The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF JAMES L. BELL, PETITIONER

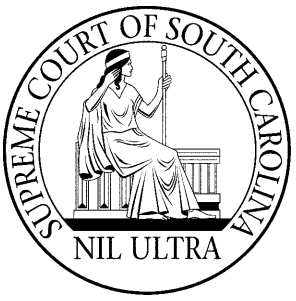
Petitioner was definitely suspended, retroactive to November 18, 2016. *In the Matter of James L. Bell*, 421 S.C. 520, 809 S.E.2d 54 (2017). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, 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. Comments should be mailed to:

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

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
May 31, 2018



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 6, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Petitioner,

v.

Venancio Diaz Perez, Petitioner/Respondent.

Appellate Case No. 2015-001576

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27810
Heard November 30, 2016 – Filed June 6, 2018

REVERSED

Jason S. Luck, of Garrett Law Offices, of North Charleston, and Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner/Respondent.

Attorney General Alan M. Wilson and Special Assistant Attorney General Amie L. Clifford, both of Columbia, and Solicitor Scarlett A. Wilson, of Charleston, for Respondent/Petitioner.

CHIEF JUSTICE BEATTY: We granted cross-petitions for a writ of certiorari to review the Court of Appeals' unpublished decision in *State v. Perez*, Op. No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015), wherein the court determined: (1) the trial court's refusal to admit testimony of a witness' U-visa[1] application was harmless error; (2) the trial court properly admitted evidence of prior bad acts Venancio Diaz Perez committed against another minor; and (3) Perez's sentence was vindictive and a violation of due process. We reverse the Court of Appeals' decision and remand for a new trial.

I. Factual and Procedural History

Perez was indicted on charges of criminal sexual conduct with a minor and lewd act on a minor for acts committed on a child ("Minor 1") whom his wife babysat in their residence. Prior to trial, the judge held an *in camera* hearing to determine whether to allow another child ("Minor 2"), who Perez's wife also babysat, to testify at trial regarding acts of sexual abuse Perez allegedly committed against Minor 2. After hearing testimony from both children, the trial court decided to allow Minor 2 to testify pursuant to *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).[2]

At trial, Minor 1 testified to six incidents involving Perez. Minor 1 described two similar incidents wherein she went into one of the bedrooms to retrieve her

[1] A U-visa allows victims of certain crimes, who have suffered mental or physical abuse and are helpful to the government in the investigation or prosecution of the criminal activity, to be lawfully present in the United States. 8 C.F.R. § 214.14 (2017); Department of Homeland Security, *Victims of Criminal Activity: U Nonimmigrant Status*, https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last updated August 25, 2017).

[2] In *Wallace,* this Court held relevant evidence of a defendant's prior bad act that is more probative than prejudicial may be admitted to show a common scheme or plan under Rule 404 of the South Carolina Rules of Evidence ("SCRE") when the similarities between the crime charged and prior bad act outweigh the dissimilarities. *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278.

PlayStation Portable at which time Perez grabbed her, pulled her into the closet, and began touching her. In the first incident, Minor 1 alleged Perez "put his hands under [her] clothes and stuck his finger inside of [her]." In the second, Minor 1 stated Perez touched her "front" and "bottom," but, unlike the first incident, there was no digital penetration. Minor 1 also described another incident in which Perez touched her "front" and "bottom" after she hid in a closet during a game of hide-and-seek. Like the second encounter, there was no penetration. In the fourth encounter, Minor 1 testified that while Perez's children were standing in front of the television "acting famous," Perez situated himself in an area of the room so that no one else could see, pulled his pants down, and showed Minor 1 his privates. In another, Minor 1 claimed Perez touched her chest and "front" and bit her on her breasts after she helped him hang wallpaper in the bathroom. In the last incident, Perez began chasing Minor 1 while she was watching a movie so she hid under a bed so that he could not reach her.

On cross-examination, Minor 1 admitted she told her therapist Perez never pulled her into the closet or digitally penetrated her during the first encounter because Perez's children walked in before anything could happen. Minor 1 also stated she did not mention the incident of Perez chasing her under the bed in her movie narrative with her therapist in which she proclaimed to have disclosed everything that occurred between her and Perez. Nor did she include the incident of Perez biting her chest, but testified she nevertheless disclosed that encounter with her therapist. Additionally, at trial, the State asked Minor 1 whether she was wearing a bra at the time of the wallpaper incident. Minor 1 answered "No," explaining she was too young to wear a bra at that time. On cross-examination, however, Minor 1 stated she told her therapist that she was wearing a bra during one of the encounters with Perez.

Minor 2 subsequently testified to two incidents of sexual abuse involving Perez. In one incident, Minor 2 testified she was in one of the bedrooms lying down when Perez got on top of her and touched her on her "top and bottom privates." In the other, Minor 2 stated she fell asleep on the couch in the living room watching a movie and Perez came up behind her and touched her on her "front private."[3]

[3] Although it was not discussed at trial, during the pretrial hearing, Minor 2 also alleged Perez touched her while she was helping him fix a doorknob. Additionally, Minor 2 asserted Perez had sexual intercourse with her inside a closet; however, the trial court did not allow Minor 2 to testify regarding the intercourse at trial.

In addition to Minor 1 and Minor 2, the State called the mother of Minor 1 ("Mother 1") and the mother of Minor 2 ("Mother 2") to testify. On cross-examination, Mother 1 stated she came to the United States from Mexico illegally in 2000. After Minor 1 reported the abuse, the victim advocate informed Mother 1 about U-visas and directed Mother 1 to an attorney who could assist her in filing an application. As a result of submitting her U-visa application, Mother 1 testified she became eligible for food stamps, which she now receives. Moreover, without the U-visa application, Mother 1 explained she would be considered an illegal immigrant and would be at risk of being deported.

Defense counsel attempted to elicit similar testimony from Mother 2, who was also in the country illegally, but the trial court refused to admit testimony concerning Mother 2's U-visa application, stating:

> I let you go into the visa and the legal status [of Mother 1] because she was the mother of the victim. I'm not going there with this witness. That has nothing to do with this case. I don't think it has anything to do with bias or anything and we're not going there, okay?

Nevertheless, the trial court permitted defense counsel to proffer the following testimony outside the presence of the jury: Mother 2 learned about U-visas from an information sheet she received at the Lowcountry Children's Center when her daughter was being examined; Mother 2 had applied for a U-visa with the assistance of an attorney; and, unlike Mother 1, Mother 2 had not applied for any government benefits.

At the conclusion of the trial, the jury returned a verdict of not guilty of criminal sexual conduct with a minor, but ultimately found Perez guilty of lewd act on a minor and of assault and battery of a high and aggravated nature ("ABHAN"). The trial court sentenced Perez to fifteen years for the lewd act on a minor conviction and to a consecutive ten years for the ABHAN conviction with credit for time served. Perez subsequently objected, arguing the sentence was vindictive and punishment for exercising his right to trial. The trial court denied Perez's motion to find the sentence vindictive and Perez appealed his convictions and sentence.

In an unpublished opinion, the Court of Appeals determined the trial court erred in refusing to allow evidence of Mother 2's U-visa application into evidence,

but determined the error was harmless beyond a reasonable doubt. *State v. Perez*, Op. No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015), *3-4. The court affirmed the trial court's decision to admit Minor 2's testimony pursuant to *Wallace*. *Id*. at *2. Finally, the court reversed and remanded for resentencing after determining Perez's sentence was vindictive and a violation of due process. *Id*. at *4-5. Then-Chief Judge Few filed a concurring opinion wherein he concurred with the majority as to the first two issues, but wrote separately to note that he would remand the case to the trial court to clarify the basis on which it sentenced Perez. *Id*. at *6.

Both parties petitioned this Court for a writ of certiorari. Perez argued the Court of Appeals erred in: (1) finding the trial court's refusal to admit evidence of Mother 2's U-visa harmless error; (2) affirming the trial court's admission of Minor 2's testimony; and (3) failing to remand the case to a different judge for sentencing. The State contended the Court of Appeals erred in finding Perez's sentence was vindictive. We granted both petitions.

II. Standard of Review

In criminal cases, this Court sits solely to review errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is based on findings of fact that are without evidentiary support. *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

III. Discussion

Whether the Court of Appeals erred in finding the trial court's refusal to admit evidence of Mother 2's U-visa was harmless error.

The Court of Appeals held the trial court's refusal to allow Perez to cross-examine Mother 2 regarding her U-visa application constituted a violation of Perez's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Perez*, at *3; *see* U.S. Const. amend. VI (stating "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (providing a

defendant demonstrates a Confrontation Clause violation when he is prohibited from "engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . . 'from which jurors . . . could appropriately draw inferences relating to the reliability of the witness'" (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974))).

According to the Court of Appeals:

> [T]here is no question Mother 2's veracity and potential bias was an important issue. Any evidence showing Mother 2 applied for or obtained the visa because her daughter was a victim of abuse and they both assisted with the prosecution was relevant impeachment evidence. Mother 2's immigration status and possible visa application was relevant to any theory that the victims falsely alleged these crimes in an attempt to gain citizenship for their parents. Further, even accepting Minor 2's testimony as true, Mother 2's U visa testimony was relevant to establish bias by demonstrating Mother 2 agreed to participate in the investigation or encouraged Minor 2 to participate in order to obtain the visa.

Perez, at *3-4. The court, however, concluded the error was harmless beyond a reasonable doubt. *Id*. at *4; *see Gracely*, 399 S.C. at 375, 731 S.E.2d at 886 ("A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis."). In its petition for rehearing, the State did not challenge the court's finding that the trial court's failure to admit the evidence was error; therefore, the only question before us on this issue is whether the error was harmless. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unchallenged ruling becomes the law of the case regardless of whether the ruling is correct).

"A [C]onfrontation [C]lause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that we are persuaded, beyond a reasonable doubt, that the violation did not affect the verdict." *State v. Holder*, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009) (quoting *State v. Vincent*, 120 P.3d 120, 124 (Wash. Ct. App. 2005)). When determining whether an error is harmless, this Court considers, *inter alia*: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material

points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

In finding the trial court's error in failing to admit testimony of Mother 2's U-visa application harmless, the Court of Appeals reasoned:

> Perez proffered no evidence Mother 2 knew about U visas before she reported Perez's acts against Minor 2. Without such evidence, Mother 2's undocumented status ***made it less likely she would falsely report a crime because this would bring her to the State's attention and possibly lead to her deportation***. ***Moreover, nothing in Mother 2's proffered testimony suggests the State's recommendation that Mother 2 obtain a U visa was quid pro quo for her or Minor 2's testimony***. Mother 2 denied someone from the solicitor's office put her in contact with an attorney to assist with the application. She also denied "a victim advocate or helper" put her in touch with an immigration attorney. She simply stated she found out about the attorney assisting with the application "[w]hen we went for [Minor 2] to have her questioning and exam[,] they gave us several information sheets and that was one of them." Also, unlike Minor 1's mother, Mother 2 denied having applied for other governmental benefits such as food stamps since she applied for the U visa. ***Therefore, Mother 2's proffered testimony does not suggest "[Mother 2] was receiving assistance from the State in exchange for her daughter's testimony," or that her "testimony against Perez was 'bought and paid for' by the State via U [v]isas' as Perez argues***.

