OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

August 13, 2001

ADVANCE SHEET NO. 29

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3354 - Murphy v. Owens-Corning		Pending
3355 - The State v. Leroy Wilkes		Pending
3356 - Kenney’s Metal v. Palmieri		Pending
3357 - The State v. Richmond Truesdale, Jr.		Pending
3358 - S. C. Coastal Cons. V. SCDHEC		Pending
3360 - Beaufort Realty v. Beaufort County		Pending
3361 - The State v. Tommy Lee James		Pending
3362 - Johnson v. Arabi		Pending
3363 - Watts v. Metro Security Agency		Pending
3364 - SCDSS v. Mrs. H. and Mr. H.		Pending
3365 - The State v. Laterrance Ramone Dunlap		Pending
3366 - Crafton v. Brown		Pending
3367 - The State v. James Henderson, III		Pending
3369 - The State v. Don L. Hughes		Pending
3370 - Bailey v. Segars		Pending
3371 - The State v. Curtis Gibbs		Pending
3372 - Dukes v. Rural Metro, et al.		Pending
3374 - Heilker v. Zoning Board of Appeals		Pending
3375 - The State v. Otis Williams		Pending
2001-UP-016 - Stanley v. Kirkpatrick	(2)	Pending
2001-UP-123 - SC Farm Bureau v. Cynthia Rabon		Pending
2001-UP-160 - The State v. Elijah Price, Jr.		Pending

2001-UP-212 - Singletary v. La-Z-Boy Pending

2001-UP-235 - The State v. Robert McCrorey, III and Robert Dimitry McCrorey Pending

2001-UP-248 - Thomason v. Barrett (2) Pending

2001-UP-282 - Holland v. Gunn Pending

2001-UP-292 - Frazello v. Bankhead Pending

2001-UP-300 - Robert L. Mathis, Jr. v. The State Pending

2001-UP-304 - Jack McIntyre v. The State Pending

2001-UP-307 - The State of SC v. Joseph McQuatters Pending

2001-UP-315 - Joytime v. Orr (2) Pending

2001-UP-321 - The State v. Randall Scott Foster Pending

2001-UP-322 - Edisto Island v. Gregory Pending

2001-UP-323 - Goodwin v. Johnson Pending

2001-UP-324 - The State v. John Williams, III Pending

2001-UP-325 - Hessenthater v. Tri-County SisterCare Pending

2001-UP-328 - S&R Services v. Thompson Pending

2001-UP-335 - The State v. Andchine Vance Pending

2001-UP-337 - The State v. Leonard Carter Pending

2001-UP-338 - Ladd v. Rainey Pending

2001-UP-344 - NBSC v. Renaissance Pending

2001-UP-350 - SCDSS v. Maddox Pending

2001-UP-355 - The State v. Gavin Jones Pending

2001-UP-358 - McCleskey v. McCleskey Pending

2001-UP-360 - Davis v. Davis	Pending
2001-UP-363 - King v. Island Club Apartments	Pending
2001-UP-364 - Clark v. Greenville County	Pending
2001-UP-365 - Gaither v. Blue Cross Blue Shield	Pending
2001-UP-371 - SCDHEC v. Paris Mountain Utilities	Pending
2001-UP-374 - Boudreaux v. Marina Villas Association	Pending
2001-UP-375 - Sutton v. Sutton	Pending
2001-UP-376 - Eastwood v. Barnwell County	Pending
2001-UP-377 - Miller v. The Ward Law Firm	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - The State v. Edward M. Clarkson	Pending
3231 - Hawkins v. Bruno Yacht Sales	Pending
3248 - Rogers v. Norfolk Southern	Pending
3254 - Carolina First v. Whittle	Pending
3267 - Jeffords v. Lesesne	Pending
3270 - Boddie-Noell v. 42 Magnolia Partnership	Granted
3271 - Gaskins v. Southern Farm Bureau	Pending
3273 - Duke Power v. Laurens Elec. Coop	Pending
3274 - Pressley v. Lancaster County	Pending
3276 - The State v. Florence Evans	Pending
3280 - Pee v. AVM, Inc.	Granted
3284 - Bale v. SCDOT	Pending

3289 - Olson v. Faculty House	(2) Pending
3292 - Davis v. O-C Law Enforcement Comm.	Pending
3293 - Wiedemann v. Town of Hilton Head	Denied
3294 - The State v. Nathaniel Williams	Pending
3297 - Silvester .v Spring Valley Country Club	Pending
3298 - Lockridge v. Santens of America, Inc.	Pending
3299 - SC Properties & Casualty Guaranty Assn. v. Yensen	(2) Pending
3300 - Ferguson v. Charleston/Lincoln	Pending
3301 - Horry County v. The Insurance Reserve	Pending
3307 - Curcio v. Caterpillar	Pending
3310 - Dawkins & Chishold v. Fields, et al.	Pending
3311 - SC Farm Bureau v. Wilson	Pending
3312 - Eady v. Oliver	Pending
3314 - The State v. Minyard Lee Woody	Pending
3315 - The State v. Ronald L. Woodruff	Pending
3319 - Breeden v. TCW, Inc.	(2) Pending
3321 - Andrade v. SCE&G	Pending
3324 - Schurlknight v. City of N. Charleston	Pending
3325 - The Father v. SCDSS	Pending
3327 - The State v. John Peake	Pending
3329 - S. C. Dept. of Consumer Affairs v. Rent-A-Center	Pending
3330 - Richard Bowen v. Ann Bowen	Pending
3331 - Wade Jenkins v. Janna Jenkins	Pending

3332 - SC Farm Bureau Mutual Ins. Co. v. Kelly	Pending
3335 - Joye v. Yon	Pending
3337 - Brunson v. SLED	Pending
3345 - Cunningham v. Helping Hands	Pending
2000-UP-601 - Johnson v. Williams	Denied
2000-UP-607 - The State v. Lawrence Barron	Denied
2000-UP-656 - Martin v. SCDC	Pending
2000-UP-677 - Chamberlain, et al. v. TIC	Pending
2000-UP-783 - The State v. Clayton Benjamin	Pending
2001-UP-015 - Milton v. A-1 Financial Services	Pending
2001-UP-019 - Baker v. Baker	(2) Denied
2001-UP-022 - Thomas v. Peacock	Pending
2001-UP-038 - Gary v. American Fiber	Pending
2001-UP-049 - Johnson v. Palmetto Eye	Pending
2001-UP-050 - Robinson v. Venture Capital	Granted
2001-UP-054 - The State v. Ae Khingratsaiphon	Pending
2001-UP-058 - The State v. Brian Keith Nesbitt	Pending
2001-UP-069 - SCDSS v. Taylor	Pending
2001-UP-076 - McDowell v. McDowell	Pending
2001-UP-078 - The State v. James Mercer	Pending
2001-UP-091 - Boulevard Dev. V. City of Myrtle Beach	Pending
2001-UP-092 - The State v. Robert Dean Whitt	Pending
2001-UP-114 - McAbee v. McAbee	Pending

2001-UP-122 - The State v. Robert Brooks Johnston Pending

2001-UP-124 - The State v. Darren S. Simmons (2) Pending

2001-UP-125 - Spade v. Berdish Pending

2001-UP-126 - Ewing v. Mundy Pending

2001-UP-156 - Employer’s Insurance of Wausau v. Whitaker’s Inc., of Sumter Pending

2001-UP-161 - Meetze v. Forsthoefel Pending

2001-UP-167 - Keels v. Richland County Pending

2001-UP-186 - The State v. Coy L. Thompson Pending

2001-UP-193 - Cabaniss v. Pizza Hut of America, Inc. Pending

2001-UP-199 - Summerford v. Collins Properties Pending

2001-UP-200 - Cooper v. Parsons Pending

2001-UP-201 - Pittman v. MasTec, Inc. Pending

2001-UP-238 - The State v. Michael Preston Pending

2001-UP-239 - The State v. Billy Ray Jackson Pending

2001-UP-249 - Hinkle v. National Casualty Pending

2001-UP-261 - San Souci Association v. Miller Pending

2001-UP-269 - Wheeler v. Revco Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Malissa Thomas, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Florence County
M. Duane Shuler, Trial Judge
James E. Brogdon, Jr., Post-Conviction Judge

Opinion No. 25339
Submitted June 20, 2001 - Filed August 13, 2001

REVERSED

Deputy Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General William Bryan Dukes; all

of Columbia, for respondent.

JUSTICE MOORE: We granted this petition for a writ of certiorari to determine if the post-conviction relief (PCR) court erred by finding counsel did not have a conflict of interest while representing petitioner. We reverse.

FACTS

Petitioner pled guilty to trafficking in more than 200 grams of cocaine, and was sentenced to twenty-five years imprisonment and a $50,000 fine. No direct appeal was taken.

The facts of the crime are as follows. Police officers at the Florence airport became suspicious after observing petitioner and her husband carrying only one piece of luggage, acting nervous, and making a cellular telephone call. The officers approached the couple, who subsequently consented to a search of their bag. The search produced a 223.7 gram package of cocaine. Petitioner and Husband were both indicted for trafficking in more than two hundred grams of cocaine. They retained the same attorney to represent them in connection with the charges.

At the plea proceeding, the solicitor informed the plea judge that he offered petitioner and Husband a plea bargain, which consisted of the following: petitioner and Husband could each plead to trafficking in cocaine in an amount of more than one hundred grams and each receive an eight-year sentence or either petitioner or Husband could plead to the entire amount and receive the mandatory minimum sentence of twenty-five years, while the other person would be allowed to go free. The solicitor advised the plea judge that petitioner had agreed to claim responsibility for the entire amount of cocaine. The plea judge accepted her plea.

Petitioner later filed a PCR application alleging her counsel had a conflict of interest while representing her.

At the PCR hearing, counsel testified petitioner and Husband requested that he represent them both. He stated he informed them they needed separate attorneys because if they began to implicate each other, there would be a conflict of interest. Counsel testified both confessed to the crime and waived the potential conflict of interest because they did not want separate attorneys.

Counsel testified that, about a day before the trial was to begin, the solicitor offered the plea bargain. He stated the decision regarding the plea bargain was difficult because neither petitioner nor Husband wanted to plead guilty. Counsel testified he explained to them that if they went to trial they would both be convicted and each would receive twenty-five years without the possibility of parole. He further testified he told them the better course of action would be if they both pled guilty and received less time. However, since he felt the decision was between the two of them, he allowed them to discuss the plea bargain out of his presence. After petitioner and Husband discussed it, petitioner decided she would plead to the entire amount.[1]

Counsel testified he was "shocked" petitioner agreed to be the one to plead guilty because he thought she was less culpable than Husband. He stated he did not recall discussing whether petitioner should retain her own counsel after the solicitor made the offer.

Petitioner testified she did not have her own money to hire a lawyer and she did not understand she could have possibly obtained an appointed lawyer. She stated if she had understood, she would not have used the same lawyer as her husband. Petitioner also indicated she would have gone to trial, rather than plead guilty, if she had understood she was pleading to a 25-

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[1]Counsel testified petitioner was going to plead guilty, but Husband was going to "stay on the street" and attempt to work with law enforcement. Counsel stated he discussed with petitioner that if Husband was instrumental in assisting law enforcement, he would try to get her case reopened. Nothing ever came of his plans, however, because Husband disappeared after the plea.

year non-parolable sentence.

The PCR court found counsel did not have a conflict of interest, and petitioner had failed to meet her burden of proving such a conflict.

ISSUE

Whether the PCR court erred by finding counsel did not have a conflict of interest while representing petitioner?

DISCUSSION

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998) (citing Cuyler v. Sullivan, 446 U.S. 335 (1980); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Jackson v. State, supra (citing Duncan v. State, supra).

In this case, an actual conflict of interest arose when the solicitor offered a plea bargain that would allow the charge against one spouse to be dismissed if the other spouse would plead guilty to the entire amount of the cocaine. See Duncan v. State, supra (interests of other client and defendant are sufficiently adverse if it is shown the attorney owes duty to the defendant to take some action that could be detrimental to his other client). The conflict arose because it was in each spouse's best interest for the other spouse to take the entire responsibility for the cocaine. See, e.g., Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995) (actual conflict of interest where counsel convinced solicitor petitioner's co-defendants were less culpable). At the moment the solicitor made the plea offer, petitioner's and Husband's interests became adverse to one another and counsel should have advised them accordingly.

Further, counsel acted upon this conflicting loyalty by failing to advise petitioner she had nothing to lose by proceeding to trial. See Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (until defendant shows counsel actively represented conflicting interests, he has not established constitutional predicate for claim of ineffective assistance arising from multiple representation). By taking the plea, petitioner received the maximum sentence.

Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict. To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently. United States v. Swartz, 975 F.2d 1042, 1048-49 (4th Cir. 1992); Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990) (citation omitted). When deciding to waive a potential conflict, petitioner was told only that she needed a separate attorney in case she and Husband began to implicate each other, something that never happened. Petitioner should have been given another opportunity to waive the conflict, if she so chose, when the solicitor offered to dismiss the charge against one spouse in exchange for the other spouse pleading guilty to the entire amount of cocaine. See Swartz, 975 F.2d at 1049-50 (waiver not knowing, intelligent, and voluntary unless defendant knows of precise form of conflict of interest that eventually results); Hoffman, 903 F.2d at 289 (Hoffman's waiver not intelligent "because Hoffman could not waive what he did not know").

Petitioner has shown an actual conflict of interest that adversely affected her attorney's performance. Further, her initial waiver of a potential conflict did not act as a waiver of this actual conflict. As a result, counsel was ineffective and the PCR court erred by denying her PCR application.[2]

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[2]Petitioner does not have to demonstrate prejudice if there is an actual conflict of interest. Duncan v. State, supra (quoting Cuyler v. Sullivan, 446 U.S. at 348-550 (defendant who shows conflict of interest actually affected

REVERSED.

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

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adequacy of his representation need not demonstrate prejudice to obtain relief)).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas Dawkins, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Richland County
John Hamilton Smith, Trial Judge
Gerald C. Smoak, Post-Conviction Judge

Opinion No. 25340
Heard June 19, 2001 - Filed August 13, 2001

REVERSED

Chief Attorney Daniel T. Stacey and Assistant Appellate Defender Katherine Carruth Link, both of the South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, and

Assistant Attorney General David Spencer; all of Columbia, for respondent.

JUSTICE MOORE: We granted this petition for a writ of certiorari to determine if the post-conviction relief (PCR) court erred by not finding petitioner's counsel had rendered ineffective assistance. We reverse.

FACTS

Petitioner was indicted for four counts of first degree criminal sexual conduct. He was acquitted of two counts and convicted of two counts. He was sentenced to thirty years in prison on each count, to be served consecutively. His convictions and sentences were affirmed. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989).

Petitioner was accused by Pamela Chambless of having sex with her beginning when she was thirteen years old. At trial, he admitted having a relationship with Chambless and testified they had been engaged with the intention of becoming married after she completed high school. However, he denied he ever physically or sexually abused her. Petitioner maintained the allegations were part of a vendetta Chambless and her family had against him for breaking up with Chambless, refusing to date her sister, and marrying her sixteen-year-old cousin.

At trial, petitioner presented evidence from numerous witnesses, including some of Chambless's extended family members, that during the period of time in which Chambless was allegedly being abused, she was happy, a good student, and acted as if she enjoyed petitioner's company. He also presented evidence that Chambless had psychiatric problems which included attention-seeking behavior and self-mutilating behaviors. Further, petitioner presented testimony explaining the items, such as ropes and razors, found by law enforcement in and around his house, which Chambless had maintained were used by him during the sexual abuse. Finally, he presented the testimony of his parents, his brother, his sister, and his brother's

girlfriend that they were at home almost every evening. This testimony was presented to show petitioner could not have brought Chambless to the house essentially every other night of the week and sexually abused her as she claimed.

Chambless testified in detail about the sexual and physical abuse allegedly perpetrated by petitioner. In addition, Chambless's church counselor, her psychiatrist, a mental health counselor, and the investigator testified about conversations they had with Chambless regarding the alleged abuse.[1] Those witnesses named petitioner as the perpetrator.

