sent O'Quinn to sign an affidavit drafted by the magistrate.

Under these facts, the statutory mandate requiring that a search warrant be based on an affidavit was not met because the affiant did not recite any of the facts stated in the affidavit and his direct personal knowledge of the facts stated in the affidavit was limited to the delivery of cocaine. The affiant, O'Quinn, did not prepare an affidavit and the magistrate's recitation of the facts in the affidavit was not verified by anyone known by the magistrate to possess knowledge of the facts stated in the affidavit. Because O'Quinn had no direct personal knowledge of numerous facts, he could not have sworn to the truth of the statements in the affidavit. At oral argument, the State explained O'Quinn was swearing that he *believed* the statements in the affidavit were truthful. The statutory affidavit requirement is not met where one officer recites facts over the phone to a magistrate, the magistrate drafts an affidavit, and subsequently an affiant who offers no facts establishing probable cause signs the affidavit. In essence, like McKnight, the magistrate was never presented with an affidavit executed by the affiant.

This opinion in no way affects the validity of search warrants issued through the use of hearsay. See, e.g., State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976) (recognizing the validity of an affiant attesting to information supplied him by a fellow officer). Here, there is no evidence

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constitutional standard requiring a search warrant be "supported by oath or affirmation." U.S. Const. amend. IV; S.C. Const. art. I, § 10; see also State v. Wimbush, 9 S.C. 309 (1877) (finding a warrant illegal where the information on which the warrant was founded was not given upon oath).

O'Quinn repeated to the magistrate any facts he may have obtained from other officers. The dissent characterizes this as a hearsay case and upholds the validity of the warrant based in part on O'Quinn's hearsay knowledge. Even assuming in this case O'Quinn obtained knowledge as a result of hearsay, it is of no consequence given O'Quinn did not relate any of this information to the magistrate and did not present an affidavit.

As the dissent correctly notes, an affidavit can show probable cause even when based on hearsay. Sullivan, 267 S.C. at 614, 230 S.E.2d at 623. However, any probable cause established in the affidavit here is not based on hearsay, it is based on oral statements by an officer who did not present an affidavit.

A search warrant affidavit insufficient in itself to establish probable cause may be supplemented by sworn oral testimony. Jones, 342 S.C. at 128, 536 S.E.2d at 678-679; McKnight, 291 S.C. at 113, 352 S.E.2d at 472. "However, sworn oral testimony, standing alone, does not satisfy the statute." Id. at 113, 352 S.E.2d at 473. Even if Rainwater's telephone conversation with the magistrate was under oath, Rainwater presented only sworn oral testimony, not an affidavit. The rule allowing supplementation presupposes an affiant presented the magistrate with a written affidavit. If not presented with an affidavit, the magistrate is left to depend totally on oral information. A magistrate cannot depend solely on oral testimony in issuing a search warrant. Here, Rainwater's oral statements to the magistrate did not *supplement* an affidavit. Rather, the magistrate used the statements to draft the affidavit subsequently signed by an affiant who did not supply the magistrate with any facts. This procedure did not satisfy section 17-13-140.

Accordingly, the trial court erred in refusing to suppress the evidence obtained during the search of the hotel room.

CONCLUSION

The trial court properly admitted the cocaine found in the car into evidence and we thus affirm Dunbar's conviction for trafficking in cocaine of more than one hundred but less than two hundred grams of cocaine. The trial court erred in refusing to suppress the powder and crack cocaine found in the hotel room and we therefore reverse Dunbar's convictions for trafficking in cocaine of more than 200 grams and less than 400 grams, and trafficking in crack cocaine.

AFFIRMED IN PART AND REVERSED IN PART.

STILWELL, J. concurs and ANDERSON, J. dissents in a separate opinion.

ANDERSON, J. (dissenting): I respectfully dissent. The majority concludes the trial court erred in failing to suppress the evidence obtained as a result of the search of the motel room because the search warrant was based on an affidavit signed by a law enforcement officer who had no direct knowledge of the information contained in the affidavit. I disagree. I vote to affirm.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. On review, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). This Court

does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see also State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) (an abuse of discretion is a conclusion with no reasonable factual support).

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App 2002). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The appellate court should give great deference to a magistrate's determination of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); see also State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976) (magistrate's determination of probable cause should be paid great deference by reviewing court).

LAW/ANALYSIS

I. Requirement of Sworn Affidavit

"Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued." State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000). Furthermore, the South Carolina Code mandates that a search warrant shall be issued only upon affidavit sworn to before the magistrate,

municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. Id.; S.C. Code Ann. § 17-13-140 (1985). The purpose of the statute requiring that a warrant be issued only upon affidavit is to provide for timely recording of facts presented to a judicial officer. State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975).