Perez, at *4 (emphasis added).

We find the Court of Appeals' credibility analysis inappropriate for appellate review. As appellate courts in this state have recognized:

> Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to the jury to decide: "The fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witnesses or his interest

> in the result. . . . If there is anything tending to create distrust in his truthfulness, the question must be left to the jury."

Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) (quoting *Terwilliger v. Marion*, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952)). Perez's jury was not given an opportunity to assess the credibility of Mother 2. Therefore, we agree with Perez that "the Court of Appeals has, in effect, improperly ruled on the credibility and weight of [Mother 2's] testimony and usurped the role of the jury." Giving due consideration to the *Van Arsdall* factors, we also agree with Perez that the trial court's error in refusing to admit Mother 2's testimony concerning her U-visa application was not harmless beyond a reasonable doubt.

Here, because there was no physical evidence of the alleged abuse, the case rested solely on credibility determinations. Thus, Perez's opportunity to elicit testimony from the State's witnesses regarding any potential bias was critical to his defense.

In particular, Mother 1 and Mother 2 both applied for U-visas as a result of Minor 1's and Minor 2's accusations. Considering the significance of obtaining a U-visa and the manner in which the visa is acquired, a jury could see the U-visa applications as a means of establishing bias in Minor 1, Minor 2, Mother 1, and Mother 2. *See Romero-Perez v. Commonwealth*, 492 S.W.3d 902, 906 (Ky. Ct. App. 2016) (recognizing the U-visa program's requirement that the victim be helpful to the prosecution could incentivize the victim to fabricate allegations or embellish their testimony in order to have their U-visas granted). Indeed, even the Court of Appeals acknowledged that Mother 2's U-visa testimony was relevant "to any theory that the victims falsely alleged these crimes in an attempt to gain citizenship for their parents" as well as "to establish bias by demonstrating Mother 2 agreed to participate in the investigation or encouraged Minor 2 to participate in order to obtain the visa." *Perez*, at *4. Therefore, prohibiting Mother 2 from testifying about her U-visa application prevented Perez from establishing a full picture of the witnesses' biases. Moreover, testimony concerning Mother 2's U-visa application would not have been cumulative to other testimony in the record.

Although the failure to admit evidence of a witness' U-visa does not automatically equate to reversible error, we find the trial court's failure to admit evidence of Mother 2's U-visa application particularly significant in this case given: (1) the lack of physical evidence of the alleged abuse; and (2) Minor 1's conflicting

testimony. *See Gracely*, 399 S.C. at 377, 731 S.E.2d at 887 ("In a case built on circumstantial evidence, including testimony from witnesses with . . . suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless.").

For these reasons, we find the Confrontation Clause violation was not harmless. Accordingly, we reverse the Court of Appeals' decision and remand for a new trial. *See State v. Henson*, 407 S.C. 154, 754 S.E.2d 508 (2014) (ordering a new trial after finding the Confrontation Clause violation was not harmless error). Based on our disposition of this issue, we decline to reach the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing this Court need not address remaining issues when disposition of prior issue is dispositive of the appeal).

IV. Conclusion

Accordingly, we reverse the Court of Appeals' decision and remand for a new trial.

REVERSED AND REMANDED.

KITTREDGE, J., and Acting Justice James E. Moore, concur. HEARN, J., concurring in a separate opinion in which BEATTY, C.J., concurs. Acting Justice Pleicones not participating.

JUSTICE HEARN: I concur in the result reached by the majority; however, I write separately because I believe the Court should take this opportunity to overturn our holding in *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), which, in my opinion, has so expanded the admissibility of prior bad acts in sexual offense cases that the exception has swallowed the rule.

Generally, evidence of a person's character is not admissible to prove he acted in conformity therewith. Rule 404(a), SCRE. Accordingly, evidence of prior crimes or bad acts is admissible only in limited circumstances—to show motive, identity, the existence of a common scheme or plan, the absence of mistake, or intent. Rule 404(b), SCRE. The seminal case in South Carolina establishing the test for admissibility of prior bad acts is *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). In *Lyle*, the defendant was charged with forging a check in Aiken and the State sought to admit into evidence several prior acts of forgery that took place in Georgia. Explaining the admissibility of those prior offenses based on the common scheme or plan exception, this Court held,

> Whether such crime was committed as part of a common plan or system was wholly immaterial, unless proof of such system would serve to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent. Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged. If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the question of intent, it follows that it was not admissible merely to show plan or system.

Id. at 427, 118 S.E. at 811 (internal citations omitted).

Decades later, the Court revisited the common scheme or plan exception in the context of sexual offenses and declined to adopt the more relaxed rule used in several other jurisdictions which allowed the introduction of prior sexual offenses to prove a defendant's "lustful disposition." *State v. Nelson*, 331 S.C. 1, 14 n. 16, 501

S.E.2d 716, 723 n. 16 (1998). Presciently, the *Nelson* court cautioned against the expansion of the exception lest it become a "cleverly disguised way of getting impermissible character evidence before the jury." *Nelson*, 331 S.C. at 14, 501 S.E.2d at 723; *see also Daggett v. State*, 187 S.W.3d 444, 451–52 (Tex. Crim. App. 2005) ("Repetition of the same act or same crime does not equal a 'plan.' It equals the repeated commission of the same criminal offense offered obliquely to show bad character and conduct in conformity with that bad character—'once a thief, always a thief.'") (footnote omitted).

However, in a marked departure from earlier case law requiring some connection between crimes beyond mere similarity in order to meet the common scheme or plan exception, *see State v. Hough*, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997), the *Wallace* majority held, "A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." 384 S.C. at 434, 683 S.E.2d at 278. Under this framework, prior bad acts are admissible as a common scheme or plan in sexual abuse cases when the similarities to the charged crime outweigh the dissimilarities. *Id.* at 433, 683 S.E.2d at 278.

I believe *Wallace* broadened the common scheme or plan exception to such an extent that it no longer has a meaningful exclusionary effect in sexual offense cases. Without requiring a greater degree of connection beyond only a mere similarity, the exception has been enlarged such that it has become simply a means to prove a defendant's criminal propensity. *See State v. Ives*, 927 P.2d 762, 768 (Ariz. 1996) ("A broad definition of 'common scheme or plan' allows the state to raise the inference of guilt based solely on 'a disposition toward criminality.'"). This is contrary to Rule 404(a), SCRE, and the traditional principle enunciated in *Lyle* that common scheme or plan evidence is not competent unless it demonstrates a continuous transaction or has some bearing on the defendant's identity or guilty intent. *See State v. Aakre*, 46 P.3d 648, 655 (Mont. 2002) ("Put another way, the government must prove that the prior crimes, wrongs or acts and the charged offense *are linked as integral components* of the defendant's common purpose or plan to commit the *current charge*.") (emphasis added).

The dangers in permitting the liberal admission of such prior bad acts are readily apparent. In fact, this Court has repeatedly warned of the prejudicial dangers stemming from the introduction of prior bad acts which are similar to the one for which the defendant is being tried. *See, e.g., State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

Absent an amendment to our rules of evidence creating a different categorical rule for sexual offenses, I would apply the common scheme or plan exception equally to sexual and nonsexual offenses alike. In the context of sexual offenses, mere similarities alone do not necessarily establish a logical connection between the crime charged and the prior bad acts such that the existence of one tends to prove the existence of the other.[4] *See State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."). Similarity between the prior bad act and the crime charged is not the type of connection such that proof of one is proof of the other. *See State v. Moore*, 6 S.W.3d 235, 241 (Tenn. 1999) ("A common scheme or plan is not found merely because the similarities of the offenses outweigh the differences. Rather, the trial court must find that a distinct design or unique method was used in committing the offenses before an inference of identity may properly arise.") (footnote omitted).

Accordingly, I would overrule *Wallace* and restore the common scheme or plan exception in sexual misconduct cases to its original purpose as articulated in *Lyle* whereby proof of a common plan or system requires "the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged." Just as mere similarities between the prior bad act and the crime charged would be insufficient in the case of all other crimes, it should likewise be insufficient when sexual misconduct is involved.

BEATTY, C.J., concurs.

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[4] The *Wallace* court stated, "Such evidence is relevant because proof of one is strong proof of the other." 384 S.C. at 433, 683 S.E.2d at 277. I find this statement at odds with the Court's subsequent holding establishing similarity as the baseline test for admissibility because similarity with prior bad acts does not necessarily constitute "strong proof" of the offense for which the defendant is being tried. Rather, the emphasis on similarity suggests the probative value of prior bad acts goes towards the defendant's propensity to act in conformity with those bad acts, undermining the strong policy against character evidence. *See State v. Melcher*, 678 A.2d 146, 149 (N.H. 1996) (explaining New Hampshire's Rule 404(b) "serves 'to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs[]'").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Timothy Artez Pulley, Appellant.

Appellate Case No. 2015-002206

Appeal From Laurens County
Donald B. Hocker, Circuit Court Judge

Opinion No. 27811
Heard March 27, 2018 – Filed June 6, 2018

REVERSED

Clarence R. Wise, of Greenwood, for Appellant.

Attorney General Alan M. Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor David M. Stumbo, of Greenwood, for Respondent.

CHIEF JUSTICE BEATTY: Timothy Pulley appeals his conviction for trafficking cocaine base (cocaine) of ten grams or more, but less than twenty-eight grams in violation of section 44-53-375(C)(1) of the South Carolina Code (2018). Pulley alleges the trial court erred in: (1) charging a permissive inference that

knowledge and possession of a substance may be inferred when the substance is found on the property under the defendant's control; (2) failing to charge the jury that the State must prove a complete chain of custody; (3) failing to suppress the cocaine due to an incomplete chain of custody; (4) failing to suppress the cocaine due to an invalid inventory search; (5) finding the cocaine was seized pursuant to a valid search incident to arrest; and (6) failing to require the State to open fully on the law and the facts of the case in closing argument and reply only to arguments of Pulley's defense counsel.[1] We find the trial court erred in concluding the State established a complete chain of custody. Accordingly, we reverse Pulley's conviction and sentence.