At the PCR hearing, petitioner claimed his counsel was ineffective for failing to object, pursuant to State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987),[2] to the witnesses's statements that Chambless told them petitioner

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[1]The church counselor and the investigator testified before Chambless took the stand to testify.

[2]State v. Munn stated the following:

> . . . there is no rule allowing any and all statements made by the alleged victim to be admissible through hearsay testimony as long as the victim testifies during the case. It is true that when the victim takes the stand and testifies, evidence that she complained of an assault may be introduced to corroborate her testimony. This right is limited in nature, however. "The particulars or details are not admissible but so much of the complaint as identifies 'the time and place with that of the one charged' may be shown."

292 S.C. at 499-500, 357 S.E.2d at 463 (citing State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980) and quoting State v. Sharpe, 239 S.C. 258, 272, 122 S.E.2d 622, 629 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

was the perpetrator. Counsel testified at the PCR hearing his defense theory was that petitioner did not commit the sexual acts and that Chambless had made up the allegations because she had a personal grudge against petitioner. Counsel testified he did not object to the witnesses's testimony because it was not a case of mistaken identity. He stated he and petitioner had known for a long time what Chambless was going to say and after the jury learned that Chambless was accusing petitioner of being the perpetrator, he was not going to make "technical objections" which he did not believe the judge would sustain.[3] Counsel stated to make those objections could have possibly upset or confused the jury and might have caused the jury not to trust his credibility as an attorney. He testified that "to simply call [petitioner] the perpetrator [was] like calling rain wet" because everyone in the courtroom knew petitioner was accused of being the perpetrator. Counsel admitted, however, that the witnesses's testimony that Chambless had told them petitioner was the perpetrator bolstered Chambless's testimony.

The PCR court found petitioner was not prejudiced by counsel's failure to object to the testimony, and concluded counsel gave valid, strategic reasons for not objecting to the testimony at issue.

ISSUE

Whether counsel was ineffective for failing to object to hearsay testimony that designated petitioner as the perpetrator of the sexual offenses?

DISCUSSION

Petitioner cited several instances in the testimony of four witnesses where counsel should have objected to inadmissible hearsay testimony that named petitioner as the person whom Chambless stated had abused her.

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[3]However, the trial judge had previously sustained objections of a similar nature.

Petitioner also claimed counsel should have objected to Sheriff Investigator Jeff Fuller's testimony describing the details of the alleged abuse which Chambless had related to him.

For petitioner to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). To show prejudice, the applicant must show, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Brown v. State, supra (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony. Id. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars. Id.; State v. Munn, supra.[4] Testimony from other witnesses regarding the victim's identification of the

[4]See also State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980) (particulars or details of victim's complaint are not admissible but so much of the complaint as identifies the time and place with that of the one charged may be shown); State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961), overruled on other grounds by State v. Torrence, supra (same); State v. Harrison, 236 S.C. 246, 113 S.E.2d 783 (1960) (same).

perpetrator does not fall within this hearsay exception. Id.[5]

Since the testimony was inadmissible hearsay, counsel's failure to object to the introduction of that evidence fell below an objective standard of reasonableness. See Strickland v. Washington, supra; Brown v. State, supra.

As to the prejudice prong of Strickland, petitioner was prejudiced by counsel's deficient performance because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. As we stated in Jolly, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." See Jolly, 314 S.C. at 21, 443 S.E.2d at 569. Consequently, petitioner should be granted relief for the ineffective assistance of counsel.

Further, the PCR court erred by finding counsel had valid strategy reasons[6] for not objecting to the testimony at issue. The testimony of the four witnesses relating what Chambless told them regarding her alleged sexual abuse served only to bolster her credibility. This case hinged on whether Chambless was credible. The improper corroboration of Chambless's allegation of sexual abuse by several witnesses thus had a "devastating impact" on petitioner's trial. Counsel's failure to object because he did not want to confuse or upset the jury does not constitute valid strategy.[7] See

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[5]See also State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989) (social worker's testimony as to details of sexual abuse reported by victim constituted impermissible bolstering of victim's testimony because the testimony was not limited to the time and place of assault).

[6]Where counsel articulates valid reasons for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000).

[7]This strategy was inappropriate especially given the fact there was not overwhelming evidence that petitioner sexually abused Chambless. For instance, while Chambless's hymen was found to be ruptured upon medical

Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992) (counsel's failure to object to trial judge's improper comments inviting the jury to prematurely deliberate did not constitute valid strategy).[8] To eliminate the possibility of confusing or upsetting the jury, counsel could have sought a determination as to the inadmissibility of the hearsay testimony out of the hearing of the jury as he had previously done.

In sum, counsel did not articulate a valid strategy for failing to object to the testimony. Accordingly, we find petitioner is entitled to a new trial because he was prejudiced by counsel's deficient performance.

REVERSED.

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

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examination, this examination did not occur until approximately three years after the alleged abuse had occurred.

[8]See also Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), cert. denied, 529 U.S. 1072, 120 S.Ct. 1685, 146 L.Ed.2d 492 (2000) (finding of deficient performance where counsel failed to employ an appropriate trial strategy in deciding whether to have defendant testify).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daughter Doe, Jim Doe, and Richard Doe, minor children, by Paulette Jolly as Guardian ad Litem, Respondents,

v.

John Doe, Appellant.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 25341
Submitted May 24, 2001 - Filed August 13, 2001

AFFIRMED IN PART; REVERSED IN PART.

John Doe, of Kershaw, pro se appellant.

James K. Lehman, Jason B. Sprenkle, and Patrick K. McCarthy, of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for respondents.

JUSTICE MOORE: We certified this appeal for review to determine the collateral estoppel effects of a criminal conviction and a family court judgment on a subsequent civil action.

FACTS

Appellant was tried and convicted of five counts of first degree criminal sexual conduct with a minor (CSC) and one count of committing or attempting to commit a lewd act upon a minor. He was sentenced to 30 years imprisonment for each of the CSC charges and 15 years imprisonment for the lewd act charge, with 90 of those years to be served consecutively. The charges arose out of appellant's sexual abuse of his children, respondents Daughter and Jim Doe. In an unpublished opinion, the Court of Appeals affirmed his convictions.

Prior to his criminal trial, the family court terminated appellant's parental rights because there was clear and convincing evidence that respondents, Daughter Doe and Jim Doe, were neglected and sexually abused while in the primary care of appellant.

Respondents brought a civil action seeking damages for assault, battery, intentional infliction of emotional distress, negligence, and negligence per se, based upon appellant's sexual and physical abuse of them. Respondents moved for summary judgment as to liability on the assault and battery claims on the grounds appellant was collaterally estopped from relitigating the issue of whether he sexually abused them due to his criminal convictions and due to the family court's order terminating his parental rights. The trial court granted the motion because the precise question at issue in the assault and battery actions had previously been adjudicated against appellant in the family court proceeding and the criminal trial.

ISSUES

(1) Did the trial court err by granting partial summary judgment on

the issue of appellant's liability based upon the collateral estoppel effect of appellant's prior criminal convictions?

(2) Did the trial court err by finding appellant is collaterally estopped from litigating the issue of the abuse of Richard Doe?

DISCUSSION

Collateral estoppel effect of criminal conviction

Appellant contends he should not be estopped from relitigating the issue of his liability for assault and battery. Although the collateral estoppel effect of a criminal conviction has never been directly addressed by this Court, we have alluded to the general rule that a criminal conviction is not binding in a subsequent civil action.[1]

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[1]See, e.g., Globe & Rutgers Fire Ins. Co. v. Foil, 189 S.C. 91, 96, 200 S.E. 97, 100 (1938) ("While it is well settled that a conviction in a criminal prosecution is not an adjudication binding the defendant in a subsequent civil action based on the same facts . . ., a plea of guilty is an admission of the matters alleged in the indictment and the judgment entered thereon is admissible [but not conclusive] in a civil action involving the same issues as proof of that admission."); Samuel v. Mouzon, 282 S.C. 616, 320 S.E.2d 482 (Ct. App. 1984) (same); Poston v. Home Ins. Co. of New York, 191 S.C. 314, 4 S.E.2d 261 (1939) (the conviction of a person upon the charges for which he was under indictment would be conclusive against him in his action against the insurance company, because the Court would not look with favor upon the right of any party to profit by his own criminal act). See also South Carolina State Bd. of Dental Exam'rs v. Breeland, 208 S.C. 469, 38 S.E.2d 644 (1946) (Court established an exception to the rule that a criminal conviction was not binding on the defendant in a subsequent civil action by stating the rule was inapplicable to the Dental Board's action to revoke Breeland's license to practice dentistry).

We now adopt the rule that once a person has been criminally convicted he is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction.[2] See 47 Am. Jur. 2d Judgments § 733 (1995) ("Under the modern approach, a judgment of conviction precludes the defendant from denying the allegations in a subsequent civil complaint as to issues that were actually litigated and adjudicated in the prior proceeding.").

We note the reasons for the former rule were nonmutuality[3] and a difference in the degree of proof required. See Breeland, supra. However, when a conviction is offered in a civil proceeding against the party convicted, the party cannot complain of a difference in the degree of proof when the burden of proof in the criminal proceeding was much higher than the burden of proof in the present civil proceeding. As a result, one of the reasons for the former rule is eliminated.

The other reason, lack of mutuality, is also eliminated because mutuality is no longer a requirement of collateral estoppel. Graham v. State Farm Fire and Cas. Ins. Co., 277 S.C. 389, 287 S.E.2d 495 (1982) (the modern trend is to disregard the privity requirement in applying estoppel by judgment; in determining the defense of collateral estoppel notwithstanding a lack of privity, the factors the courts have taken into consideration include: whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action); Irby v. Richardson, 278 S.C. 484, 298 S.E.2d

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[2]We note there are exceptions to this rule. See, e.g., S.C. Code Ann. § 56-5-6160 (1991) ("No evidence of conviction of any person for any violation of [the chapter entitled Uniform Act Regulating Traffic on Highways] shall be admissible in any court in any civil action.").

[3]Nonmutuality arises out of the fact that the parties in the present suit are not the same as the parties in the previous suit. Breeland, 208 S.C. at 474, 38 S.E.2d at 646 (citing Fonville v. Atlanta & C. Air Line Ry. Co., 93 S.C. 287, 75 S.E. 172 (1912)).

452 (1982) (same). Accordingly, we find the natural progression of the law of this State is to allow a criminal conviction to collaterally estop relitigation of the same issue in a subsequent civil action.

As a practical matter, to allow a party to offensively invoke the collateral estoppel doctrine in this situation,[4] it must be shown the identical issue must have necessarily been decided in the prior criminal action and be decisive in the present civil action. It must also be shown the party precluded from relitigating the issue, appellant here, must have had a full and fair opportunity to contest the prior determination. See, e.g., Breeland, 208 S.C. at 476, 38 S.E.2d at 648 ("The question of his guilt here is precisely the same as was determined adversely to him under circumstances most favorable to himself – that is, in a prosecution in which he could not have been convicted unless his guilt had been shown beyond a reasonable doubt."); Irby v. Richardson, 278 S.C. at 487, 298 S.E.2d at 454 ("Where the plaintiff has had a full and fair opportunity to litigate the question of an attorney's negligence or effectiveness in a particular case, he should be collaterally estopped to adjudicate the same issue in a subsequent legal malpractice action.").

We find appellant, due to his conviction, is collaterally estopped from relitigating the issue of whether he abused his children in the civil proceeding against him. The identical issue was decided in the prior criminal action and is decisive in the assault and battery actions.[5] Further, appellant has had a

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[4]The offensive use of collateral estoppel is permissible. South Carolina Property and Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991).

[5]The criminal conviction of CSC necessarily found that appellant had committed a battery on respondents. See S.C. Code Ann. § 16-3-655(1) (1985) (A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age). Further, the allegations giving rise to appellant's convictions preclude appellant from denying respondents' assault claim in the civil action. See Herring v. Lawrence Warehouse Co., 222 S.C. 226, 72 S.E.2d

full and fair opportunity to contest the prior determination.

In conclusion, the trial court did not err by granting partial summary judgment on respondents' assault and battery claims based on appellant's prior criminal conviction for their abuse.[6] Because of this conclusion, we need not address appellant's contention the trial court erred by granting partial summary judgment on the issue of appellant's liability based upon the collateral estoppel effect of the family court's judgment terminating his parental rights.

Collateral estoppel effect as to Richard Doe

Because the issue of whether appellant abused Richard Doe has not been litigated either in the family court or in a criminal trial, appellant is not collaterally estopped from litigating the issue of the abuse of Richard Doe. Accordingly, the grant of partial summary judgment as to Richard's civil action against appellant is reversed.[7]

AFFIRMED IN PART, REVERSED IN PART.

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

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453 (1952) (assault occurs when a reasonable apprehension or fear of bodily harm has been caused by the defendant's conduct).

[6]We note an acquittal will not end the litigation, because while the State may fail to prove the charges beyond a reasonable doubt in order to convict, the defense in the civil suit could prevail if proven by the greater weight of the evidence. Poston, 191 S.C. at 317, 4 S.E.2d at 262.

[7]Respondents agree the grant of summary judgment as to Richard should be reversed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

First Union National Bank,

Plaintiff,

v.

First Citizens Bank and Trust Company of South Carolina,

Defendant/Third-Party Plaintiff,

v.

Bruce Beach, d/b/a Cars Unlimited, Jay Crull, d/b/a Lowcountry Auto Sales; and Carl Maxfield and Toni Maxfield, d/b/a TLM Cars, Inc.,

Third-Party Defendants,

Of Whom First Union National Bank, First Citizens Bank and Trust Company of South Carolina, Bruce Beach, d/b/a Cars Unlimited, and Carl Maxfield and Toni Maxfield, d/b/a TLM Cars, Inc., are

Respondents,

and Jay Crull, d/b/a Lowcountry Auto Sales is

Appellant.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3377
Heard June 4, 2001 - Filed August 6, 2001

REVERSED

Benjamin Goldberg and Ivan Nossokoff, both of Charleston, for appellant.

G. Wells Dickson, Jr. and Gerald A. Kaynard; Richard S. Rosen and Kevin R. Eberle, both of Rosen, Goodstein & Hagood; W. Andrew Gowder, Jr., of Pratt-Thomas, Pearce, Epting & Walker, all of Charleston; and Thomas O. Mason, of Sherriff & Roof, of Columbia, for respondents.

HUFF, J.: In this civil action, Jay Crull asserted his state and federal constitutional rights against self-incrimination as the basis for his refusal to answer discovery requests from First Citizens Bank and Trust Company of South Carolina ("First Citizens"). The trial court held Crull in contempt. We reverse.

FACTS

On April 1,1998, First Union National Bank ("FUNB") sued First Citizens for wrongful dishonor and conversion, alleging First Citizens wrongfully stopped payment of a series of cashiers' checks, refused to pay or

return sight drafts, and caused the Federal Reserve to charge FUNB the full amount of checks written by Crull on his FUNB account after FUNB stopped payment on the checks at Crull's order. First Citizens named Crull as a third-party defendant, alleging that Crull and other used car dealers were involved in a check-kiting scheme. First Citizens then served interrogatories and requests for production on Crull. In response, Crull asserted his state and federal constitutional rights against self-incrimination. Crull claimed he may be the subject of a criminal investigation conducted by the Federal Bureau of Investigation and United States Attorney's Office arising from the same facts and circumstances as the civil suit.

In reply, First Citizens filed a motion to compel a complete response to its discovery requests. The trial court granted First Citizens' motion, and ordered Crull to respond to all of the interrogatories and requests to produce that had been served upon him. Crull again failed to respond and a Rule to Show Cause was served on him. Crull responded to the Rule to Show Cause by partially answering the discovery requests and reasserting his privilege against self-incrimination on the remaining requests. In addition, Crull offered a letter by a special agent of the FBI to the United States Attorney confirming that a criminal investigation into the subject of the civil suit was opened as a direct result of a report it received from FUNB's special investigation unit. The letter further confirmed that the investigation was incomplete and continuing. Following the hearing on the Rule to Show Cause, the trial court held Crull in contempt for failing to respond fully to the discovery requests as ordered.

Crull subsequently produced another discovery response to the court under seal but did not provide the information to First Citizens. He then filed a motion to reconsider the contempt order, which the trial court denied. Crull appealed the contempt order.

