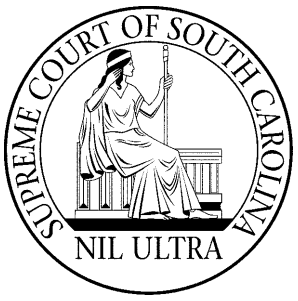

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8

February 14, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vergie W. Fields, individually and as the personal representative of Thomas Edison Fields, deceased, Respondent,

v.

Regional Medical Center Orangeburg South Carolina and F. Simons Hane, M. D., Defendants,

Of whom F. Simons Hane, M. D. is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Calhoun County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 25939
Heard January 6, 2005 – Filed February 14, 2005

AFFIRMED IN PART; REVERSED IN PART

Andrew F. Lindemann, of Davidson, Morrison and Lindemann, P.A., of Columbia, and Julius W. McKay, II, of McKay, McKay, Settana & Addison, of Columbia, for Petitioner.

J. Marvin Mullis, Jr., of Mullis Law Firm, of Columbia, for Respondent.

JUSTICE BURNETT: We granted the petition for a writ of certiorari to review the Court of Appeals' opinion in Fields v. Regional Medical Center Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003). We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Vergie Fields (Plaintiff) brought this wrongful death action against Physician and Regional Medical Center Orangeburg (RMC), alleging negligence and medical malpractice in failing to diagnose a heart condition suffered by her husband, Thomas Edison Fields (Decedent), and admit him to RMC. The Court of Appeals reversed the jury verdict for Physician and RMC and granted Plaintiff a new trial.[1]

Plaintiff took Decedent, age 49, to RMC's emergency room when he began suffering chest pain which radiated into both arms on the afternoon of September 14, 1994. Decedent was examined, his history and past records were reviewed, he was placed on a heart monitor, and an electrocardiogram (EKG) test of his heart revealed no abnormalities. Decedent suffered from previously diagnosed conditions of chronic back pain, caused by a 1976 employment-related injury which left him totally disabled, and a hiatal hernia and gastrointestinal reflux. Decedent was given medication to relieve pain, told to follow up with his physician and sent home.

Plaintiff again took Decedent to RMC's emergency room at about 3 a.m. on September 18, 1994, after he awoke with severe chest pain radiating into both arms. Physician, who was on duty in the emergency room, testified he examined Decedent and reviewed past records which showed Decedent's history as a smoker, complaints of chest pain in past

[1] RMC is not a party on appeal.

years, and past hospital admissions for mental health issues. Physician reviewed previous EKG and heart test results, including a heart catheterization in 1993 and the visit four days earlier, none of which revealed any heart condition.

Physician testified he placed Decedent on a heart monitor and performed an EKG which showed no abnormalities. Decedent stated his chest pain was similar to past instances, but worse. He was crying and upset. Physician gave Decedent the same pain medications he had received previously for the hiatal hernia and reflux, conditions which also may cause chest pain. Physician diagnosed Decedent with histrionics[2] and chronic pain, told him to follow up with his doctor, and discharged him at 3:50 a.m. Physician denied his diagnosis was substantially affected by an emergency room nurse who told him Decedent, her uncle, was "crazy" and possibly seeking drugs, but instead was based primarily on Decedent's medical history, the current exam and normal EKG test.

Plaintiff testified Decedent's chest pains worsened after leaving RMC and she drove her husband to a Columbia hospital. There, Decedent suffered a documented heart attack about an hour after leaving RMC. Decedent was transferred to another Columbia hospital the same day, where he underwent an emergency heart catheterization. Decedent died after his right coronary artery was dissected during the operation, which is a known risk of the procedure. An autopsy revealed Decedent suffered from severe coronary artery disease.

Plaintiff alleged that, had Physician properly diagnosed Decedent with potential coronary artery disease and realized a heart attack might be imminent, Decedent would have been admitted to RMC, probably would have been given thrombolytic ("clot-busting") medications when he suffered his heart attack, and would not have undergone the emergency procedure

[2] Plaintiff's expert defined histrionics as "[a]n unofficial term sometimes used by doctors referring to a behavioral pattern of an individual when it is loud, crying, disorganized, that to an average individual appears to be not appropriate to the situation on hand."

which resulted in his death. Plaintiff presented evidence, including the testimony of two expert witnesses, of Physician's medical malpractice in failing to have Decedent examined by a heart specialist and admitted to RMC; in failing to adequately investigate and consider Decedent's medical and family history and past episodes of similar chest pain; in failing to perform additional tests and monitoring; and in concluding Decedent was simply hysterical or exaggerating his symptoms.

Physician contended his examination and treatment of Decedent met the requisite standard of care. Physician and his expert in emergency medicine testified Physician adequately reviewed Decedent's medical history, which included several instances in which Decedent had complained of chest pain and undergone heart-related tests which did not reveal any heart disease or impairment. Physician presented evidence Decedent had suffered from a variety of physical and psychiatric ailments and made numerous trips to RMC's emergency room. Physician also presented the testimony of Decedent's regular physician, his psychiatrist, and the cardiologist who performed the 1993 heart catheterization which revealed no significant abnormalities.

ISSUES

I. Did the Court of Appeals err in denying Physician's motion to dismiss Plaintiff's appeal as untimely?

II. Did the Court of Appeals err in reversing the jury's verdict based on the trial court's exclusion of testimony regarding the qualifications of Plaintiff's expert witness?

III. Did the Court of Appeals err in reversing the jury's verdict based on the trial court's refusal to allow Plaintiff to use a medical treatise to cross-examine Physician?

STANDARD OF REVIEW

Qualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the trial court. Similarly, the admission or exclusion of evidence in general is within the sound discretion of the trial court. In both instances, the trial court's decision will not be disturbed on appeal absent an abuse of discretion. Pike v. S.C. Dept. of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000); Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997); Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 923 (Ct. App. 2001). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. Means, 348 S.C. at 166, 558 S.E.2d at 924.

To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997); Timmons v. S.C. Tricentennial Commn., 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970); Powers v. Temple, 250 S.C. 149, 160, 156 S.E.2d 759, 764 (1967).

LAW AND ANALYSIS

I. MOTION TO DISMISS APPEAL

Physician contends the Court of Appeals lacked jurisdiction to consider Plaintiff's appeal because Plaintiff failed to timely serve the notice of appeal on the opposing parties. We disagree.

At the end of the trial on March 30, 2000, Plaintiff requested ten days to file a new trial motion, as provided in Rule 59(b), SCRCP. The trial judge denied the request, stating he would prefer to consider any motions immediately while the case and issues were still fresh in his mind. Plaintiff then asserted, in a one-sentence statement, that the trial court's previous evidentiary rulings constituted reversible error. The trial judge denied the oral motion.

Seven days later, Plaintiff filed a written motion for a new trial, citing Rule 59, SCRCP. Plaintiff asserted that, inter alia, the trial judge erred in excluding testimony about her expert witness's qualifications on the ground of hearsay, and in refusing to allow Plaintiff to use a medical treatise to cross-examine Physician on the ground the treatise had not been listed by Plaintiff in discovery responses. The trial judge denied Plaintiff's post-trial motion July 14, 2000, after a hearing. Plaintiff filed and served a notice of appeal August 8, 2000.

Physician filed a motion to dismiss the appeal for lack of jurisdiction after the Court of Appeals issued an opinion reversing the jury's verdict. The Court of Appeals denied the motion.

Physician contends, as he did to the Court of Appeals, that the trial judge denied Plaintiff's request to file a written new trial motion. Thus, Plaintiff's written new trial motion, which followed the oral new trial motion made at the end of the trial, was an improper successive motion akin to those condemned in Quality Trailer Products, Inc. v. CSL Equipment Co., 349 S.C. 216, 562 S.E.2d 615 (2002) and Collins Music Co. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002). Physician further contends the written motion cannot be viewed as a Rule 59(e) motion for reconsideration because it raised issues not previously ruled upon by the trial court. Physician argues the improper successive motion did not toll the time to appeal, making Plaintiff's notice of appeal untimely and depriving the appellate court of jurisdiction. See Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985); Rule 203(b)(1), SCACR.

We conclude Plaintiff's written motion is properly viewed as a motion for reconsideration under Rule 59(e), SCRCP to the extent it addressed the trial court's evidentiary rulings which Plaintiff challenged in her briefly stated oral motion at the end of the trial. See e.g. C.A.H. v. L.H., 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (party may not use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not). It is proper to treat Plaintiff's written motion as a Rule 59(e) motion even though it was erroneously captioned as a motion for new trial. See Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its substance and effect as opposed to how it was captioned by party); Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (illustrating that when court is able to discern the relief requested, "[i]t is the substance of the requested relief that matters regardless of the form in which the request for relief was framed"); Standard Fed. Sav. & Loan Assn. v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (explaining that civil procedure rules must be construed to secure the just, speedy, and inexpensive determination of every action, and defects which do not affect the substantial rights of the parties should be disregarded; thus, it is the substance of the relief sought that matters regardless of the form in which the request for relief was framed).

Moreover, we recently clarified the limits and rationale of Quality Trailer and Collins Music in Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004). We explained that an appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – simply recaptions a written motion for judgment notwithstanding the verdict (JNOV) or new trial, which has been ruled on, and resubmits it as a virtually identical, written Rule 59(e) motion. Elam, 361 S.C. at 20, 602 S.E.2d at 778; Quality Trailer, 349 S.C. 216, 562 S.E.2d 615 (presenting case in which appeal was barred as untimely where appellant filed written JNOV/new trial motion, which was ruled on, and then filed a virtually identical, written Rule 59(e) motion); Collins Music, 353 S.C. 559, 579 S.E.2d 524 (same).

However, in Elam we held that

> a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court. Again, we caution a party who files post-trial motions to note carefully the exceptions to this general rule as expressed in Coward Hund,[3] Quality Trailer and Collins Music.

Elam, 361 S.C. at 21, 602 S.E.2d at 778. Accordingly, Plaintiff timely filed a Rule 59(e) motion, which was denied, and Plaintiff then timely served and filed her notice of appeal. The Court of Appeals had jurisdiction in this case and correctly denied Physician's motion to dismiss the appeal.

II. EXCLUSION OF TESTIMONY ABOUT EXPERT'S QUALIFICATIONS

Physician argues the Court of Appeals erred in reversing the jury's verdict and remanding for a new trial because the trial court excluded part of the explanation of Plaintiff's expert for not being board-certified in emergency medicine. We agree.

Physician's expert witness in emergency medicine, Dr. Robert Bartlett, testified a physician may seek board certification in emergency medicine after eight years of training. A physician must pass a written and oral examination, and is recertified every ten years.

The expert witnesses of both parties were routinely asked if they were board-certified in emergency medicine or another specialty.

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[3] The case of Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), addressed the issue of successive motions for reconsideration under Rule 59(e), SCRCP, an issue not raised in this appeal.

Physician's witness, Bartlett, testified he was board-certified in emergency medicine. One of Plaintiff's expert witnesses, Dr. Alfred Frankel, also testified he was board-certified in emergency medicine. Physician testified he was board-certified in family medicine, but had failed the emergency medicine exam for board certification by one point.

Plaintiff presented Dr. George Podgorny as an expert in emergency medicine. Podgorny testified by video deposition that he had practiced emergency medicine for more than twenty-five years. In explaining why he was not board-certified in the specialty, Podgorny testified, "The reason is that I was the first president of the board of emergency medicine and was instrumental in development of the examination, and then served for many years as the editor of both the written and the oral exam."

The trial court sustained Physician's objection to the remainder of Podgorny's explanation on the ground it was inadmissible hearsay. The jury did not hear this statement: "And the opinion of legal counsel was that there may be a conflict of interest if I will take the exam, which it was perceived that I knowed (sic) all the answers."

In closing arguments, Plaintiff's counsel mentioned the board certification of the expert witnesses. He noted Podgorny was not board certified "because he's the one that writes the test that they use" and described Podgorny as "the guru in this part of the country on emergency rooms." Physician's counsel, in closing, emphasized Bartlett's qualifications as a "true expert" who "knows what he's talking about. Dr. Podgorny; what evidence is there that Dr. Podgorny writes the test? Ridiculous! Dr. Podgorny never took the test to be board certified."

The Court of Appeals held Plaintiff demonstrated both error and resulting prejudice in the trial court's exclusion of a portion of Podgorny's explanation. The Court of Appeals stated

> [u]sually, if opinion testimony is offered by a physician or surgeon, his competency to testify as an expert is sufficiently established by the fact that he has been duly licensed to practice

> medicine or surgery. State v. Moorer, 241 S.C. 487, 129 S.E.2d 330 (1963), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 316 (1991); Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545 (1943). A physician or surgeon is not incompetent to testify as an expert merely because he is not a specialist in the particular branch of his profession involved in the case. Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993). The fact that the physician is not a specialist in the particular area affects only the weight of the witness's testimony and affords no basis for completely rejecting it. Hill, 204 S.C. at 109, 28 S.E.2d at 555; Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985). . . .
>
> Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Proof of a statement introduced to show a party heard and acted upon information is not objectionable hearsay. Webb v. Elrod, 308 S.C. 445, 449, 418 S.E.2d 559, 562 (Ct. App. 1992); 31A C.J.S. Evidence § 259 (1996) ("[T]estimony is not hearsay where it relates to what the witness himself did in reliance on, or in response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of statements on the listener, the fact that something was said, or identifying what was said.").
>
> Podgorny's statement is a classic example of showing an action based upon information and is not offered for the truth of the matter asserted. The statement was not offered to prove that the counsel was correct in showing that there would be a conflict of interest if Podgorny took the test, but rather explained why Podgorny did not take the test and therefore, was not board-certified.