II. Sufficiency of Affidavit Supporting Search Warrant

An affidavit in support of a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976); see also Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), overruled on other grounds by United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (affidavit for search warrant which sets out personal observations relating to existence of cause to search is not to be deemed insufficient by virtue of fact that it sets out not the affiant's observations but those of another, so long as a substantial basis for crediting the hearsay is presented). An affidavit can show probable cause even when based on hearsay statements. Sullivan, 267 S.C. at 614, 230 S.E.2d at 623; see also Morris v. State, 62 S.W.3d 817 (Tex. App. 2001) (information with which magistrate is supplied, in affidavit for search warrant, may be hearsay).

Hearsay, even second hearsay, may provide a legal basis for a search warrant. United States v. Welebir, 498 F.2d 346 (4th Cir. 1974); see also State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967) (affidavit for search warrant may be based on hearsay information); State v. Elkhill, 715 So. 2d 327 (Fla. Dist. Ct. App. 1998) (finding affidavit established probable cause to search defendant's residence for drugs, even though affiant did not continuously observe confidential informant during controlled buy; informant was under almost constant supervision of one of two officers during buy, and what affiant did not see, the other officer did; as long as specific facts are set forth to justify finding of probable cause to issue search warrant, those facts may be based on hearsay information).

The fact that the information provided is double hearsay is relevant to its value in determining probable cause, but hearsay testimony will not per se invalidate a judge's determination of probable cause. State v. Taylor, 612 N.E.2d 728 (Ohio Ct. App. 1992). The fact that the affiant's knowledge may be the result of double or multiple levels of hearsay does not, per se, invalidate the resulting search warrant. United States v. Jenkins, 525 F.2d 819 (6th Cir. 1975); see also United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two and 43/100 Dollars ($149,442.43) in U.S. Currency, 965 F.2d 868 (10th Cir. 1992) (hearsay, even multiple hearsay, may be used to establish probable cause for a search warrant); United States v. McCoy, 478 F.2d 176 (10th Cir. 1973) (fact that affidavit in support of search warrant contains some double hearsay and perhaps even a bit of triple hearsay does not in and of itself render the affidavit insufficient).

The fact that there is hearsay upon hearsay involved in a case, as far as the information upon which the affidavit is based, does not preclude a finding of probable cause. Lewis v. State, 508 S.E.2d 218 (Ga. Ct. App. 1998); see also Hennessy v. State, 660 S.W.2d 87 (Tex. Crim. App. 1983) (when viewing the affidavit, hearsay upon hearsay will support issuance of warrant as long as underlying circumstances indicate there is a substantial basis for crediting hearsay at each level).

III. Direct Knowledge of Affiant Officer Not Required

The propriety of an affiant attesting to information supplied him by a fellow officer has been judicially endorsed. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). It is well settled that an affiant seeking a search warrant can base his information on information in turn supplied him by fellow officers. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); United States v. Welebir, 498 F.2d 346 (4th Cir. 1974). Observations by fellow law enforcement officers engaged in a common investigation with the search warrant affiant are a reliable basis for a warrant applied for by one of their number. Ventresca, 380 U.S. at 111, 85 S.Ct. at

747, 13 L.Ed.2d at 690; State v. Hage, 568 N.W.2d 741 (N.D. 1997). See also United States v. Morales, 238 F.3d 952 (8th Cir. 2001) (probable cause may be based on collective knowledge of all law enforcement officers involved in an investigation and need not be based solely on information within knowledge of officer on scene if there is some degree of communication).

Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit and is not limited to the firsthand knowledge of the officer who executes the affidavit. State v. Stickelman, 299 N.W.2d 520 (Neb. 1980); see also Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002) (probable cause for a search warrant may be based upon information known to the law enforcement organization as a whole). A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Pearson, 566 S.E.2d 50 (N.C. 2002).

It is not unusual for an affidavit of a law enforcement officer to contain hearsay information from another, which, in turn, is based on other information gathered by that person. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623. Hence, when a magistrate receives an affidavit which contains hearsay upon hearsay, he need not categorically reject this double hearsay information. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623. Rather, he is called upon to evaluate this information as well as all other information in the affidavit in order to determine whether it can be reasonably inferred that the information was gained in a reliable way. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623-24.

IV. Efficacy of Affidavit in Present Case

The affidavit in the present case clearly justified the issuance of the warrant. Officer Keith O'Quinn was "part of the initial responding units for the take-down of the operation" and was at the scene of the arrest. O'Quinn testified that he had "personal knowledge . . . that a narcotics deal had been

performed at the Exxon station on Bush River Road" and that two subjects had been arrested. Officer O'Quinn had knowledge there was cocaine in the car. He declared that, "[b]ased on [his] conversation in dealing with Investigator Rainwater," he obtained a search warrant. O'Quinn signed an affidavit based on information which was obtained through a joint investigation. When asked "[w]as there a reason for the belief contained in the affidavit that there was cocaine in Sheraton (sic) room 158," Officer O'Quinn responded: "From the information that I gathered that was told to Investigator Rainwater by the C.I., yes, sir, there was." Moreover, although Officer Rainwater actually communicated the information to the magistrate, Officer O'Quinn read over and reviewed the affidavit for accuracy before he signed it.