STANDARD OF REVIEW

This court will reverse a trial court's decision regarding contempt only if it is without evidentiary support or is an abuse of discretion. Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988); Dale v. Dale, 341 S.C.

516, 534 S.E.2d 705 (Ct. App. 2000). An abuse of discretion can occur where the trial court's ruling is based on an error of law. Henderson v. Puckett, 316 S.C. 171, 447 S.E.2d 871 (Ct. App. 1994) (citing 16 S.C. Juris. Appeal and Error § 124 at 31-32 (1992)).

LAW/ANALYSIS

Crull argues that the trial court's refusal to accept his assertion of his privilege against self-incrimination violated his constitutional rights. We agree.

The Fifth Amendment of the United States Constitution provides in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. The South Carolina Constitution includes the same protection. See S.C. Const. art I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). The South Carolina Supreme Court described the importance of the privilege against self-incrimination:

> The framers of the Bill of Rights recognized the dangers inherent in self-incrimination, and as a result, placed in the Fifth Amendment a prohibition against compelling a witness to testify against himself. This prohibition against compelled self-incrimination is a basic constitutional mandate which is not a mere technical rule, but rather, a fundamental right of every citizen in our free society. To this end, the framers of the South Carolina Constitution extended this same protection in our own State Constitution.

State v. Thrift, 312 S.C. 282, 296, 440 S.E.2d 341, 349 (1994).

A witness may assert this constitutional privilege "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . . ." Kastigar v. United States, 406 U.S. 441, 444 (1972); see In

Re: Hearing Before Joint Legislative Committee, Ex parte Johnson, 187 S.C. 1, 196 S.E. 164 (1938) (stating the privilege applies to any tribunal or other body that has the power to subpoena and compel the attendance of witnesses). The privilege "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar, 406 U.S. at 445. It extends not only to answers that would in themselves support a conviction but likewise encompasses those that would furnish a link in the chain of evidence needed to prosecute the witness for a crime. United States v. Hubbell, 530 U.S. 27 (2000). Thus, "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." Id. at 38 (quoting Doe v. United States, 487 U.S. 201, 208, n.6 (1988)). The privilege is available even if the risk of criminal prosecution is remote; the witness only has to show that there is a possibility, and not a likelihood, of prosecution. Moll v. U.S. Life Title Insurance Company of New York, 113 F.R.D. 625 (S.D.N.Y. 1987).

It is a matter for the court to consider and decide whether a direct answer to a question can implicate the witness. Hoffman v. United States, 341 U.S. 479 (1951); Ex parte Johnson, 187 S.C. at 16, 196 S.E.2d at 170 ("When a question is propounded, it belongs to the Court to consider and decide whether any direct answer to it can implicate the witness."). However, the court should give deference to the witness in determining this matter.

The United States Supreme Court explained,

> [I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Hoffman, 341 U.S. at 486-87.

The South Carolina Supreme Court reasoned:

> It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. The fact of itself might be unavailing; but all other facts without it might be insufficient. . . . [T]he witness must himself judge what his answer will be, and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer.

Ex parte Johnson, 187 S.C. at 16-17, 196 S.E.2d at 170-71 (citation omitted).

Crull consistently asserted his privilege against self-incrimination in response to the following interrogatories:

> · For each witness identified, please set forth a summary of the important facts known to or observed by such witness.[1]
>
> · Please list each bank at which third-party defendant or any entity owned in whole or in part by third-party defendant has maintained an account of any kind during the last ten years. For each such bank, please identify all accounts by number, the date on which the account was opened, whether the account has been closed, and the closing date if appropriate.
>
> · Please describe the method by which third-party defendant Beach would acquire titles to automobiles sold by third-party defendant Maxfield or Crull.

[1] Crull provided a summary for all witnesses other than himself.

The trial court found Crull failed to carry his burden of showing there is a reasonable likelihood that a response will lead to incrimination. We hold this finding is in error.

In Moll, the plaintiff brought a class-action lawsuit against an insurance company alleging the insurance company had been paying kickbacks to real estate attorneys. The plaintiff sought discovery from the attorneys. The district court found that because the "attorneys are alleged to be participants in a kickback scheme and subject to criminal penalties, they are 'confronted by substantial and real and not merely trifling or imaginary hazards of incrimination.'" Moll, 113 F.R.D. at 628 (quoting United States v. Doe, 465 U.S. 605 (1984)). Thus, the court held that although none of the attorneys was a defendant in the civil action and no criminal investigation appeared to be pending, the constitutional privilege against self-incrimination would apply where appropriate. Id.

In its third-party complaint, First Citizens alleged Crull engaged in a check-kiting scheme. Such allegations if true would subject Crull to criminal penalties for financial institution fraud. Under the reasoning in Moll, this substantial and real hazard of incrimination would be sufficient to support Crull's assertion of the privilege against self-incrimination even absent evidence of an ongoing criminal investigation.

Furthermore, Crull offered evidence in the form of the affidavit from his attorney and the letter from the FBI agent to show that there was, in fact, an ongoing criminal investigation into the very same facts and circumstances of the civil suit. The FBI agent confirmed that the investigation involves bank site drafts and alleged check-kiting and includes Jay Crull and the business, Lowcountry Auto Sales.

Upon examination of the interrogatories we find that the trial court erred in concluding that no answer or response to these discovery requests could have the effect of incriminating or tending to incriminate Crull, or causing him to disclose some information might provide a link in a chain of evidence against him. Thus, we conclude Crull was justified in exercising his constitutional right to refuse to answer the interrogatories.

Crull also asserted his privilege against self-incrimination in response to the following requests to produce:

- Copies of all documents generated or received by the Third-Party Defendant regarding the allegations in the Complaint and/or the Answer and Third-Party Complaint.
- All documents which the Third-Party Defendant intends to use at trial.
- All documents referenced in the Complaint and/or the Answer and Third-Party Complaint.
- All drafts, front and back, which are at issue in this case: those deposited with the Plaintiff by Jay Crull d/b/a Lowcountry Auto Sales, and Carl Maxfield and Toni Maxfield d/b/a TLM Cars, Inc., which the Plaintiff forwarded to the Defendant from November 1, 1997 to January 5, 1998.
- Copies of all bank account records covering any account of Third-Party defendant during the period of November 1, 1987 through January 15, 1998.

The United States Supreme Court has held a person may be required to produce certain documents even though they contain incriminating information. Fisher v. United States, 425 U.S. 391 (1976). The court reasoned the privilege protects a person only against being incriminated by his own compelled testimonial communications. Id. Thus, the constitutional privilege against self-incrimination is not violated by the fact alone that business records, which were prepared voluntarily, on their face might incriminate the person from whom they are sought. However, the act of production itself may implicitly communicate statements of fact and be considered compelled testimony. Hubbell, 530 U.S. at 36. The privilege protects against production of documents when by producing the documents, the witness would be admitting that the papers existed, were in his possession or control, or were authentic. Id.

Crull's production of his bank records from his account with FUNB may not have risen to the level of testimony within the protection of the privilege as "[t]he existence and location of the papers are a foregone conclusion

and [Crull would add] little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." See Fisher, 425 U.S. at 411. First Citizens' counsel admitted at oral argument that the bank already had received these records. He asserted that First Citizens bank was trying to discover information about unknown bank accounts and activities that would link Crull to other instances of check-kiting to show that FUNB knew or should have known that Crull and the other Third-Party Defendants were involved in illegal check-kiting.

If Crull produced the documents First Citizens is seeking, he would be admitting the existence of the documents, and thus the existence of other bank accounts and activities. He would also be admitting that the documents were in his possession or control or were authentic. As is First Citizens' stated objective, Crull's admission could lead to evidence of other check-kiting activity. Thus, his compelled testimony in producing the documents could furnish a link in the chain of evidence needed to prosecute Crull for financial institution fraud. We therefore conclude Crull was justified in exercising his constitutional right to refuse to respond to the requests to produce.

We hold the trial court abused its discretion by holding Crull in contempt and rejecting his right to assert the privilege against self-incrimination.

Based upon the foregoing, the order of the trial court is

REVERSED.

ANDERSON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roger D. Haselden,

Appellant,

v.

Joanne F. Haselden,

Respondent.

Appeal From Georgetown County
Jamie F. Lee, Family Court Judge
Lisa A. Kinon, Family Court Judge

Opinion No. 3378
Heard June 4, 2001 - Filed August 6, 2001

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Thomas M. Neal, III, of Columbia; and Charles Owen Nation, II, of Georgetown, for appellant.

Elizabeth Rhoad Myrick and Mary Perrin O'Kelley, both of Rosen, Goodstein & Hagood, of Summerville, for respondent.

Guardian ad Litem: William S. Jacobs, of Georgetown.

HUFF, J.: Roger D. Haselden (the father) appeals from an order of the family court ordering him to pay two-thirds of the expenses of his minor child at Hidden Lake Academy (HLA), a private treatment facility located in Georgia. He also appeals from a subsequent order of the family court holding him in contempt for failure to comply with the court's order to pay the expenses. We affirm in part, reverse in part and remand.

FACTUAL/PROCEDURAL BACKGROUND

The father and Joanne F. Haselden (the mother) were divorced by order of the family court in October of 1993. Pursuant to the divorce decree, the mother was granted custody of the parties' child, Gabrielle Gadson Haselden, and the father was ordered to pay bi-weekly child support in the amount of $220.00 ($476.67 per month). The family court further ordered the father, who earned 82% of the family's income, to pay two-thirds of the child's medical expenses, excluding extraordinary medical expenses.

In May of 1998, the mother enrolled Gabrielle in Hidden Lake Academy, a therapeutic boarding school for children diagnosed with Oppositional Defiant Disorder.[1] The cost of tuition at HLA was, at all times pertinent to this case, $4,150.00 per month.

On July 14, 1998, the father commenced this action seeking, among other things, a declaratory judgment relating to his responsibility for expenses incurred due to the placement of the child at HLA. Specifically, the father sought to have the child's treatment at HLA judicially declared an extraordinary medical expense, with the mother bearing full responsibility for the payment of

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[1] Gabrielle was to graduate from Hidden Lake Academy in December of 1999.

the cost of the treatment. The father also sought a change of custody, and access to the child. He also moved for temporary relief, seeking essentially the same relief sought in the complaint. The mother counterclaimed, seeking an increase in child support, an order requiring the father to contribute towards the expenses of the therapeutic boarding school, and an award of attorney fees. She also filed a motion for temporary relief, seeking essentially the same relief requested in her pleadings.

On September 8, 1998, the family court held a hearing on the father's motion for temporary relief and the Honorable Jamie F. Lee issued a temporary order on September 27, 1998 addressing the placement of the child at HLA, finding the father should have equal access to information from the school regarding the child and appointing a guardian ad litem for the child. On September 22, 1998, Judge Lee held a hearing on the mother's motion for temporary relief. Thereafter, by temporary order dated November 16, 1998, Judge Lee increased the father's child support obligation from $220.00 bi-weekly to $571.00 per month. The judge also found the mother made a prima facie showing that the child was in need of treatment and that Hidden Lake Academy was a proper place for such treatment, and required the father to pay an additional $380.00 per month in excess of the amount of child support calculated under the Child Support Guidelines, for a total of $951.00 per month.

On November 20, 1999, the father filed two motions for temporary relief, seeking Christmas visitation with the child and requesting an order requiring the mother to participate in psychological evaluations with a clinical psychologist the father retained. The mother opposed the psychological evaluations and further opposed any overnight visitations with the father. The motions were heard by the Honorable Lisa A. Kinon, who granted the motions by order dated December 22, 1998.

The case came to trial on April 7 and 8, 1999 before Judge Kinon. Following a pretrial conference, the parties announced to the court they had reached an agreement resolving the issues of custody and visitation, leaving the issue of HLA fees, contempt, attorney fees, suit money, and costs before the court. The parties stipulated to expert evidence consisting of reports and

testimony regarding Gabrielle's emotional condition, psychological and psycho-educational evaluations, diagnosis, and placement at Hidden Lake Academy.

At trial, the father argued, in essence, that while Gabrielle was experiencing emotional and behavioral difficulties, the mother made a premature, unilateral decision to enroll her at HLA. Although he admitted Gabrielle was "doing better" as a result of being involved in the programs at the school, he disagreed with her being in a boarding school atmosphere. Dr. C. Barton Saylor, the father's expert witness, testified a "less intrusive intervention," such as a temporary change of custody or residential care, would have been advisable at the time the mother enrolled Gabrielle at HLA. He stated that such action "might have been enough for [Gabrielle] to respond in a positive manner." However, he further opined the mother "made a genuine effort to get the best available recommendations" before deciding to enroll the child in HLA, that the decision to place Gabrielle in long term care was not "recklessly or casually" made, and it was reasonable for the mother to rely on the experts' recommendations in deciding to place Gabrielle at the school. Dr. Saylor acknowledged the father indicated that if the court were to award him custody of Gabrielle, he intended to pull her from the program. He agreed that Gabrielle benefitted from the program and recommended that the child remain at HLA through the completion of the program through December of 1999. He believed Gabrielle's best interest would be served by remaining in the custody of the mother.

Both parties filed financial declarations. According to the father's financial declaration, he earns a gross monthly income of $4,281.33 from Santee Cooper, and $351.67 from the National Guard. He also owns a retirement account valued at $94,558.38 and real estate he valued at $58,145.00.[2] The mother earns $1,026.04 from her employment, with additional income in the form of child support from the father. She owns real estate valued at $279,000.00. The mother also has access to a family trust, with an approximate

[2] A post-trial appraisal of the father's residence established his residence was worth $77,000.00 rather than $58,145.00.

value of $275,000.00, of which the mother is one of four beneficiaries. The mother testified the beneficiaries were not supposed to have access to the trust until the death of her parents, but that her mother made arrangements to access the trust for Gabrielle's school, and she was obligated by written agreement to reimburse the trust.[3] She further stated the trust had already been liquidated greatly because of her father's poor health. The mother has no retirement funds.

By order dated May 25, 1999, Judge Kinon found, regarding the mother's decision to enroll the child at HLA:

> 11. Throughout this action, the Father has vigorously contested the minor child's placement at HLA. He stated his intention at the outset to remove the minor child from HLA if he was awarded custody. . . .
> . . . .
>
> 13. The evidence overwhelmingly demonstrates that the Mother's decision to place the child at Hidden Lake Academy was reasonable under the circumstances which existed at the date of admission to the program. All of the experts who treated and/or evaluated the minor child agreed that she needed out of home treatment, and there is no evidence of any expert dissenting with placement at a therapeutic boarding school.
>
> 14. The decision to place Gabrielle at Hidden Lake Academy was also not made hastily. Over the course of six and a half (6 ½) to seven (7) weeks, the Mother made eighteen (18) inquiries about placement for the minor child, at least twelve (12) while the Father was in

[3] It is unclear whether the mother is required to reimburse the trust in full, or only the amounts paid to her by the father.

> the same room. The Father actually accompanied the Mother and minor child to the various treatment facilities, to the evaluation with Grant Price and Dr. Chesno, and to the two (2) schools personally visited. I find and conclude the Father was involved in the search process for a placement for Gabrielle with the Mother.
>
> 15. Dr. C. Barton Saylor, the Father's expert witness, confirmed that the Mother's decision to enroll the minor child in HLA was not a rash decision and that the minor child had benefitted from the program. This psychologist also could not refute the placement decision in hindsight.
>
> 16. Dr. Saylor further testified that it is in the best interests of the child to complete the program at HLA. All information indicates that the minor child has made progress in the HLA program but continues to need treatment.

The court determined the child's treatment at HLA was an extraordinary medical expense, such that payment of the expense was not controlled by the provision in the parties' divorce decree requiring the father to pay two-thirds of the child's ordinary medical expenses. Nonetheless, Judge Kinon determined the husband should be responsible for two-thirds of the HLA expenses, both prospectively and retroactively. In reaching this determination, the court specifically considered that a proportionate division of the HLA expenses based on gross income alone would require the father to pay 80% of the expenses and the mother to pay 20%. The judge rejected this formula in favor of requiring the father to be responsible for only two-thirds of the cost, finding, although the mother's income was substantially less than that of the father, the mother had "significant assets which she could mortgage and/or sell in order to cover the costs" of the HLA program. She also noted the mother could petition the "Elizabeth H. Freeman Trust" for a payout to apply to the

school costs.