Fields, 354 S.C. at 452-54, 581 S.E.2d at 492-93. The Court of Appeals further concluded Plaintiff was prejudiced by the error because the case

presented the "paradigmatic example of clashing experts and debatable qualifications" in a close case in which the experts' credentials were crucial. Id. at 454-55, 581 S.E.2d at 494.

We conclude the Court of Appeals correctly found error in the trial court's ruling, and the trial court abused its discretion in excluding the "legal counsel" testimony. The testimony was not hearsay because it was not admitted to prove the truth of the matter asserted.

However, the Court of Appeals erred in concluding Plaintiff has shown prejudice. When evidence is erroneously excluded by the trial court, the appellate court usually engages in the following analysis to determine whether prejudice has occurred. First, the court considers, inter alia, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered;[4] the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively

[4] E.g. Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 217, 439 S.E.2d 838, 840 (1994) (any error in exclusion of co-defendant's financial statements was harmless, given that such evidence would have been cumulative to testimony that co-defendant reduced the corporation's value through the substantial use of business funds for personal expenditures); Smith v. Winningham, 252 S.C. 462, 467, 166 S.E.2d 825, 827 (1969) ("Alleged error in the exclusion of offered testimony is of no avail if the same testimony or testimony to the same effect had been or was afterwards allowed to be given by the witness."); Lowie v. Dixie Stores, 172 S.C. 468, 174 S.E. 394 (1934) (exclusion of evidence is not prejudicial when the evidence is supplied by another witness); S.C. Dept. of Highways & Public Transp. v. Galbreath, 315 S.C. 82, 86, 431 S.E.2d 625, 628 (Ct. App. 1993) ("[e]ven if the trial court erred in excluding evidence, there is no reversible error where the testimony would have been cumulative"); Patterson v. I.H. Servs., Inc., 295 S.C. 300, 308, 368 S.E.2d 215, 220 (Ct. App. 1988) (even if it were error to exclude testimony of employee regarding telephone call to employer, its exclusion was harmless because the evidence was cumulative to testimony later given by employer about the call).

cross-examining a witness;[5] the jury's verdict or a proper court ruling rendered the wrongly excluded evidence moot because it was relevant to an issue that did not have to be reached;[6] the aggrieved party failed to establish a claim or defense even when both the admitted and excluded evidence are considered;[7] or the wrongly excluded evidence involved a generally known fact.[8]

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[5] E.g. Goudelock v. Prudential Ins. Co. of America, 219 S.C. 284, 294, 65 S.E.2d 114, 118 (1951) (any error in exclusion of letter showing the plaintiff's salary scale did not prejudice defendant because plaintiff during cross-examination testified to substantially what the letter contained); Young v. Hudsex Motor Co., 172 S.C. 541, 174 S.E. 489 (1934) (in action for fraud in sale of automobile, trial court's refusal to allow witness to testify about resale price of automobile was not prejudicial error because plaintiff was afterwards permitted to fully examine president of defendant company about the issue).

[6] E.g. First State Sav. and Loan v. Phelps, 299 S.C. 441, 449, 385 S.E.2d 821, 826 (1989) (any error in exclusion of defendant's proferred testimony on damages was harmless because defendant failed to establish counterclaim that plaintiff bank committed either a fraud or breached an express oral warranty in sale of horses).

[7] E.g. Triple "F," Inc. v. Gerrard, 298 S.C. 44, 378 S.E.2d 67 (Ct. App. 1989) (even if trial court wrongly excluded extension agent's testimony that university had not endorsed feed program for area dairy farmers, the error was harmless because only testimony on record did not establish feed suppliers' claim that feed program marketer had committed fraud).

[8] E.g. Coffee v. Anderson County, 224 S.C. 477, 488, 80 S.E.2d 51, 56 (1954) (any error in not allowing county engineer to testify about number of miles of improved roads in county was harmless because jurors had general knowledge about size of county and extent of road system).

Second, the appellate court considers whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error, i.e., the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the challenged evidence.[9]

It certainly is true that the credentials of both parties' expert witnesses were crucial in the present case. Both parties' medical experts were routinely asked whether they were board-certified. Both parties mentioned the experts' board certification in closing arguments while praising their own expert and criticizing their opponent's.

Plaintiff did not present evidence that was equivalent or cumulative to the wrongly excluded "legal counsel" testimony. Plaintiff did, however, accomplish her primary objective in demonstrating Podgorny was well-qualified to render an opinion on Physician's actions. Podgorny

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[9] E.g. Elledge v. Richland/Lexington School Dist. Five, 352 S.C. 179, 185-89, 573 S.E.2d 789, 792-95 (2002) (finding prejudicial error in the exclusion of industry safety standards for playground equipment because such standards would have helped establish the necessary standard of care, would have provided important support and enhancement of opinion testimony of expert witnesses, and would not have been cumulative to experts' testimony); Senn v. J.S. Weeks & Co., 255 S.C. 585, 591, 180 S.E.2d 336, 338 (1971) (in action for injuries allegedly resulting from defendant's truck being parked illegally in manner that obscured stop sign and caused motorist to proceed through intersection without stopping, it was prejudicial error to exclude photographs showing stop sign with truck parked substantially as described by witnesses because the photographs were relevant to a basic and vital issue in the case – the motorist's view of stop sign); Sellers v. Public Sav. Life Ins. Co., 255 S.C. 251, 256, 178 S.E.2d 241, 243 (1970) (finding prejudicial error where witness was not allowed to offer his lay opinion on whether decedent was intoxicated, where life insurance policy prohibited payment of double indemnity benefit for accidental death if the insured was intoxicated or under influence of illegal narcotic).

testified he had practiced emergency medicine for more than twenty-five years and had helped edit the board certification test for years. In addition, Plaintiff's other expert, Frankel, was board-certified in emergency medicine.

Viewing the case as a whole, we are not persuaded the "legal counsel" testimony was so crucial and important in proving Plaintiff's malpractice claim that its exclusion constitutes prejudicial error. Plaintiff has not shown a reasonable probability the jury was influenced by the absence of a portion of Podgorny's explanation regarding his lack of board certification. This case differs, for example, from the Elledge, Senn, or Sellers cases described in footnote 9, where the aggrieved party was prejudiced by the wrongful exclusion of crucial and important evidence.

In short, both parties presented experienced, well-qualified experts who offered opposing opinions about the propriety of Physician's actions. Whether Physician's actions met the requisite standard of care was a question for the jury and the jury decided it in favor of Physician. Accordingly, we affirm the Court of Appeals' finding of error in the trial court's ruling, but reverse the finding of prejudice.

III. USE OF MEDICAL TREATISE TO CROSS-EXAMINE PHYSICIAN

Physician contends the Court of Appeals erred in reversing the jury's verdict and remanding for a new trial because the trial court refused to allow Plaintiff to use a medical treatise during cross-examination of Physician. Although this issue presents a closer question than Issue II, we agree.

Plaintiff attempted to use an emergency medicine textbook written by Tintinalli, Krome, and Ruiz while cross-examining Physician. Physician testified he was familiar with the treatise, considered an authoritative source by emergency room doctors. Physician's counsel objected to use of the treatise because Plaintiff had failed to list it in her responses to Physician's discovery requests.

Plaintiff's counsel stated he intended to use the treatise to "ask [Physician] if what he's testified to is different from what's in the text." Counsel did not proffer any specific questions or information from the textbook. The trial court sustained the objection and instructed the jury to disregard all references to the treatise. In an affidavit which accompanied Plaintiff's written motion for a new trial, Plaintiff's paralegal testified Physician's counsel, apparently realizing Plaintiff's counsel had seen the treatise on defense counsel's table while cross-examining Physician, instructed an assistant to put it away. The assistant placed the treatise on the floor and covered it up with several notebooks.

The Court of Appeals, relying on Rule 37(b), SCRCP, held the trial court abused its discretion by disallowing use of the treatise without weighing the nature of the interrogatories, the discovery posture of the case, the willfulness of the offending party, and the degree of prejudice to the objecting party. The Court of Appeals held Plaintiff had been prejudiced by the error. Fields, 354 S.C. at 455-59, 581 S.E.2d at 494-96.

We conclude the Court of Appeals correctly held the trial court abused its discretion in preventing Plaintiff from using the treatise to challenge Physician's assertion that his examination and treatment of Decedent was appropriate. There was no evidence Plaintiff willfully failed to disclose the treatise, and Physician was not prejudiced or surprised by the use of an admittedly authoritative treatise lying on defense counsel's table. Disallowing use of the treatise for a discovery violation under these facts did not further the primary purpose of the civil procedural rules at issue, i.e., preventing or limiting ambush tactics at trial.

However, the Court of Appeals erred in concluding Plaintiff has demonstrated prejudice under the analysis set forth in Issue II. Plaintiff has failed to explain persuasively at trial or on appeal how she would have used the treatise to challenge Physician's testimony. The treatise evidence likely would have been cumulative to the testimony of Plaintiff's two experts, who testified Physician failed to perform additional tests and monitoring of Decedent's condition. Viewing the case as a whole, Plaintiff has not shown the treatise was so crucial and important that its wrongful exclusion

constitutes prejudicial error. Plaintiff has failed to establish a reasonable probability the jury was influenced by the lack of cross-examination of Physician with information from the medical treatise.

As explained in Issue II, both parties presented experienced, well-qualified experts who offered opposing opinions about the propriety of Physician's actions. Whether Physician's actions met the requisite standard of care was a question for the jury and the jury decided it in favor of Physician.

CONCLUSION

We affirm the Court of Appeals' denial of Physician's motion to dismiss the appeal. On Issues II and III, we affirm the Court of Appeals' findings of error in the trial court's evidentiary rulings, but reverse the findings of prejudice. Accordingly, we affirm the jury's verdict in favor of Physician.

AFFIRMED IN PART; REVERSED IN PART

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charlene Taylor,
John Sketers and
Delores Wilson, Appellants,

v.

Town of Atlantic Beach
Election Commission,
Irene Armstrong, Jake
Evans, and Sherry
Suttles, Respondents.

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 25940
Heard September 21, 2004 – Filed February 14, 2005

AFFIRMED

Ernest A. Finney, Jr., of the Finney Law Firm, of Sumter, Emma Ruth Brittain and Matthew R. Magee of Thompson & Henry, P.A., of Myrtle Beach, and Helen T. McFadden, of Kingstree, for Appellants.

John C. Zilinsky, of Conway, for Respondents Irene Armstrong, Jake Evans, and Sherry Suttles.

Louis Milton Cook, of Louis M. Cook & Associates, of North Myrtle Beach, and Darryl Caldwell, of Duff Turner White & Boykin, of Columbia, for Respondent Town of Atlantic Beach Election Commission.

JUSTICE BURNETT: This is an election protest. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Municipal Election Commission of the Town of Atlantic Beach (the Commission) certified the results of a nonpartisan election held November 4, 2003: Irene Armstrong, mayor; Jake Evans, town council; Sherry Suttles, town council.[1]

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[1] The certified results of the November 4, 2003, election were:

Mayor's seat: Irene Armstrong, 104; Charlene Taylor, 18; Josephine Isom, 34, Gloria Lance, 13.

Town council seat (two to be elected): Jake Evans, 110; Sherry Suttles, 65; Retha Pierce, 52; Kenneth McIver, 24; William Cain, 3; Erica Lewis, 2; Russell Skeeters, 17; John Sketers, 17; Delores Wilson, 16; Russell Reave, 1.

Respondents have not begun serving in their respective positions pending the outcome of this appeal. See S.C. Code Ann. § 5-15-120 (2004) ("Newly elected officers shall not be qualified until at least forty-eight hours after the closing of the polls and in the case a contest is finally filed the incumbents shall hold over until the contest is finally

continued . . .

On November 5, 2003, Charlene Taylor, John Sketers, and Delores Wilson (Appellants) filed letters contesting the election results. The Commission reviewed challenged ballots at a hearing on November 6, 2003, and denied the candidates' protests following a separate hearing on November 8, 2003.

On appeal the circuit court affirmed the Commission's decision. This appeal is pursuant to S.C. Code Ann. § 14-8-200(b)(5) (Supp. 2003) and Rule 203(d)(1)(E), SCACR.

ISSUES

1. Did the circuit court err in refusing to remand the case to the Commission for explicit rulings and a more definitive written order on allegations raised by Appellants at a hearing before the Commission?

2. Did the circuit court err in affirming the Commission's denial of the election protests because the constitutional and statutory right to a secret ballot of those who voted by challenged ballot was violated?

3. Are Appellants' remaining issues preserved for appellate review?

STANDARD OF REVIEW

In municipal election cases, we review the judgment of the circuit court only to correct errors of law. Our review does not extend to findings of fact unless those findings are wholly unsupported by the evidence. We will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered

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determined."); S.C. Code Ann. § 5-15-140 (2004) ("notice of appeal shall act as a stay of further proceedings pending the appeal").

doubtful. In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, we will not set aside an election for a mere irregularity. E.g. Broadhurst v. City of Myrtle Beach Election Commn., 342 S.C. 373, 379, 537 S.E.2d 543, 546 (2000); George v. Mun. Election Commn. of Charleston, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999); Sims v. Ham, 275 S.C. 369, 271 S.E.2d 316 (1980); May v. Wilson, 199 S.C. 354, 19 S.E.2d 467 (1942); State v. Jennings, 79 S.C. 246, 60 S.E. 99 (1908). "Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result." Berry v. Spigner, 226 S.C. 183, 190, 84 S.E.2d 381, 384 (1954) (internal quotes omitted).