I find the affidavit was properly executed. The affidavit included information Officer O'Quinn learned through his participation in the investigation, as well as hearsay information. Thus, the affidavit justified the issuance of the search warrant. Under the totality of the circumstances, the magistrate had a substantial basis for concluding probable cause existed. I would affirm the trial court's decision to allow the evidence obtained as a result of the search of the motel room.

CONCLUSION

The opinion of the majority acknowledges the viability of the rule that hearsay is admissible to show probable cause. This declaration rings hollow because the majority opinion neglects to give any efficacy to the rule.

With etymological precision, the majority in cathartic verbiage concludes the rule should not be applied. The statement is made that the magistrate never heard the "hearsay." The record belies this averment.

The judicial embargo countenanced by the majority flies in the face of the universal rule of evidence allowing "hearsay, even second hearsay" to determine probable cause in the magisterial warrant scenario.

Without question, the appellate entity will "rue the day" of the "statutory affidavit deficiency" rule adopted in this case. This court-created albatross in search warrant proceedings is anathema to the law extant in the field of criminal law.

I VOTE TO AFFIRM.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Raul H. Aragon, Appellant.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3632
Submitted January 29, 2003 – Filed April 21, 2003

AFFIRMED

John J. Stathakis, of Anderson; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General David A. Spencer, all of Columbia; and Solicitor Druanne Dykes White, of Anderson; for Respondent.

GOOLSBY, J.: Raul H. Aragon appeals his convictions for 1) simple assault and battery and 2) assault and battery of a high and aggravated nature. His appeal focuses entirely upon the admission by the trial court of a taped conversation between him and one of the victims. We affirm.[1]

Aragon assaulted two women one evening. He admitted he slapped one of them. That victim, however, complained of a more extensive assault upon her. She stated that Aragon, among other things, smashed her head against a door jamb, rammed a chair into her stomach, dragged her from her bedroom into the kitchen, and made her plead for her life while threatening to stab her.

Following the assault and at the request of the investigating officer, the victim called Aragon from the sheriff's office and engaged him in a taped conversation. The solicitor's office took custody of the tape after the victim reviewed it. The State introduced the tape into evidence. Aragon argues the State failed to properly authenticate the tape because the State did not establish a chain of custody.

We think the State, consistent with the requirements of Rule 901, SCRE,[2] regarding authentication, sufficiently established that the tape in

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

[2] Rule 901, SCRE, provides as follows:

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

. . .

question is what it claimed. The victim who made the call to Aragon testified that she had known him for over ten years and once had a relationship with him, that she telephoned Aragon from the sheriff's office and knew the conversation was taped, that she listened to the tape, that she recognized the tape from her initials on it, that the tape fairly and accurately represented the phone conversation, and that the tape had not been edited or altered in any way.[3]

As for establishing a chain of custody, that was not necessary since the tape was otherwise authenticated.[4]

> (5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

[3] After the tape was admitted and published, the victim further testified she knew her conversation was held with Aragon because she dialed his number and she recognized his voice. See Rule 901(b)(6), SCRE (stating that an example of authentication regarding telephone conversations may include "evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business. . . ."). At no point in his testimony did Aragon challenge the genuineness of the tape or in any way suggest the tape had been tampered with. Indeed, he seemed to embrace the correctness of the tape, saying when questioned about its contents, "What I said on the tape you heard it. It's all on the tape."

[4] See United States v. Tropeano, 252 F.3d 653 (2d Cir. 2001) (holding that a chain of custody need not be established where the witnesses had first-hand knowledge of conversations and identified the voices on the tape); McCollum v. State, 582 N.E.2d 804 (Ind. 1991) (holding that a chain of custody need not be established where a participant in a conversation listened to the tape the night before and testified the tape was a true and accurate recording of the conversation).

As for establishing a chain of custody, that was not necessary since the tape was otherwise authenticated.[5]

AFFIRMED.

HEARN, C.J., and SHULER, J., concur.

[5] See United States v. Tropeano, 252 F.3d 653 (2d Cir. 2001) (holding that a chain of custody need not be established where the witnesses had first-hand knowledge of conversations and identified the voices on the tape); McCollum v. State, 582 N.E.2d 804 (Ind. 1991) (holding that a chain of custody need not be established where a participant in a conversation listened to the tape the night before and testified the tape was a true and accurate recording of the conversation).