I. Factual/Procedural History[2]

On Saturday, June 22, 2013, Pulley picked up his girlfriend's vehicle from a local paint shop. Early the next morning, Officers Brewer and Craven, of the Laurens Police Department (the Department), initiated a traffic stop to cite Pulley for a speeding violation. Both officers—driving separately—activated their blue lights[3] and followed Pulley until he eventually parked in the McDonald's parking lot. After stopping, Pulley immediately exited the vehicle and closed the door. At that time, Craven recognized Pulley from a prior incident and knew that he was driving under suspension (DUS). The officers asked Pulley for identification and he responded he did not have a license. As a result, the two officers attempted to place Pulley under arrest for DUS. After a struggle, the officers eventually handcuffed Pulley and placed him into Brewer's patrol car. During the struggle Pulley's pants came off. Before returning the pants to Pulley, the officers searched them and found marijuana.

Although the Department did not have a policy outlining the procedures for

[1] Pulley appealed and his case was certified to this Court from the Court of Appeals pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

[2] We note that this is the second trial of this case. Pulley's initial trial ended with a hung jury.

[3] At this time, the dash cam recorder was activated and incorporated thirty seconds of video footage prior to the activation of the blue lights.

towing vehicles from private property, the officers determined the vehicle should be towed because the traffic violation occurred on a public highway and Pulley was arrested. Thus, the officers conducted an inventory search of the vehicle. Before the tow truck arrived, and upon opening the driver's side door, the officers located a yellow grocery bag on the floor behind the driver's seat. Inside the yellow grocery bag, the officers found three clear plastic bags that, combined, contained 16.5 grams of cocaine.

A grand jury indicted Pulley for trafficking cocaine. Prior to trial, Pulley moved to suppress the drug evidence discovered during the inventory search on the basis that the officers were not authorized to tow the vehicle from the private parking lot and failed to follow the Department's inventory procedures.

At the suppression hearing,[4] Craven admitted that the vehicle was not impeding traffic in the McDonald's parking lot, but that it was standard procedure to tow vehicles where the lone occupant was arrested. Additionally, Craven testified he did not list the drugs on the "towed vehicle report" because they were not personal items and were instead listed on the incident report property list. However, Craven acknowledged that the tow truck driver did not sign the report, as is customary, and admitted he did not complete the inventory report form until he returned to the Department and filled out the report the best he could from memory.

The trial court denied the motion to suppress on the grounds that the speeding violation created probable cause to stop the vehicle and, after Pulley was arrested for DUS, the marijuana the officers found on Pulley's person provided the justification for the officers to search the car,[5] without a warrant, incident to arrest.

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[4] This hearing was held before the first trial which ended in a mistrial. However, the trial court incorporated the first suppression hearing into the record of the second trial and only heard additional questions regarding when the marijuana was found. Nonetheless, his ruling remained the same.

[5] Defense counsel argued before the second trial that the marijuana was mentioned for the first time on the video from the dash cam after Pulley was in the back of Brewer's patrol car. According to defense counsel, this fact proved that the officers began searching the vehicle prior to finding the marijuana and, thus, the cocaine was not found pursuant to a valid search incident to arrest. Defense counsel called Officers Craven and Brewer and both emphasized that the marijuana was found prior

The trial court noted that he did not consider the situation to be an inventory search and, even if he did, the fact that the tow truck operator's signature was missing would not have invalidated the search.

During trial, Craven explained to the jury that after the cocaine was discovered, the "[drugs] were placed in evidence inside the Laurens Police Department." Next, Officer Brewer testified that he did not take the cocaine from the scene. According to Brewer's recollection, Craven "took possession" of the drugs, however, Brewer could not remember "how the drugs got from [the scene] to the patrol office."

At the time of the incident, John Stankus was the evidence custodian for the Department. Stankus testified that he retrieved the cocaine from the lockbox and that the chain of custody form indicated Craven was the officer that placed the cocaine in the lockbox. However, the chain of custody form suggested that Stankus received the cocaine from Craven in person. In response, Stankus admitted the form was incorrect, but maintained it was standard procedure to write "in person" in the space provided that asks whether the custodian received the evidence by mail or in person.

Maribeth McCormick, a forensic scientist in the drug analysis department of the South Carolina State Law Enforcement Division (SLED), testified that she received the cocaine from the Department. After McCormick began testifying, but before stating the results of her analysis, defense counsel argued that the State failed to establish a chain of custody in regards to the cocaine. Thereafter, the following

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to Pulley entering the patrol car and prior to the search of the vehicle. Craven testified that the marijuana was found during the initial struggle with Pulley and placed back in his pocket because Pulley was still struggling with the officers. Pulley took the stand for the limited purpose of testifying that the officers found the marijuana after he was placed in the patrol car and also after the cocaine was found.

A thorough review of the video does cast doubt on whether the officers found the marijuana before searching the vehicle. However, although it appears that the officers were discussing the marijuana for the first time after the cocaine was found, we can only speculate as to when the marijuana was actually discovered.

colloquy took place:

> Trial Court: Solicitor would you agree . . . we have no testimony from the time of the [cocaine] on Brewer's car [to] whenever Craven got possession of them?
>
> Solicitor: I would stipulate that we have not produced any evidence as far as when Craven leaves the scene and what happened with the drugs.

After a brief recess, the trial court determined that the State established a chain of custody sufficient for the admissibility of the cocaine. Expounding on his ruling the trial court stated:

> [E]ven though Officer Brewer did not testify that he handed the bag to Craven . . . the logical assumption is that he did. Officer Brewer is the last officer on the scene. I would be very surprised that Officer Brewer would have driven off from McDonald's with the bag of drugs on his hood. Presumably, he had to take possession of it and then turn it over to Craven at some point.

Subsequently, the State recalled Brewer. Brewer testified that, after reviewing the dash cam video, he remembered leaving the McDonald's with the cocaine and turning the drugs over to Craven. However, the dash cam video does not reflect that, and Brewer added he did not sign any paperwork indicating that he transferred the cocaine to Craven.

Thereafter, the jury found Pulley guilty as charged. Pulley appealed and his case was certified to this Court from the Court of Appeals pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." *Id*.

III. Discussion

Pulley maintains the State presented contradictory and confusing evidence in attempting to establish the chain of custody. Because the chain was not properly established, Pulley claims the trial court erred in admitting the cocaine. We agree.

"[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)).

Where multiple people have handled the analyzed substance, "the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205. "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *Id*. at 7, 647 S.E.2d at 206 (citing *State v. Taylor*, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct. App. 2004)). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id*. at 7, 647 S.E.2d at 206.

"Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession *because the identity of those who handled the [substance] was not established at least as far as practicable*." *Id*. (Emphasis added.)

Prior to Brewer being recalled by the State, the State had not established a sufficient chain of custody.[6] Up to that point, the State presented testimony establishing that: 1). Craven seized the cocaine; 2). the cocaine was on the hood of Brewer's car when Craven left the scene; 3). Brewer initially testified that he did not take the drugs from the scene; 4). Craven placed the drugs in the Department's evidence lockbox; and 5). the evidence custodian admitted that he did not receive the cocaine from Craven personally as was indicated on the chain of custody form. Consequently, as the trial court noted and the State stipulated, there was no testimony or forms indicating how the cocaine was transported from Brewer's car

[6] Pulley did not object to the analysis of the cocaine.

back to Craven. Thus, at the time of the trial court's ruling, it was error to assume that Brewer transferred the cocaine to Craven and the State had established a sufficient chain of custody as far as practicable. *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205 (stating "who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture").

Therefore, we must determine whether Brewer's subsequent testimony cured the missing link. We conclude it did not. Initially, Brewer testified unequivocally that he did not take the cocaine from the scene. In response, defense counsel argued the State failed to establish a sufficient chain of custody. After a break in the trial, the trial court overruled the objection and admitted the cocaine into evidence. Subsequently, the State recalled Brewer and he testified that, after reviewing the video, he remembered taking the drugs from the scene. However, the dash cam video does not reflect Brewer's recollection. Additionally, Brewer admitted he did not sign any paperwork indicating that he transferred the cocaine to Craven.

Although a perfect chain of custody is not required, a sufficient chain of custody requires more than the State presented in this case. Here, the express denial of handling the cocaine by Brewer, followed by a stipulation of a missing link by the State, the subsequent reversal by Brewer that he did in fact take the cocaine from the scene, coupled with the State's failure to produce testimony from Craven indicating how he obtained possession of the cocaine after the drugs were seen on the hood of Brewer's car, equates to conjecture. *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205. As a result, the chain of custody was not sufficiently established as far as practicable. *Id*.

IV. Conclusion

Based on the foregoing, we hold the trial court erred in determining the State established a complete chain of custody as far as practicable. Further, we find that Brewer's testimony, which followed the trial court's ruling, did not cure the deficiency. Therefore, we reverse Pulley's conviction and sentence.[7]

[7] Because the chain of custody issue is dispositive, we decline to address the remaining issues on appeal. *See State v. Allen*, 370 S.C. 88, 102, 634 S.E.2d 653, 660 (2006) (declining to address remaining issues raised by appellant when prior issue was dispositive).

REVERSED.

KITTREDGE, HEARN and FEW, JJ., concur. JAMES, J., concurring in a separate opinion in which FEW, J., concurs.

JUSTICE JAMES: I concur in the result reached by the majority. However, I write separately to explain why I believe Officer Brewer's supplemental testimony did not rescue the State from its initial failure to establish the chain of custody.

As noted by the majority, the evidence custodian testified he could not tell from his records who delivered the crack cocaine to the evidence drop box, though he assumed Officer Craven did so. The assistant solicitor asked Officer Craven, "What did you do with the drugs after you found them?" Officer Craven responded, "They were placed in evidence inside the Laurens Police Department." Regarding Officer Craven's use of the word "they," we do not know whether this response was calculated to be vague or whether Officer Craven was claiming he took the drugs from the scene and placed them into the drop box at the police department. However, we do know that Officer Brewer's dash-cam video clearly shows that when Officer Craven drove away from the scene to take Pulley to jail, the drugs were still on the hood of Officer Brewer's vehicle.

On day one of this two day trial, Officer Brewer testified he did not take the crack cocaine away from the scene and did not deliver it to the drop box. He was specifically asked, "[D]id you take the drugs from the scene?" He responded, "No, sir." Officer Brewer was asked if Officer Craven took possession of the drugs, and he responded, "That's correct." Immediately after Officer Craven's testimony, Officer Brewer testified he never touched the drugs again, "[b]ased on [his] recollection." Finally, Officer Brewer testified he had seen the video showing the drugs on the hood of his vehicle at the time Officer Craven drove away.