LAW AND ANALYSIS

1. DENIAL OF REMAND TO COMMISSION

The Commission by letter advised Appellants had not proved the late opening of the polls affected the outcome of the election; Appellant Taylor's "allegations of fraud and bribery were not proven"; and Appellant Sketers' "allegations of ballots being seen and ballots being removed from the voting place were not proven."[2] The circuit court affirmed.

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[2] Appellants raised the following issues in their notice of contest letters to the Commission:

Appellant Taylor (including attached statement of poll watcher Patricia Bellamy): fraudulent registration, bribery of voters, late opening of voting site, loud or boisterous behavior at the poll caused voters to stay away, improper dismissal of challenges, and improper assistance provided to voters by a poll watcher.

continued . . .

Appellants contend the circuit court erred in denying their request to remand the case to the Commission for more definitive findings and rulings in a written order on issues they had raised before the Commission. Appellants acknowledge an election protest generally is limited to allegations contained in the written notice of protest. They urge the Court to require some degree of concomitant specificity by the election commission which hears the protest; otherwise, it is difficult or impossible for circuit or appellate courts to properly review the decision. Appellants do not suggest such orders be required to contain formal findings of fact or conclusions of law similar to those demanded of lower courts or government agencies in other settings. Appellants ask the Court to either remand the case to the Commission or set aside the election for reasons set forth in their appeal.

Respondents assert the circuit court did not err in refusing to remand the case to the Commission for further review. They argue there is no need to require greater specificity or clarity in decisions issued by election commissions, and urge the Court to reject Appellants' call for a new standard for such orders.

There was no right to contest an election under the common law. Broadhurst, 342 S.C. at 383, 537 S.E.2d at 548. "The right to contest an election exists only under the [state] constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed." Taylor v. Roche, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978); see also S.C. Const. art. II, § 10 ("General Assembly shall . . . establish procedures for contested elections, and enact other

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Appellant Sketers: late opening of voting site, ballots were allowed to be seen, ballots were removed from the voting place, improper assistance was given to voters, intimidation of his poll watcher when she tried to challenge voters, and loud or boisterous behavior at the poll caused voters to stay away.

Appellant Wilson: late opening of voting site, corrupt conduct, and excessive arguing over challenges caused voters to stay away.

provisions necessary to the fulfillment of and integrity of the election process").

> Statutes applicable to municipal elections provide:
>
> > Within forty-eight hours after the closing of the polls, any candidate may contest the result of the election as reported by the managers by filing a written notice of such contest together with a concise statement of the grounds therefor with the Municipal Election Commission. Within forty-eight hours after the filing of such notice, the Municipal Election Commission shall, after due notice to the parties concerned, *conduct a hearing on the contest, decide the issues raised, file its report together with all recorded testimony and exhibits with the clerk of court of the county in which the municipality is situated, notify the parties concerned of the decisions made,* and when the decision invalidates the election the council shall order a new election as to the parties concerned.

S.C. Code Ann. § 5-15-130 (2004) (emphasis added).

The decision of the municipal election commission may be appealed to the court of common pleas within ten days after a party receives notice of it. S.C. Code Ann. § 5-15-140 (2004). The circuit court, sitting in an appellate capacity, does not conduct a de novo hearing or take testimony. The circuit court must examine the decision for errors of law, but it must accept the factual findings of the commission unless they are wholly unsupported by the evidence. Blair v. City of Manning, 345 S.C. 141, 546 S.E.2d 649 (2001); Butler v. Town of Edgefield, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997).

Appellants have not cited, nor have we have found, any South Carolina statute or case establishing standards for written orders issued by an election commission. Appellants initially asserted the Administrative Procedures Act (APA) may apply to such a proceeding. The circuit court correctly recognized the APA does not apply to the

appeal of a decision by a municipal election commission. See S.C. Code Ann. § 1-23-310(2) and (3) (Supp. 2003) (defining "agency" and "contested case").

We affirm the circuit court's ruling the Commission fulfilled its statutory duty under existing law. Section 5-15-130 requires an election commission conduct a hearing, decide the issues raised, file a report with the testimony and exhibits, and notify the parties of the decision. The statute does not require a written order containing findings of fact or conclusions of law similar to those, e.g., required of tribunals in APA or family court proceedings. Cf. S.C. Code Ann. § 1-23-350 (1986) (establishing standards for written orders in APA cases, which require findings of fact and conclusions of law); Rule 26(a), SCRFC (order or judgment in domestic relations case shall set forth specific findings of fact and conclusions of law). We decline to impose standards for written orders on election commissions beyond those imposed by statute. It is within the plenary power of the Legislature, not this Court, to promulgate election standards or enact statutory election requirements which address the necessity or substance of written orders issued by an election commission.

2. SECRECY OF CHALLENGED BALLOTS

Twenty-three voters cast challenged ballots. All were included in the results except the vote of one person who no longer lived in Atlantic Beach. Patricia Bellamy, a poll watcher for unsuccessful mayoral candidate Taylor, challenged most of the ballots due to allegedly questionable addresses.

Poll manager Vanessa Warren stated in a letter to the Commission that challenged voters "were told to write the candidates' names they were voting for on a blank sheet of paper with their signature." Further, the "fail-safe" printed ballots listing candidates' names were not used "because we were rushing and did not get situated." Warren acknowledged before the Commission the procedures followed were improper. Appellant Sketers stated in his notice of contest the "ballots were allowed to be seen."

Violet Taylor, a witness for Appellant Taylor whose vote was challenged, testified she "was not given a printed ballot to vote on. I was given a blank sheet of paper and I was told to step to the side and write the names of the candidates I was choosing in pencil." Six of the twenty-one challenged ballots contained in the record were signed by the voter.

The Commission rejected the assertion that "ballots were allowed to be seen." Appellants in their notice of appeal to circuit court attacked the challenged ballot procedures. The circuit court ruled Appellants had failed to raise issues related to the challenged ballots to the Commission and rejected Appellants' motions to reconsider the matter or remand it to the Commission.

Appellants argue the circuit court erred in affirming the Commission's denial of the election protests because the constitutional and statutory right to a secret ballot of those who voted by challenged ballot was violated. Appellants assert the issues were sufficiently raised to the Commission, although they concede the Commission hearing did not result in an "exemplary record" because they were not then represented by counsel. We conclude the issues are sufficiently preserved.

Respondents argue that the issue of secrecy of the challenged ballots is not preserved for appellate review. They further assert the issue is without merit because it was "not the kind of systemic invasion of privacy that affects the fundamental integrity of the electoral process."

"There are two prerequisites to maintaining an election contest in South Carolina: (1) the contest notice must allege irregularities or illegalities; and (2) the alleged irregularities or illegalities must have changed or rendered doubtful the result of the election in the absence of fraud, a constitutional violation, [or] a statute providing that such irregularity or illegality shall invalidate the election." Butler v. Town of Edgefield, 328 S.C. 238, 246, 493 S.E.2d 838, 842 (1997).

A notice of contest filed pursuant to Section 5-15-130 should briefly state facts or a combination of facts sufficient to apprise the election commission and winning candidate of the reason for the challenge. It is not sufficient to allege fraud generally or mere conclusions of the protesting person. Butler, 328 S.C. at 245-46, 493 S.E.2d at 842. The circuit court, sitting in an appellate capacity, may not consider issues which were not raised to the election commission. The circuit court has no authority to conduct a full hearing when one is denied by the election commission; nor does it have authority to take testimony or conduct a de novo hearing. Butler, 328 S.C. at 248, 493 S.E.2d at 843; Blair, 345 S.C. at 144, 546 S.E.2d 651.

We recently emphasized the importance of ballot secrecy in George, 335 S.C. 182, 516 S.E.2d 206. There we held the total absence of voting booths and foldable ballots in a municipal election violated voters' constitutional and statutory right to cast a secret ballot. We reviewed the occasionally violent nature of past elections and reasons underlying the nation's gradual move toward secret ballots. This Court and many others long have emphasized the importance of secret ballots. See George, 335 S.C. at 187-190, 516 S.E.2d at 209-210 (listing cases and statutes); Corn v. Blackwell, 191 S.C. 183, 4 S.E.2d 254 (1939) (holding ballot secrecy was violated when numbering system for ballots and voter sign-in lists could be used to identify a particular voter's ballot); State ex rel. Birchmore v. State Bd. of Canvassers, 78 S.C. 461, 468-469, 59 S.E. 145, 147 (1907) (holding ballot secrecy was violated when voters were required to place their ballots in "for" and "against" boxes that plainly revealed their choice).

It is undisputed the proper procedure was not followed with regard to the twenty-two challenged ballots. Voters should have been given printed ballots listing the candidates' names after appropriate determinations by the poll manager, been provided with a private place to cast their ballot, and absolutely not been asked or required to sign their name on the ballot. The ballot should have been placed in a separate envelope with the name of the voter and challenger written on the envelope. See S.C. Code Ann. § 7-13-830 (Supp. 2003) (establishing procedures for handling challenged ballots); Greene v.

S.C. Election Commn., 314 S.C. 449, 445 S.E.2d 451 (1994) (discussing challenged ballots); S.C. Code Ann. § 5-15-10 (2004) (municipal elections shall be conducted pursuant to provisions set forth in Title 7).

However, the present case is distinguishable from previous cases addressing ballot secrecy. The secrecy of the six challenged ballots signed by the voter undoubtedly was compromised. The secrecy of the remaining sixteen challenged ballots may have been compromised by the voter "stepping aside" to cast it in potential sight of other voters or poll workers. We agree with Respondents there was no systemic invasion of privacy, as was evident in George, Corn, and Birchmore, which affected the fundamental integrity of the election and gave rise to a constitutional violation sufficient to set aside the election results. We conclude this issue constitutes an irregularity that did not affect the result of the election, and the record does not demonstrate evidence of fraud, a constitutional violation, or a statute providing this irregularity should invalidate the election.

3. PRESERVATION OF REMAINING ISSUES

Appellants assert the circuit court erred in affirming the Commission's denial of their election protests because (1) the constitutional and statutory right to a secret ballot of twenty-eight persons who voted by absentee ballot allegedly was violated and (2) the Commission was required by statute to order a new election due to alleged irregularities based on the number of voters who signed the poll list.

These issues are not preserved for appellate review. Appellants failed to raise either issue in their notice of contest letters. See footnote 2, supra. The issue of absentee ballot secrecy was not raised to the Commission or to the circuit court. Issues related to the signing of the poll list were not raised to the Commission. Appellants did allege in their notice of appeal to circuit court that challenged ballot voters had failed to sign the poll list and questioned whether those voters' identities were properly recorded, but their arguments came too

late. See Butler, 328 S.C. at 248, 493 S.E.2d at 843 (circuit court, sitting in an appellate capacity, may not consider issues which were not raised to the election commission and it has no authority to conduct a full hearing when one is denied by the election commission; nor does it have authority to take testimony or conduct a de novo hearing); Blair, 345 S.C. at 144, 546 S.E.2d at 651 (stating same principles).

CONCLUSION

We affirm the circuit court's order upholding the results of the election held November 4, 2003. We decline to impose standards for written orders issued by election commissions beyond those imposed by statute. We conclude the alleged violation of secrecy of the challenged ballots constitutes an irregularity that did not affect the result of the election. There is no evidence of fraud, a constitutional violation, or a statute providing this irregularity should invalidate the election. Lastly, Appellants' remaining issues are not preserved for appellate review because they were not raised to the election commission.

Accordingly, we order that Respondents Irene Armstrong, Jake Evans, and Sherry Suttles, as the winning candidates, be forthwith seated in their respective positions.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Charleston, a Municipal Corporation, Robert B. Kizer, and Laura Cabiness, Appellants/Respondents,

v.

Thomas J. Masi, Margaret B. Schwochow, John L. Chisolm, Carolyn L. Collins, and June D. Smith, in their capacities as The Charleston County Election Commission, Gertrude D. Brown, Flora P. Condon, Louise M. Hill, Alice K. Mitchell, and Beverly A. Whitney, in their capacities as The Board of Elections and Voter Registration of Charleston County, Respondents,

And The James Island Public Service District, Respondent/Appellant.

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

Opinion No. 25941
Heard January 4, 2005 – Filed February 14, 2005

AFFIRMED

Susan Jeanne Herdina, of Charleston; Timothy A. Domin, of Clawson & Staubes, LLC, of Charleston; William B. Regan and Frances I. Cantwell, of Regan and Cantwell, LLC, of Charleston, for appellants/respondents

Samuel W. Howell, IV, of Howell & Linkous, LLC, of Charleston, for respondents.

Trent M. Kernodle, David A. Root, Christine C. Varnado, and Robert B. Varnado, of Kernodle, Taylor & Root, of Charleston, for respondent/appellant.

PER CURIAM: We dismiss this action as moot and find the trial court did not err by failing to award attorney's fees to the James Island Public Service District (District).

FACTS

In June 2002, the Town of James Island (Town) was formed. Thereafter, an action was commenced by the City of Charleston (City), a resident and elector of the City who lives on James Island (Kizer), and a taxpayer and elector of the Town (Cabiness) (jointly referred to as City unless otherwise noted). The complaint sought injunctive relief and declaratory relief as to who, after the incorporation of the Town, was entitled to vote in the District elections and to serve as District commissioners. The complaint alleged that as a function of the incorporation of the Town, which overlapped certain areas in the District, the territorial boundaries of the District were reduced such that Town residents should be prohibited from participating in District elections.

A general election for District commissioners was scheduled for November 5, 2002. The City's motion for a preliminary injunction to stay the November election was denied after a hearing. This matter was heard on the merits and the circuit court issued an order declining to decide the issues raised by the City. The circuit court also denied the District's motion for attorney's fees. Both the City and the District appealed.

