The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF SAMANTHA D. FARLOW, PETITIONER

On June 25, 2007, Petitioner was definitely suspended from the practice of law for two (2) years. In the Matter of Farlow, 374 S.C. 90, 647 S.E.2d 243 (2007). She has now filed a petition to be reinstated.

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

Committee on Character and Fitness
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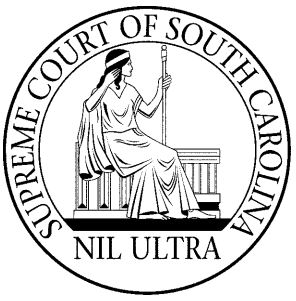
Columbia, South Carolina 29211

These comments should be received no later than June 29, 2009.

Columbia, South Carolina
April 29, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
May 4, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Elliott D. Chandler, Respondent,

v.

The State of South Carolina, Appellant.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26640
Heard October 21, 2008 – Filed April 27, 2009

REVERSED AND REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R.J. Shupe, Assistant Attorney General Brandy A. Duncan, all of Columbia, for Appellant.

Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: The State appeals from a circuit court order finding there was no probable cause to believe Elliott D. Chandler meets the

definition of a sexually violent predator under the South Carolina Sexually Violent Predator Act.[1] We reverse and remand.

FACTS

In December 2003, Chandler entered a negotiated plea of guilty to one count of assault and battery of a high and aggravated nature (ABHAN). He was sentenced under the Youthful Offender Act (YOA)[2] to an indeterminate sentence of one to six years, suspended upon the service of two years of probation and enrollment in counseling. The victim alleged Chandler sexually assaulted her in February 2003 by pulling her into an unoccupied classroom at school and forcing her to have intercourse. At the time of the offense, Chandler was 18 and the victim was 15.

While on probation for this offense, Chandler, then 19, was arrested on an allegation of criminal sexual conduct (CSC) with a minor in the second degree for having sex with a 13-year-old girl on two occasions in February or March 2004.[3] On both occasions, Chandler came to the victim's home at night and had intercourse with her while her parents were asleep. In December 2005, Chandler was allowed to plead guilty to one count of CSC in the third degree, and he received a second YOA sentence of commitment for one to six years.[4]

Before Chandler entered his plea to the above-described charge, he was arrested in April 2005 for CSC with a minor in the second degree after he

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[1] S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2008).

[2] S.C. Code Ann. §§ 24-19-10 to -160 (2007).

[3] The documents in the record variously state the time of the incidents as February 2004 or March 2004.

[4] The State notes that under S.C. Code Ann § 24-19-50(5) (2007), a court may not sentence a person under the YOA more than once, and since Chandler had already received a YOA sentence in 2003, he was ineligible for a second YOA sentence in 2005.

was observed having sex with a 13-year-old girl behind a school building. He was 20 years old when he committed this offense. There is nothing in the record regarding the disposition of this charge.

In June 2006, prior to Chandler's release from detention, a multidisciplinary team appointed by the Director of the South Carolina Department of Corrections reviewed Chandler's case and determined there was probable cause to believe Chandler was a sexually violent predator as defined by the Act and referred his case to the prosecutor's review committee. The prosecutor's review committee issued a report agreeing with the finding of probable cause.

Thereafter, on August 9, 2006, the State filed a petition in the circuit court alleging Chandler met the statutory requirements for civil commitment as a sexually violent predator. The State alleged that Chandler's conviction for CSC in the third degree was a qualifying sexually violent offense under the Act, and that Chandler has a mental abnormality or personality disorder that makes it likely he will engage in acts of sexual violence again if he is not confined in a secure facility for long-term control, care, and treatment.

On August 14, 2006, a preliminary finding was made by a circuit court judge that the State had set forth sufficient evidence to establish probable cause. The matter proceeded to a probable cause hearing in the circuit court before Judge Markley Dennis in which Chandler was allowed to contest the probable cause finding. After the hearing, the circuit court issued an order dismissing the State's petition and finding there was no probable cause to believe Chandler met the statutory definition of a sexually violent predator. The State appeals, arguing the circuit court considered inappropriate factors and erred in failing to find the State established probable cause in this case.