Because the mother had paid all HLA expenses from the child's enrollment in May, 1998 through April, 1999, the father was ordered to reimburse her for his portion of the expenses within 60 days of the order, in addition to making prospective payments directly to Hidden Lake Academy. The court noted the parties had agreed the father would be credited with the additional $380.00 monthly payments he made over the Guideline figure against his liability for the HLA fees and he would be relieved of paying the additional $380.00 monthly stipend once he began paying his portion of the HLA expenses. The increase in child support made pursuant to the Guidelines remained undisturbed. The court also ordered the father to contribute $20,000.00 toward the mother's $36,000.00 attorney fees bill within 90 days of the order.

On June 22, 1999, the father moved to alter or amend Judge Kinon's order pursuant to Rules 52(b), 59(e) and 60(b), SCRCP. Prior to the hearing on the father's motion to alter or amend, the mother petitioned the family court for a rule to show cause why the father should not be held in contempt for failure to comply with the final order. On July 29, 1999, the Honorable H.T. Abbott, III, issued the rule to show cause.

In his motion to alter or amend, the father moved for, among other things, the court to change his two-thirds allocation of HLA expenses to one-half. He also moved to have the order state he was to receive credit for all child support paid by him to the mother during the child's enrollment in HLA, and that future child support payments to the wife be suspended during this time. He further sought a reduction in the award of attorney fees and a credit for fees of $1,500.00 paid by him pursuant to the temporary order.

Judge Kinon heard the father's post-trial motion on September 3, 1999. By order dated October 11, 1999, she denied the father's motions, with the exception of an agreed upon stipulation not pertinent to this appeal. Specifically, she found she had fully considered both parties' economic circumstances in determining the split of two-thirds for the father and one-third

for the mother, and denied the father's motion to change it to one-half for both parties. As to credit for past child support and suspension of future child support while Gabrielle was enrolled at HLA, Judge Kinon denied this request noting that, following the trial, the parties agreed the father would receive credit for the additional $380.00 stipend required by the temporary order to be used toward HLA expenses. They further agreed the father would be relieved of paying that amount once he began paying his portion of the HLA expenses. However, she found she never specifically ordered child support payments and that, other than the HLA expenses, child support was not an issue she had been asked to rule upon. Finally, Judge Kinon denied the father's request for a reduction in attorney fees finding the award appropriate based on the wife's success on the merits, the difficulty of the case, and the Glasscock factors. She further noted the court had considered that the $1,500.00 fee had been awarded on a temporary basis in setting the amount awarded at trial.

Judge Lee held the hearing on the mother's rule to show cause on October 29, 1999. By order dated December 10, 1999, Judge Lee found the father in willful contempt for failure to comply with the final order, and sentenced him to a 90 day suspended sentence, provided he could avoid the sentence by making an immediate payment of $4,416.00, paying $24,000.00 within fifteen days of the date of the order, and beginning monthly payments of $750.00 until the mother was paid in full.[4]

The father appealed, seeking review of both the final order and the order of contempt. On November 18, 1999, the husband sought a stay of both orders, which request was denied. Thereafter, the father petitioned this court for a writ of supersedeas regarding the contempt charges. On December 21, 1999, this court issued an order granting a partial stay of Judge Lee's order requiring the father to pay $24,000.00 within fifteen days.

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[4] It should be noted the order was dated the same month Gabrielle was scheduled to finish the HLA program and, thus, no further monthly tuition would be incurred at the school. Further, Judge Lee restructured the payments in an attempt to ease the burden on the father of such a large payment up front.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Owens v. Owens, 320 S.C. 543, 546, 466 S.E.2d 373, 375 (Ct. App.1996). This broad scope of review does not, however, require this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999).

LAW/ANALYSIS

I.

The father asserts the mother should bear the full expense of Gabrielle's treatment at HLA because she unilaterally decided to place the child in the treatment facility. We disagree.

South Carolina Code Ann. § 20-7-420 (1985 & Supp. 2000) grants the family court exclusive jurisdiction

> (15) To include in the requirements of an order for support the providing of necessary shelter, food, clothing, care, medical attention, expenses of confinement, both before and after the birth, the expense of educating his or her child and other proper and reasonable expenses.

We note the father does not directly challenge the family court's finding that Gabrielle's placement at HLA was proper or that the child benefitted from the treatment. See ML-Lee Acquisition Fund, L.P. v. Deloitte

& Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997); Resolution Trust Corp. v. Eagle Lake & Golf Condos., 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993) (holding an unappealed ruling is the law of the case).

We are compelled to agree with the family court that the father was involved in the search for treatment for Gabrielle. The record supports the family court's finding that the mother made extensive inquiries, approximately fifteen to eighteen, about placement for the child before admitting her to HLA. The father was present during approximately twelve of these inquiries. The father testified he accompanied the mother and Gabrielle to various treatment facilities, the psycho-educational evaluation, and two prospective schools. He acknowledged that therapeutic boarding school was recommended for Gabrielle by a clinical psychologist. He testified he accompanied the mother and Gabrielle to boarding schools because he "wanted to know exactly what was going on with my daughter." Thus, the record shows the father participated in, or at the very least was not excluded from the search for Gabrielle's treatment.[5]

The father testified that during these trips to look at programs, he expressed concern to the mother regarding the cost of boarding facilities, and opined that Gabrielle could have benefitted from local treatment with both parents involved. Although the father ultimately objected to placing Gabrielle in a boarding facility, there is no suggestion he exerted independent efforts prior to the commencement of this action to find a suitable local treatment facility for Gabrielle. In fact, at the time the mother enrolled Gabrielle at HLA, the child had already undergone treatment through a local counselor as well as other intervention programs, and had received a number of professional recommendations that the child be placed in a therapeutic setting. Inasmuch as the evidence presented at trial fully bears out the family court's conclusion that Gabrielle's placement at HLA was proper, and in the absence of evidence the

[5] It is undisputed the parties toured a school in Alabama with a nine-month program costing $3,000.00 per month. However, the father objected to the "rustic" school, was adamant their daughter not be enrolled there, and threatened to physically remove the child.

father presented the mother with any specific, appropriate local alternatives for treatment from which Gabrielle would have benefitted, we cannot conclude the father was simply excluded from the process of finding care for the child. Rather, the mother was compelled to choose one of the only existing alternatives for proper treatment for the child.

II.

We also disagree with the father's contention the family court erred in requiring him to be responsible for two-thirds of the cost of treatment.

The family court considered, and rejected, an income proportionate method of allocating the cost of Gabrielle's treatment at HLA which would have subjected the father to an even greater burden. The family court expressly considered the parties' respective incomes and assets in reaching its determination as to allocation of the debt. The court's reasoning in this regard resulted in the father being assigned a less than income-proportionate share. As noted by the guardian ad litem, the parties are in diametric financial conditions, with the father's income being almost three time that of the mother's, but the mother having substantially larger assets. However, the father enjoys some financial stability in his future based on his retirement, while the mother has no retirement accounts or plans. Clearly the mother will have to rely on the equity in her real estate and her one-fourth interest in any remaining trust funds to secure her financial condition upon retirement. It would be inequitable for the court to require the mother to substantially reduce or possibly deplete her current assets when she has no other future source of support and earns very little income. Moreover, it is notable the father refused to cooperate in completing a form necessary to determine Gabrielle's eligibility to receive financial assistance for the school costs.

While we recognize the financial strain the expense of Gabrielle's treatment at HLA puts on the parties, we are nonetheless convinced the family court properly considered their financial circumstances and the equities of the

case in apportioning the cost of the treatment.[6]

III.

The father next asserts the family court erred in requiring him to pay $20,000.00 of the mother's attorney fees. We disagree.

The decision whether to award attorney fees is a matter within the sound discretion of the family court and will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). In determining whether to award attorney fees, the court should consider the parties' ability to pay their own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining the amount of attorney fees to award, the court should consider the nature, extent, and difficulty of the case, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The father summarily argues he does not have the ability to pay the award of attorney fees. He does not challenge the sufficiency of the order in addressing the factors or of the evidence in support of the other factors to be

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[6] The father summarily asserts it is inequitable to require him to continue paying child support to the mother while he is responsible for two-thirds of the child's expenses at HLA. Although we are not unsympathetic to this argument, Judge Kinon denied the father's motion for reconsideration on this ground ruling that the issue of child support payments to the mother, other than the HLA expenses, was not properly before her. The father has not challenged that ruling on appeal, and it is thus the law of the case. ML-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (1997); Resolution Trust Corp., 310 S.C. at 475, 427 S.E.2d at 648 (1993) (an unappealed ruling is the law of the case).

considered in an attorney fee award. The father was ordered to pay $20,000.00 of the mother's $36,000.00 in attorney fees. This amounts to a little over half of her bill. Under the facts and circumstances of this case, particularly the father's superior income, the fact the father initiated this action seeking custody and did not drop the issue until trial, the mother's successful defense against the father's attempt to avoid the child's continued placement at HLA, as well as the mother's success in her plea for a substantial contribution from the father toward the HLA fees, we find no abuse of discretion in the award.

IV.

Next, the father takes issue with the family court's denial of his request the mother contribute to the fees for his expert witness, Dr. C. Barton Saylor, requiring him to pay all the fees. We find no error.

"The decision of whether to award expert witness fees, like the decision to award attorney fees, rests within the sound discretion of the family court." Brunner v. Brunner, 296 S.C. 60, 62, 370 S.E.2d 614,616 (Ct. App. 1988). We find no abuse of discretion occurred here. In support of its decision to assign Dr. Saylor's fees to the husband, the family court found the father had the opportunity to have the child evaluated prior to her placement at HLA, but failed to do so. The father asserts the mother blocked his attempt to have the child evaluated. He presented no evidence, however, that he made any attempt, prior to retaining Dr. Saylor for purposes of this litigation, to have the child independently evaluated. In particular, we note the father made no such attempt during the 6 to 7 week period prior to the commencement of this litigation, when placement alternatives were being explored. We further note, although Dr. Saylor testified less intrusive intervention **might** have been enough for Gabrielle to have responded in a positive manner, he ultimately agreed the decision to place Gabrielle in long term care was not recklessly or casually made and it was reasonable for the mother to rely on the experts' recommendations in deciding to place Gabrielle at the school. He further agreed that Gabrielle benefitted from the program, recommending she remain at the school, and believed Gabrielle's best interest would be served by maintaining custody with the mother.

V.

Next, the father contends Judge Lee erred in finding him in contempt based upon a rule to show cause which was improperly issued prior to the issuance of an order on his motion for reconsideration. We find no error.

In support of his argument that the rule to show cause was improperly issued, the husband contends a motion made pursuant to Rule 59(e), SCRCP stays the time for appeal by delaying entry of a final judgment, thus depriving the court of a final order from which a rule could be issued. We disagree. While a timely motion made under Rules 52(b) and 59(e) does stay the time to appeal a judgment, the rules do not provide such motions stay proceedings to enforce a judgment. Rule 60(b) specifically states such a motion does not affect the finality of a judgment or suspend its operation. Moreover, while Rule 62(a), SCRCP automatically stays enforcement of a judgment, the automatic stay expires 10 days after the judgment is entered. Although further stays are available under the subdivisions of Rule 62, they are not automatic and must be ordered by the court. See, e.g., Rule 62(b), SCRCP (providing court may, in its discretion, stay the execution of proceedings to enforce a judgment, pending disposition of a motion for a new trial or to alter or amend made pursuant to Rules 59, 60, 50 or 52(b)). There is no evidence the father sought to have the contempt matter held in abeyance pending the court's ruling on his motion to alter or amend.

VI.

The father next asserts the family court erred in finding him in willful contempt of the May 25, 1999 order. We find no reversible error.

"Contempt results from the willful disobedience of a court order." Henderson v. Henderson, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989). The record before the court must "clearly and specifically" exhibit the contemptuous conduct to sustain a finding of contempt. Id. A finding of contempt rests within the trial judge's sound discretion. Id. This court will reverse a trial judge's determination regarding contempt only if it is without evidentiary support or is

an abuse of discretion. Dale v. Dale, 341 S.C. 516, 520, 534 S.E.2d 705, 707 (Ct. App. 2000).

The May 25, 1999 order clearly directed the husband to pay two-thirds of Gabrielle's expenses at HLA prospectively as well as retroactively, in order to reimburse the mother for the father's share of payments made by her in the past. The father does not challenge the clarity of the order and admits he failed to comply with its terms. He asserts, however, that his failure to comply with the order was a result of his financial inability to do so, rather than any willfulness on his part.

In finding the father in contempt, the family court noted that from April 30, 1998 until July of 1999, the father obtained and spent $37,311.90. The sources of these funds were (1) a $14,420.82 inheritance; (2) a $10,000.00 loan from the father's 401(k) plan; (3) a $5,891.08 loan from the father's mother; and (4) a $5,000 loan from the father's sisters; and (5) Gabrielle's $2,000.00 inheritance from the father's relative, which the father obtained by signing as Gabrielle's legal guardian.

The father received his $14,420.82 inheritance on April 29,1998, one day before he wrote a letter to the mother stating he would not be able to contribute to Gabrielle's treatment. In spite of his knowledge of his daughter's need of treatment and her enrollment at HLA, he gave $7,500.00 of his inheritance to his mother, allegedly in satisfaction of a debt he created in 1994. He also used some of the funds from his inheritance to pay for home improvements. He spent Gabrielle's $2,000.00 inheritance to pay for his travel, hotel, and food expenses while Gabrielle was hospitalized in Charter of Charleston and Charter of Memphis. In September of 1998, with full knowledge that Gabrielle was enrolled in HLA and that the mother was bearing the full cost of her treatment, the father borrowed $8,891.08 from his mother, $5,000.00 of which he used to pay his attorney. The father admitted that $3,000.00 of the $8,891.08 promissory note represented the balance he owed his mother from the 1994 loan. Moreover, the husband did not use the proceeds of either the $10,000.00 loan from his 401(k), which he received in January of 1999, or the $5,000.00 loan from his sisters to help satisfy his support

obligation. As well, the father executed liens against his property in favor of his mother and sisters, refinanced his home and real estate, and satisfied the mortgages held by his family members.[7] Due to the mortgages filed in July 1999, the father received only $7,981.57 from the refinancing, an amount substantially less than the amount he could have obtained had he not executed the mortgages. The father acknowledged he would have had over $20,000.00 to pay on his HLA obligations had he not executed the mortgages and paid his family members, but reasoned such a contribution would have made little difference in his total obligation. In spite of the court order, the husband did not make any payments to the school.

In addition to failing to reimburse the mother for his share of the HLA expenses or make payments directly to HLA, it is undisputed the father failed to make child support payments in the amounts specified in the May 25, 1999 order. The father was required to make payments of $951.00 per month until he began making his HLA payments, at which point he was allowed to reduce the child support payments to $571.00 per month. The father did not begin making his portion of the HLA payments, yet he reduced his child support payments to the wife. Further, not only did he reduce the child support, he did not even pay the $571.00, but cut the amount back to $476.00 per month, the amount due under the 1993 order.

Under these facts and circumstances, and giving due deference to the family court's consideration of matters of credibility, we find no error in the court's determination the father's failure to comply with the mandates of the final order was willful in nature.

VII.

The father also contends the family court erred in awarding the mother $1,000.00 in attorney fees in connection with bringing the contempt action. He asserts the award of these fees should be reversed if the finding of

[7] The proceeds from this refinancing, approximately $8,000.00, are being held in escrow by the father's attorney.

contempt is reversed. Given our affirmation of the family court's finding of contempt, this argument has no merit.

The father further argues, however, the award should be reversed based on the court's failure "to make findings of salient facts and conclusions of law" supporting the award in its order. We agree.

Rule 26(a), SCRFC provides:

> An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision.

When an order from the family court is issued in violation of Rule 26(a), the appellate court may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence. Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 535 (Ct. App. 1998). However, if there is inadequate evidentiary support for the factors to be considered in making such an award, the appellate court should reverse and remand for the trial court to make specific findings. Id. at 646, 506 S.E.2d 535.