As the majority clearly explains, the evidence custodian further testified that while another form stated he received the drugs "in person" from Officer Craven, in some instances—including this one—he would not be present to receive the drugs "in person." Since the evidence custodian cannot be expected to be manning the drop box every hour of every day, it is understandable that he would not be present for every delivery. However, the State still must satisfactorily establish the chain of custody of evidence passing from hand to hand to hand. Here, the custodian testified he did not receive any documents showing whose hands the drugs passed through before they were placed in the drop box.

As the majority explains, when the trial court ruled the State had established the chain of custody for the cocaine, the State clearly had not done so. The assistant solicitor admitted this, as evidenced by the stipulation quoted by the majority. Nevertheless, the trial court ruled the chain was complete based on its "assumption"

that Officer Brewer gave the drugs to Officer Craven. Such an assumption is only conjectural support for a ruling that the chain was established and is not a sufficient basis upon which to base such a ruling. *See State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007) (holding "what was done with the evidence between the taking and the analysis must not be left to conjecture"). I agree with the majority that at this point in the trial that "as the trial court noted and the State stipulated, there was no testimony or forms indicating how the cocaine was transported from Brewer's car back to Craven."

Despite the trial court's ruling that the State had sufficiently established the chain of custody, the assistant solicitor realized the chain of custody was not sufficiently established. He therefore recalled Officer Brewer to the stand on the second day of trial. Officer Brewer's subsequent testimony—given one day after his initial testimony—that he did in fact take the drugs from the scene back to Officer Craven at the police station appears on its face to have established the chain. However, Officer Brewer's subsequent testimony completely contradicted his initial testimony and, in my view, called the integrity of the chain even more into question. In other contexts, we require trial courts to exercise discretion when considering whether contradictory statements from the same witness create legitimate factual issues. *See Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (providing "a court may disregard a subsequent affidavit as a 'sham,' that is, as not creating an issue of fact . . . , by submitting the subsequent affidavit to contradict that party's own prior sworn statement"); *McMaster v. Dewitt*, 411 S.C. 138, 144, 767 S.E.2d 451, 454 (Ct. App. 2014) (holding a trial court must exercise discretion to determine whether to accept a "sham" affidavit).

I would require the same exercise of discretion here. I would require that before the State may supplement its proof on the chain of custody with testimony that contradicts the same witness's prior testimony on a key issue in the same case, it must present the testimony to the trial court for the trial court to determine whether to accept it. While I am certain our trial courts are equipped to conduct this inquiry, courts should take guidance from the considerations we have identified for accepting sham affidavits in civil cases. *See Cothran*, 357 S.C. at 218, 592 S.E.2d at 633 (listing six considerations).

The trial court never undertook to exercise its discretion by inquiring into Officer Brewer's subsequent contradictory account. This was error. When Officer Brewer testified for the second time, he was never asked to explain his reversal in

testimony, and he never explained how the video might have refreshed his recollection. Though he stated he had "an opportunity to review the video," there is nothing in the video that would explain his reversal in testimony. Also, when Officer Brewer initially testified, he stated he had already seen the video showing the drugs on the hood of his vehicle when Officer Craven drove away. I agree with the majority that (1) Officer Brewer's initial denial of transporting the drugs, (2) the State's concession of a missing link in the chain of custody, (3) Officer Brewer's subsequent testimony contradicting his initial testimony, and (4) the State's failure to elicit testimony from Officer Craven as to how he obtained possession of the drugs after he left the scene, all force us to impermissibly speculate as to the sufficiency of the chain of custody. Since the chain of custody of the drugs was not sufficiently established, the drugs should not have been entered into evidence. Therefore, we have no choice but to reverse Pulley's conviction.

FEW, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, Respondent,

v.

Johnnie Lee Lawson, Appellant.

Appellate Case No. 2015-002467

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5565
Heard March 6, 2018 – Filed June 6, 2018

REVERSED

Appellate Defender Laura Ruth Baer, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

THOMAS, J.: Appellant Johnnie Lee Lawson appeals his conviction for breaking into a motor vehicle, arguing the trial court erred by (1) admitting evidence of his prior criminal record, (2) refusing to give a limiting instruction to the jury regarding the evidence of his prior criminal record, and (3) admitting a witness for the State as an expert in fingerprint analysis. We reverse.

FACTS/PROCEDURAL HISTORY

In April 2015, a grand jury indicted Appellant for breaking into a motor vehicle in violation of section 16-13-160(A)(1) of the South Carolina Code (2015). The State called Appellant's case for trial in November 2015 and began by calling Jessica Wilbanks, the alleged victim, to testify.

Wilbanks testified she was in the process of moving, with her husband and a teenager who lived with them, from Barnwell County to Lexington County in March 2014. Wilbanks asserted they were in Lexington for the weekend preparing their new house and moving in some household items. According to Wilbanks, they parked their car on the street in front of the house while they were moving items into the house from a moving truck. Wilbanks testified she went outside around 10:30 p.m. and heard a noise. As she walked around the moving truck, she noticed someone standing over her car. Wilbanks described the person as an adult, black male who was "[t]aller than [her]" and wearing a "dark hoodie sweatshirt and either very dark blue jeans or, or black jeans." Wilbanks alleged she heard a metal scraping noise when she saw the man near her car. She admitted she did not see his face during the encounter. Wilbanks testified the man ran away once he saw her. Following the encounter, Wilbanks returned to the house to notify her husband, and they called 911.

Following Wilbanks's testimony and outside the presence of the jury, Appellant brought up "one other matter" to the trial court. Appellant explained State's Exhibit 16 was a "ten-print fingerprint card" and he had "an issue with the hearsay of what he was arrested for on the back." Appellant acknowledged the State had an employee from the South Carolina Law Enforcement Division (SLED) to authenticate the card, but he agreed to stipulate to authenticity. The trial court agreed the prior criminal history was inadmissible and instructed the State to redact that information. With regard to Appellant's offer to stipulate, the trial court explained the State was not required to accept the stipulation. Appellant noted he had no objection as long as "his prior arrests are not there."

Sergeant Jason Merrill testified he responded to the scene on the night of the incident and, when inspecting one of the car windows, found "approximately three fingerprints on the inside of the glass." Merrill asserted he collected the fingerprints and submitted them for latent print examination. Subsequently,

Merrill received a report from the examiner alleging the fingerprints from the scene matched Appellant's fingerprints.

Next, the State called Seraphim Haftoglou who was the supervisor at SLED for the Automated Fingerprint Identification System (AFIS). Haftoglou testified AFIS is an automated database where SLED stores all fingerprints in a statewide system. Haftoglou explained the fingerprints in AFIS come "mainly" from arrests because detention centers throughout the state "capture the person's demographics and fingerprints and submit it to us through SLED pretty immediately." He noted AFIS allows SLED to have an up to date criminal history on the individual. Haftoglou then clarified that AFIS also contains fingerprints from individuals submitted by various entities for background checks. Haftoglou testified he printed and certified State's Exhibit 16, which was a ten-print fingerprint card, for the trial. The State requested to admit the ten-print card, and Appellant objected "to what we said previously." The trial court noted the objection and admitted the exhibit. Haftoglou then identified the ten-print card as belonging to Appellant. Haftoglou testified the ten-print card indicated Appellant's fingerprints were collected in July 2003 at the "Department of Corrections, Kirkland Correctional Institute" (Kirkland). Appellant objected and asked for the jury to be excused.

Appellant explained he objected to referencing the ten-print card's connection to Kirkland. Appellant claimed his understanding of the earlier discussion of the ten-print card included redacting that the fingerprints were collected at Kirkland. He asserted the reference to Kirkland indicated to the jury he had been arrested prior to this incident and again offered to stipulate to the authenticity of the ten-print card. The trial court noted the State was not required to accept a stipulation and, in the absence of an accepted stipulation, must authenticate the fingerprints. The trial court contended Appellant's prior criminal history had not come into evidence despite the reference to Kirkland. Appellant alleged the State's motive for rejecting the stipulation was to allow the jury to hear he had a prior criminal history. The trial court explained the State's motive was irrelevant to its decision. When the jury returned, Haftoglou repeated that Appellant's ten-print card originated at Kirkland in July 2003.

Subsequently, the State called James Hickman. Hickman testified he was the AFIS operator and a latent fingerprint examiner. Following voir dire, the trial court excused the jury, and Appellant objected to qualifying Hickman as an expert. The trial court disagreed with Appellant and admitted Hickman as an expert in

fingerprint examination. Hickman then testified the fingerprints collected from the scene by Sergeant Merrill matched the fingerprints in AFIS belonging to Appellant.

At the conclusion of the trial, the jury found Appellant guilty of breaking into a motor vehicle. After the State recited Appellant's lengthy criminal record, which included many instances of theft, the trial court sentenced him to the statutory maximum of five years' imprisonment. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err by allowing the State to elicit testimony showing Appellant's ten-print card originated at Kirkland in July 2003?

2. Did the trial court err by refusing Appellant's proposed jury instruction regarding prior bad acts?

3. Did the trial court err by admitting Hickman as an expert in fingerprint examination and finding he met the threshold for admission on qualifications and reliability?

DISCUSSION

Appellant argues the trial court erred by allowing the State to elicit testimony showing his ten-print card originated from Kirkland in July 2003 because it indicated to the jury he had a prior criminal record. Appellant claims the testimony was evidence of a prior bad act, which violated Rule 404, SCRE. Appellant also argues the trial court erred by finding the evidence of his prior criminal record was required to allow the State to meet its burden of authenticating the fingerprints.

The State claims this issue is unpreserved because Appellant consented to admitting this evidence in a pretrial hearing. On the merits, the State argues the trial court properly allowed the evidence to confirm Appellant's prints were obtained at Kirkland because the State was required to authenticate the prints and was not required to accept Appellant's "vague stipulation." Further, the State asserts Appellant was not prejudiced by the reference to Kirkland and any error was harmless because the existence of a prior criminal record could not have impacted the jury's verdict.

Initially, we disagree with the State's argument that Appellant's argument is unpreserved. The colloquy following Wilbanks's testimony regarding the prior criminal record evidence was somewhat vague. Appellant's concession to admit the ten-print card, as long as "his prior arrests [were] not there," could be construed as including any reference to Kirkland. Due to the lack of specificity regarding references to Kirkland during the initial colloquy, we find Appellant did not consent to admitting Haftoglou's reference to Kirkland. Furthermore, when the State elicited the testimony, Appellant immediately objected and raised this issue, and the trial court ruled on it. Thus, because Appellant raised the argument and received a ruling on it, the argument is preserved. *See State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) (explaining a party need only raise an issue and receive a ruling on it for it to be preserved).