LAW/ANALYSIS

A. South Carolina Sexually Violent Predator Act

The Act provides for the involuntary civil commitment of an individual deemed to be a sexually violent predator, which is defined under the Act as a person who (a) has been convicted of a sexually violent offense, and

(b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if the person is not confined in a secure facility for long-term control, care, and treatment. S.C. Code Ann. § 44-48-30(1) (Supp. 2008).

The procedures of the Act are initiated when a person is about to be released from confinement. At that time, a multidisciplinary team appointed by the Director of the South Carolina Department of Corrections reviews the relevant records, including the person's "criminal offense record," to assess whether or not the person meets the statutory definition of a sexually violent predator. Id. § 44-48-50.

Upon referral from the multidisciplinary team, the prosecutor's review committee examines whether probable cause exists to believe the person is a sexually violent predator. Id. § 44-48-60. If so, the Attorney General must file a petition in the circuit court asking the court to rule on the issue of probable cause. Id. § 44-48-70.

In the event the circuit court makes an initial determination that probable cause exists, the person must be taken into custody if he is not already confined. Id. § 44-48-80(A). Thereafter, the person is allowed the opportunity to appear in person at a hearing to contest probable cause. Id. § 44-48-80(B). Once a probable cause determination is made by the circuit court, the person is required to undergo an evaluation by a court-approved expert. Id. § 44-48-80(D). A trial is then held in the court of common pleas to conclude whether the person is, in fact, a sexually violent predator as defined by the Act. Id. § 44-48-90. The State must prove the allegation beyond a reasonable doubt to either the court or a jury. Id. § 44-48-100(A).

B. Circuit Court's Order

In the current case, the circuit court dismissed the State's petition after the hearing to contest probable cause, concluding "[p]robable cause does not exist to order further evaluation and commitment pending trial." The court found the State had established Chandler was convicted of a qualifying offense under the Act, but did not establish that Chandler suffers from a mental abnormality or personality disorder that makes him likely to engage in

acts of sexual violence in the future. The court stated "[i]t may be possible that the Respondent will not commit further offenses."

In reaching this determination, the court noted that Chandler was given a YOA sentence, "which indicates that both the court and consenting prosecution believed his acts were substantially caused by youthful poor judgment and impulsiveness." The court further noted that "[i]t does not appear clear from the record that actual physical violence was used in committing these crimes." The court stated Chandler has taken some courses related to his offense while at the Department of Corrections, and his being on probation and listed on the sex offender registry "provide sufficient opportunity for [Chandler] to rehabilitate himself as well as permanent protection of the public." The court stated it "must weigh this case in view of the State's limited resources for treatment and finds that commitment under the [A]ct is a substantial infringement on [Chandler's] ability to earn a living and contribute productively to society while the resources used to continue his treatment may be better used to protect the community in other ways . . . ."

C. The State's Appeal

On appeal, the State argues the circuit court erred in dismissing its petition and finding there was no probable cause to believe Chandler is a sexually violent predator. The State contends the circuit court considered inappropriate evidence, including the facts that Chandler received a YOA sentence and would be on probation after his release. The State asserts the court should have allowed this matter to proceed to a full evaluation of Chandler and a trial on the merits of the petition.

"On review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding." In re the Care and Treatment of Tucker, 353 S.C. 466, 470, 578 S.E.2d 719, 721 (2003); accord In re the Care and Treatment of Beaver, 372 S.C. 272, 278, 642 S.E.2d 578, 582 (2007). Thus, we must consider whether any evidence reasonably supports the court's ruling.

The Act contains a two-pronged test to determine whether a person is a sexually violent predator. The circuit court found the first prong was satisfied and there is no dispute in this regard. Chandler was convicted of CSC in the third degree, which is specifically listed as a qualifying offense under the Act. See S.C. Code Ann. § 44-48-30(2)(c) (Supp. 2008) (listing CSC in the third degree as a violent offense for purposes of the Act). This case turns on the second prong, i.e., whether Chandler suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if he is not confined in a secure facility for long-term control, care, and treatment.