In this case, the family court merely stated the mother "introduced a detailed Affidavit from her attorney" in support of her request for fees, that the hourly rate of $150.00 was reasonable, and "based on the factors relevant to setting an award of fees" the father should contribute $1,000.00 toward the mother's attorney fees. Clearly, this does not comply with the mandate of Rule 26(a). Further, there is simply no evidentiary support in the record whatsoever from which this court can make its own findings.[8] Accordingly, we reverse and remand this issue for the family court to make specific findings of fact.

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[8] There is no indication of the hours spent on the case or even the total amount of the attorney fees incurred by the mother in the contempt action.

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

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

ANDERSON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Johnny Goodwin,

Respondent,

v.

Reverend David Kennedy, individually, and the Abbeville Chapter of C.A.F.E., a nonprofit corporation,

Appellants.

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

Opinion No. 3379
Heard March 7, 2001 - Filed August 6, 2001

AFFIRMED

Stephen John Henry, of Greenville, for appellants.

Thomas E. Hite, Jr., of Abbeville, for respondent.

CONNOR, J.: In this defamation action, Johnny Goodwin sued David Kennedy and the Abbeville Chapter of C.A.F.E., a nonprofit corporation, for allegedly slanderous statements Kennedy made while Goodwin was an assistant principal of a local high school. The jury returned a verdict for

Goodwin and awarded him actual damages of $5,000 and punitive damages of $25,000. Kennedy appeals.[1] We affirm.

FACTS

This action arises out of statements Kennedy made about Goodwin on two occasions in February and March of 1997. At that time, Goodwin was an assistant principal at Abbeville High School, and his responsibilities included ninth-grade discipline.

The first incident occurred on February 6, 1997, when the parents of a suspended student brought their son to school following his three-day suspension for fighting. School policy required that a parent return with the student for re-enrollment. The parents were accompanied by Kennedy, the organizer of C.A.F.E.,[2] and Kennedy's assistant, Carol Bishop.

Goodwin noted it was unusual for parents to bring someone else to a conference. However, he proceeded with the meeting in his office, during which Kennedy vigorously objected to the discipline given to the suspended student. Kennedy asked to hear from the teacher who recommended the suspension, and the teacher was brought into the conference as well. As the meeting became progressively heated, the principal of Abbeville High School, Mike Campbell, joined the meeting at Goodwin's request approximately thirty minutes after the meeting began. According to Goodwin, the meeting took on racial overtones when Kennedy repeatedly and vociferously questioned why the

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[1] For simplicity, "Kennedy" shall also include his organization, C.A.F.E., where appropriate.

[2] According to Kennedy, he was the organizer of four chapters of C.A.F.E. (Carolina Alliance of Fair Employment), which he stated is involved in challenging corruption of the police and sheriff's departments, assisting persons terminated from employment, and providing help with school matters and other issues affecting the community.

African-American student was suspended, while the Caucasian student purportedly involved in the incident was not.

As the meeting ended and after Campbell had asked Kennedy to leave, the parties walked out of Goodwin's office into the receptionist's area, where the secretary was sitting with her four-year-old grandson. Kennedy allegedly stated he was "not running" and then yelled, "I am not a house nigger. There is your house nigger right there [indicating Goodwin] and you are his master slave owner [indicating principal Campbell]." Kennedy repeated the words four or five times in a loud voice. Goodwin and Kennedy are both African-American. Campbell is Caucasian.

The second incident of alleged slander occurred on March 25, 1997. On that date, a full school board meeting was held at Calhoun Falls High School, at which the board was to consider a recommendation that the same suspended student be placed in an alternative school. When Goodwin exited the meeting room and walked into the hallway, Kennedy loudly stated in the presence of about fifteen persons present for the meeting, "There is the house nigger and the master slave owner is standing right down there."

Goodwin filed this defamation action against Kennedy and the Abbeville Chapter of C.A.F.E. on September 11, 1997, alleging Kennedy's statements caused him to suffer great pain and mental anguish, damaged his reputation, and brought his fitness to serve in his profession into question.

At trial, Kennedy admitted making the statements attributed to him at the meeting on March 25, 1997, and testified they were negative comments meaning Goodwin was a traitor and a puppet. The trial judge charged the jury on slander per se and slander per quod. The jury returned a verdict in favor of Goodwin for $5,000 actual damages and $25,000 punitive damages. Kennedy appeals.

LAW/ANALYSIS

I. Slander Per Se

Kennedy contends the trial judge erred in denying his motion for a directed verdict as to whether the alleged defamatory statements constituted slander per se, and in charging the jury on slander per se.[3]

Slander is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 511, 506 S.E.2d 497, 502 (1998). In a defamation action that is actionable per se, general damages are presumed and need not be proven by the plaintiff. Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 447 S.E.2d 194, cert. denied, 513 U.S. 1017 (1994).

In this case, Goodwin alleged Kennedy's statements were actionable per se because they imputed an unfitness in his profession when considered in the context in which they were spoken. At trial, Goodwin defined the comments as meaning that he was a traitor to his own race, and stated the remarks were evil, degrading, and "just plain embarrassing." Kennedy testified that he meant Goodwin was a puppet of the principal and a traitor to the African-American student who was disciplined. He conceded the term was "bad" and "negative." Kennedy also admitted his statements arose from his concern about Goodwin's actions as an assistant principal interfering with the African-American student's

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[3] For better understanding of the issues involved in this opinion, we will follow the Supreme Court's directive and use the following language to refer to the two parts of a slander action. A statement is (1) either defamatory per se or defamatory per quod, and (2) either actionable per se or not actionable per se. See Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998).

education. We also note the statements were both made in the course of Goodwin carrying out his responsibilities as an assistant principal.

Goodwin testified students did not respond as well to his discipline after the incidents. One student even told Goodwin he was "a disgrace to [his] race." Goodwin believed this comment was a direct result of Kennedy's public remarks. Goodwin felt Kennedy's comments affected his ability to discipline the students effectively. Goodwin testified that because of these continuing difficulties, he retired in June of 1998. He stated he could not think of anything worse than what Kennedy said to him in public.

The circuit court denied Kennedy's motion for a directed verdict, ruling that when viewed in the light most favorable to Goodwin, there was evidence that the statements were defamatory and that the statements charged Goodwin with unfitness in his profession. The court noted that both Goodwin and Kennedy had testified the words were intended to mean Goodwin was a traitor to his race regarding his actions in disciplining the students.

In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion where either the evidence yields more than one inference or its inference is in doubt. Strange v. South Carolina Dep't of Highways & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "The trial court can only be reversed by this Court when there is no evidence to support the ruling below." Id. at 430, 445 S.E.2d at 440. "In essence, we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." Bultman v. Barber, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981).

We find the trial judge did not err in ruling that whether the statements were defamatory is a question for the jury as the finders of fact. Viewing the evidence in the light most favorable to Kennedy, it is a reasonable inference that, under the circumstances in which Kennedy made the statements, the jury could find those statements defamatory.

Likewise, the question of whether the statements were actionable per se or not actionable per se was a matter for the jury to determine as the finders of fact. See Turner v. Montgomery Ward & Co., 165 S.C. 253, 261, 163 S.E. 796, 798-99 (1932) ("[T]he evidence adduced by the plaintiff in the case at bar required the submission to the jury of the question whether the language used by [the defendant] charged the plaintiff with the commission of such crime."). A reasonable inference arising from Goodwin's testimony is that Kennedy's comments were directed at Goodwin's alleged unfitness in his profession as an assistant school principal. Specifically, the jury could find Kennedy assailed Goodwin's integrity and decision-making ability when carrying out his responsibility to discipline all students, African-American and Caucasian, fairly. Another reasonable inference from Kennedy's comments is that he was attributing racism and bias to Goodwin in his dealings with the students in matters of discipline. It cannot be said that when viewing the evidence in the light most favorable to Goodwin, the jury could not have inferred that the statements attacked Goodwin's fitness to serve as an assistant principal.

Accordingly, we find no error in the trial judge's decision to deny Kennedy's motion for a directed verdict on the issue of whether Kennedy's statements were actionable per se.[4] Consequently, we also reject

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[4] We also reject Kennedy's argument that the context in which the statement was made cannot be considered when determining if it is defamatory. Kennedy also misguidedly argues that if the context of the words is considered, then the statement cannot, as a matter of law, be actionable per se. Kennedy has cited no authority for this proposition. To the contrary, the law in South Carolina allows the context of the words themselves and the circumstances under which the words are spoken to be considered in determining whether there is a defamatory meaning and whether it is actionable per se. Herring v. Lawrence Warehouse Co., 222 S.C. 226, 235, 72 S.E.2d 453, 455 (1952) (holding that when considered in light of circumstances, employer's statement that employee was "short" was clearly defamatory and actionable per se because it alleged the commission of a crime, namely theft); Lily v. Belk's Dept. Store, 178 S.C. 278, 182 S.E. 889 (1935); Turner v. Montgomery Ward & Co., 165 S.C. 253, 163 S.E. 796 (1932); see Sandifer v. Electrolux Corp., 172 F.2d 548

Kennedy's assertion that the trial judge's charge to the jury on this issue was error.

II. Request to Charge on "Opinion"

Kennedy contends the trial judge committed reversible error by denying his written request to charge the jury that the "mere expression of opinion is not slander."

On appeal, Kennedy cites no South Carolina authority on point. However, we note that in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the United States Supreme Court remarked, "Under the First Amendment there is no such thing as a false *idea*. However pernicious an *opinion* may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other *ideas*. But there is no constitutional value in false statements of fact." Id. at 339-40 (footnote omitted) (emphasis added).

In Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), the Supreme Court observed that its language in Gertz "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." Id. at 18 (quoting Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2nd Cir. 1980)). The Milkovich Court reasoned that, read in context, "the fair meaning of the [Gertz] passage is to equate the word 'opinion' in the second sentence with the word 'idea' in the second sentence," and that "the language was merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept."[5] Id.

(4th Cir. 1949) (holding under South Carolina law, where words themselves do not impute the commission of a crime, the jury may consider surrounding circumstances to determine whether statement was defamatory because it charged the commission of a crime). Therefore, we dismiss Kennedy's arguments in that regard as unsupported by the law of defamation in this State.

[5] See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas

In Milkovich, a high school wrestling coach brought a defamation action against a newspaper and a reporter. The Supreme Court rejected the defendants' argument that there is a First Amendment protection afforded defamatory statements which are categorized as "opinion" rather than "fact." Id. at 17-23. The Court held that couching a statement with a defamatory connotation in terms of an opinion does not grant an exemption for anything that might be said. The Court concluded:

> [W]e do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact.
>
> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Id. at 18-19 (citation omitted); see also 50 Am. Jur. 2d Libel and Slander § 105 (1995) ("In Milkovich, the United States Supreme Court rejected the creation of an artificial dichotomy between opinion and fact, holding that the Constitution does not require a wholesale defamation exemption for anything

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[and] the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]").

that might be labeled 'opinion.'"). Because Kennedy's request to charge appears to exempt all opinion as non-defamatory comment without qualification, we find no error in the circuit court's decision to deny Kennedy's proposed jury charge.

III. Epithet

Kennedy next asserts the trial judge erred in denying a directed verdict because the alleged statements were mere epithets and not defamatory, and in failing to charge the jury that name-calling and insults cannot be slanderous.

At trial, Kennedy argued he was entitled to a directed verdict because there was no evidence the comments were anything other than epithets. The trial judge denied the motion for a directed verdict, stating "all of the words have to be considered in the context with which they are used." The court stated whether the words were defamatory or not presented "factual questions" for the jury. We agree with the trial judge that, viewing all the evidence in the light most favorable to Goodwin, as we are required to do, whether the comments were defamatory presented a question of fact for the jury to determine. Thus, we find no error in the denial of a directed verdict on this basis.

To the extent Kennedy argues the trial judge erred in denying his request to charge the jury on epithet, we also find no error. Kennedy sought a charge to the effect that name-calling, insults, and profanity do not constitute slander, citing Smith v. Phoenix Furniture Co., 339 F. Supp. 969 (1972). We have reviewed Phoenix Furniture and find Kennedy's request to be an incomplete statement of the law announced therein. In Phoenix Furniture, the court granted summary judgment for the defendant because the allegedly defamatory words, "bastard" and "son-of-a-bitch," were not actionable per se, and the plaintiff had suffered no special damages. Smith v. Phoenix Furniture Co., 339 F. Supp. 969, 971 (1972). Further, the court found the only witnesses to the defendant's allegedly defamatory statements, the plaintiff's wife and mother-in-law, did not believe the words spoken and "did not understand the words spoken as being other than words uttered in anger." Id. at 971-72. The

trial judge summed up his ruling by stating, "It does not appear that anyone who heard the words alleged spoken understood them in a defamatory sense." Id. at 972.

In Capps v. Watts, 271 S.C. 276, 246 S.E.2d 606 (1978), the South Carolina Supreme Court stated that "the words 'paranoid sonofabitch' are words of abuse and scurrility and that such words, on their face, are not, as a general rule, considered defamatory." Id. at 281-82, 246 S.E.2d at 609. The Court went on to explain, however, that when viewed in light of the extrinsic facts pleaded in plaintiff's complaint, the words were capable of having a defamatory meaning. Id. at 282, 246 S.E.2d at 609. The court clearly held that words of "abuse and scurrility" can be defamatory when the circumstances surrounding their publication are considered and that it is the jury's responsibility to decide whether the words are defamatory or not. Id. at 282, 246 S.E.2d at 609-610 ("It is not the words alone but the circumstances surrounding their publication which renders them susceptible of a [defamatory] construction. It is for the jury to determine whether they were used in a [defamatory] sense given the circumstances.")

Kennedy requested the jury be charged the following: "Name calling, insults and profanity, absent the showing of special damages is not slander." The trial judge seemed troubled by the broad statement of law offered by defense counsel. The judge did not believe he could give the charge as proposed without some quote or further explanation. The judge was correct, and it would have been an incorrect statement of the law to have charged the jury that insults or profanity cannot be defamatory, as extrinsic facts may be proven to show the defamatory nature of the remarks. We find the charge as a whole was proper, and note that the judge did not preclude the defense from arguing that the alleged defamatory statements were mere insults or name-calling. Keaton v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999) (holding a jury charge which is substantially correct and covers the law does not require reversal). Accordingly, we find no error in the trial judge's refusal to charge in this instance.

IV. Public Official

Kennedy next alleges the trial judge erred by not finding Goodwin was a public official and, accordingly, charging the jury on the plaintiff's burden of proving actual malice and the falsity of the alleged defamatory statement.

The designation of a plaintiff as a public official is considerable in a defamation action. "In defamation actions involving a 'public official' or 'public figure,' the plaintiff must prove the statement was made with 'actual malice,' i.e., with either knowledge that it was false or reckless disregard for its truth." Elder v. Gaffney Ledger, 341 S.C. 108, 113, 533 S.E.2d 899, 901 (2000).

Kennedy argued Goodwin, as an assistant principal, was a public official. On that basis, Kennedy asserted he was entitled to a jury charge that Goodwin had the burden of proving actual malice and the falsity of the statements. The trial judge ruled Goodwin was not a public official.

The United States Supreme Court explained that a plaintiff may be designated a "public figure" in two circumstances:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Gertz, 418 U.S. at 351.

On appeal, Kennedy cites no South Carolina authority on point, but references South Carolina cases holding police officers and assistant police chiefs are public officials for purposes of defamation actions. See, e.g., Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996) (applying Constitutional actual malice standard in case involving assistant police chief); Beckham v. Sun News, 289 S.C. 28, 344 S.E.2d 603, cert. denied, 479 U.S.

1007 (1986) (applying Constitutional actual malice standard in case involving former police officer); McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980) (holding police officer is a public official); Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994). We find these cases involving law enforcement officers are not controlling here.

Kennedy also relies upon Johnson v. Robbinsdale Independent School District No. 281, 827 F. Supp. 1439 (D. Minn. 1993) (holding public school principals criticized for their official conduct are public officials for purposes of defamation law) and Reaves v. Foster, 200 So. 2d 453 (Miss. 1967) (holding a school principal seeking recovery for defamation has the burden of showing actual malice).