Subsequent to the filing of this appeal, this Court found the Town of James Island to be a nullity because it had been created by unconstitutional special legislation. Kizer v. Clark, 360 S.C. 86, 600 S.E.2d 529 (2004).

ISSUES

I. Is the City's action moot?

II. Did the trial court err by failing to award the District attorney's fees?

DISCUSSION

I

We find the District correctly argues that this case regarding the Town residents' entitlement to vote in the District elections and the entitlement to serve as a District commissioner is moot given that the Town is a nullity. Our opinion in Kizer v. Clark, *supra*, rendered the case nonjusticiable because a judgment, if rendered, would not have any practical legal effect given the Town was deemed nonexistent. *See* Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001), *cert. denied*, 535 U.S. 926 (2002) (case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy); Waters v. South Carolina Land Resources Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996) (justiciable controversy is real and substantial controversy appropriate for judicial determination, as opposed to dispute or difference of contingent, hypothetical or abstract character).

The City argues, however, that the Court should decide the issues involved because they are capable of repetition yet evade review and because the issues involve matters of important public interest. We find neither exception is met in this case.

Regarding the exception that a court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review, we find that while the questions involved could arise again, the questions will not "usually become moot" before they can be reviewed. *See* South Carolina Dep't of Mental Health v. State, 301 S.C. 75, 390 S.E.2d 185 (1990) (although specific case is moot, appeal allowed because raises question that is capable of repetition, but which usually becomes moot before it can be reviewed). Further, the issues involved do not appear to present a "recurring dilemma" which the Court needs to address to clarify the law. *See* Evans v. South Carolina Dep't of Social Servs., 303 S.C. 108, 399 S.E.2d 156 (1990) (although development renders case moot, controversy presents a recurring dilemma which the Court will address to clarify the law).

The other exception the City argues is that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest. Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947); Berry v. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951) (same). However, pursuant to our opinion in Sloan v. Greenville County, Op. No. 25899 (S.C. Sup. Ct. filed November 22, 2004) (Shearouse Adv. Sh. No. 45 at 40), we find this case does not fit within the public importance exception to mootness because there is no imperative or manifest urgency in obtaining a decision on whether Town residents can vote in the District's election when the Town does not exist. Further, while ensuring voters are not improperly denied their right to vote in a particular election is important, the fact remains that the pertinent issue does not present a recurring dilemma such that this issue should be addressed to clarify the law. *Compare* Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) (important public interest exists in stewardship of public funds and strong need exists to provide guidance for future procurement decisions) *and* Sloan v. Sch. Dist. of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (same) *with* Sasser v. South Carolina Democratic Party, 277 S.C. 67, 282 S.E.2d 602

(1981) (appeal from circuit court order sustaining demurrers to petition to nullify results of primary election for political party's nomination to State House of Representatives was rendered moot, where general election had already occurred).

Accordingly, this case is dismissed as moot.

II

Following the circuit court's order finding there were no rights to declare in the declaratory judgment action, the District moved for attorney's fees pursuant to S.C. Code Ann. § 15-77-300 (Supp. 2003). Section 15-77-300 provides:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. . . .

The circuit court found the District was not entitled to attorney's fees because the District was not a "prevailing party" and the City had a substantial justification in bringing the action.

There are three prerequisites that must be established prior to the recovery of attorney's fees and costs by a party contesting state action. Heath

v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990). First, the contesting party must be the "prevailing party;" second, the court must find that the agency acted without substantial justification in pressing its claim against the party; and third, the court must find that there are no special circumstances that would make an award of attorney's fees unjust. *Id*.

The District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party and because this case is being dismissed as moot. *See* Heath v. County of Aiken, *supra* (court determines prevailing party by evaluating degree of success obtained). Therefore, the circuit court did not err by denying the District's motion for attorney's fees. *See* Heath v. County of Aiken, *supra* (award of attorney's fees will not be disturbed absent abuse of discretion). Accordingly, the decision of the trial court is
AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thurman O'Neil Smith, Jr., Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3916
Heard November 10, 2004 – Filed January 10, 2005
Withdrawn, Substituted and Refiled February 10, 2005

REVERSED

Edward T. Hinson, Jr., of Charlotte, and Leland Bland Greeley, of Rock Hill, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant and Attorney General David Spencer, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

STILWELL, J.: Thurman O'Neil Smith, Jr. was tried for murder and possession of a firearm during the commission of a violent crime and convicted of voluntary manslaughter and the weapons charge. He appeals, arguing the evidence did not support either the verdict of voluntary manslaughter or its submission as a verdict option. We reverse.

BACKGROUND

On June 10, 2002, Smith's 16-year-old daughter told her mother her paternal grandmother's husband, Tommy Moss, molested her when she was approximately 8 years old. She said the molestation happened at her grandmother's home while her grandmother was sleeping. Although she did not tell her parents at the time, she never spent the night at her grandmother's home again.

Around 7:00 a.m. the next day, Smith's wife relayed the allegation to Smith. Although shaken by the news, Smith went to work until about 3:15 p.m., when he left one work site and stopped by another to give a price estimate. Smith arrived at home between 4:00 and 4:20 p.m. While there, he had a beer and talked for about 45 minutes to his wife and daughter about the alleged molestation. They discussed seeking counseling for Smith's daughter, which spurred Smith to call his therapist to arrange an appointment. They also discussed whether law enforcement could be involved and about exposing what Moss had done. Smith then showered, talked to the therapist, and retrieved a gun from his dresser. He left the house, with his wife and daughter unaware he had the gun and under the impression he was going to a lake he frequented.

Instead, Smith drove to the home of a friend, and without mentioning the molestation allegation, discussed target practice. During the discussion, he asked his friend's son or the son's friend to go buy some shells for him, which he did. Smith left and stopped at a local bar and grill around 5:30 p.m. He talked with another friend, Tommy Edwards, and drank part of a beer. The two walked outside and continued to talk. Smith told Edwards about the

alleged molestation of his daughter and the earlier abduction and death of another daughter many years before.

After Edwards left, Smith loaded the gun with six bullets and started driving to the home of his mother and stepfather. Along the way, Smith stopped and removed the bullets, but he put two back in the gun. He arrived at the Mosses' home about twenty minutes later.

Smith's mother, Loretta, saw a truck she did not recognize[1] arrive in her driveway. When Smith stepped out of his truck, Loretta then recognized her son. Smith was yelling, asking Loretta something to the effect of "Where is that son of a bitch you're married to?" He screamed out the accusations against Moss, and Loretta responded Smith was wrong and his daughter was a "lying slut." Loretta testified Smith said, "I've come down here to kill you" to Moss. At this point, Moss was outside at his doorway. Smith was waving the gun, and Loretta was asking him to put the gun away. Moss possibly raised his hand and made contact with Smith's arm, and the gun fired. Moss was shot and he fell blocking the door, requiring Loretta to enter the house from the back to call for emergency assistance. Moss died.

DISCUSSION

Smith argues the trial court erred in charging the jury on the law of voluntary manslaughter and allowing the jury's voluntary manslaughter guilty verdict to stand. We agree.

The trial court must determine the law to be charged based on the evidence at trial. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d. 110, 112 (2003). When the record contains no evidence to support it, a voluntary manslaughter jury charge should not be given. See State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-69 (2000).

In considering a new trial motion based on insufficiency of the evidence, the trial court is concerned with the existence of evidence rather

[1] Smith and his mother had been estranged for nearly three years.

than its weight. See State v. Pauling, 264 S.C. 275, 278, 214 S.E.2d 326, 327 (1975). The weight of the evidence is a question for the jury. Id. Where there is any evidence supporting the jury's verdict, the court commits no error in denying the motion. Id.

> Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence.

State v. Cooley, 342 S.C. at 67, 536 S.E.2d at 668 (internal citations omitted). Even if sufficient legal provocation has aroused a defendant's passion, "if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001).

Assuming without deciding sufficient legal provocation existed in this case, the evidence clearly does not establish Smith acted in the sudden heat of passion. Smith heard the allegation early in the morning, went to work, talked to his family and called to make his daughter an appointment with a therapist, went to a friend's house to talk, dropped by a bar where he talked with another friend, and finally arrived at Moss's home in the evening. This was certainly a long enough period to render Smith capable of cool reflection. Also, during this time he retrieved his gun, had someone buy him ammunition, loaded the gun, unloaded it, and reloaded it. Although there was testimony he was upset, this evidence suggests he in fact coolly reflected on the situation. Because demonstration of sudden heat of passion is required to establish voluntary manslaughter, the evidence supports neither the voluntary manslaughter verdict option nor the verdict itself.

As a consequence of our reversal of Smith's conviction on the charge of voluntary manslaughter, we also reverse his conviction for possession of a

firearm during the commission of a violent crime, because the former is a prerequisite for the latter. S.C. Code Ann. § 16-23-490 (2003) (providing contemporaneous indictment and conviction of violent crime prerequisite to punishment under section 16-23-490). Absent the voluntary manslaughter conviction, Smith's conviction for violation of section 16-23-490 cannot stand. State v. Taylor, 356 S.C. 227, 235 n.4, 589 S.E.2d 1, 5 n.4 (2003); State v. Mouzon, 321 S.C. 27, 29 n.1, 467 S.E.2d 122, 124 n.1 (Ct. App. 1995).

REVERSED.[2]

SHORT, J., concurs.

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

I **VOTE** to **REVERSE** and **REMAND** for a new trial on involuntary manslaughter. In my judgment, a reversal is proper in regard to the charge of voluntary manslaughter, but the case must be remanded for the purpose of a new trial on involuntary manslaughter.

I am convinced that a retrial of the defendant on the charge of involuntary manslaughter is proper. In State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000), our supreme court edified:

> Furthermore, based on the testimony presented at Defendant's trial, the result of our holding here is that without any evidence of legal provocation Defendant cannot be retried on the charge of voluntary manslaughter. Thus, retrial will be limited to the charge of involuntary manslaughter.

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[2] The majority thoroughly agrees with the dissent that State v. Cooley would allow Smith to be tried on a charge of involuntary manslaughter. Even though this court does not specifically remand for that purpose, that option remains open should the solicitor in his discretion determine the facts of the case warrant it.

Id. at 69, 536 S.E.2d at 669.

Applying Cooley, a reversal encapsulates a retrial on involuntary manslaughter.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Henry Fletcher, **Appellant.**

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

Opinion No. 3940
Submitted January 1, 2005 – Filed January 31, 2005

AFFIRMED

Robert E. Lominack, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Warren B. Giese, of Columbia, for Respondent.

ANDERSON, J.: Henry Fletcher appeals his homicide by child abuse conviction. He argues the trial court erred in refusing to (1) exclude evidence of prior bad acts; (2) suppress evidence obtained through a search

warrant; (3) redact additional information from his co-defendant's statement; and (4) exclude photographs of the victim. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Around 1:15 p.m. on September 21, 2000, nine-month-old Jaquan Perry presented at the Palmetto Richland Memorial Hospital emergency room in full cardiopulmonary arrest. After medical personnel placed the infant on a ventilator, medicated him to maintain his blood pressure, and repeatedly attempted to resuscitate him, they pronounced him dead at 4:20 p.m. During treatment, CT scans were performed and x-rays were obtained. The tests revealed injuries throughout Jaquan's abdomen—including internal bleeding, bruises to the liver, bowels, pancreas, and little blood flow to the kidneys, spleen, and liver.

The police investigated Jaquan's death. Columbia police officer Joe Smith interviewed hospital personnel about Jaquan's injuries. When Officer Smith talked with Jaquan's mother, Ikeisha Perry, she told Smith that Jaquan fell from a bed. In her written statement, Perry declared she picked Jaquan up, comforted him, and brought him with her while she ran errands. Perry said she noticed something was wrong when they left the dentist's office. She could not hear Jaquan's heart beating. Perry then drove Jaquan to the hospital. Her live-in friend, Henry Fletcher, attempted CPR as she drove to the hospital.

When asked by Officer Smith whether she had ever beaten or spanked Jaquan, Perry claimed she had "popped" Jaquan but "[a]s far as beating him to bruise him, no I haven't." Perry admitted Jaquan had been handcuffed to a bedpost.

Fletcher provided statements to the police. In the first of two statements, Fletcher said Jaquan fell out of the bed on the morning of

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

September 21, 2000. He noted: Jaquan did not "look right" when they left the dentist's office; they did not hear Jaquan's heartbeat; and they drove to the hospital immediately, with Fletcher attempting to resuscitate Jaquan on the way. Fletcher maintained that sometimes he would "play fight" with Jaquan. In a later statement, Fletcher denied ever hitting Jaquan, but admitted he put some of his weight on Jaquan when they wrestled although he was not sure if doing so hurt Jaquan. Fletcher professed he hit Jaquan twice with his fists. At trial, Fletcher testified this statement was made in a sarcastic tone and was not meant to be taken as truth.

As part of the investigation, the police executed a search warrant of the home in which Perry and Fletcher lived. They seized a pair of handcuffs, went into the attic, and took photographs of the residence.

Fletcher and Perry were both arrested and charged with homicide by child abuse. They were indicted and tried.[2] Before jury selection, the trial court heard several motions, including motions to exclude evidence of prior bad acts and to suppress evidence found in connection with an allegedly invalid search warrant. The motions were denied.

Jaquan suffered injuries to his internal organs, which caused an infection that led to his death. The testimony of two witnesses who observed Jaquan indicated that Jaquan's eyes were half-closed and he was pale and non-responsive on the morning of September 21. One of the witnesses, Kimberly Hampton, related that Jaquan was making a strange breathing sound, one she characterized as "a death gurgle." By noon, when Perry brought Jaquan with her and her other child to the dentist's office, a witness noticed that Jaquan looked sick and pale but the witness did not hear unusual breathing sounds.