Under the Act, "mental abnormality" is defined as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." Id. § 44-48-30(3); see also In re the Care and Treatment of Kennedy, 353 S.C. 394, 397 n.2, 578 S.E.2d 27, 28 n.2 (Ct. App. 2003) (defining "mental abnormality" as used in the statute).

As this Court has previously noted, the State cannot require a mental evaluation of an offender until a court has found probable cause after a hearing; therefore, the State is generally unable to produce mental health information at the probable cause hearing, but this does not preclude a finding of probable cause:

> Pursuant to the SVP Act, and particularly S.C. Code Ann. § 44-48-80(D) (Supp. 2006), the State is not able to require a mental examination of the offender until a judge, after a hearing, has found that there is probable cause to believe the offender is a sexually violent predator. Therefore, the State is generally unable to produce any mental health information at the probable cause hearing because probable cause must first be found by a judge at the hearing before such evidence can be obtained. The State's inability to provide mental health evidence does not prevent a finding of probable cause.

In re the Care and Treatment of Beaver, 372 S.C. at 278, 642 S.E.2d at 582 (emphasis added).

"In the context of probable cause to believe someone to be a sexually violent predator, probable cause requires that the evidence presented would lead a reasonable person to believe and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator." In re the Care and Treatment of Brown, 372 S.C. 611, 620, 643 S.E.2d 118, 122-23 (Ct. App. 2007). "Probable cause 'does not demand any showing that such a belief be correct or more likely true than false.'" Id. at 620, 643 S.E.2d at 123 (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)). "The very term itself, 'probable cause,' does not import absolute certainty." Id. at 619, 643 S.E.2d at 122.

One of the findings of the circuit court is that "[i]t does not appear clear from the record that actual physical violence was used in committing these crimes." At the hearing Chandler's counsel argued two of the offenses, the ones involving the two 13-year-old victims, were consensual; as for the remaining offense, which involved the alleged forcible assault of the victim and Chandler's plea to ABHAN, counsel opined that "in all probability this was also a consensual act." Chandler's counsel asserted he did not "think this is a matter of a man in denial. It is – this is a case of immaturity and impulsiveness, such as is not unusual to see in a nineteen or twenty-year-old man; taking advantages of girls who, frankly, wanted to be taken advantage of." On appeal, Chandler asserts "[a]ll of the evidence indicates that the three acts were consensual."

Contrary to counsel's assertion, the record indicates that in one of the incidents, which resulted in Chandler's plea to ABHAN, the victim reported that force was used. As for the other two offenses involving 13-year-old girls, the victims were underage and could not legally give consent. In any event, physical violence is not a prerequisite under the Act. As noted in the case of In re the Care and Treatment of Brown, to qualify as a sexually violent offense, the actions do not have to be violent in the sense of being physically injurious or destructive, and many of the listed offenses do not require an act of physical violence. Id. at 621, 643 S.E.2d at 123 ("That Brown was not violent, per se, toward any of his victims is of no consequence. . . . Many of the listed offenses [in the Act] do not require an overt act of violence.").

Consideration of a person's past criminal history is directly relevant to establishing whether a person has been convicted of a sexually violent offense under section 44-48-30(1)(a), which in turn bears directly on whether one suffers from a mental abnormality under section 44-48-30(1)(b). In re the Care and Treatment of Ettel, 377 S.C. 558, 562, 660 S.E.2d 285, 287 (Ct. App. 2008). As the State points out, Chandler has been involved in three known offenses of a sexual nature involving young girls, which indicates Chandler has developed a pattern of engaging in inappropriate conduct. He committed some acts even while he was already on probation for similar conduct.