We find these cases to be distinguishable. Both concern whether a school *principal* should be deemed a public official, not an *assistant principal*. Further, as Kennedy acknowledges, there is no clear consensus among those jurisdictions which have considered the issue of whether a school principal is a public official for purposes of a defamation claim.

> Courts are divided as to whether a public school principal is a public official. Some courts have held that public school principals are public officials, but others have held that public school principals are not public officials, reasoning that principals in general are far removed from the general conduct of government and are not policymakers at the level intended by the New York Times ruling.

50 Am. Jur. 2d Libel and Slander § 65 (1995) (footnotes omitted); see also Palmer v. Bennington Sch. Dist., Inc., 615 A.2d 498, 501 (Vt. 1992) ("Few courts have considered whether a school principal is a public official. Those that have are divided.").

Kennedy's argument that an assistant principal is a public official is less than compelling in view of the conflicting decisions over whether a principal, much less an assistant principal, is a pubic official. Compare Ellerbee

v. Mills, 422 S.E.2d 539, 540 (Ga. 1992) ("[U]nder normal circumstances, a principal simply does not have the relationship with government to warrant 'public official' status under New York Times. Principals, in general, are removed from the general conduct of government, and are not policymakers at the level intended by the New York Times designation of public official."), cert. denied, 507 U.S. 1025 (1993), and McCutcheon v. Moran, 425 N.E.2d 1130, 1133 (Ill. App. Ct. 1981) ("The relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation."), and East Canton Educ. Ass'n v. McIntosh, 709 N.E.2d 468, 475 (Ohio 1999) (noting there is a split among other jurisdictions and stating, "[W]e believe that the better view is that principals are not public officials for purposes of defamation law."), with Bennington School Dist., Inc., 615 A.2d at 501 ("Few courts have considered whether a school principal is a public official. Those that have are divided. Because of the crucial role of public education in American society, we agree with the courts holding that a principal is a public official." (citations omitted)).

Goodwin was an assistant principal whose duties included ninth-grade discipline. In the context of this case, we believe Goodwin was not a public official. His position as assistant principal is not one "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). Accordingly, we agree with the trial judge that Goodwin, as an assistant principal, is not a public official and Kennedy was not entitled to such a jury charge.

V. Instruction on Reputational Damages

Kennedy contends the trial judge erred in submitting the issue of reputational damages to the jury because there was insufficient evidence to support this instruction.

"The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a

false message about the plaintiff." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 484, 514 S.E.2d 126, 133 (1999).

General damages in a defamation action include injury to reputation, mental suffering, hurt feelings, and other similar types of injuries which are not capable of a definite monetary valuation. Holtzscheiter, 332 S.C. at 510 n.4, 506 S.E.2d at 502 n.4. Special damages, on the other hand, are tangible losses or injury to the plaintiff's property, business, occupation or profession, which are capable of being assessed monetarily and which result from injury to the plaintiff's reputation. Id.

At trial, Kennedy objected to charging the jury on reputational damages. The trial judge overruled the objection, noting there was evidence that Kennedy's statements affected the students' attitude toward Goodwin at school.

We find no error. Goodwin testified students heard Kennedy's comments at the school board meeting on March 25, 1997. He also stated that Kennedy's comments had an effect on the students as some students did not respond to his disciplinary efforts and he "thought it was pretty much a direct result of [the comments]." He recalled one incident when he disciplined a student and the student told him he was "a disgrace to [his] race." Goodwin stated he believed the remark "was a direct result of the house nigger calling, the names that had been called." Because there was some evidence of reputational damage, we find no error in the charge.

VI. Slander Per Quod

Kennedy asserts the trial judge should have granted a directed verdict in his favor on the issue of slander per quod because Goodwin failed to prove special damages.

Kennedy argues the alleged defamatory remarks were not actionable per se and Goodwin was required to plead and prove special damages. Kennedy claims no proof of special damages was presented because Goodwin did not testify that he suffered any monetary loss to his property or profession. See Holtzscheiter, 332 S.C. at 510 n.4, 506 S.E.2d at 502 n.4 (stating special

damages are tangible losses or injury to the plaintiff's property, business, occupation or profession, which are capable of being assessed monetarily and which result from injury to the plaintiff's reputation).

We find no reversible error in this regard. Goodwin testified his reputation was damaged and approximately one year later he reluctantly retired because of continuing difficulties with the students. Furthermore, if the jury found the remarks charged unfitness in his profession, no proof of special damages was needed. Because interrogatories were not submitted to the jury, the basis for the jury's award is unknown. The jury reasonably could have found the comments actionable per se. See Piedmont Aviation, Inc. v. Quinn, 294 S.C. 502, 504, 366 S.E.2d 31, 32 (Ct. App. 1988) ("Where a case is submitted to the jury on two or more theories and a general verdict is returned, the verdict will be upheld if it is supported by at least one [of the theories].") (quoting Gasque v. Heublein, Inc., 281 S.C. 278, 281, 315 S.E.2d 556, 558 (Ct. App. 1984) (alteration in original)). Therefore, we find the argument to be without merit.

VII. Alleged Hearsay Testimony of Lula Clinkscale

Kennedy lastly asserts the trial judge committed reversible error by allowing hearsay testimony from Lula Clinkscale.

Clinkscale was not present when the February 1997 statements were made by Kennedy at Abbeville High School. She was present at the March 1997 incident at Calhoun Falls High School, but did not hear the alleged defamatory statements. Clinkscale testified she did not know specifically what the term "house nigger" meant, although she knew it was bad. During her testimony, however, Clinkscale recounted a meeting she had with Kennedy after the March incident:

> And at St. James Church was when we was there trying to compromise with him, you know, so he could stop saying these words because the kids were beginning to say the same words. And, you know, I thought it was bad. [Emphasis added.]

Kennedy objected to any reference to what the children were saying on the basis of hearsay. The court overruled the objection, stating it was being admitted not for the truth of the matter asserted, but to show how the children were affected or what they did.

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE.

We agree with the circuit court that the testimony was not offered for the truth of the matter asserted, but to show the effect on the students to support Goodwin's claim of reputational damages. Testimony that students were repeating the slanderous statements was relevant for purposes of establishing Goodwin's reputational damages. Therefore, we hold the testimony was not hearsay and was properly admitted.

For the foregoing reasons, the judgment below is

AFFIRMED.

HUFF and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Claude and Phil Humphries,

Appellants.

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

Opinion No. 3380
Heard February 7, 2001 - Filed August 6, 2001

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh and Assistant Attorney General Melody J. Brown; and Solicitor C. Kelly Jackson, of Sumter, for respondent.

CURETON, J.: In this criminal case, Claude and Phil Humphries appeal from their convictions for trafficking marijuana on the grounds that the trial court erred in refusing to compel the State to disclose the identity of its confidential informant and in admitting evidence of other bad acts. We affirm.[1]

FACTS/PROCEDURAL BACKGROUND

In October of 1996, the Sumter County Sheriff's Department received a tip that a package containing illegal drugs would be delivered to C&J Automotive from an address in California. Deputies of the sheriff's department intercepted the package while it was en route with the United Parcel Service (UPS). The package, addressed to C&J Automotive, contained approximately 40 pounds of marijuana with a street value of approximately $60,000. Police repackaged the drugs and made a controlled delivery using a South Carolina Law Enforcement Division (SLED) agent disguised as a UPS driver. Phil accepted the package, and stated he was signing for the garage's owner, Claude. Officers then executed a search warrant and seized the package, files, ledgers, and $4,500 in U.S. currency. Both Phil and Claude were present during the search.

The Sumter County Grand Jury indicted the Humphries on charges of criminal conspiracy and trafficking in more than ten, but less than one hundred pounds of marijuana. During their trial on the trafficking charges, the Humphries moved to have the State reveal the identity of the confidential informant. After argument from both sides, the trial court refused to grant the motion, reasoning it did not have enough information to determine whether the State was required to disclose the informant's identity. The trial court also refused to exclude evidence the Humphries had trafficked marijuana on other occasions.

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[1]This case was previously affirmed in an unpublished opinion. State v. Humphries, 2000-UP-336 (Ct. App. 2000). It is now being considered on the grant of the Humphries' petition for rehearing.

The Humphries were convicted of trafficking in marijuana and each sentenced to twenty-five years imprisonment and required to pay a $25,000 fine. This appeal follows.

LAW/ANALYSIS

I. Confidential Informant

The Humphries argue the trial court erred by refusing to compel the State to disclose its informant's identity. We disagree.

The State is ordinarily privileged from disclosing the name of a confidential informant. State v. Wright, 322 S.C. 484, 472 S.E.2d 642 (Ct. App. 1996). However, the State may be compelled to reveal an informant's identity where the informant is either an active participant in a criminal transaction or a material witness to the question of the defendant's guilt or innocence. State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973).

In this case, the Humphries put forth three possible grounds for compelling the State to disclose the informant's identity: the informant may have framed or mis-identified the defendants, there was no informant, or the informant was part of the drug transaction. The State asserted the informant was merely a tipster. The court found nothing to support an inference that the informant was anything other than a tipster, but agreed to revisit the issue if during trial it appeared the informant was either an active participant in the crime or a material witness on the issue of guilt or innocence.

The informant in this case merely provided law enforcement with the reasonable suspicion necessary to seize the package destined for C&J Automotive and expose it to a drug dog. Nothing in the record indicates that the informant was present during law enforcement's inspection of the package or its controlled delivery to the garage. Accordingly, we find no error in the trial court's determination that the informant was a mere tipster and its decision to deny the motion to reveal his identity. See State v. Burney, 294 S.C. 61, 362 S.E.2d 635 (1987) (declining to compel the identification of a "tipster."); State

v. Blyther, 287 S.C. 31, 336 S.E.2d 151 (Ct. App. 1985) (recognizing that the State is not required to disclose the identity of a "mere tipster").

II. Evidence of Other Trafficking Incidents

The Humphries also argue the trial court erred in admitting prejudicial character evidence prohibited by State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) "because it was irrelevant and more prejudicial than probative." We agree but conclude the admission was harmless error.

Initially, we address the State's contention that this issue is not preserved for appellate review. Prior to trial, the defense made a motion in limine to exclude evidence of other drug trafficking by the Humphries as being improper evidence of other bad acts and violative of State v. Lyle. The State opposed the motion by arguing the evidence was admissible to show a common plan or scheme. After hearing the proposed evidence, the trial court ruled in limine for the State. In its ruling, the court stated to defense counsel: "I am sure that you take exception to that ruling and I will tell you that your position is protected without the necessity of further objection on forward." The evidence was later admitted without objection during the Humphries' trial.

Ordinarily, an evidentiary ruling in limine is not final, thus the opposing party must object to the introduction of the evidence at trial in order to preserve the objection for appellate review. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998). In this case, the trial court indicated its ruling in limine was final and instructed the defense that it need not object to the evidence when it was introduced at the time of the admission. For this reason, the issue is preserved notwithstanding the Humphries' failure to raise an objection at trial. See State v. Wilson, 337 S.C. 629, 524 S.E.2d 411 (Ct. App. 1999), rev'd on other grounds by, State v. Wilson, 545 S.E.2d 827 (holding that a contemporaneous objection to the introduction of testimonial evidence was not required to preserve the issue for appellate review where the trial court made its final evidentiary ruling following an in camera hearing); see also State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994) (excusing the failure to make a contemporaneous objection where the judge's comments are such that any

objection would be futile).

As to the merits, during the in limine hearing, the State offered the testimony of a former C&J employee, Jeff Seruya. Seruya testified that during his employment he was instructed not to open certain packages delivered to C&J. Seruya became suspicious about the packages due to the heavy traffic of "undesirable people" through the garage and his perception that C&J was under police surveillance. Acting on his suspicions, Seruya secretly opened one of the packages and found that it contained marijuana. He then decided to leave his employment "because things were getting too hot around there." Sometime after Seruya left C&J, Claude and Phil were arrested and charged with the instant offense.

Seruya also testified in limine that a few days after Claude and Phil's arrest, Claude contacted him and asked if he would take delivery of an Airborne Express package.[2] Seruya testified that Ray, Claude's acquaintance, delivered a box to his home and told him the box belonged to Claude. Shortly after the delivery, Seruya was arrested and the box, containing approximately twenty pounds of marijuana, was opened by law enforcement officers. With officers listening in, Seruya then telephoned Claude and asked him to come and retrieve his box. Claude agreed and arrived with another man to collect it.

Dexter McGee, a narcotics investigator with the sheriff's department, also testified in limine for the State, but provided a slightly different explanation of Seruya's arrest. Investigator McGee indicated his office learned from the Drug Enforcement Agency (DEA) that a package containing marijuana was being shipped to Seruya's residence via Airborne Express. Acting on the tip, the sheriff's department performed a controlled delivery of the package, arrested Seruya, and then had him call C&J. Claude answered the phone and said he would come get the box later in the day. Claude and Peter Jenkins, a C&J

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[2] Although Seruya testified in limine only that "Mr. Humphries" contacted him about the Airborne Express package, it appears from his trial testimony that he was referring to Claude.

employee, later picked up the box.

At trial, Seruya testified that during his employment with C&J he was instructed to not open certain packages which came from California. However, he did not testify, as he had in limine, that he opened one of the packages against those instructions and found marijuana. As to the box delivered to his house, Seruya testified at trial that it arrived wrapped in plain brown paper without a packing list, as had the suspect packages he saw at C&J. However, unlike the C&J packages, the box contained no stickers or labels indicating who it was for, where it was destined, or from where it originated. He testified that the box was for Claude, but did not explain how he knew it was for him or where the box came from. Seruya also claimed to have opened the box, found marijuana inside, and called Claude to come and retrieve it. Seruya described how Claude and Peter Jenkins arrived at his home and how Claude waited in the car as Peter came inside and retrieved the box.

McGee did not testify to the latter transaction at trial. The State offered no evidence at trial concerning Seruya's arrest or that his call to Claude was monitored by the police. In its brief, the State concedes "[t]he trial judge's ruling on the admissibility of Seruya's testimony was based upon the in camera testimony of Seruya and McGee." [3] The Humphries argue that all evidence

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[3] This case illustrates the difficulty inherent in issuing a final evidentiary ruling before the evidence is offered at trial. Seruya's trial testimony varied so markedly from his pre-trial testimony as to suggest that the trial court may have ruled differently had it considered only the former. Nevertheless, we must review the trial court's evidentiary ruling in light of the evidence actually admitted at trial, not what was offered before trial. See State v. Nelson, 331 S.C. 1, 5 n.4, 501 S.E.2d 716, 718 n.4 (1998) (suggesting an appellate court should review evidentiary rulings based on the evidence entered at trial rather than the evidence presented at a motion in limine hearing). A motion in limine seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998).
A pretrial ruling in limine is not final; unless an objection is made at the time the

regarding the post-arrest delivery of a package to Seruya's house was improperly admitted under Lyle.

Evidence of other crimes or bad acts is inadmissible to prove a person's character or guilt for the charged offense unless the evidence tends to establish, inter alia, a common scheme or plan. See Rule 404(b), SCRE; State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Lyle, 125 S.C. 406, 118 S.E. 803. The common scheme or plan exception requires "a close degree of similarity or connection" between the other bad act or crime and the charged offense. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). A general similarity between the offenses is not enough; "some connection between the crimes is necessary." Id. at 52, 488 S.E.2d at 325.

> Evidence of other crimes must be put to a rather severe test before admission. The acid test of admissibility is the logical relevancy of the other crimes. The trial judge must clearly perceive the connection between the other crimes and the crimes charged. Further, other crimes which are not the subject of conviction must be proven by clear and convincing evidence.

State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998) (citations omitted).