On the merits, we find the trial court abused its discretion by admitting testimony referencing Kirkland and July 2003 on the ten-print card because the reference indicated to the jury that Appellant had a prior criminal record and the reference was unnecessary to authenticate the fingerprints. "In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial [court] has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." *State v. Scott*, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id*. (quoting *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012)).

"In a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person." *Id*. "Evidence of other crimes must be put to a rather severe test before admission." *State v. Timmons*, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. Our appellate courts have addressed in multiple opinions a defendant's claim that evidence

introduced at trial implied he had a criminal record and thus was admitted in violation of Rule 404(b). In a case involving fingerprints, a SLED crime scene processor testified he compared and matched the suspect's fingerprints to those on a card he obtained from "SLED records." *State v. Council*, 335 S.C. 1, 11–12, 515 S.E.2d 508, 513 (1999). The appellant argued the testimony was inadmissible because it implied to the jury that he had a prior criminal record. *Id*. at 12, 515 S.E.2d at 513. Our supreme court disagreed and found it was "questionable whether the jury even understood the implication" of the testimony. *Id*. at 13, 515 S.E.2d at 514. The court further distinguished the testimony from the evidence in *State v. Tate*[1] by pointing out the reference to SLED records did not indicate to the jury when SLED obtained the fingerprints. *Id*. at 13 n.7, 515 S.E.2d at 514 n.7.

However, in *Tate*, the State introduced a photographic lineup, which included a mug shot of the appellant. 288 S.C. at 105, 341 S.E.2d at 381. The mug shot included "a small board with the date 11-20-82 and the words 'SPTBG. CO. SHERIFF' [] hanging around [the] appellant's neck." *Id*. Under these circumstances, our supreme court found "the markings on the photographs, particularly the date, which was almost one year prior to the trial of this case, would clearly infer to the jury that [the] appellant had a prior criminal record." *Id*. at 106, 341 S.E.2d at 381. The court reversed and remanded for a new trial. *Id*.

More recently, in *State v. Stephens*, the appellant argued the State's use of his "mug shot" in a photographic lineup implied he had a prior criminal record.[2] 398 S.C. 314, 321, 728 S.E.2d 68, 72 (Ct. App. 2012). This Court disagreed with the notion that the photograph implied he had a criminal record because the photographs in the lineup showed only each person's "head and neck against a blank background." *Id*. at 322, 728 S.E.2d at 72. This Court explained, although the photograph was a mug shot, there was nothing in the photograph to actually imply it was a mug shot, and the "photographs at issue here could have come from driver's licenses,

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[1] *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986).

[2] Generally, admission of a mug shot is reversible error unless the State meets certain conditions including that the photograph does not suggest the defendant has a criminal record. *See State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) (explaining admission of a mug shot is error unless "(1) the [S]tate has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication").

employee identification badges, or other sources." *Id.*; *see State v. Ford*, 334 S.C. 444, 450, 513 S.E.2d 385, 388 (Ct. App. 1999) (finding use of a mug shot in a photographic lineup was not improper character evidence because they were displayed "in such a way as to hide any indication of their origin" and no testimony "reveal[ed] the origin of the photographs").

In *State v. Holland*, a jury convicted the appellant of murder and other crimes after he shot another man. 385 S.C. 159, 164–65, 682 S.E.2d 898, 900–01 (Ct. App. 2009). During the trial, a witness testified the appellant showed him a firearm "a few weeks" prior to the incident. *Id*. at 163–64, 682 S.E.2d at 900. On appeal, the appellant argued admission of this testimony was error because it implied a prior bad act. *Id*. at 172, 682 S.E.2d at 905. This Court disagreed and found the testimony was not improper character evidence because it "did not indicate that [the appellant]'s mere possession of the handgun was illegal, that [he] had used the gun to commit any bad acts prior to the incident, or that [he] had a criminal record involving weapon-related offenses." *Id*. at 173, 682 S.E.2d at 905.

In *State v. Thompson*, a deputy testified he was looking for the appellant in a certain location and referenced the appellant "had warrants." 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). The appellant claimed this testimony was improper because it "constituted improper evidence of prior bad acts." *Id*. This Court disagreed and found the reference to warrants could reasonably have been a reference to the warrants related to the crimes for which the appellant was on trial, instead of some prior bad act. *Id*. at 561, 575 S.E.2d at 82.

With regard to authenticating Appellant's ten-print card, the trial court and the State relied upon *Anderson* as requiring the State to authenticate the ten-print card. In *Anderson*, the State offered a ten-print card assigned to the appellant and maintained in AFIS. *State v. Anderson*, 386 S.C. 120, 122, 687 S.E.2d 35, 36 (2009). The appellant argued the authentication requirement "should be strictly construed to require the person who actually took his fingerprints to testify regarding the reliability or authenticity of the ten-print card." *Id*. at 132, 687 S.E.2d at 41. Our supreme court disagreed with such a strict interpretation and found the State properly authenticated the ten-print card under both the South Carolina Rules of Evidence and case law prior to adoption of the rules. *Id*. at 128–29, 687 S.E.2d at 39. Specifically, the court found the State properly authenticated the ten-print card under Rule 901(b)(7), SCRE, because the ten-print card was a public report or record. *Id*. at 130–31, 687 S.E.2d at 40. Also, the State

authenticated the ten-print card under Rule 901(b)(9), SCRE, by presenting evidence as to "when and where [the appellant]'s fingerprints were taken; how they were submitted to SLED; the process implemented by law enforcement for taking the fingerprints; and how an accurate record of them was maintained in the AFIS." *Id*. at 131, 687 S.E.2d at 41. Thus, our supreme court explained alternative ways the State could authenticate ten-print cards maintained in AFIS. *Id*. at 129–32, 687 S.E.2d at 39–41. The *Anderson* court also noted it expressed no opinion as to whether the State's method of authentication, which included testimony that the ten-print card originated from a law enforcement agency, constituted prior bad act evidence because the appellant did not raise that issue during trial. *Id.* at 124 n.2, 687 S.E.2d at 37 n.2.

In this case, the testimony referring to Kirkland and July 2003 on Appellant's ten-print card indicated to the jury that Appellant had a prior criminal record. We find Haftoglou's testimony that Appellant's ten-print card originated from Kirkland in July 2003 is most similar to the circumstances in *Tate*. *See Tate*, 288 S.C. at 106, 341 S.E.2d at 381 (finding a mug shot of the defendant containing a board that identified the law enforcement agency who took the photograph and the date of the photograph "clearly infer[red] to the jury that [the] appellant had a prior criminal record").

Haftoglou's references to Kirkland indicated to the jury that Appellant had been incarcerated at some point. Also, Haftoglou explained multiple times the ten-print card was collected in July 2003, over ten years prior to the commission of this crime. This temporal clarification excluded any possibility the jury would conclude Appellant's time at Kirkland was related to the crime for which he was on trial. Thus, Haftoglou's references to Kirkland in July 2003 indicated to the jury that Appellant had been incarcerated and, in contrast to *Council* and *Thompson*, excluded the possibility that Appellant was incarcerated due to the crime at issue in the trial. *See Council*, 335 S.C. at 13 n.7, 515 S.E.2d at 514 n.7 (distinguishing *Tate* by explaining a reference to the State obtaining the defendant's fingerprints from "SLED records" did not indicate to the jury when SLED obtained the fingerprints); *Thompson*, 352 S.C. at 560–61, 575 S.E.2d at 82 (finding a deputy's testimony that the defendant "had warrants" was not reversible error because the jury could have reasonably concluded the reference to warrants related to the crimes for which the defendant was on trial, instead of some prior criminal record). As a result, we find Haftoglou's references violated Rule 404(b)'s prohibition against admitting evidence of prior crimes, wrongs, or acts, and the trial court

abused its discretion by admitting the testimony. *See Scott*, 405 S.C. at 497, 748 S.E.2d at 241 ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.").

With regard to the State's claim it was required to elicit the testimony that Appellant's ten-print card originated from Kirkland in July 2003 in order to authenticate the ten-print card, we disagree. First, the State could have, and did, authenticate the ten-print card by other methods that did not involve referencing Kirkland. The State elicited testimony from Haftoglou showing, pursuant to statute, law enforcement takes the fingerprints of every person who is arrested in this state. Haftoglou testified AFIS is where SLED stores and maintains all of the fingerprint records it receives pursuant to arrests and background checks. As our supreme court concluded in *Anderson*, this testimony alone, without any reference to Kirkland, was sufficient to authenticate Appellant's ten-print card as a public report or record under Rule 901(b)(7). *See Anderson*, 386 S.C. at 130–31, 687 S.E.2d at 40 (finding the State adequately authenticated a ten-print card under Rule 901(b)(7) by eliciting testimony that law enforcement collects fingerprints from every arrested person in this state and SLED stores and maintains the prints in AFIS). Furthermore, the State could have accepted Appellant's offer to stipulate to the authenticity of the ten-print card. Thus, it was unnecessary for the State to reference Kirkland to authenticate Appellant's ten-print card.

Second, even evidence offered to authenticate other evidence must be admissible under the rules of evidence. If relevant evidence may be excluded under Rule 403, SCRE; Rule 404(b); or other rules of evidence; it is reasonable to require authentication evidence to be admissible under these rules as well. We note this case is distinguishable from our jurisprudence addressing the admissibility of prior convictions when the prior conviction is an actual element of the offense for which the defendant is on trial. Here, Appellant's prior criminal record was not an element of the offense for which he was on trial. Thus, the State's need to admit the controversial testimony in this case was lower than when a prior conviction is an element of the crime.

However, even in cases involving prior convictions as an element of the offense for which the defendant is on trial, our supreme court has explained the evidence showing prior convictions continues to be subject to admissibility under other rules of evidence. *See State v. James*, 355 S.C. 25, 34, 583 S.E.2d 745, 749–50 (2003)

("[N]one of the relevant authorities nullify the trial [court]'s traditional role in weighing the probative value of evidence versus its prejudicial effect or suggest that Rule 403 is displaced by operation of" a statute making prior criminal convictions an element of a crime); *id*. at 34, 583 S.E.2d at 750 ("The admissibility of prior convictions is always limited by the traditional rules of evidence."); *id*. at 35, 583 S.E.2d at 750 ("Although the State is entitled to submit evidence of 'its own choosing,' it must do so within the confines of the established rules of evidence."). As a result, the State may not bootstrap improper character evidence into admissible testimony by simply claiming it is offered to authenticate other evidence. This is especially true when the State can overcome the low threshold of authentication with otherwise admissible evidence such as a stipulation or, as discussed above, under Rule 901(b)(7). *See Deep Keel, LLC v. Atl. Private Equity Group, LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (noting the burden to authenticate evidence "is not high").