In December 2003, Chandler pled guilty to ABHAN, and the victim alleged force was used when Chandler assaulted her. In early 2004, while still on probation for this offense, Chandler, then 19, had intercourse with a 13-year-old on two occasions, for which he was allowed to plead guilty to CSC in the third degree. Chandler received a YOA sentence for both charges. Before he entered his plea to this last charge, however, Chandler was again brought to the attention of authorities for having intercourse with a 13-year-old minor in April 2005. At that time, Chandler was 20 years old.

The record indicates Chandler was aware that his conduct was inappropriate, as he told the responding officers that he was already on probation for the "same thing" and he denied having sex with the last 13-year-old victim, despite the reports of eyewitnesses and the victim herself. The victim told the responding officers that Chandler knew she was 13 years old. Chandler was arrested for CSC with a minor in the second degree, but there is no record of a disposition on that charge. Although Chandler contends only the conviction for the CSC in the third degree is relevant since it is a qualifying offense enumerated in the Act, there is no merit to this contention. Under the Act, a person's "criminal offense record" includes convictions for criminal sexual offenses as well as evidence of criminal sexual offenses not resulting in convictions. In re the Care and Treatment of Ettel, 377 S.C. at 562, 660 S.E.2d at 287; In re the Care and Treatment of White, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007).

As to the circuit court's other considerations, i.e., that Chandler's receipt of sentencing under the YOA indicated the sentencing judge and the

prosecutor thought Chandler could be rehabilitated, and the provision for probation gave the public adequate protection, these factors are not determinative of the probable cause issue. Rehabilitation is a goal of all concerned; however, the positive potential for rehabilitation does not negate probable cause for a mental evaluation and a hearing on the merits. Moreover, there are a variety of reasons why the State would negotiate a plea with Chandler, ranging from the ability of the State to acquire the necessary evidence to the possibility that testifying might be difficult for the victims. The severity of punishment imposed in the criminal matter may give rise to closer scrutiny of the facts, but it is not determinative in this civil proceeding to evaluate whether there is probable cause to believe that Chandler suffers from a mental abnormality or personality disorder. Chandler was twice the recipient of a YOA sentence, but he committed a third sexual offense, so the sentence Chandler received was not a reliable indicator of his propensity to commit future acts of sexual violence.

In In re the Care and Treatment of Beaver, we held the circuit court erred in finding the State had not set forth sufficient evidence of probable cause. Beaver pled guilty to aggravated sexual battery and incest; a few years later, after his release from prison, he performed a lewd act upon a 10-year-old girl. 372 S.C. at 274, 642 S.E.2d at 579-80. We noted, "His behavior reveals a propensity to commit acts of sexual violence to such a degree as to pose a menace to the health and safety of young girls." Id. at 278, 642 S.E.2d at 582. We observed that the State is not able to require a full evaluation of a subject until probable cause is found, and we concluded the circuit court erred in ruling the State had failed to provide sufficient evidence that Beaver suffered from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined. Id. at 278-79, 642 S.E.2d at 582. Chandler's record likewise demonstrates he has a propensity to commit inappropriate acts with young girls.

We hold the State has met its burden of establishing probable cause. As the State points out, Chandler has not completed his treatment program while at the Department of Corrections. It is important to note also that "a finding of probable cause at the probable cause hearing does not . . . finally decide the question of whether that person is a sexually violent predator." Id.

at 275 n.2, 642 S.E.2d at 580 n.2. Thus, once Chandler has a complete evaluation, he will still have the opportunity to refute the State's allegation that he meets the definition of a sexually violent predator at a trial on the merits.

CONCLUSION

There is no evidence to support the circuit court's finding that the State failed to establish probable cause. Consequently, we reverse the circuit court's order and remand this matter for further proceedings in accordance with the Act, including a psychiatric evaluation and a trial on the merits.

REVERSED AND REMANDED.

TOAL, C.J., KITTREDGE, J., concur. PLEICONES, J., dissenting in a separate opinion in which Waller, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, there is evidence in the record which supports the probable cause hearing judge's conclusion that respondent does not suffer from "a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1)(b) (Supp. 2007) (definition of sexually violent predator); In the Matter of Brown, 372 S.C. 611, 643 S.E.2d 118 (Ct. App. 2007) (any evidence scope of review on appeal from probable cause determination).