The State and Fletcher disagreed as to which injuries should have been included in the testimony. The State introduced evidence of two instances of abuse, which Fletcher describes as occurring "prior to that which caused

[2] Over defense counsel's objection, the trials of Fletcher and Perry were not severed.

Jaquan's death on September 21st." About three or four weeks prior to September 21, Carlos Jenkins visited Fletcher's home and found Jaquan handcuffed to a bed. Approximately two weeks before September 21, Jenkins returned to Fletcher's house and discovered Jaquan alone in the attic, crying and sweating profusely. Jaquan's ribs had been injured and were healing suggesting the injuries had been sustained about two weeks before Jaquan died. However, Jaquan's being handcuffed and left in a hot attic did not cause his death.

The medical evidence provided more details about Jaquan's injuries and offered information regarding the cause of his death. Dr. Timothy P. Close, a radiologist, testified the injuries revealed by the scans and x-rays were inflicted at different times and Jaquan's rib fractures were "[p]robably not" caused by Fletcher's alleged resuscitation attempts. Dr. Close estimated some of the rib fractures were as recent as a few hours to a few days old and other, older fractures were ten days to more than two weeks old (with some of the ribs having been broken twice). He declared the liver injuries were likely caused within forty-eight hours of Jaquan's death and the bowel injuries occurred at least twelve hours or more before Jaquan's death. He stated the injuries were inconsistent with either a fall from a bed or with a single blow ("most likely" multiple blows to the front of Jaquan). Rather, his injuries were caused by a force equivalent to ejection from a car involved in an accident when the car had been traveling sixty to seventy miles per hour or a fall from a three or four story building.

Dr. Robert D. Hubbird noted when Jaquan arrived at the hospital his abdomen was "very, very distended and protuberant," he had multiple rib fractures, a ruptured bowel which caused an infection or sepsis, and such significant damage to his liver that it "was dying." Dr. Hubbird explained the internal bleeding had been going on for days; the injuries had been caused over a period of days; and the ribs had been injured at different times. He testified the abdominal and back bruises occurred at different times, with some green bruises, which indicated they were "five to seven, [even] ten days old." Dr. Hubbird expounded that some of the bruises could have been caused by resuscitation attempts but others were not. He declared that the cause of the injury must have been "incredibly concentrated striking, a very

powerful blow" to have caused the damage—destroyed bowel wall, ruptured bowel, disrupted liver—and must have been more than one blow. He articulated blunt force might not leave a bruise each time because the body sometimes absorbs the force. Dr. Hubbird opined Jaquan died from "child abuse from massive intra-abdominal injuries; massive injuries to kill the bowel, caused widespread infection, killed the liver."

The autopsy yielded additional information. Dr. Jeffrey Allen Welsh performed the autopsy. The autopsy demonstrated several bruises on Jaquan's back and a distended abdomen. A "tense" abdomen is abnormal in a child. Dr. Welsh confirmed resuscitation attempts may have caused some of the chest bruises. After reviewing x-rays and CT scans and performing an external and internal examination, Dr. Welsh determined the cause of death was from blunt abdominal trauma, which caused infection that ultimately led to Jaquan's death. He found, based on the scar formation on the internal organs, the injuries occurred at least forty-eight hours before death and likely earlier than that, with the injuries occurring at different times. Dr. Welsh opined the type of force necessary to inflict the trauma evidenced on Jaquan's body "would have been significant because the injuries to the liver, for example, are those described mainly with motor vehicle type accidents." Dr. Welsh concluded the injuries Jaquan sustained were consistent with battered child syndrome. Dr. Welsh enunciated that Jaquan's injuries would have caused great pain and lethargy, making it obvious Jaquan needed medical attention.

Fletcher presented evidence that: (1) he was not aware Jaquan had been handcuffed to the bed; (2) Perry sometimes left Jaquan in the attic while she dried her laundry up there; and (3) the attic had an air conditioning vent near the door. Fletcher professed he had never "beat" Jaquan. Perry introduced evidence that Jaquan was not injured before early September; rib fractures in children are not uncommon; and Perry's mother saw Jaquan the day before he died and did not notice anything wrong.

The jury found both Fletcher and Perry guilty of homicide by child abuse. Fletcher was sentenced to life in prison.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, Op. No. 3900 (S.C. Ct. App. filed December 6, 2004) (Shearouse Adv. Sh. No. 47 at 74). This court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Landis, Op. No. 3904 (S.C. Ct. App. filed December 6, 2004) (Shearouse Adv. Sh. No. 48 at 73). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. On review, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990); see also State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) (an abuse of discretion is a conclusion with no reasonable factual support). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

LAW/ANALYSIS

I. PRIOR BAD ACTS

Over Fletcher's objection, the trial court allowed the State to introduce evidence indicating Jaquan had been abused. Carlos Jenkins, who worked with Fletcher and had known him for four or five years, testified about two incidents that occurred before Jaquan's death.

The first incident Jenkins recalled happened at Fletcher's residence approximately two weeks before Jaquan's death. When Jenkins walked in the house, he heard Jaquan crying. Jenkins found Jaquan in a walker in the attic, which was "real hot." Jenkins took Jaquan outside to cool him off. According to Jenkins, Jaquan was "pouring down sweat like he had just

dipped him in a bathtub." He testified that, although the house was air-conditioned, a person in the attic could not feel the air-conditioning in the house because the door to the attic was closed. Jenkins said Fletcher and Perry showed no concern about Jaquan. In fact, Fletcher told Jenkins the house was his and that Jenkins should "mind [his own] business." Jenkins did not see who put Jaquan in the attic (which Fletcher describes as a laundry room) but Jenkins stated that both Fletcher and Perry were home.

The second incident took place at Fletcher's home when Jenkins went to visit Fletcher about three to four weeks prior to Jaquan's death. When Jenkins followed Fletcher to the bedroom, he observed Jaquan lying on his back, crying and screaming, handcuffed by his feet to the foot of the bed. Jenkins unlocked the handcuffs and asked Fletcher and Perry if they were crazy. They "just giggled" at him.

Jenkins did not see who handcuffed Jaquan to the bed. He did not testify he noticed any injuries to Jaquan.

A. Issue Preservation

Fletcher did not object to the sufficiency of the trial court's ruling on the admissibility of Jenkins' testimony. A trial court's general ruling that evidence was admissible does not constitute reversible error. State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) (holding the failure to request a more explicit ruling constitutes a waiver to any objection to the trial court's general ruling). Although Fletcher cannot object to the sufficiency of the trial court's ruling for the first time on appeal, he contends the trial court ruled on the issue during the trial and that erecting a procedural barrier is unnecessary.

Fletcher did not independently object to the evidence on the ground it was less than clear and convincing. However, Perry's counsel objected: "the rib injuries should not come in because there was no clear and convincing evidence as to who inflicted these rib injuries." Fletcher's attorney then joined Perry's objection: "For the record, your Honor[,] . . . I would join in his objection."

B. The Continued Juridical Journey of Rule 404(b) and State v. Lyle

Fletcher argues the trial court erred in allowing evidence of the prior bad acts pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Fletcher contends the two incidents were unrelated to the rib injuries and Jaquan's death and claims the incidents were not causally or temporally related. We disagree.

Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); see also State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity therewith).

However, evidence of other crimes is generally admissible when it is necessary to establish a material fact or element of the crime charged. See Johnson, 293 S.C. at 324, 360 S.E.2d at 319; State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1981); State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). Thus, such evidence is admissible when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see also Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003) (explaining that Rule 404, the modern expression of the Lyle rule, excludes evidence of other crimes, wrongs, or acts offered to prove character of person in order to show action in conformity therewith; the rule creates an exception when testimony is offered to show motive, identity, existence of common scheme or plan, absence of mistake or accident, or intent).

If not the subject of a conviction, a prior bad act must first be established by clear and convincing evidence. Beck, 342 S.C. at 135, 536 S.E.2d at 683; State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004); see also State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003) (noting when the appellate court determines whether clear and convincing evidence exists of the prior bad acts, it is bound by the trial court's findings of fact unless they are clearly erroneous). The bad act must logically relate to the crime with which the defendant has been charged. Beck, 342 S.C. at 135, 536 S.E.2d at 682-83; see also State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) (declaring that record must support logical relevance between prior bad act and crime for which defendant is accused). In making the determination of whether evidence of prior bad acts is admissible, the trial court must gauge its logical relevancy to the particular purpose for which it is sought to be introduced. See State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986). If the prior bad act evidence is "logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." Id. at 497, 343 S.E.2d at 630-31 (internal quotations omitted). If there is any evidence to support the admission of prior bad act evidence, the trial judge's ruling will not be disturbed on appeal. Pagan, 357 S.C. at 143, 591 S.E.2d at 652.

Even if evidence of other crimes is admissible under Rule 404(b), the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Beck, 342 S.C. at 135-36, 536 S.E.2d at 683; see also Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Sweat, Op. No. 3898 (S.C. Ct. App. filed December 6, 2004) (Shearouse Adv. Sh. No. 47 at 49). The determination of prejudice must be based on the entire record and the result will generally turn

on the facts of each case. Id. A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. Id.

1. Common Scheme or Plan Exception

In the present case, the trial judge admitted the evidence of prior abuse under the common scheme or plan exception to Rule 404(b), SCRE, and State v. Lyle.

"A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997); State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct. App. 2004). "A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary." Timmons, 327 S.C. at 52, 488 S.E.2d at 325; see also State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (stating that the common scheme or plan exception requires not just similarity of the other acts to the crime charged, but also a close relationship between the crimes); State v. Moultrie, 316 S.C. 547, 554, 451 S.E.2d 34, 39 (Ct. App. 1994) ("Clear and convincing evidence of prior crimes or bad acts that is logically relevant is . . . admissible to prove . . . a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other."). The degree of similarity or remoteness between the prior bad acts and the crime charged should be considered in determining the connection between them. See, e.g., State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995).

In deciding whether to admit evidence of prior bad acts, courts must weigh the probative value of evidence of prior bad acts against its prejudicial effect. State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its

prejudicial effect, it is admissible. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). However, even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Id. Thus, "[s]uch evidence is inadmissible 'unless the close similarity of the charged offense and the previous act[s] enhances the probative value of the evidence so as to overrule the prejudicial effect.'" McClellan, 283 S.C. at 392, 323 S.E.2d at 774.

In State v. Pierce, 326 S.C. 176, 485 S.E2d 913 (1997), the supreme court ruled testimony about the rough treatment of the child one year before the child's death was not admissible under the common scheme or plan exception because of the lack of a connection between the incident and the crime of homicide by child abuse. Id. at 178-79, 485 S.E.2d at 914. This case is distinguishable from Pierce. Here, one of the alleged prior incidents of abuse occurred only three to four weeks before Jaquan's death and the other incident of abuse took place merely two weeks prior to his death.

Our supreme court has held that evidence of a prior conviction for assault and battery of a high and aggravated nature of a boy was not admissible in a later prosecution for homicide by child abuse of the boy's sister because the type of injury was dissimilar. State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996). In the present case, although the type of abuse is dissimilar, the victim of the prior incidents and the victim of the alleged homicide by child abuse are the same.

This court, in State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993), determined evidence of abuse against one of the stepdaughters was admissible because both she and the victim experienced similar acts of abuse by the defendant which occurred in the same places and during the same time frame. Id. at 108, 432 S.E.2d at 491. Evidence of abuse against another stepdaughter was not admissible because she was not subjected to the alleged abusive conduct to the extent of her sisters. Id.

In the case sub judice, the prior bad acts evidence was relevant to the existence of a common scheme or plan of child abuse and neglect. The

evidence demonstrates by clear and convincing proof the occurrence of the prior bad acts. Additionally, the probative value of the evidence regarding the prior abuse outweighs the prejudicial effect of admitting the evidence. See State v. Beck, 342 S.C. 129, 136, 536 S.E.2d 679, 683 (2000) ("After conducting a Lyle analysis and finding evidence both relevant and admissible as a prior bad act, the trial court must conduct a Rule 403, SCRE analysis to determine whether or not the evidence is unduly prejudicial."). Thus, the trial judge did not err in admitting Jenkins' testimony under the common scheme or plan exception to Rule 404(b), SCRE and State v. Lyle.

2. Intent/Absence of Mistake or Accident/Identity

Evidence of prior bad acts may be admissible to prove intent or absence of mistake or accident. See, e.g., State v. Key, 277 S.C. 214, 284 S.E.2d 781 (1981); State v. Turbeville, 275 S.C. 534, 273 S.E.2d 764 (1981). Further, prior bad acts evidence is admissible if necessary to establish a material fact or element of the crime charged. See, e.g., State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004).

A person who causes the death of a child under the age of eleven while committing child abuse or neglect, when the death occurs under circumstances manifesting an extreme indifference to human life, is guilty of homicide by child abuse. S.C. Code Ann. § 16-3-85(A)(1) (2003). "Extreme indifference is in the nature of a culpable mental state . . . and therefore is akin to intent." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002) (internal quotations omitted).