Finally, contrary to the State's assertion, the trial court's error was not harmless. The State's case was circumstantial and relied almost entirely on the fingerprints to connect Appellant to the crime. Under these circumstances, with limited evidence linking the defendant to the crime, the evidence suggesting Appellant had a prior criminal record was prejudicial because it could have influenced the jury's verdict. We find the State failed to conclusively prove Appellant's guilt with competent evidence, such that the jury could not have reached any other rational conclusion. *See King*, 334 S.C. at 514, 514 S.E.2d at 583 ("Whether the improper introduction of this evidence is harmless requires the Court to determine whether [the] appellant's 'guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached.'" (quoting *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993))). Thus, the trial court committed reversible error by admitting the evidence suggesting Appellant had a prior criminal record.[3]

CONCLUSION

Based on the foregoing, the trial court abused its discretion by admitting testimony showing Appellant's ten-print card originated at Kirkland in July 2003 when the

[3] Because this issue is dispositive of Appellant's remaining issues, we decline to address them. *See State v. Corley*, 383 S.C. 232, 244–45, 679 S.E.2d 187, 194 (Ct. App. 2009) (explaining an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

reference indicated to the jury Appellant had a prior criminal record. We find the reference was unnecessary to authenticate the fingerprints, and the State may not render improper character evidence admissible by claiming it is needed to authenticate other evidence. Furthermore, the trial court's error was not harmless.

REVERSED.

SHORT and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tyrone York, as personal representative for Timothy York (Deceased), Shirley York, and Yvonne Burns, Plaintiffs,

Of Whom Yvonne Burns is the Appellant,

And,

Shirley York is a Respondent,

v.

Longlands Plantation a.k.a Knollwood, Inc., and Companion Property and Casualty Group, Respondents.

Appellate Case No. 2016-000258

Appeal From The Workers' Compensation Commission

Opinion No. 5566
Heard April 18, 2018 – Filed June 6, 2018

REVERSED AND REMANDED

William E. Jenkinson, III, and John Thomas Thompson, both of Jenkinson, Jarrett & Kellahan, P.A., of Kingstree, for Appellant.

Ann McCrowey Mickle, of Mickle & Bass, LLC, and Blake A. Hewitt, of Bluestein Thompson Sullivan, LLC, both of Columbia, for Respondent Shirley York; and Helen F. Hiser, of Mount Pleasant, and Jonathan Brandon

Hylton, of Florence, both of McAngus Goudelock & Courie, LLC, for Respondent Longlands Plantation.

LOCKEMY, C.J.: Yvonne Burns appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) denying her claim for death benefits. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Timothy York died in a work-related accident on August 26, 2013, when his boat capsized on a pond at Longlands Plantation while he was working within the course and scope of his employment with Knollwood, Inc.

In January 2014, Tyrone York, Timothy's brother and the personal representative of his estate, filed a Form 52 notice of a claim for death benefits and requested a hearing. A hearing was held before the single commissioner in June 2014 to determine the beneficiary of Timothy's statutory benefits. At the hearing, Tyrone sought workers' compensation benefits on behalf of Timothy's mother, Shirley York, as Timothy's next of kin under section 42-9-140(B) of the South Carolina Code (2015). Yvonne Burns sought benefits for herself as Timothy's common law wife under section 42-9-110 of the South Carolina Code (2015); or alternatively, as a dependent under sections 42-9-120 or 42-9-130 of the South Carolina Code (2015).

In June 2015, the single commissioner found Shirley entitled to the full sum of death benefits allowable under the Workers' Compensation Act (the Act)[1]. The single commissioner held the preponderance of the testimony did not support a finding Timothy and Yvonne had a common law marriage. The single commissioner found Timothy and Yvonne "lived together off and on in a tumultuous relationship characterized by separations resulting from either alcohol consumption or arguments regarding finances." In finding Yvonne failed to prove the existence of a common law marriage, the single commissioner relied heavily on (1) the conflicting testimony from family and friends as to whether Timothy and Yvonne planned to get married; (2) Yvonne's testimony she never told her son of any plans to marry Timothy; (3) Yvonne's testimony the couple had not formalized any plans for a wedding; (4) Timothy and Yvonne's individual tax returns

[1] S.C. Code Ann. §§ 42-1-10 to 42-19-50 (2015 & Supp. 2017).

indicating they were single without any dependents; and (5) Yvonne's failure to contribute to Timothy's funeral expenses.

The single commissioner further held that although Yvonne's financial dependency on Timothy was greater than Shirley's, such financial dependence was not determinative of the outcome of the case. The single commissioner noted South Carolina's statutory prohibition against fornication and cited *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950), as dispositive. The *Day* court held "it was not the intention of the legislature to permit a woman to be classed and considered as a dependent within the meaning of [the] Act who lives in [an] illicit relationship with a man to whom she is not legally married." *Id.* at 345, 58 S.E.2d at 88. The single commissioner held, as our supreme court held in *Day*, an individual cannot be a dependent if he or she is in an illicit relationship, and if the legislature intended to sanction an illicit relationship as constituting a basis for dependency, a provision for such would have been made in the Act.

Yvonne subsequently appealed the single commissioner's order to the Appellate Panel. The Appellate Panel affirmed the single commissioner's order in full on January 20, 2016. This appeal followed.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the [Appellate Panel]." *Murphy v. Owens Corning*, 393 S.C. 77, 81, 710 S.E.2d 454, 456 (Ct. App. 2011). "Under the substantial evidence standard of review, this court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse whe[n] the decision is affected by an error of law." *Id.* at 81-82, 710 S.E.2d at 456. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence [that], considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

LAW/ANALYSIS

I. Applicable Statutory Law

Section 42-9-290 of the South Carolina Code (Supp. 2017) provides that if an employee dies as the result of an accident arising out of the course of employment, the employer must provide death benefits to dependents wholly dependent on the decedent's earnings for support.

One may be deemed wholly dependent either through a conclusive statutory presumption under section 42-9-110 or through a factual demonstration under section 42-9-120. *See* S.C. Code Ann. § 42-9-110 (2015) ("A surviving spouse or a child shall be conclusively presumed to be wholly dependent for support on a deceased employee."); S.C. Code Ann. § 42-9-120 (2015) ("In all other cases questions of dependency . . . shall be determined in accordance with the facts as the facts may be at the time of the accident . . . .").

"If there is more than one person wholly dependent, the death benefit shall be divided among them . . . ." S.C. Code Ann. § 42-9-130 (2015). "If the deceased employee leaves no dependents or nondependent children, the employer shall pay the commuted amounts . . . to his father and mother, irrespective of age or dependency." S.C. Code Ann. § 42-9-140(B) (2015).

II. Issues on Appeal

A. Fornication Statutes

Yvonne argues the Appellate Panel erred in finding she and Timothy were engaged in fornication. She contends the record contains no evidence of any acts of fornication or convictions for fornication, and thus, the Appellate Panel's findings are not supported by substantial evidence.

"'Fornication' is the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman, both being unmarried." S.C. Code Ann. § 16-15-80 (2015).

> Any man or woman who shall be guilty of the crime of adultery or fornication shall be liable to indictment and, on conviction, shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor

> more than one year or by both fine and imprisonment, at the discretion of the court.

S.C. Code Ann. § 16-15-60 (2015).

The Appellate Panel found Timothy and Yvonne were engaging in fornication, and thus, based on the *Day* court's holding that an individual cannot be a dependent if they are in an illicit[2] relationship, Yvonne's claim to Timothy's death benefits was denied as a matter of law. We hold the Appellate Panel erred in finding Timothy and Yvonne were engaged in fornication. The record contains no evidence of any acts of fornication or convictions for fornication. Accordingly, we reverse the Appellate Panel as to this issue.[3]

B. *Day v. Day*

Yvonne argues the Appellate Panel erred in finding her claim for death benefits was barred by the supreme court's holding in *Day*.

Yvonne contends *Day* is not applicable because the relationship at issue in *Day*, unlike in the present case, was bigamous, and thus, illegal. Shirley asserts *Day* is a longstanding precedent that holds the legislature did not intend to include an unmarried cohabitant as a dependent under the Act.

In *Day*, our supreme court denied the claimant death benefits finding the marriage of the claimant to the deceased employee was bigamous and void from its inception. 216 S.C. 334, 344-45, 58 S.E.2d 83, 88 (1950). The court held although the claimant believed she was legally married to the deceased, it could not "escape the conclusion that it was not the intention of the legislature to permit a woman to be classed and considered as a dependent within the meaning of [the] Act who lives in [an] illicit relationship with a man to whom she is not legally married." *Id.* at 345, 58 S.E.2d at 88. While the *Day* court found the claimant was dependent on the deceased employee and noted her case appealed strongly to the court's sympathy, it nevertheless found the claimant was not entitled to benefits.

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[2] "Illegal or improper." *Illicit*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[3] Yvonne further asserts South Carolina's fornication statutes are unconstitutional. We decline to address this argument. *See Fairway Ford, Inc. v. Cty. of Greenville*, 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996) (holding it is this court's firm policy to decline to rule on constitutional issues unless such a ruling is required).

Id. at 344-45, 58 S.E.2d at 88. The court stated "[t]o hold otherwise might well give rise to great abuses in the administration of the [] Act." *Id.* at 345, 58 S.E.2d at 88.

In light of our reversal of the Appellate Panel's fornication findings, we remand this case to the Appellate Panel to reconsider its holding. *Day* held individuals cannot be dependents under the Act if they are involved in an illicit relationship. Here, no evidence was presented of an illicit relationship. Thus, we ask the Appellate Panel to determine, based on the evidence in the record, whether Yvonne qualifies as a dependent under the Act.

REVERSED AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Karl and Lisa Jobst, Respondents,

v.

Bryan Jobst, Brittany Martin, and South Carolina Department of Social Services,

Of whom Brittany Martin is the Appellant

and South Carolina Department of Social Services is the Respondent.

In the interest of a minor under the age of eighteen.

Appellate Case No. 2016-002439

Appeal From Spartanburg County
Monét S. Pincus, Family Court Judge

Opinion No. 5567
Heard March 14, 2018 – Filed June 6, 2018

AFFIRMED

Melinda Inman Butler, of The Butler Law Firm, of Union, for Appellant.

George Brandt, III, of Henderson Brandt & Vieth, PA, of Spartanburg, for Respondents Karl and Lisa Jobst; and

Robert C. Rhoden, III, of Spartanburg, for Respondent
South Carolina Department of Social Services.