In finding that respondent did not suffer from the requisite mental abnormality or personality disorder, the circuit court relied upon the following findings of fact:

1) Respondent was offered a Youthful Offender Act (YOA) sentence for the predicate offense based on a plea negotiated by a solicitor noted for careful protection of the public interest in sexual offense cases;

2) The negotiated plea was accepted by a trial judge who is also known for this kind of protective attitude;

3) Respondent turned himself in, and pled guilty, thereby accepting responsibility for his actions;

4) A YOA sentence indicates both the plea judge and the prosecutor believed respondent's criminal acts were substantially caused by youthful poor judgment and impulsiveness, a conclusion concurred in by the hearing judge after review of the facts of all respondent's offenses;

5) It does not appear that actual physical violence was involved in any of respondent's offenses;

6) While incarcerated, respondent has completed several courses related to his offense;

7) Probation and registration as a sex offender, with the concomitant monitoring and supervision provide both an opportunity for respondent to rehabilitate himself and permanent protection for the public; and

8) Respondent has not been previously incarcerated for this type of conduct, nor has he received prior treatment or counseling.

The majority takes issue with certain evidence cited by the hearing judge. For example, the majority notes that there could be a variety of reasons why the State would offer Chandler a YOA sentence. I agree with the majority in this regard, but note that on appeal, "this court is concerned with the existence of evidence, not its weight." In re Matter of Brown, 372 S.C. at 616, 643 S.E.2d at 121. In my view, whether the offender was offered a negotiated plea, a lesser sentence, and/or probation is relevant to the question of probable cause to believe the offender is among the "mentally abnormal and extremely dangerous group of sexually violent predators who require involuntary civil commitment in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-20 (Supp. 2007). While certainly factors other than the seriousness of the offenses and the offender's potential threat to the public play a role in these considerations, the post-arrest decisions made by law enforcement professionals and prosecutors with intimate knowledge of the circumstances, which result in an alleged SVP serving a YOA, a probationary sentence, or no sentence at all, have evidentiary value in deciding whether an offender is more immature than dangerous. In my opinion, these prosecutorial and sentencing decisions provides evidentiary support for the probable cause hearing judge's conclusion that respondent was more immature than abnormal.

The State alleged the following facts in support of its allegation that there was probable cause to believe respondent was a sexually violent predator:

(1) Chandler pled guilty in December 2003 to one count of ABHAN and was sentenced under the YOA. The victim stated that she was forced to have intercourse with Chandler.

(2) Chandler pled guilty to one count of CSC in the third degree based on two occasions on which he had intercourse with a 13-year-old girl. He was sentenced under the YOA.

(3) Chandler was arrested in April 2005 based on an allegation that he had intercourse with a 13-year-old girl. He denied the offense and was not charged.

The hearing judge found that actual physical violence was not involved in any of the crimes, which he viewed as a factor in determining whether there is probable cause to believe respondent suffers from a mental abnormality or personality disorder.

The majority rejects, as lacking in evidentiary support, the finding that physical violence was not involved in any of respondent's offenses. The record contains the following evidence which support this finding:

(1) Offense A

> This offense involved intercourse between 18 year old respondent and a 15 year old victim in February 2003. Although the victim stated she was "forced" to have intercourse, she did not report the incident and was a reluctant witness, expressing concern that she would be sent away from home for "getting in trouble again." The incident occurred in a classroom during the school day but was not discovered until a week later when the victim's sister was overheard yelling at respondent and others that the sister "was going to have [victim] tell everybody that she was raped." There was no evidence of physical violence on the part of respondent in "forcing" the sexual encounter.

Respondent received a YOA sentence, suspended to two years probation, after pleading to Assault and Battery of a High and Aggravated Nature.