In addition, evidence identifying the perpetrator may be admissible. State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996) (finding court properly admitted evidence the defendant acted as gunman in stealing a car two hours before allegedly committing murder); State v. Good, 315 S.C. 135, 432 S.E.2d 463 (1993) (noting that evidence of prior conviction for burglary of similar items from the same residence against the same victim as the robbery and murder for which defendant was charged was admissible). Fletcher asserts the present case is distinguishable from Forney and Good because of

the temporal closeness of events in Forney and the unique similarities in the crimes and bad acts in Good. Given the nature of the crime in the present case, the prior incidents are sufficiently related in time and in similarity. Fletcher claimed he was not at home when the fatal injuries were inflicted. Perry's witnesses testified they saw no injuries before Jaquan's death and described Perry as a loving mother. In support of identifying the perpetrator, the evidence of prior bad acts was used to demonstrate that Fletcher was at home. The evidence was probative as to the fundamental element of identity pursuant to Rule 404(b) and Lyle.

The prior bad acts evidence, the alleged incidents of abuse, was admissible under the intent, absence of mistake or accident, and identity exceptions to Rule 404(b) and Lyle. The evidence was necessary to establish a material fact or element of the crime charged. The trial court did not abuse its discretion in allowing Jenkins' testimony.

C. Res Gestae

Fletcher contends the trial court erred in allowing evidence of the prior bad acts under the res gestae doctrine. We disagree.

Evidence of bad acts or other crimes may be admitted under the res gestae theory:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged."

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)). When evidence is admissible to provide this "full presentation" of the offense, there is "no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." Adams, 322 S.C. at 122, 470 S.E.2d at 371 (internal quotations omitted). The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, Op. No. 3900 (S.C. Ct. App. filed December 6, 2004) (Shearouse Adv. Sh. No. 47 at 74). Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. Owens, 346 S.C. at 652, 552 S.E.2d at 753. Even if the evidence is relevant under this theory, prior to admission the trial judge should determine whether its probative value clearly outweighs any unfair prejudice. Rule 403, SCRE; State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990).

Fletcher alleges the prior incidents of abuse were neither factually nor temporally related to the charged crime. In this case, the time period and similarity of the incidents involved must be examined overall because of the nature of the crime charged. The overall view of the facts provides the context in which the crime occurred and demonstrates the culminating impact on Jaquan. The medical testimony indicated the injuries occurred over a period of time. The prior incidents were temporally related, occurring close in time to Jaquan's death. The incidents were relevant to establishing Fletcher's state of mind and whether he manifested an extreme indifference to human life.

The alleged child abuse occurred in the two weeks during which Jaquan's ribs were fractured and within days of when the abdominal trauma was inflicted. Extreme indifference to a human life was an element of the crime charged. The evidence of incidents occurring during the same time period as the injuries leading to Jaquan's death established Perry and Fletcher's extreme indifference to Jaquan's life.

The evidence was necessary to establish the crime charged. Admission of the testimony was essential and relevant to a full presentation of the evidence in this case. The testimony regarding the prior bad acts was relevant to show the complete, whole, unfragmented story relating to the charge of homicide by child abuse. Moreover, the probative value of the evidence outweighed its prejudicial effect. See Owens, 346 S.C. at 653, 552 S.E.2d at 753. The trial court did not err in admitting the evidence of alleged prior abuse under the res gestae doctrine.

D. Harmless Error

Assuming arguendo the trial judge erred in admitting Jenkins' testimony, we find such error was harmless.

Whether an error is harmless depends on the circumstances of the particular case. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). No definite rule of law governs this finding. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). Rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. at 63, 584 S.E.2d at 897; Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996); Thompson, 352 S.C. at 562, 575 S.E.2d at 83; State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172,

399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795; see also State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (noting that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside conviction for insubstantial errors not affecting result). The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) (instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (explicating that any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

Any error in the admission of the prior bad acts testimony is harmless beyond a reasonable doubt given the overwhelming evidence of guilt in this case. Extensive medical testimony was admitted describing Jaquan's rib fractures (injuries which did not lead directly to Jaquan's death but demonstrated a pattern of child abuse in the weeks before it). Fletcher does not argue this evidence was prejudicial. Thus, Jenkins' testimony, irrespective of its detail, was merely cumulative to other evidence of child abuse and, therefore, harmless.

II. SEARCH WARRANT

During the investigation, the police obtained a warrant to search the home of Perry and Fletcher, seeking "[p]hotographs of the residence . . .[and] any evidence of abusive behavior towards the children of the residence." The affidavit did not specify police suspected child abuse, but it specifically described the situation: Perry brought nine-month-old Jaquan to the hospital;

the child arrived in respiratory arrest; the child died; Perry told investigators Jaquan fell from a bed; Perry later noticed Jaquan was not breathing; examination of the child revealed bruises on his back and abdomen; the cause of death was unknown; and police believed examination of the residence might lead to the discovery of information that would assist investigators in determining the child's cause of death.

The police officers searched the home and seized a bed frame, a mattress, and a set of handcuffs. Before trial, Fletcher moved to suppress the evidence obtained pursuant to the search warrant, alleging a lack of probable cause that particular evidence would be found at the residence and lack of particularity as to what items were sought. At the motions hearing, the officer who obtained the warrant testified he may have told the magistrate that police suspected child abuse, but no other evidence suggested the officer was under oath when he gave the magistrate this information. The motion to suppress was denied and the photographs and handcuffs were entered into evidence at trial.

Fletcher failed to object at trial to the admission of the photographs. Making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a ruling in limine is not a final determination. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). Thus, the moving party must make a contemporaneous objection when the evidence is introduced. Id.; see also State v. Mitchell, 330 S.C. 189, 193 n. 3, 498 S.E.2d 642, 644 n. 3 (1998) ("We have consistently held a ruling in limine is not final, and unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.") (citation omitted); State v. Floyd, 295 S.C. 518, 521, 369 S.E.2d 842, 843 (1988) ("We caution Bench and Bar that these pre-trial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence."). Unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Because Fletcher failed to renew his objection, the issue was not properly preserved.

In addition, Fletcher did not join Perry's argument for suppression of the evidence on the ground of insufficient probable cause. A defendant cannot bootstrap an issue for appeal via his co-defendant's objection. State v. Carriker, 269 S.C. 553, 238 S.E.2d 678 (1977); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001). The probable cause issue Fletcher raises may not have been properly preserved.

A. Probable Cause

Adverting to the merits, Fletcher asserts the search warrant affidavit did not contain sufficient facts to constitute probable cause to believe evidence of a crime would be found at the residence. We disagree.

A magistrate may issue a search warrant only upon a finding of probable cause. State v. Tench, 353 S.C. 531, 579 S.E.2d 314 (2003); State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004). A probable cause determination requires the magistrate to analyze the totality of the circumstances, meaning he should make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. See Illinois v. Gates, 462 U.S. 213 (1983); Bowie, 360 S.C. at 219, 600 S.E.2d at 116-17. Probable cause is a flexible, common-sense standard. Bowie, 360 S.C. at 220, 600 S.E.2d at 117. The term "probable cause" does not import absolute certainty. Id. In determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties. Id.

"The South Carolina General Assembly has enacted a requirement that search warrants may be issued 'only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant.'" State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (quoting S.C. Code Ann. § 17-13-140 (1985)). The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003); State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995).

Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976); Dupree, 354 S.C. at 683, 583 S.E.2d at 441. Affidavits must be judged on the facts presented and not on the precise wording used. Bowie, 360 S.C. at 220, 600 S.E.2d at 117.

The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant is issued. State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988); State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. Bowie, 360 S.C. at 219, 600 S.E.2d at 116.

An appellate court reviewing the decision to issue a search warrant must decide whether the magistrate had a substantial basis for concluding probable cause existed. Bowie, 360 S.C. at 216, 600 S.E.2d at 115; Dupree, 354 S.C. at 683, 583 S.E.2d at 441; State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); see also State v. 192 Coin-Operated Video Game Machs., 338 S.C. 176, 525 S.E.2d 872 (2000) (finding that as long as the magistrate had a substantial basis for concluding a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. The appellate court should give great deference to a magistrate's determination of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); Driggers, 322 S.C. at 510, 473 S.E.2d at 59; see also Sullivan, 267 S.C. at 617, 230 S.E.2d at 624 (elucidating that magistrate's determination of probable cause should be paid great deference by reviewing court). Searches based on warrants will be given judicial deference to the extent an otherwise marginal search may be justified if it meets a realistic standard of probable cause. State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971).

Based on the totality of the circumstances, the affidavit provided the magistrate with a substantial basis for finding probable cause to search the

home of Fletcher and Perry. See Weston, 329 S.C. at 291, 494 S.E.2d at 803 (finding duty of reviewing court is simply to ensure that magistrate had substantial basis for concluding probable cause existed). The affidavit edifies: (1) that Perry claimed Jaquan fell out of bed in the morning and was brought to the hospital because he stopped breathing; and (2) that there were bruises on the child. Concomitantly, the suspicion of child abuse is not only implicit but is verifiable. This suspicion supported the magistrate's finding of probable cause. Thus, the warrant is valid. Because investigators searched the residence pursuant to a valid warrant, the trial court properly refused to suppress the evidence, including the handcuffs and photographs, found in the search.

B. Scope of the Search Warrant

Fletcher claims the affidavit did not describe with sufficient particularity the property to be seized, and the trial court erred in refusing to suppress evidence resulting from an invalid search warrant. We disagree.

To pass constitutional muster, a search warrant shall not be issued unless it particularly describes "the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; see also S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained."). An objective of this "particular description" requirement is to prevent general warrants—those authorizing "a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). The South Carolina Code requires a warrant "identifying the property" to be seized. S.C. Code Ann. § 17-13-140 (2003). The statute requires no more than the state and federal constitutions, both of which require warrants to particularly describe the things to be seized. State v. Williams, 297 S.C. 404, 377 S.E.2d 308 (1989). "[T]he particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and . . . a description of property will be

acceptable if it is as specific as the circumstances and nature of activity under investigation permit." State v. Sullivan, 281 S.C. 522, 524, 316 S.E.2d 404, 406 (1984) (internal quotations omitted); see also United States v. Osborne, 630 F.2d 374, 377 (5th Cir. 1980) (upholding a warrant authorizing the seizure of several described items and "any other evidence relating to the armed robbery"); State v. Malloy, 409 N.W.2d 707, 708 (Iowa Ct. App. 1987) (approving a warrant authorizing the seizure of specified items as well as "evidence of instrumentalities which would substantiate abuse or neglect").

The warrant in the instant case was limited to evidence of abusive behavior toward the children. The exact characteristics of the evidence were unknown to investigators. However, requiring a more detailed description would unreasonably thwart an investigation. The warrant did not authorize a search for evidence of other crimes and its scope was properly limited. Therefore, it was not fatally general. The trial court did not err in allowing evidence found pursuant to the valid search.

Even if the evidence was erroneously admitted, the error is harmless beyond a reasonable doubt because it could not have impacted the jury's verdict. See State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); see also State v. Tench, 353 S.C. 531, 579 S.E.2d 314 (2003) (noting the erroneous admission of evidence may be harmless if it did not affect the outcome of the trial); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (stating error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained). The State established homicide by child abuse by overwhelming evidence, including the medical testimony which proved the injuries could not have been accidental and the child's obvious pain would have indicated he needed medical attention long before Fletcher and Perry took him to the hospital. In addition, Fletcher admitted the handcuffs belonged to him. Even the erroneous admission of the handcuffs could not have affected the jury's verdict.

III. CONFRONTATION CLAUSE

Both Perry and Fletcher provided statements to investigators. At a pre-trial hearing pursuant to Bruton v. United States, 391 U.S. 123 (1968), Fletcher requested the trial court redact the following from Perry's September 22, 2000 statement:

> Q. What was Jaquan handcuffed to?
> A. He was handcuffed to the bottom rail of the bed.
>
> Q. Which bed was Jaquan handcuffed to?
> A. The bed in my room, the one in there now. He [sic] friend Carlos came in the house and took the handcuffs off and told Henry he shouldn't do that.

The trial court redacted the reference to Carlos as "he friend" and the reference to Fletcher in the second answer. The second response then stated: "The bed in my room, the one in there now. Carlos came in the house and took the handcuffs off." The trial court redacted references to other handcuffing incidents and Perry's statement that Fletcher beat Jaquan with a belt. The trial judge provided the jury with a limiting instruction when the statements were introduced and with a similar instruction when he charged the jury on the law.

A. Redacted Statement of Perry

Fletcher submits the trial court erred by failing to adequately redact Perry's statement, which violated the sixth and fourteenth amendments to the United States Constitution and article one, section fourteen of the South Carolina Constitution. We disagree.

"The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The introduction of a non-testifying co-defendant's statement

which implicates a defendant violates a defendant's right to confrontation because no opportunity to cross-examine the co-defendant is presented. Bruton, 391 U.S. at 137. Because the right to confrontation is so fundamental, limiting instructions are not an adequate substitute. Id.; see also State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) (recognizing that in Bruton, the Supreme Court held that a defendant's rights under the Confrontation Clause of the Sixth Amendment are violated by the admission of a non-testifying co-defendant's confession that inculpates a defendant, even if a cautionary instruction is given).

Redaction has come into play as a tool to allow admission of a co-defendant's confession against the confessor in a joint trial. State v. Holmes, 342 S.C. 113, 536 S.E.2d 671 (2000). The point of redaction is to permit the confession to be used against the non-testifying confessor, while avoiding implicating his co-defendant. Id. The Confrontation Clause is not violated when a defendant's name is redacted but other evidence links the statement's application to the defendant, if a proper limiting instruction is given. Richardson v. Marsh, 481 U.S. 200, 211 (1987) (holding "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.").

The redacted version of Perry's statement neither mentions nor implicates Fletcher. Unlike the defendant in Bruton, Fletcher was not named as a participant in the crime. See Richardson, 481 U.S. at 208 (distinguishing Bruton in a case in which the confession was not incriminating on its face).