KONDUROS, J.: Brittany Martin (Mother) appeals an order awarding custody of her minor child (Child) to Karl (Grandfather) and Lisa Jobst (Grandmother, collectively Grandparents). On appeal, Mother argues the family court erred in (1) finding Grandparents had standing to seek custody, (2) dismissing the South Carolina Department of Social Services (DSS) from the action, and (3) holding Mother in contempt for failing to attend mediation. We affirm.

FACTS

Child was born in 2013. Mother and Brian Jobst (Father) are Child's parents, and Grandparents are Child's paternal grandparents. On June 5, 2015, Mother was arrested for driving under the influence (DUI), possession of marijuana, and child endangerment because Child was in the car with Mother at the time of her arrest. The following day Mother and Father signed a Safety Plan with DSS agreeing Father would act as Child's protector and not allow Mother to have unsupervised contact with Child during DSS's investigation. Because of Father's work schedule, Mother and Father asked Grandmother, who lived in Texas, to come to South Carolina and care for Child. Grandmother came to South Carolina, and on June 11, 2015, Grandparents filed this action alleging Mother and Father were unfit, Grandparents were Child's de facto custodians or psychological parents, and custody with Grandparents was in Child's best interest. On June 15, 2015, the family court issued an order granting Grandparents temporary custody of Child and requiring them to remain in South Carolina. On August 17, 2015, the family court issued a second order granting Grandparents temporary custody of Child and allowing Child to move to Texas, where Grandparents lived.

On October 4, 2016, the family court held a final hearing. Grandmother testified Mother and Father previously lived with Grandparents in South Carolina while Mother was pregnant, and Mother, Father, and Child lived with Grandparents until Child was about one year old. She stated everyone got along well during that time and testified, "We took care of the baby. [Father] took care of the baby. [Mother] at times took care of the baby." However, she believed Mother was not always attentive to Child. She explained, "[Mother] would get up at two o'clock [p.m.]

and take a shower, smoke a couple of cigarettes[,] and get dressed and go off to work, and we wouldn't see her until two, three, four in the morning, whenever she came home . . . ." Grandmother added "Sometimes she would do the two o'clock feeding before she went to work and sometimes she wouldn't. She didn't say much. She just went on her way."
Grandmother stated Father worked full-time and attended school, and he "was a little disappointed that [Mother] wasn't . . . doing more with [Child]." She stated she and Grandfather were able to help care for Child in part because Grandmother worked two days per week and Grandfather had been laid off from his job. Grandmother testified she and Grandfather moved to Texas in July 2014.

When Grandmother arrived in South Carolina following Mother's arrest, the DSS caseworker told her "if Father and Mother did not pass their drug test, that either [Grandmother] could get custody of [Child] or she would go to a foster home, . . . and that if [Grandmother] wanted [custody], [she] needed to get an attorney."

Grandmother testified Father visited Child "every night after work" when she lived in South Carolina with Child under the temporary custody order. She testified, "[Child] was happy to see him, glad to see him." Grandmother testified Mother had scheduled visitation on Wednesdays, Saturdays, and Sundays and "[s]ometimes she would come for the visitation. Sometimes she wouldn't." Grandmother described Mother's behavior during that time as "weird." She stated Mother had "[j]erking movements, tremors. She had facial expressions. Sometimes . . . her pupils were really dilated." Grandmother stated she asked Mother whether she had entered drug treatment or done anything required by the court; Mother replied, "[W]hat are you talking about? No one told me I had to do anything."

Grandmother testified the modified temporary order allowing Grandparents to take Child to Texas required Grandparents to pay Mother's travel expenses for monthly visits. The order also required Mother to pay child support, which she generally failed to do with the exception of August of 2015 and January 2016.

Regarding Mother's visits to Texas, Grandmother testified Mother generally acted bizarre—exhibiting tremors, making odd facial expressions, staying up late, and going outside frequently. Grandmother further testified Mother had limited engagement with Child, argued with Child on several occasions over trivial

matters, like tea sets, water guns, and coloring. Grandmother estimated Mother spent about twenty to forty minutes with Child during visits and the visits were largely unproductive. She stated Mother "call[ed Child] here and there, not on a regular basis," but Child "usually didn't want to talk to her."

Grandmother testified Child attended preschool, did not have special needs or concerns, and was thriving in Grandparents' custody. She stated Father had moved to Texas to live with them and helped pay household expenses. She further stated Texas Child Protective Services (CPS) visited their home monthly at DSS's request, she was not aware of any negative reports, and CPS's last visit was in June 2016. Grandmother testified she and Grandfather had driven to South Carolina for court-ordered mediation with Mother, but Mother did not attend. Grandmother stated she spent $400 for the mediator, $300 per hour for her attorney, and around $1,000 in travel expenses. She requested Mother be held in contempt for not appearing at mediation or paying child support.

On cross-examination, Grandmother acknowledged the visits between Child and Mother had "gotten a little bit better" but maintained the visits were still "not good." Grandmother stated Child did not appear upset when Mother left, and Mother's ability to interact with Child had not improved. Grandmother also acknowledged DSS planned to file a removal action against Mother and Father in 2014 after Father failed a drug test, but tesitifed DSS allowed Father to have unsupervised contact with Child after he passed a drug test in May 2016. She stated DSS "was still directing this case" at that time.

Grandfather testified he was married to Grandmother and earned $120,000 per year in Texas. He described Child as "a great joy," believed Child was doing "wonderful[ly]," and believed it would be in Child's best interest to remain in Grandparents' custody. Grandfather stated he and Grandmother tried to encourage a relationship between Mother and Child during visits. He stated he never saw any indication Mother had stopped using drugs; however, he "was quite convinced [Father] stopped using them." Grandfather noted Father's job required a drug test.

Dana Lyles, a human services specialist for DSS, testified she became involved with this family when DSS received a report on June 5, 2015, that Child may have been abused or neglected. She testified Mother and Child were living with Angela Ivey, Mother's mother. Lyles visited them at Ivey's house on June 6. Lyles stated

DSS determined Child "would need a kinship caregiver," but Ivey could not "serve in that position because she was listed in the central registry, and her husband Ronald . . . was the perpetrator on a past indicated child abuse and neglect case." Lyles indicated DSS agreed to a safety plan "allowing [Father] to be the protector of [Child] and [providing] he would supervise all contact between Child [and Mother]." She testified DSS requested Father submit to a drug screen; while they were awaiting the results of that test, DSS learned "[Grandmother] was flying in and that she wanted to be the protector of [Child] because [Father] was working." Lyles clarified she "didn't place [C]hild with [Grandparents]. [She] placed [C]hild with [Father]." On cross-examination, Lyles explained the safety plan did not address custody; it "only addresse[d] placement of [C]hild and how [C]hild would be protected in the presence of the alleged perpetrator."

Lyles explained she was "subpoenaed to come to court for [Grandmother's] private action" before the results of Father's drug screen came back. She testified Grandmother obtained temporary custody, and DSS transferred the case to the family preservation department. Lyles acknowledged DSS "didn't object to [Grandmother] getting custody." She explained the family court entered the temporary custody order before DSS completed its investigation, but DSS continued its investigation. Lyles stated DSS indicated a case for physical neglect against Mother but did not address custody because of the private action.

Lyles's involvement with the case ended in July 2015, when the case was transferred to Stefanie Hill, a DSS family preservation worker. Hill's role was "to work with the family on correcting the reasons for DSS involvement." Hill testified she was assigned the case in August 2015, and she met with Mother to discuss a treatment plan. She stated DSS asked Mother to complete a drug and alcohol assessment and also parenting classes. Hill testified she discussed the treatment plan with Mother, Mother was aware of the services she had to complete, and Mother signed the treatment plan on August 4, 2015. Hill provided she maintained regular contact with Mother "in an effort to get her to complete" treatment, and Mother "started doing it, but she did not fully complete it."

Hill testified DSS referred Mother to a twelve-week parenting program; Mother began the classes on August 17, 2015; "[h]er last session there was January 25, 2016"; and she only completed eight of the twelve sessions. Hill stated DSS also referred Mother to a drug program but Mother was inconsistent with the program.

Hill stated Mother began treatment on November 30, 2015, but "by January 20th, 2016[,] she was told that she could no longer attend the agency" because she "broke confidentiality" by discussing another client in the program. Hill indicated she told Mother the agency could refer her to another agency, and Mother knew "she had to speak to that agency so they [could] make referrals, but she never went back in."

Hill testified she continued contacting Mother "off and on" "until about June" 2016. She testified, "Most of the time I couldn't get in contact with [her]." She explained, "[W]hen I would call [Mother], it would be there is something going on with her phone, voicemail not set up, or no answer. . . . [S]ince I didn't get her by phone, I would go to the home and sometimes nobody would be there or answer the door."

Hill stated she spoke to Mother the day before the May 2016 mediation, and Mother told her she had transportation and planned to attend. However, Mother did not attend. Hill testified she went to Mother's home on June 11, 2016, and a male answered the door indicating Mother was home and said he would get her. However, Ivey came to the door and said Mother was not feeling well. Hill testified Ivey said "she would [bring Mother] to the [DSS] office by two o'clock," but Mother did not appear. Hill testified she never saw Mother after that, and she closed the DSS file in July 2016. Hill indicated Mother did not cooperate with her a majority of the time. She testified she did not observe any behavioral changes in Mother that indicated Mother was stable or complying with treatment. Hill stated DSS never filed a removal action because Grandmother filed a private custody action. She acknowledged the last time she spoke to Mother was May 2016. Hill testified she explained to Mother the steps she could take to attempt to regain custody in the private action if DSS closed its case. Hill believed DSS should be dismissed as a party to the private action.

Following Hill's testimony, DSS moved to be dismissed from the action, asserting it did not "have a position on the custody." Mother objected, asserting "DSS is the reason this child got removed." Mother then requested the "hearing be considered a merits hearing and that DSS be ordered to put the court-ordered treatment plan in place and for [the family] court to adopt the treatment plan." The family court deferred ruling on DSS's motion.

After Grandparents rested, Mother moved for a nonsuit, arguing Grandparents were not de facto custodians or psychological parents, and thus, did not have standing to file the custody action. The family court denied Mother's motion.

Father testified in his case and asked the court to grant Grandparents custody of Child because Child was thriving in their care. Father testified he lived with Grandparents, saw Child daily, and did not have immediate plans to move out of their home. Father acknowledged he and Mother lived with Grandparents before they moved to Texas, and stated he and Mother fostered a parent-like relationship between Child and Grandparents. Father stated he earned between $55,000 and $60,000 per year and contributed to Child's care. He acknowledged testing positive for marijuana when this action began but stated he had completed a twelve-week drug and alcohol program, and he tested negative for drugs prior to starting his job. Father did not believe Mother could adequately care for Child.