Our supreme court addressed the common plan or scheme exception within the context of a drug trafficking prosecution in State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995). The Raffaldt court reviewed the admission of testimony about the defendant's prior drug dealing as it related to the charged

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evidence is offered and a final ruling procured, the issue is not preserved for review. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998). Under the posture of this case, we must presume the Humphries objected to the evidence at issue and the trial court overruled the objection.

offense of trafficking in cocaine. The cocaine at issue came to the defendant from New York via a series of transactions which began when Mr. Jiminez brought the cocaine into South Carolina and gave it to Mr. Kelly, who, along with Mr. Burchett, then delivered the cocaine to the defendant, who paid Kelly for the drugs. After retaining a portion of the money, Kelly then paid Jiminez. Id. At trial, Burchett testified he had purchased marijuana and cocaine from the defendant on several occasions in the year preceding the commission of the charged offense. Burchett also testified that he had set up other cocaine deals between Kelly and the defendant prior to the charged offense. Id.

The trial court held that the testimony concerning the defendant's prior drug dealing was admissible under the common plan or scheme exception because it was not only "quite similar to" the charged offense, but it also "gave rise to" his connection with Kelly and Burchett, who facilitated the transaction between the defendant and Jiminez. Id. at 114, 456 S.E.2d at 392. Because the prior trafficking was the genesis of the charged offense, the court found sufficient similarity and connection to employ the common plan or scheme exception.

In keeping with Raffaldt, this court has refused to employ the common plan or scheme exception for prior drug transactions which were similar to the charged offense and involved the same actors, but were otherwise unconnected.

In State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996), this court rejected the use of the exception to introduce testimony concerning a prior drug transaction where the defendant was tried on a single charge of distribution. "[T]estimony of a prior drug sale using a similar sales technique is not relevant to prove a single charge of distribution." Id. at 468, 476 S.E.2d at 918. In Carter, the defendant was arrested for selling crack cocaine to an informant on January 18th. At trial, the informant testified that he agreed to participate in the defendant's arrest because the police had arrested him on January 14th after he had left the defendant's house with crack, which he claimed to have purchased from the defendant. This court held the evidence was inadmissible, reasoning:

> There is no legal connection between these two purchases sufficient to come within the framework of the common scheme or plan exception. Indeed, the purpose of the State's use of the evidence appears . . . [to have been] to convince the jury that because Carter sold crack cocaine to [the informant] on January 14th, he was selling crack cocaine on January 18th. This is the precise type of inference prohibited by Lyle.

Id. at 468, 476 S.E.2d at 918. The court further stated that if the trial court "does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, *the accused should be given the benefit of the doubt, and the evidence should be rejected."* Id. at 469, 476 S.E.2d at 919 (quoting State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923)).

Carter relied heavily on State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994). In Campbell, the defendant was charged with distributing crack cocaine. The defendant was arrested at the home of an informant who, in cooperation with the police, had summoned the defendant by "beeping" him. Id. The defendant arrived at the informant's home with three yellow rocks which appeared to be crack cocaine; however, the substance was never positively identified because the defendant retrieved the rocks from the police during the arrest and swallowed them. Id. At trial, the informant testified he originally purchased crack from the defendant on the street, but that the defendant had given him a beeper number to facilitate subsequent transactions. Id. The informant claimed that prior to the arrest, he had used the same beeper number on several occasions to summon the defendant who would then arrive at his home and sell him crack. Id. This court held "testimony . . . of prior drug sales utilizing a similar sales technique" was insufficient to meet the common plan or scheme exception. Id. at 451, 454 S.E.2d at 901. Specifically, the court stated:

> The methodology of prior sales is not relevant to prove this transaction. . . . By introducing the prior bad acts,

> the State was not trying to prove a common scheme but to convince the jury that because Campbell sold crack cocaine in the past, he was selling crack cocaine on this occasion. This is precisely the type of inference that Lyle prohibits.

Id. at 451, 454 S.E.2d at 901.[4]

In this appeal, the Humphries do not appeal the requirement that the other bad acts be established by clear and convincing evidence. Thus, we may not consider the sufficiency of the evidence regarding whether or not the prior bad acts were proven by clear and convincing evidence. See State v. Wilson, 545 S.E.2d 827 (concluding an appellate court does not review a trial court's ruling on the admissibility of other bad acts by determining de novo whether the

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[4]But cf. State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994). In Moultrie, the defendant was charged with possession of marijuana with intent to distribute. The police, acting on information from an informant, observed eight people standing around the defendant's car while it was parked in front of his house. When the police approached, they saw marijuana on the ground near the defendant's car. The defendant was arrested. At trial, the court allowed the informant to testify that the defendant had a practice of selling drugs from a bag which he kept either under his car or in the woods near his house.

On appeal, the defendant argued the evidence should have been excluded under Lyle. This Court held the issue was not preserved as no objection was made at the trial. However, the Court concluded that the evidence was admissible under the Lyle common plan or scheme exception to prove the existence and nature of the defendant's drug trafficking scheme and was probative of his conduct with respect to the crime for which he was on trial. In so holding, the Court stated, the defendant's "mode of operation" in previous drug deals "bore an extraordinary similarity to the evidence [the police] discovered on the night of [the defendant's] arrest and tended to show the nature and content of [the defendant's] previous drug dealing." Id.

evidence rises to the level of clear and convincing; if there is any evidence to support the admission of the bad act evidence, the trial court's ruling will not be disturbed on appeal).

The Humphries do argue in this appeal that even if the bad act evidence was otherwise admissible, it was not relevant or probative to show they trafficked in marijuana on October 1, 1996. The Humphries were convicted of a single act of drug trafficking because a package of marijuana of sufficient weight to satisfy the statutory definition of trafficking, addressed to C&J, was mailed from California and delivered to C&J. To the extent that Seruya testified about the arrival of other, similar packages from California during the tenure of his employment with C&J, that testimony would appear to fall within the ambit of the common plan or scheme exception. However, Seruya's testimony concerning the delivery of marijuana to his home on Claude's behalf without other identifying similarities to the C&J deliveries is not sufficiently relevant or probative to warrant its admission into evidence under the common plan or scheme exception. At most, Seruya's testimony suggests that after Claude and Phil's arrest, they enacted another scheme to traffick in drugs. The new trafficking scheme was not sufficiently connected to the earlier scheme to warrant its introduction at trial pursuant to the common scheme or plan exception.

Based on this Court's reasoning in Carter and Campbell, the evidence of the subsequent bad acts in this case does not have the requisite connection to the charged offense to meet the common plan or scheme exception. Furthermore, Raffaldt is distinguishable from the instant action in that the other bad acts at issue in Raffaldt were not only "quite similar" to the charged offense, but also "gave rise" to that offense. Such a connection was not present in Carter and Campbell which, at best, merely involved the same parties undertaking similar transactions. The instant action is even further removed from Raffaldt because Seruya's trial testimony did not indicate the delivery to his home was sufficiently similar to the deliveries to C&J. Seruya never indicated he was involved with any of the packages delivered to C&J, whereas he was a direct participant in the delivery to his house. Furthermore, Seruya's description of the box delivered to his home is markedly different from his description of the

packages received at C&J. Such discrepancies between the transactions in the instant action defeat both the similarity prong found in Carter, Campbell, and Raffaldt as well as the connection prong in Raffaldt.

Having concluded the trial court erred in admitting evidence of the subsequent delivery of marijuana to Seruya's home, we now consider whether that error requires reversal or whether the admission may be considered harmless error. See State v. Berry, 332 S.C. 214, 503 S.E.2d 770 (Ct. App. 1998) (concluding improper admission of evidence of other bad acts is subject to harmless error analysis). To make that determination we must look to the other evidence admitted at trial to determine whether the Humphries' guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

Clearly, there is undisputed evidence, without reference to the subsequent bad act evidence, that conclusively proves the Humphries' guilt as to the indicted offense. Along with other evidence, there was Seruya's testimony of the delivery of similar packages from California and the Humphries' directive forbidding him from opening those packages; law enforcement's interception of one of the packages from California that contained forty pounds of marijuana; the controlled delivery of that package to a garage operated by the Humphries; the acceptance of the package by Phil Humphries, and the search of the garage and the discovery of $4,500 that tested positive for marijuana. We hold that the erroneous admission of the bad acts evidence did not unfairly prejudice the Humphries in view of Seruya's unchallenged testimony that there had been other packages, similar to the package the Humphries were convicted for receiving, that had been delivered to C&J.

CONCLUSION

Although the trial court properly allowed the State to withhold the confidential informant's name, it erred by admitting evidence of the subsequent drug delivery to Seruya's home. Nevertheless, we hold that there is overwhelming evidence of the Humphries' guilt without reference to the

erroneously admitted evidence and accordingly affirm the convictions.

AFFIRMED.

HUFF, J. concurs. ANDERSON, J., concurs in result only in a separate opinion.

ANDERSON, J. (concurring in result only): Although I agree that the convictions of Claude and Phil Humphries should be affirmed, I write separately to express my concernment over the majority's holding that the admission of Seruya's testimony regarding marijuana being delivered to his house for the Humphries is not sufficiently similar to or connected to the charged offense and, thus, does not fit into the common scheme or plan exception to Lyle. The majority concludes this erroneous admission is harmless. The problematic aspects of the court's reasoning in support of its conclusion are all the more troubling because the analysis is fundamentally flawed. I find the admission of the subsequent bad acts evidence was not error and would AFFIRM the rulings of the trial judge and the convictions of Claude and Phil Humphries without resorting to a harmless error analysis.

STANDARD OF REVIEW

In State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001), the Supreme Court articulated the appropriate standard of review on appeal in determining the admissibility of bad act evidence:

> In criminal cases, the appellate court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. For instance, in order for a confession to be admissible, the State must prove a voluntary waiver of the defendant's Miranda rights by a preponderance of the evidence. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). 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, supra. 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. See In re: Corey D., 339 S.C. 107, 529 S.E.2d 20

(2000)(an abose of discretion is a conclusion with no reasonable factual support).

> Similarly, we do not review a trial judge's ruling on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal.

Wilson, 345 S.C. at __, 545 S.E.2d at 829 (footnotes omitted).

IN LIMINE **TESTIMONY/ TRIAL TESTIMONY**

Prefatorily, I agree with the majority that the ruling on the admissibility of the challenged evidence must be analyzed pursuant to the trial testimony. Generally, a motion in limine seeks a pretrial ruling preventing the disclosure of potentially prejudicial matter to the jury. State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995). The in limine ruling by the trial judge and the testimony encapsulated within that proceeding is, in essence, a temporary decision on admissibility. A ruling in limine is not a final ruling on the admissibility of evidence. State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). Evidence developed during trial may warrant a change in the in limine ruling. See State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). The final ruling on admissibility of evidence is nexed directly to trial testimony.

FACTUAL BACKGROUND

At the Humphries' trial, Sergeant Dexter McGee, with the Narcotics Unit of the Sumter County Sheriff's Department, testified regarding the package containing marijuana which was delivered to C&J Automotive. On October 1, 1996, officers with the Sheriff's Department received a tip "that a package . . . was coming in from California[,] was possibly containing illegal narcotics and was to be delivered at C and J Automotive." Officers "intercepted" the package from the carrier, which was UPS.

The package contained approximately forty pounds of marijuana valued at about "$60,000 on the street." The package was addressed to C&J Automotive at 330 Fort Street in Sumter, South Carolina. The return address was Cocoas Car Care Accessories in Ventura, California. Inside the box, the marijuana was wrapped in plastic wrap, inside a trash bag, which was wrapped in fabric softener and packaged in cushioned material. According to Terry Proctor, K-9 Unit Supervisor with the Sheriff's Department, the package was a brown cardboard box with "strapping tape" on it.

Jeffrey Seruya, a former manager of C&J Automotive, testified at trial regarding (1) packages mailed to C&J when he was an employee and (2) a package of marijuana delivered to his house after the arrest of the Humphries. Seruya quit working at C&J because of his "suspicions of involvement in illegal activity." He stated "a lot of boxes" were delivered to C&J. Seruya declared "Mr. Humphries" instructed him not to open certain packages. Seruya claimed the boxes he was ordered not to open looked like the box the police seized from C&J Automotive the day the Humphries were arrested on the current charge. The following exchange occurred between the Solicitor and Seruya:

> Q: What is it about this box [the package seized from C&J by the police] that's similar to those boxes; if you could explain to the jury.
>
> A. Plain box. Brown box. Lot of times have things written on them. Sometimes you would have a little–you know–label thing like this or that or whatever on it or stuff like this. You know.
>
> Usually when you get a real packing list, it's enclosed in a plastic envelope style–you know–to let you know the contents of what is in the box.
>
> Most of the other boxes didn't have any of those significant traits like you would see from a normal delivery.

The boxes Seruya was not allowed to open were all mailed from California. The boxes were plain with automotive stickers on them.

The package containing marijuana which was delivered to Seruya's house

after the Humphries' arrest was "kind of like the other boxes. No packing list. Plain brown wrap–you know–box." There were no stickers, "definite markings," or addresses on this box. The label had been pulled off. Seruya testified the package was for Claude Humphries. Seruya opened the box and discovered it contained marijuana. He called Claude and told him "to come get this box." Claude and Peter Jenkins, an employee of C&J, drove to Seruya's house to pick up the box. While Jenkins retrieved the box from Seruya, Claude waited in the truck but waved to Seruya.

COMMON SCHEME OR PLAN EXCEPTION

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. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). See also Rule 404(b), SCRE (evidence of other crimes, wrongs, or acts is not admissible to prove character of person in order to show action in conformity therewith). The purpose of excluding evidence of prior crimes or other bad acts is to ensure a defendant is convicted, not based upon the other bad act, but upon the present offense with which he is charged. State v. Johnson, 314 S.C. 161, 442 S.E.2d 191 (Ct. App. 1994). Such evidence is admissible, however, when it tends to establish motive, intent, the absence of mistake or accident, 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 others, or the identity of the perpetrator. Lyle, 125 S.C. at 416, 118 S.E. at 807; State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); Rule 404(b), SCRE.

Evidence of subsequent bad acts, not just prior bad acts, is admissible under Rule 404(b), SCRE. See United States v. Whaley, 786 F.2d 1229 (4th Cir. 1986); United States v. Hadaway, 681 F.2d 214 (4th Cir. 1982). If not the subject of a conviction, proof of other bad acts must be clear and convincing. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997); Weaverling, 337 S.C. at 468, 523 S.E.2d at 791. See also State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000)(if defendant was not convicted of prior crime, evidence of prior bad act must be clear and convincing).

In the case of the common scheme or plan exception under Lyle, a close degree of similarity or connection between the other bad act and the crime for which the defendant is on trial is necessary. See State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998); State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997). The relationship between the acts must have established such a connection between them as would logically exclude or tend to exclude the possibility that the present crime could have been committed by another person. State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979).

The question is whether the particular item of evidence tends to show the existence, the nature, or the content of the plan. State v. Anderson, 253 S.C. 168, 169 S.E.2d 706 (1969). Much of the showing is evidence of the conduct of the defendant, and the specific question becomes whether the particular conduct circumstantially tends to prove the design or plan. Id. at 181-82, 169 S.E.2d at 712. To be admitted, evidence of other crimes must be logically relevant to the crime charged. See Cutro, 332 S.C. at 103, 504 S.E.2d at 325. See also State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001)(record must support a logical relevance between other bad act and crime for which defendant is accused); State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999)(other bad acts evidence must be logically relevant to particular purpose or purposes for which it is sought to be introduced).

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

The trial judge must balance the probative value of the evidence of other crimes or bad acts against its prejudicial effect. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). Where the evidence is of such a close similarity to the charged offense that the other bad act enhances the probative value of the evidence so as to overrule the prejudicial effect, it is admissible. See State v.

Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995). Even if the evidence is clear and convincing and falls within a Lyle exception, the judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); Rule 403, SCRE.

In State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979), our Supreme Court addressed the common scheme or plan exception to Lyle. William Caskey, a Lexington attorney, and Luther Pender, a former Lexington County magistrate, were indicted for obstruction of justice and conspiracy to obstruct justice. The charges grew out of a DUI second charge against Virgil Kilgoar which was allegedly dismissed after Kilgoar paid Caskey $800. At trial, the State presented evidence involving Kilgoar's stepson, who was arrested for DUI on a separate occasion and whose charges were allegedly dropped after the payment of money to Caskey.