Based on Richardson, Fletcher's right to confrontation was not violated. The statement that Jaquan was handcuffed indicates someone other than Perry may have handcuffed the child but does not necessarily implicate Fletcher. Therefore, Perry was not a witness against Fletcher and no violation of his right to confront a witness against him occurred. See State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994) (finding a co-defendant's statement admissible where, although the statement's incriminating import was inferable from other evidence properly admitted against the defendant,

the statement did not on its face incriminate the defendant). Because the trial court adequately redacted Perry's statement and gave a proper limiting instruction to the jury, Fletcher's right to confrontation was not violated.

B. Cross-Examination by Perry

The State introduced a statement Perry gave to police officers. Perry did not testify, but Perry's counsel used her statement in cross-examining Fletcher. After Fletcher said Perry was home during the alleged handcuffing incident and denied Perry cussed him out or told him not to handcuff Jaquan to the bed, counsel for Perry referred to Perry's statement. Fletcher's attorney objected. The trial court overruled the objection. Fletcher, as instructed by Perry's counsel, read from Perry's statement:

A. "What was Jaquan doing that was so bad?"
Q. All right. Here. And the answer is?
A. I don't know what the last word is.
Q. But what does it say?
A. I came home; Jaquan was in the—
Q. All right. And what's the next question; the next question?
A. "What was Jaquan handcuffed to?"
Q. And what does it say here? What is the answer?
A. "He was handcuffed to the bottom rail of the bed."
Q. So your story is that Ms. Perry was there?
A. Yes, sir.
Q. And you deny that she came home and witnessed this and cussed you out about this?
A. Yes, sir.

Fletcher complains the use of Perry's statement in cross-examining him improperly "pitted him against [Perry's] previous statement" and the trial court erred in overruling his objection.

The record shows Fletcher raised a general objection to the publication of Perry's statement by Fletcher. When Perry's counsel asked Fletcher to read from Perry's statement, Fletcher's attorney declared: "I'll object to

having [Fletcher] publish another person's statement." The judge overruled the objection. It is well settled that an objection must be on a specific ground. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001). To be preserved for appellate review, an objection should be sufficiently specific to bring into focus the precise nature of the alleged error. Id. The objection here lacks specificity. Fletcher did not present the trial judge with the issue of "pitting" witnesses based on this colloquy. This issue is not preserved for our review.

IV. PHOTOGRAPHS

During the trial, the State, over Fletcher's objection, was allowed to introduce post-mortem photographs of Jaquan when the trial court found them "admissible under 403." The photographs depicted Jaquan's external injuries. The photograph labeled State's Exhibit 1 shows Jaquan on a hospital gurney, unclothed, with a tube in his mouth, as well as gauze and an unidentified incision near the genital area (related to medical intervention). The other photographs depict bruises on Jaquan's body.

Fletcher asseverates the photographs were calculated to arouse the sympathy or prejudice of the jury and were irrelevant. He argues there was little probative value to State's Exhibit 1 and several of the photographs showing bruises were irrelevant, unnecessary to substantiate material facts, and inflammatory in nature.

Perry's attorney noted his objection but did not state a ground. He declared: "We would object to those." A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve the issue for review. State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). During the bench conference, neither Perry nor Fletcher asked to place a ground for the objection on the record. An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001). In addition, an issue is not preserved for appeal merely because the trial judge mentions it. See, e.g., Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951). Fletcher contends the trial court's

ruling on the matter indicates a specific objection was made off the record, and because the trial court ruled on the record, the error was preserved. Fletcher made no independent objection on the record. He concurred in the objection of Perry's counsel. Furthermore, the trial court's mentioning the issue does not preserve it for appeal. Thus, the issue is not preserved for our review. In addition, we disagree with Fletcher's substantive argument.

The relevance, materiality, and admissibility of photographic evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999); see also State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (stating that trial judge has considerable latitude in ruling on admissibility of evidence and his rulings will not be disturbed absent showing of probable prejudice). The trial judge must balance the prejudicial effect of graphic photographs against their probative value. State v. Vang, 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003). A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001). Admitting photographs which serve to corroborate testimony is not an abuse of discretion. See State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

The photographs were introduced to corroborate the testimony of witnesses who saw Jaquan's injuries at or near the time of his death. The pictures demonstrated the trauma occurred over a period of time because they showed the discoloration of the bruises. The photographs were necessary to depict the severity of the bruises and the resultant trauma, which were

inconsistent with those resulting from an accident or play. They indicated the presence of internal injuries (e.g., the distended abdomen indicated rib fractures). The photographs corroborated testimony that the cause of death was child abuse and the abuse manifested an extreme indifference to human life. The photographs were relevant and necessary and were not inflammatory or calculated to illicit sympathy or prejudice of the jury. Therefore, the trial court did not abuse its discretion in admitting the photographs.

CONCLUSION

Based on the foregoing, the conviction of Fletcher is

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Alvin Jermaine Green, **Appellant.**

Appeal From Clarendon County
Howard P. King, Circuit Court Judge

Opinion No. 3941
Heard December 7, 2004 – Filed January 31, 2005

VACATED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Cecil Kelley Jackson, of Sumter, for Respondent.

ANDERSON, J.: Alvin J. Green was convicted of criminal sexual conduct (CSC) with a minor in the first degree and CSC with a minor in the second degree. He contends the trial court lacked subject matter jurisdiction over both offenses. We vacate the convictions and sentences of Green.

FACTUAL/PROCEDURAL BACKGROUND

Green was charged with two counts of CSC with a minor, both stemming from alleged sexual assaults on the same victim. The allegation of CSC with a minor in the first degree concerned events before the victim's eleventh birthday and the second-degree allegation related to a period of time after the victim's eleventh birthday. However, three of the four dates listed in the two-count indictment were off by ten years. At trial, the State moved to amend the indictment to correct the three dates that were ten years earlier than the offenses allegedly occurred. Defense counsel objected to the amendment, but conceded the language in the indictments followed the statute creating the offenses. After a discussion, the trial court allowed the amendment, concluding the dates originally included were scrivener's errors. Green then waived presentment to the amended indictment while purporting to preserve his objection to the amendment itself. After the State rested, the defense noted the first count of the amended indictment (for CSC with a minor in the first degree) contained a time span for the alleged offenses which included dates in which Green was too young to be prosecuted in circuit court as well as dates in which such prosecution was proper. In response, the trial court again amended the first count of the indictment to include only dates in which Green was old enough to be tried as an adult. The jury found Green guilty as charged and the trial court sentenced him to concurrent fifteen-year prison terms.

LAW/ANALYSIS

The Circuit Court does not have subject matter jurisdiction to convict a defendant of an offense unless: (1) there has been an indictment which

sufficiently states the offense; (2) the defendant has waived presentment of the indictment; or (3) the offense is a lesser included offense of the crime charged in the indictment. State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002); State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002). An indictment is sufficient to convey jurisdiction if it apprises the defendant of the elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend. Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004). The acts of a court with respect to a matter as to which it has no jurisdiction are void. Guthrie, 352 S.C. at 107, 572 S.E.2d at 312.

Under section 17-19-100 of the South Carolina Code, if an indictment contains any defect or, "on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof," the trial court "may amend the indictment . . . if such amendment does not change the nature of the offense charged." S.C. Code Ann. § 17-19-100 (2003). "After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause." Id. The appropriate analysis for determining whether an amendment to an indictment deprives the trial court of subject matter jurisdiction is whether the amendment changed the nature of the offense charged, not whether the amendment in any way surprised or prejudiced the defendant. State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001).

Generally, amendments are permitted for the purpose of correcting an error of form, such as a scrivener's error. Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003). Otherwise, if the defendant objects to an amendment on grounds that the amended indictment would change the nature of the offense, the trial judge is obligated to inform the parties of the necessity of reindictment or obtain a waiver of presentment from the defendant. Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994).

"Critical determinations to be made by a court when confronted with the issue of amending the date alleged in an indictment is always whether the amendment alters the nature of the offense charged and surprises the accused, preventing a fair trial." State v. Quarles, 261 S.C. 413, 417, 200 S.E.2d 384, 385 (1973). "A motion to amend the date alleged in an indictment is addressed to the sound discretion of the trial judge, and the burden of showing an abuse of discretion and resulting prejudice is upon the party adversely affected by his ruling thereon." Id. at 417, 200 S.E.2d at 386.

The indictment as crafted by the drafter reveals a date deficiency. The dates contained in the indictment presented to the grand jury apply to a two-year-old defendant and an unborn victim. At a minimum, the indictment is fatally flawed in regard to an identification and articulation of criminal sexual conduct charges.

Initially, the State moved to amend the indictment to change the dates of the alleged offenses to a current era. After granting the amendment, the court was confronted with charges against the defendant which could not be tried in the circuit court because of the age of the defendant, i.e., under the age of sixteen. The court redacted the indictment by extirpating certain dates contained in the indictment relating to the defendant's being under the age of sixteen.

We decline to place our approbation and imprimatur upon the subject matter juxtaposition between the family court and the circuit court. The prosecutorial endeavors are not efficacious. Approval of the amendment activities and rulings in the case under the rubric and guise of salutary and salubrious amendments flies in the face of the grand jury and indictment procedure enunciated in the South Carolina Constitution and applicable statutes.

No precedent is cited in approving the amendatory activities involving the indictment in this case. The indictment moves through a peripatetic journey from the circuit court to the family court and back to the circuit court as finally amended.

The gravamen of our conclusion rests upon the efficacy of sections 20-7-400 and 20-7-7605 of the South Carolina Code. Section 20-7-400, titled "**Exclusive original jurisdiction of family court**," states:

> (A) Except as otherwise provided herein, **the court shall have exclusive original jurisdiction and shall be the sole court for initiating action**:
>
> . . . .
>
> (3) Concerning any child seventeen years of age or over, living or found within the geographical limits of the court's jurisdiction, alleged to have violated or attempted to violate any State or local law or municipal ordinance **prior to having become seventeen years of age** and such person shall be dealt with under the provisions of this chapter relating to children.

S.C. Code Ann. § 20-7-400 (1985 & Supp. 2003) (emphasis added). Under the Children's Code, the general sessions court ordinarily lacks jurisdiction over individuals under the age of seventeen, with certain exceptions. See S.C. Code Ann. § 20-7-7605 (Supp. 2003). Section 20-7-7605 reads in pertinent part:

> In accordance with the jurisdiction granted to the family court pursuant to Sections 20-7-400, 20-7-410, and 20-7-420, jurisdiction over a case involving a child must be transferred or retained as follows:
>
> (1) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this State, **it is ascertained that the child was under the age of seventeen years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case**,

together with all the papers, documents, and testimony connected with it, **to the family court of competent jurisdiction**, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section. The court making the transfer shall order the child to be taken immediately to the place of detention designated by the court or to that court itself, or shall release the child to the custody of some suitable person to be brought before the court at a time designated. The court then shall proceed as provided in this article. The provisions of this section are applicable to all existing offenses and to offenses created in the future unless the General Assembly specifically directs otherwise.

. . . .

(4) If a child sixteen years of age or older is charged with an offense which, if committed by an adult, would be a misdemeanor, a Class E or F felony as defined in Section 16-1-20, or a felony which provides for a maximum term of imprisonment of ten years or less, and if the court, after full investigation, considers it contrary to the best interest of the child or of the public to retain jurisdiction, the court, in its discretion, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult.

(5) If a child fourteen or fifteen years of age is charged with an offense which, if committed by an

> adult, would be a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more, the court, after full investigation and hearing, may determine it contrary to the best interest of the child or of the public to retain jurisdiction. The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.
>
> (6) Within thirty days after the filing of a petition in the family court alleging the child has committed the offense of murder or criminal sexual conduct, the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child coming within the purview of this article. The judge of the family court is authorized to determine this request. If the request is denied, the petitioner may appeal within five days to the circuit court. Upon the hearing of the appeal, the judge of the circuit court is vested with the discretion of exercising and asserting the jurisdiction of the court of general sessions or of relinquishing jurisdiction to the family court. If the circuit judge elects to exercise the jurisdiction of the general sessions court for trial of the case, he shall issue an order to that effect, and then the family court has no further jurisdiction in the matter.

S.C. Code Ann. § 20-7-7605 (Supp. 2003) (emphasis added). Pursuant to the Children's Code, "[c]hild" is defined in section 20-7-6605(1):

> "Child" means a person less than seventeen years of age. "Child" does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item.

S.C. Code Ann. § 20-7-6605(1) (Supp. 2003). In Kent v. United States, 383 U.S. 541 (1966), the United States Supreme Court noted the following criteria for determining whether jurisdiction should be waived under the District of Columbia Juvenile Court Act:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> 7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id. at 566-67. The South Carolina Supreme Court, in State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000), concluded that the family court may properly consider the Kent factors when determining whether jurisdiction over a juvenile should be transferred. Id. at 117-18, 529 S.E.2d at 25-26 ("Moreover, the family court specifically considered the Kent factors, which in previous cases this Court has implicitly approved as appropriate criteria.").

Facially and legally, jurisdiction of the offenses contained in the amended and re-amended indictment is erroneously placed with the circuit court. The referenced statutes plainly and luculently demonstrate that the exclusive original jurisdiction of the family court controls **all** charges pending against a juvenile under the age of sixteen. The amalgamation and commingling of pending charges with exclusive original jurisdiction in the family court and exclusive original jurisdiction in the circuit court result in an indictment that can **NOT** be placed in a legally sufficient position by an amendment procedure that simplistically eliminates original family court jurisdiction offenses, leaving original jurisdiction circuit court offenses. This procedure violates the constitutional and statutory function of the grand jury in South Carolina.