The guardian ad litem (GAL), Ken Shabel, stated he met with Mother in August 2015, and "it was pretty clear . . . she knew what she needed to do. She had actually already had her [drug] assessment and was waiting on the group enrollment program to begin." However, he stated he never saw any drug screens after January 2016 or certificates of completion for the treatment programs. The GAL testified he reviewed the public index and learned Mother was arrested on July 13, 2016, for possession of marijuana, "public drunkenness, or being intoxicated on a state highway or city road, and possession of drug paraphernalia"; Mother was convicted in her absence on July 29. The GAL stated Mother had either served her time or paid the fine for that charge. He believed Father "rectified [his] drug issues." He also believed Child was "well taken care of" with Grandparents.

Following the close of evidence, Mother renewed her directed verdict/involuntary non-suit motion, asserting Grandparents were not psychological parents or de facto custodians. The family court denied the motion.

In its final order, the family court found clear and convincing evidence showed Mother was unfit. The court found Mother tested positive for amphetamines, opiates, and marijuana; she was arrested for possession of marijuana in March 2015 and pleaded guilty in April 2015; she was arrested again for possession of marijuana in June 2015 and pleaded guilty in February 2016; and she was arrested

a third time for possession of marijuana in July 2016 and convicted in her absence. The family court found DSS determined Mother physically neglected Child, DSS referred Mother for drug treatment, Mother did not complete the treatment, and Mother did not cooperate with DSS. The family court determined Father was not unfit but was not contesting custody.

Regarding standing, the family court found Grandparents were not Child's de facto custodians because they did not have custody of Child for six months before they filed the custody action. However, the family court found, "[S]tanding under this statute was not needed since [Grandparents] received physical custody from the parents either through their consent or acquiescence at the time when neither parent could retain custody . . . ." The family court found Child was "bonded with [Grandparents] as if they [were] her parents and she was entirely dependent upon them for all her needs," and she lived with Grandparents during the first year of her life. The family court determined, "[Grandparents] may, in fact, be psychological parents, but because the parents are either unfit or unwilling to have custody and [Grandparents] have a loving, bonded parental-type relationship with [C]hild, it is in her best interest to remain in the permanent custody of [Grandparents.]."

The family court granted DSS's motion to be dismissed as a party, suspended Mother's visitation until she tested negative for drugs, and ordered Mother to pay child support. The family court also ordered Mother to reimburse Grandparents $400 in mediation fees and $600 in attorney fees for the missed mediation. This appeal followed.

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *see also Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651-52. The burden is upon the appellant to convince this court that the family court erred in its findings. *Id*. at 385, 709 S.E.2d at 652.

LAW/ANALYSIS

I. STANDING

Mother argues Grandparents did not have standing to pursue custody of Child. We disagree.

"As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation." *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006). "One must be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id*. "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

Section 63-3-550 of the South Carolina Code (2010) provides, "[A]ny person having knowledge or information of a nature which convinces such person that a child is neglected . . . may institute a proceeding respecting such child." While no cases have interpreted this provisions in this particular context, both the plain language of the statute and existing case law support a finding Grandparents had standing to institute a custody action in this case.

In *Middleton v. Johnson*, 369 S.C. 585, 633 S.E.2d 162 (Ct. App. 2006), Middleton brought an action seeking visitation with his ex-girlfriend's biological son based on the fact he had played a prominent role in the child's life. *Id*. at 588, 633 S.E.2d at 164. The court of appeals determined Middleton was the child's psychological parent and allowing him visitation was in the child's best interest. *Id*. at 604, 633 S.E.2d at 172. In considering whether Middleton had standing to pursue his case, the court observed:

> To further promote the goal of safeguarding the best interests of children, the General Assembly has recognized that in certain circumstances, persons who are not a child's parent or legal guardian may be proper

> parties to a custody proceeding. Section 20-7-420(20)[1] of the South Carolina Code grants the family court jurisdiction to award custody of a child to the child's parent or "any other proper person or institution." *Pursuant to that statute, third parties have been allowed to bring an action for custody of a child.*

Id. at 594, 633 S.E.2d at 167 (emphasis added).

Furthermore, the plain language of section 63-3-550 gives a broad grant of standing specifically in cases involving abuse or neglect. Recently, in *South Carolina Department of Social Services v. Boulware*, 422 S.C. 1, 809 S.E.2d 223 (2018), our supreme court considered whether foster parents had standing to petition for adoption of a child prior to DSS making an adoption placement. The court noted its case turned upon the interpretation of section 63-9-60 of the South Carolina Code (2010 and Supp. 2017), which provides "[a]ny South Carolina resident may petition the court to adopt a child" provided such petition is filed prior to the child being "placed" for adoption by DSS. *Id*. at 7, 809 S.E.2d at 226 (quoting S.C. Code Ann. § 63-9-60). The court concluded the analysis to determine standing was simple and required only looking at the statute's plain language even though such reading could lead to anomalous situations. *Id*. at 13-14, 809 S.E.2d at 229; *see id*. at 14, 809 S.E.2d at 230 (Hearn, J., concurring) (concluding in the majority the analysis is simple but acknowledging in the concurrence that the plain language could produce an anomaly unintended by the General Assembly).

Here, the plain language of section 63-3-550, indicates any person may bring a proceeding when he or she believes a child has been abused or neglected. The general principles of standing—that a party have an interest and personal stake in

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[1] This section is now codified at section 63-5-530(A) and reads identically to the prior version cited in *Middleton*. *See* S.C. Code Ann. § 63-5-530(A)(20) (2010). It provides the family court has jurisdiction "to award the custody of the children, during the term of any order of protection, to either spouse, or to any other proper person or institution." S.C. Code Ann. § 63-5-530(A)(20).

the matter—overlay that broad interpretation, but otherwise the statute simply provides "any person."

Grandparents filed the action after DSS became involved due to allegations of drug use by Mother and Father and Mother's arrest. Grandparents alleged Mother and Father were unfit and unable to comply with a DSS safety plan. Based on these allegations, Grandparents had standing under section 63-3-550, and the family court properly considered the merits of this action. Further, because Grandparents had standing under section 63-3-550, they were not required to establish they were de facto custodians or psychological parents.[2]

II. DISMISSAL OF DSS

Mother argues the family court erred in dismissing DSS as a party to the case. We disagree.

First, DSS remained a party to the action until the conclusion of the case. Therefore the dismissal of DSS could not have prejudiced Mother in any meaningful way. Mother's real argument centers on the fact DSS did not proceed with its own removal action, and therefore she did not receive certain benefits pursuant to the removal statutes—primarily a court-appointed attorney and court-ordered treatment plan. Again, we disagree.

DSS "may promulgate regulations and formulate policies and methods of administration to carry out effectively child protective services, activities, and responsibilities." S.C. Ann. § 63-7-910(E) (2010). DSS must investigate allegations of child abuse or neglect. S.C. Code Ann. § 63-7-920(A) (2010). DSS "is charged with providing, directing, or coordinating the appropriate and timely

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[2] While the family court relied at least in part on these theories and Child's best interests to determine Grandparents had standing, we base our finding in the additional sustaining ground raised by Grandparents on appeal that section 63-3-550 afforded standing to them under the facts of this case. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (instructing that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

delivery of services to children found to be abused or neglected and those responsible for their welfare . . . ." S.C. Code Ann. § 63-7-960 (2010). "Services must not be construed to include emergency protective custody . . . ." *Id.* Whenever a child is placed in emergency protective custody, DSS must conduct a preliminary investigation. S.C. Code Ann. § 63-7-640 (2010). "During this time [DSS] . . . shall convene[] a meeting with the child's parents or guardian . . . to discuss the family's problems that led to intervention and possible corrective actions, including placement of the child." *Id.* If DSS assumes legal custody of a child following an investigation, it "shall begin a child protective investigation" and "initiate a removal proceeding in the appropriate family court." S.C. Code Ann. § 63-7-700(B)(1) (2010). DSS "may petition the family court for authority to intervene and provide protective services without removal of custody if [DSS] determines by a preponderance of evidence that the child is an abused or neglected child and that the child cannot be protected from harm without intervention." S.C. Code Ann. § 63-7-1650(A) (2010).

In this case, Mother agreed to the DSS safety plan naming Father as Child's protector. DSS investigated the case as it was required to do and indicated a case against Mother for abuse and neglect. DSS prepared a treatment plan and referred Mother for services as it was required to do. However, DSS never assumed legal custody of Child, and therefore, the removal statutes were not triggered. *See* § 63-7-700(B)(1) (providing DSS shall file a removal action *if* it assumes legal custody after a child is placed in emergency protective custody and DSS conducts its preliminary investigation). Consequently, we affirm the ruling of the family court dismissing DSS as a party to the case.

III. CONTEMPT

Mother argues the family court erred in holding her in contempt of court for failing to attend mediation because DSS cases are exempt from mediation. We disagree.

"A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, which will not be disturbed on appeal unless it is without evidentiary support." *Haselwood v. Sullivan*, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct. App. 1984). "An adult who wilfully violates, neglects, or refuses to obey or perform a lawful order of the court . . . may be proceeded against for contempt of court." S.C. Code Ann. § 63-3-620

(Supp. 2017). "Once the movant makes a prima facie showing by pleading an order and demonstrating noncompliance, 'the burden shifts to the respondent to establish his defense and inability to comply.'" *Eaddy v. Oliver*, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001) (quoting *Henderson v. Henderson*, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989)). "[A]ll contested issues in domestic relations actions filed in family court, except for cases set forth in Rule 3(b) or (c), are subject to court-ordered mediation under these rules unless the parties agree to conduct an arbitration." Rule 3(a), SCADR. "ADR is not required for . . . family court cases initiated by [DSS]." Rule 3(b)(8), SCADR.

> If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person[,] or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP.

Rule 10(b), SCADR.

Mother's arrest for DUI and DSS's resulting involvement was the catalyst for Grandparents' pursuing custody of Child. Furthermore, DSS continued "directing" the case in many ways throughout the course of the proceedings. However, the only cases exempt from mediation are those "initiated" by DSS. *See* Rule 3(b)(8), SCADR ("ADR is not required for . . . family court cases initiated by [DSS]."). Here, Grandparents initiated the custody action in family court. The family court ordered mediation and the record demonstrates Mother had notice of the mediation. In light of Mother's failure to attend, the family court awarded costs as permitted by Rule 10(b), SCADR, and we affirm that award.

CONCLUSION

We affirm the family court's ruling Grandparents had standing to file their action pursuant to section 63-3-550. Furthermore, we affirm the family court's dismissal of DSS from the case and affirm the award of costs and fees against Mother for failing to attend mediation. Accordingly, the family court's order is

AFFIRMED.

LOCKEMY, C.J., and WILLIAMS, J., concur.