On appeal, Caskey asserted the trial court erred in admitting evidence of his alleged wrongdoing in an independent case. The Court held:

> While evidence of the commission by an accused of another crime is generally inadmissible, one recognized exception to this rule is when the evidence is admitted to show a common scheme.
>
> Recently, in State v. Rivers, [273 S.C. 75], 254 S.E.2d 299 [1979)], this Court quoted approvingly the following language from State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803 (1923):
>
> > "Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be

> given the benefit of the doubt, and the evidence should be rejected."
>
> While in Rivers, supra, the connection between the two alleged crimes was held to be too tenuous to permit the admission of evidence of the prior alleged incident, here, the two alleged crimes were so closely related as to leave little doubt of the former incident's logical relevancy. Therefore, we conclude the trial court correctly admitted the evidence of another crime to show a common scheme.

Caskey, 273 S.C. at 328-29, 256 S.E.2d at 738 (citations omitted)(emphasis omitted).

The Supreme Court found evidence of prior crimes admissible under the common scheme or plan exception in State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). On February 20, 1979, Ronald Woomer and Gene Skaar left West Virginia and drove to Myrtle Beach. The two men concocted a scheme with a local coin shop owner, who agreed to identify local coin collectors for Woomer and Skaar so they could rob the collectors and sell the coins to the shop owner. Although Woomer apparently had never before participated in this scheme, he had been expressly told by Skaar, prior to departing from West Virginia, that the purpose of the trip was to make money by robbing people. Woomer understood beforehand that no victims were to remain alive.

On February 22, Woomer and Skaar drove to John Turner's home in Colleton County and stole his coin collection. Woomer killed him by shooting him in the head. On the way back to their motel, Woomer and Skaar stopped at another home and robbed the residents of money and firearms. The occupants, a man, woman, and young child, were all shot in the head and killed by several blasts from Woomer's shotgun. Driving back toward Myrtle Beach, Woomer and Skaar stopped at Jack's Mini-Mall and decided to rob it. After taking money from the cash register, the men took two female employees hostage. The

men raped the two women. Woomer then shot both women. Although one of the women died, the second victim survived and testified at trial.

During the guilt phase of the trial, the State sought to introduce evidence of the other killings committed by Woomer just prior to the episode at Jack's Mini-Mall. The State argued the evidence tended to identify and place Woomer at Jack's Mini-Mall and show a common scheme on Woomer's part to dispose of all victims. The evidence was admitted over defense counsel's Lyle objection. The Court explained:

> The plan or design which the State sought to show was that Woomer and Skaar left West Virginia intending to come to South Carolina, make money by robbery, and dispose of all victims. A photograph and driver's license of one of the robbery victims were found in the motel room of Skaar and Woomer. Their admission into evidence, along with testimony that this victim had been shot and killed, was proper since it was used to show the existence and commission of a preconceived plan and tended strongly to implicate Woomer as a participant. The scheme and Woomer's participation in it were later confirmed at trial by the taped confession of Woomer himself. In that confession, Woomer explained his involvement with Skaar, their scheme to rob and dispose of witnesses, and the actual execution of that scheme, including the robbery and killing of the victim from whom the photograph and driver's license were taken.

Woomer, 276 S.C. at 266, 277 S.E.2d at 700.

The Court of Appeals discussed the common scheme or plan exception in State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994). On June 15, 1991, Ricky Dean Fabre gave Deputies Joseph Boykin and Ronald Maugans a detailed account of drug transactions involving cocaine, crack cocaine, and marijuana that David Moultrie regularly conducted in front of his house since 1989. Fabre acquired the information that he gave the officers from personal experience. Fabre told the deputies Moultrie kept drugs in a brown paper bag

either under his car in front of his house or in the woods adjacent to his house near where he parked his car.

On June 17, 1991, at 10:00 p.m., the two deputies pulled up on the road in front of Moultrie's house. Deputy Boykin observed a crowd of about eight people around a car parked in front of the house. He recognized Moultrie, who was standing in front of the car, from prior encounters. As Deputy Boykin approached the crowd, lighting his way with a small flash light, he saw on the ground, approximately one to two feet from Moultrie, a plastic-wrapped package of marijuana. Further, Deputy Boykin discovered cocaine, crack cocaine, and more marijuana in a brown paper bag at the edge of the woods, ten to fifteen feet from Moultrie's car.

In a pretrial motion in limine, Moultrie challenged the admission of "any evidence of prior crimes which did not result in any conviction." In arguing the motion, Moultrie focused entirely on Fabre's testimony concerning Moultrie's involvement since 1989 in the drug trade. The Circuit Court judge found the testimony admissible to prove a common scheme. In affirming the judge's ruling,[5] this Court stated:

> Fabre's testimony relating the specifics of Moultrie's mode of operation when conducting prior drug deals bore an extraordinary similarity to the evidence Deputy Boykin discovered on the night of Moultrie's arrest and tended to show the nature and content of Moultrie's previous drug dealing. This testimony was, therefore, admissible to prove the existence and nature of Moultrie's drug trafficking scheme and was probative of Moultrie's conduct with respect to the crime for which he was on trial.

Moultrie, 316 S.C. at 555, 451 S.E.2d at 39 (footnote omitted).

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[5]Initially, the Court of Appeals ruled the issue as to the admission of prior bad acts testimony was not preserved. Yet, noting the outcome was the same, the Court addressed the merits.

Evidence of prior bad acts was admitted in State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995), to prove the existence of a common scheme or plan. Raffaldt was charged with trafficking in cocaine. The indictment alleged Raffaldt, along with Jesus Jiminez, William Kelly, Richard Smith, Michael Hayes, and Edward Burchett, conspired to bring one hundred grams or more of cocaine into the state from December of 1989 to March 14, 1991.

At trial, Jiminez testified he would transport cocaine from New York to various locations in South Carolina, where he would sell it to Kelly. Specifically, on January 30, 1991, Jiminez bought a kilogram of cocaine from New York. He met Kelly in Pageland, South Carolina, and gave him the cocaine. Kelly, along with Burchett, delivered the cocaine to Raffaldt at his house, at which time Raffaldt gave Kelly $26,000. Kelly then returned to Pageland and paid Jiminez $25,000. Kelly, Burchett, and Hayes all corroborated Jiminez's account of the sale of January 30, 1991. Additionally, Kelly testified he first met Raffaldt in early 1990 at a rooster fight. Shortly thereafter, Kelly sold him four ounces of cocaine. After two similar transactions in 1990, they arranged for the sale and purchase of the kilogram on January 30, 1991.

Burchett stated he has known Raffaldt all his life. He began purchasing quantities of marijuana from Raffaldt in 1990 and, occasionally, also bought small amounts of cocaine. In 1991, Burchett set up cocaine deals between Kelly and Raffaldt. He corroborated the other witnesses' account of the kilogram deal of January 30, 1991.

During direct examination of Kelly and Burchett, the State presented evidence that, beginning in 1990, Raffaldt sold marijuana to Burchett, who, in turn, sold it to Kelly. Raffaldt objected to the admission of this testimony. The trial court held the evidence of marijuana dealing by Raffaldt was admissible under Lyle since it indicated a common scheme or plan. The Court articulated:

> Here, the record shows that the method of marijuana dealing between Raffaldt and Burchett was quite similar to the cocaine conspiracy. We find that the evidence of prior drug dealing

> between Raffaldt and Burchett, which gave rise to the cocaine transactions, was admissible as a common scheme or plan. See State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978) (possession of marijuana is relevant to possession with intent to distribute cocaine); State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994)(defendant's prior involvement in drug trade admissible to prove nature and existence of marijuana trafficking); U.S. v. Rawle, 845 F.2d 1244 (4th Cir. 1988)(defendant's prior drug dealings admissible to show common scheme or plan).

Raffaldt, 318 S.C. at 114, 456 S.E.2d at 392.

In State v. Patrick, 318 S.C. 352, 457 S.E.2d 632 (Ct. App. 1995), the Court of Appeals examined the common scheme or plan exception. Charles Patrick was convicted of burglary, armed robbery, assault with intent to kill, and use of an automobile without permission. On appeal, Patrick argued the trial judge improperly allowed the State to introduce evidence of a subsequent crime in Georgia. This Court explicated:

> In both the Georgia case and the [current] case, the suspects used the same disguises (gloves, wigs, bandannas) and the same tools (walkie-talkies, flashlights). They cut telephone lines in the same manner [a portion of the wire was removed-rather than simply cut]. They generally carried the same type of weapons. There are sufficient similarities between the Georgia case and the present case to apply the Lyle common scheme or plan exception. Moreover, here the probative value of that evidence outweighed its prejudicial effect.

Patrick, 318 S.C. at 356, 457 S.E.2d at 635.

State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996), is particularly instructive regarding the common scheme exception. Donnie Aiken was found guilty of armed robbery. On appeal, he claimed the trial court erred in admitting evidence of his participation in other robberies. This Court

concluded:

> Here, [the] testimony concerning Aiken's other bad acts was probative on the issue of whether all of the robberies were part of a common scheme or plan. The evidence showed all of the robberies took place in the same month in the same part of Orangeburg, all either on or near the Highway Twenty-One bypass. Additionally, each robbery was perpetrated by a young, black gunman with his face concealed.
>
> . . . .
>
> . . . We therefore hold the trial court did not abuse its discretion in allowing the testimony of Aiken's participation in the other robberies.

Aiken, 322 S.C. at 181, 470 S.E.2d at 406-07.

Likewise, the case of State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999), is enlightening. On December 17, 1995, Theodore Wells was robbed of $200 at gunpoint by Derrick Ford and Anthony Brown. During the defendants' trial for common law robbery and criminal conspiracy, the Solicitor sought to admit Wells's testimony that Ford and Brown robbed him at gunpoint in August of 1995, telling him that they would shoot him in the head if he did not give them $200 every time he saw them. Wells further testified Ford and Brown attempted to rob him again in October of 1995. The trial judge ruled the evidence could be admitted as res gestae or under the Lyle exceptions of motive, intent, and common scheme or plan. The jury found the defendants guilty of both charges.

Ford appealed maintaining the trial judge erred in allowing testimony about other bad acts. The Court of Appeals determined:

> In the present case, the fact that Ford and Brown had previously robbed or attempted to rob Wells was a necessary

> element in understanding their motive and intent when they accosted Wells on December 17, 1995. The statement that Wells should be prepared to give money to the defendants each time he saw them was, in particular, so closely related to the criminal conspiracy charged that proof of the statement tends to establish the existence of a common plan and, thus, of the conspiracy. The previous robbery and attempted robbery also were so similar to the incident for which Ford and Brown were charged that they tend to establish both the existence of a common plan and the fact that the plan was being carried out. Cf. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995)(holding evidence of marijuana dealing by the defendant in prosecution for trafficking in cocaine was admissible as indicative of a common scheme or plan); State v. Moultrie, 316 S.C. at 555, 451 S.E.2d at 39 (holding evidence of defendant's prior drug deals was admissible to prove existence and nature of marijuana trafficking scheme).

Ford, 334 S.C. at 452, 513 S.E.2d at 389 (citations omitted).

Evidence regarding other crimes was admitted to establish a common scheme or plan in State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000). The charges against Thomas Kennedy arose out of an early evening residential burglary at the home of Sandra York and the use of an ATM card taken from the home. At trial, the State presented evidence that Kennedy committed similar burglaries at the homes of David Odle, Jack Pfeiffer, and Dr. Tan Platt and that he used or attempted to use bank and credit cards he took from these homes. Kennedy was convicted of first degree burglary, grand larceny, and financial transaction card fraud.

On appeal, Kennedy claimed the court erred in allowing extensive testimony and other evidence concerning his involvement in three other burglaries and related financial transaction card fraud offenses. The Court emphasized:

> We conclude the trial court properly allowed evidence of

> Kennedy's involvement in each of the other burglaries and fraudulent use of the cards taken from the homes. The crimes were very similar to the crimes for which Kennedy was tried. Each of the four burglaries occurred within a three month time span. The Odle and Pfeiffer homes were in the same area of town as York's home. Each burglary occurred during a weekday in the early evening hours between 6:00 and 8:00 p.m., the residents having all left their homes between 6:10 and 6:30 p.m. In each burglary, the master bedroom was the targeted room and only small, portable items were taken, while larger items such as televisions and VCR's were undisturbed. Items which held some of the smaller things taken from several of the homes, including safes, a briefcase, and a humidor, were discarded outside somewhere near the residences. The stolen credit or ATM cards taken from each home were used shortly after the burglaries, and almost immediately after in the Odle and Platt cases, as well as the present case.
>
> We find the evidence of the other burglaries and credit card fraud was logically relevant to the crimes charged and was proven by clear and convincing evidence. Further, the other crimes were not of just a general similarity, but were so closely connected to the crimes charged that the similarity enhanced the probative value of the evidence to the extent that it outweighed any prejudicial effect. Accordingly, we find no error.

Kennedy, 339 S.C. at 248-49, 528 S.E.2d at 703.

A raft of criminal sexual conduct (CSC) cases is extant in regard to the common scheme or plan exception. See, e.g., State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989)(testimony of three young women regarding sexual abuse allegedly perpetrated by foster father was admissible in his trial for first degree CSC and attempting to commit lewd act upon minor foster child; prior acts occurred while each of the young women was foster child and of similar age to victim, foster father took advantage of relationship for sexual gratification in each instance, and abuse commenced in exactly same manner under similar

circumstances); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984)(victim's testimony regarding prior attacks upon her by defendant was admissible under common scheme exception in order to show continued illicit intercourse forced upon her by defendant); Id. (testimony of defendant's daughters concerning his prior misconduct with them was admissible under common scheme or plan exception where experiences of each daughter paralleled that of her sisters, one of whom was the prosecuting victim); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999)(in prosecution for CSC with a minor and disseminating harmful material to a minor, victim's testimony regarding pattern of sexual abuse he suffered by defendant was properly admitted under common plan or scheme exception where testimony showed the same illicit conduct with same victim under similar circumstances over a period of years); State v. Adams, 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998)(testimony of one stepdaughter that she was molested by defendant at least once a week for eight years was admissible, in prosecution for sexual abuse of other stepdaughter, to establish common plan or scheme, where defendant used his relationship as stepfather to control both stepdaughters, and defendant engaged in similar conduct as to each stepdaughter); State v. Wingo, 304 S.C. 173, 403 S.E.2d 322 (Ct. App. 1991)(testimony of child sexual abuse victim's twelve year old female cousin that defendant had also sexually assaulted victim's twelve year old sister using methods almost identical to those that nine year old victim testified defendant subsequently employed when he sexually assaulted her tended to show common scheme or plan).

In the case sub judice, there are sufficient similarities between the charged offense and the subsequent act to apply the Lyle common scheme or plan exception. The evidence regarding the package delivered to Seruya's house was clear and convincing. Such evidence established the existence of a common scheme or plan. Further, the probative value of Seruya's testimony was so great, considering the close degree of similarity between the packages, it substantially outweighed any prejudice to the Humphries. See State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)(unfair prejudice does not mean damage to defendant's case that results from legitimate probative force of evidence; rather it refers to evidence which tends to suggest decision on an improper basis). Because the testimony about the package delivered to Seruya's residence was

relevant to the existence of a common scheme or plan, was clear and convincing, and was more probative than prejudicial, the trial judge did not err in admitting the testimony under Rule 404(b), SCRE, and State v. Lyle.

The majority relies on State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996), and State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), in reaching its conclusion the court erred in allowing the testimony regarding the subsequent bad act. Carter and Campbell are inapposite. Facially, factually and legally, these cases involve evidence of prior drug sales. By no stretch of the imagination does the instant case relate to prior drug sales.

The decision to admit contested evidence rests within the sound discretion of the trial judge. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). The ruling will not be disturbed absent prejudicial abuse of discretion. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). In the case at bar, the judge properly admitted the evidence regarding subsequent bad acts.

In determining the admissibility of bad act evidence, this Court does not re-evaluate the facts based on its own view of the preponderance of the evidence. We merely determine whether the trial judge's ruling is supported by any evidence. See State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). Here, the opinion of the majority is violative of State v. Wilson. Indubitably, the majority used the wrong standard in determining admissibility because the majority weighed the evidence rather than reviewing the evidence presented at trial. Because there is evidence to support the admission of the bad act evidence in this case, I would AFFIRM the rulings of the trial judge and the convictions of Claude and Phil Humphries without resorting to a harmless error analysis.