CONCLUSION

Accordingly, the convictions and sentences of Green are

VACATED.

SHORT, J., concurs.

STILWELL, J., dissents in a separate opinion.

STILWELL, J. (dissenting): I respectfully dissent. The two amendments to the indictment, in my opinion, neither changed the nature of the offense with which Green was charged nor did they otherwise divest the circuit court of subject matter jurisdiction.

The circuit court lacks subject matter jurisdiction to convict a criminal defendant unless the defendant is charged by an indictment sufficiently stating the offense, the offense is a lesser-included offense of the indicted offense, or the defendant waives presentment of his indictment to the grand jury. State v. Wilkes, 353 S.C. 462, 464-65, 578 S.E.2d 717, 719 (2003). An indictment is sufficient where it charges the elements of the offense and sufficiently apprises the defendant of what he must be prepared to meet. Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995).

If an indictment contains any defect or there is a "variance between the allegations of the indictment and the evidence offered in proof thereof," the trial court may amend the indictment if the amendment "does not change the nature of the offense charged." S.C. Code Ann. § 17-19-100 (2003). Unless the amendment operates as a surprise entitling the defendant to a continuance on demand, the trial shall proceed as though the indictment had originally been returned in its amended form. Id. Generally, amendments are permitted to correct an error such as a scrivener's error. Cutner v. State, 354 S.C. 151, 155, 580 S.E.2d 120, 122 (2003). "Otherwise, if the defendant objects to an amendment on grounds that the amended indictment would change the nature of the offense, the trial judge is obligated to inform the parties of the

necessity of reindictment or obtain a waiver of presentment from the defendant." Id. at 155, 580 S.E.2d at 122-23.

Green contends the second count of the indictment was changed by the amendment at the beginning of trial from an allegation of CSC with a minor in the first degree to CSC with a minor in the second degree. His argument is based solely on the fact the victim was under the age of eleven on the dates originally listed in the indictment. See S.C. Code Ann. § 16-3-655(1), (2) (2003). However, both before and after the amendment, the allegation was that Green committed a sexual battery on the victim who was between the age of eleven and fourteen years old. The fact the victim was not yet eleven on the dates originally included in the indictment was a mere scrivener's error the amendment, by design, corrected. The amendment did not change the nature of the offense. See State v. McRae, 222 S.C. 194, 199, 72 S.E.2d 451, 453 (1952) (holding amendment changing the date of the alleged offense was proper because the amendment did not change the nature of the offense); cf. State v. Pierce, 263 S.C. 23, 27-28, 207 S.E.2d 414, 416 (1974) (noting when the State produces evidence the crime occurred on a date different than the one in the indictment in a case where the accused relies on an alibi defense, it is proper for the court to amend the indictment and then declare a mistrial to allow the defendant to establish an alibi defense for the new date).

As to the first count of the indictment, charging Green with CSC with a minor in the first degree, Green argues the trial court lacked subject matter jurisdiction because the indictment alleged he committed the offense at a time he was within the exclusive jurisdiction of the family court. As drafted, this count of the indictment originally alleged the offenses occurred beginning when Green was just two years old. However, as evidence the dates were scrivener's errors, the State noted the victim was not even born during part of the time originally alleged in the indictment. Again, these errors necessitated, and were corrected by, the amendment at the beginning of trial.

After the amendment, however, this count of the indictment still alleged conduct occurring before Green's sixteenth birthday. The court of general sessions has subject matter jurisdiction over charges alleging CSC with a minor in the first degree. S.C. Code § 16-3-655(1). However, under

the children's code it typically lacks jurisdiction over individuals under the age of seventeen, with certain exceptions. See S.C. Code Ann. § 20-7-7605 (Supp. 2003) (requiring the circuit court, with certain exceptions, to transfer to the family court the case of any child under the age of seventeen who is being criminally prosecuted). Notwithstanding this general rule, a person sixteen years of age or older who is charged with a Class A, B, C, or D felony is not a child within the meaning of the juvenile justice article of the children's code, which includes section 20-7-7605. S.C. Code Ann. § 20-7-6605(1) (Supp. 2003). Criminal sexual conduct with a minor in the first degree is a Class A felony. S.C. Code Ann. § 16-1-90 (Supp. 2003). In accordance with these provisions, the trial court amended the first-degree charge after the State rested to include only those dates in which Green was sixteen years of age or older. The court also advised it would instruct the jury to only consider allegations on or after that date in rendering its verdict on this charge. This amendment, like the one at the beginning of the trial, changed dates only, not the nature of the offense charged. Also, because of the amendment and instruction, Green's conviction and sentence on this charge only concerned conduct on or after his sixteenth birthday. Thus, in my opinion the trial court had both subject matter and personal jurisdiction to try Green and I would affirm the conviction.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Branch Banking and Trust Company of South Carolina, Respondent,

v.

Carolina Crank & Core, Inc., Michael D. McNelis, Kenneth F. Taylor, Robert Thompson and Bruce Tipi, Defendants,

Of Whom Bruce Tipi is Appellant.

Appeal From Spartanburg County
Larry R. Patterson, Circuit Court Judge

Opinion No. 3942
Submitted January 1, 2005 – Filed February 7, 2005

AFFIRMED

F. Milton Mann, Jr., of Spartanburg, for Appellant.

Seann A. Gray, of Greenville, for Respondent.

HEARN, C.J.: In this civil action, Bruce Tipi appeals the circuit court's grant of Branch Banking and Trust Company of South Carolina's motion for summary judgment. As a result, Tipi was found to be personally liable on a $325,000 guaranty owed to the Bank. We affirm.[1]

FACTS

In December 1998, Michael McNelis, Kenneth Taylor, and Robert Thompson purchased an automotive crankshaft division of a company and incorporated as Carolina Crank & Core, Inc. McNelis, Taylor, and Thompson obtained a term loan from Branch Banking and Trust Company of South Carolina[2] ("Bank"), to assist in the purchase. The Bank also agreed to extend a line of credit in the amount of $175,000, as evidenced by the company's promissory note dated February 2, 1999, with a maturity date of February 2, 2000. In addition to other security given by the company to the Bank, McNelis, Taylor, and Thompson executed and delivered their personal guaranty to the bank thereby securing payment of the indebtedness owed to the bank. This line of credit is the indebtedness at issue.

In May 1999, the Bank increased the line of credit to $225,000, as evidenced by the Company's promissory note dated May 10, 1999, with the original maturity date of February 2, 2000. Again the personal guaranties of McNelis, Taylor, and Thompson were executed and delivered to the Bank, securing the indebtedness owed to the Bank. The Bank subsequently extended a second line of credit, distinct from the original line of credit, in the amount of $100,000. The Company executed and delivered its promissory note to the Bank on November 24, 1999, also reflecting the same February 2, 2000 maturity date as the original line of credit. Again the personal guaranties of McNelis, Taylor, and Thompson were executed and delivered to the Bank.

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

[2] The loan was initially with First Federal Bank, which was purchased by Branch Banking and Trust Company of South Carolina in 2001.

Both lines of credit matured on February 2, 2000, and at that time the Bank agreed to renew the lines of credit for an additional three months. Moreover, the Bank combined the two lines of credit into a single line with a total indebtedness of $325,000. The Company executed and delivered its promissory note to the Bank on February 2, 2000, evidencing this consolidation, and also reflecting the new May 2, 2000 maturity date. The lines of credit were renewed for another three months from May 2, 2000, to establish a new maturity date of August 2, 2000. In each renewal, the personal guaranties of McNelis, Taylor, and Thompson were executed and delivered to the Bank, securing the indebtedness.

As of the August 2, 2000 maturity date, the Bank had made a decision not to renew the outstanding line of credit due to the poor financial condition of the Company. J. Timothy Camp, the Bank loan executive responsible for the Company's line of credit, informed McNelis, in his capacity as company president, that the Bank would be unwilling to renew the line of credit without the Company obtaining additional Bank-approved security, including a new guarantor.

McNelis informed Camp the company was in the process of acquiring an additional investor. McNelis identified Bruce Tipi, the appellant, as the potential investor. Tipi decided to become an investor, shareholder, and employee of the Company in an agreement formalized on September 25, 2000.

Camp testified the Bank required Tipi's personal guaranty as a condition of renewing the line of credit, and no renewal would have been approved absent Tipi's guaranty. The Credit Approval Report narrative prepared by Camp on October 4, 2000 illustrated the Bank's position. The report stated: "The [Company] has requested that [Bank] renew an existing $325K line of credit . . . [Bank] will require the personal guarantee of Mr. Bruce W. Tipi." On October 6, 2000, Camp prepared the appropriate documentation to renew the line of credit, which included a new promissory note, effective August 2, 2000, and a guaranty, also effective August 2, 2000. The guaranty had four signature lines, under which the names of McNelis, Taylor, Thompson, and Tipi were typed. Upon receipt of the signed documents, including the fully executed guaranty complete with the signature

of Tipi, the Bank renewed the line of credit effective retroactively to August 2, 2000 with a maturity date of April 2, 2001.

Ultimately, the Company defaulted on its obligation to the Bank. The Bank commenced this action seeking to collect on the outstanding indebtedness under the promissory note and under the signed guaranty. Tipi denied liability under the signed guaranty, asserting a failure of consideration.[3] The circuit court rejected Tipi's argument and granted summary judgment in favor of the Bank, thus rendering Tipi liable under the guaranty. Tipi appeals the grant of summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the facts in the light most favorable to the non-moving party. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

"In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment is proper when 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Regions Bank v. Schmauch, 354 S.C. 648, 659, 582 S.E.2d 432, 438 (Ct. App. 2003) (citations omitted).

LAW/ANALYSIS

Tipi advances two primary arguments in support of his position that the circuit court erred in granting the Bank's motion for summary

[3] The parties agree Tipi, along with McNelis, Taylor, and Thompson, executed the guaranty document. The parties disagree only as to whether this guaranty is enforceable against Tipi.

judgment. First, Tipi alleges the circuit court erred in finding the guaranty was supported by sufficient legal consideration. Second, Tipi claims the circuit court erred in finding mutual assent existed between Tipi and the Bank. We disagree as to both arguments and affirm.

I. The circuit court correctly found the guaranty was supported by sufficient legal consideration.

Tipi argues the circuit court erred in finding the guaranty was supported by sufficient legal consideration. He alleges a lack of sufficient legal consideration because the Bank did not advance any additional funds after receipt of the guaranty. We disagree.

"A guaranty is 'a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is himself in the first instance, liable to such payment or performance.'" Crafton v. Brown, 346 S.C. 347, 350-51, 550 S.E.2d 904, 905 (Ct. App. 2001) (citation omitted). A guaranty must be supported by sufficient legal consideration, which can consist of either a benefit to the principle obligor or guarantor, or some detriment to the obligee. Hope Petty Motors of Columbia, Inc. v. Hyatt, 310 S.C. 171, 178, 425 S.E.2d 786, 791 (Ct. App. 1992). Consideration that is wholly past is not valuable consideration. Future Group, II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996 (citation omitted)). If all debt was pre-existing, the guaranty must "be supported by some new consideration other than the original debt." Id. Moreover, the guarantor need not derive any benefit from either the principle contract or the guaranty provided there is a benefit to the principle obligor or a detriment to the creditor. Crafton, 346 S.C. at 354, 550 S.E.2d at 907.

In this case, in exchange for receiving Tipi's guaranty, the Bank agreed to extend the line of credit for an additional eight months past the original maturity date, thus forbearing on its pre-existing right to enforce other remedies, including collection under the original note. This agreement to extend the line of credit and forebear exercising remedies available to the Bank was a benefit to the Company and Tipi as shareholder, guarantor, and employee, as well as a detriment to the Bank.

Tipi further asserts the circuit court erred in finding consideration was legally sufficient because the guaranty was not executed simultaneously with the note. We disagree.

If a note and guaranty are executed simultaneously, the consideration of the note functions as consideration for the guaranty; however, if the documents are not executed simultaneously, there is no presumption of consideration, and the consideration must be proved. See id. at 351, 550 S.E.2d at 907.

In this situation, the only evidence regarding the execution of the note and the guaranty was testimony offered by Camp. Camp testified he prepared the new line of credit and guaranty documents together on October 6, 2000 and delivered them to the Company for the requisite signatures. Camp testified that the line of credit would not have been renewed prior to the Bank's receipt of the signed guaranties. Additionally, the executed loan renewal documents, including Tipi's signed personal guaranty, were returned to the Bank and entered into the Bank's computer system on October 12, 2000. Tipi offered no evidence to the contrary at trial. Therefore, we find the circuit court correctly held the note was prepared and executed simultaneous to the guaranty, that it was forwarded for signatures contemporaneous with the guaranty, and that the Bank renewed the line of credit upon receipt of all the signed documents. Moreover, even if the note and guaranty were not executed simultaneously, we have previously held the guaranty was supported by the additional consideration of the Bank forgoing the remedies available to it at the time of the guaranty. Accordingly, we affirm the ruling of the circuit court.

II. The circuit court did not err in finding mutual assent existed between Tipi and the Bank.

Tipi claims the circuit court erred in finding mutual assent existed between Tipi and the Bank. We disagree and affirm.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties." Crafton, 346 S.C. at 354, 550 S.E.2d at 907. "If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement is contemporaneous with the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract." Id.

Because the guaranty and promissory note were executed contemporaneously, further evidence of a meeting of the minds is not necessary. Therefore, the circuit court did not err in finding that mutual assent existed between Tipi and the Bank, and the grant of summary judgment is hereby

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.