(2) Offense B

In March 2004, respondent, aged 19, had consensual intercourse with 13 year old victim at her home. Respondent told officers that the victim had lied about her age.

Respondent received a YOA sentence after pleading guilty to Criminal Sexual Conduct with a Minor in the Third Degree (CSCM 3rd).

(3) Offense C

In 2005, 20 year old respondent was arrested and charged with Criminal Sexual Conduct with a Minor in the Second Degree for having consensual intercourse with a 13 year old. No charges were lodged.

In my opinion, there is evidence to support the finding that no physical violence was involved in any of respondent's three offenses. Like the majority, I note that physical violence is not necessary in order for an offense to qualify as "sexually violent." I agree with the circuit judge, however, that the absence of such violence may be probative the respondent suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence unless confined long term in a secure facility.

Finally, the majority suggests that respondent's record of offenses is comparable to that of the respondent in In the Matter of Beaver, 372 S.C. 272, 642 S.E.2d 578 (2007). Beaver's arrest record consisted of four counts of aggravated rape of a child, two counts of aggravated sexual battery, and two counts of incest arising from his molestation of his eight and ten year old daughters, charges which Tennessee authorities allowed him to plead down to one count of aggravated sexual battery and one count of incest. Following

his release from prison in Tennessee, Beaver was charged in South Carolina with committing a lewd act on a child under sixteen (in this case, ten) and one count of communicating obscene messages to her. He was permitted to plead to the lewd act charge and the obscene message charge was dropped. In my opinion, the criminal history of respondent is not comparable to that of Beaver.

Based on the above, it is my opinion that there is evidence in the record which supports the probable cause judge's finding that respondent is an immature person rather than an extremely dangerous sexual predator. I would therefore affirm. In the Matter of Brown, *supra*.

WALLER, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hibah O. Osman, M.D., Respondent/Appellant,

v.

South Carolina Department of Labor, Licensing, and Regulation, South Carolina State Board of Medical Examiners, Appellant/Respondent.

Carolyn C. Matthews, Administrative Law Court Judge

Opinion No. 26641
Heard January 6, 2009 – Filed April 27, 2009

AFFIRMED IN PART; REVERSED IN PART

Kenneth P. Woodington, of Davidson & Lindemann, and Lynne W. Rogers, of South Carolina Department of Labor, Licensing, and Regulation, both of Columbia, for Appellant-Respondent.

F. Barron Grier, III, and Lauri Soles Darwin, both of Grier Law Firm, of West Columbia, for Respondent-Appellant.

JUSTICE KITTREDGE: In this medical disciplinary proceeding, the State Board of Medical Examiners of the South Carolina Department of Labor, Licensing, and Regulation (the Board) issued an order finding Dr. Hibah O. Osman's conduct in performing a surgical procedure warranted the issuance of a public reprimand, the imposition of costs, and the proviso that Dr. Osman must meet certain requirements to reestablish her competency if she ever returned to the practice of surgical obstetrics in South Carolina. On appeal, the Administrative Law Court (ALC) upheld the public reprimand and costs but struck the competency requirement holding the requirement was an "anticipatory suspension." The Board and Dr. Osman filed cross-appeals. We affirm in part and reverse in part.

I.

Dr. Osman is a physician licensed by the State Board of Medical Examiners to practice family medicine in South Carolina. In July 2002, she was practicing in Allendale, South Carolina. One of Dr. Osman's patients was expecting her third child. The thirty-nine year old patient and her husband wanted the child to be born in Allendale, apparently to minimize the inconvenience and disruption to the husband's motel business during a busy holiday season. Dr. Osman acquiesced in this request, although the patient suffered from placenta previa, which is an anterior, low-lying placenta possibly covering a portion of the opening to the womb.

Dr. Osman began the Caesarean section (hereinafter C-Section). Epidural anesthesia was attempted multiple times without success. Therefore, general anesthesia was administered. Unbeknownst to Dr. Osman, the Certified Registered Nurse Anesthetist (CRNA) was unable to intubate the patient. During the surgery, the placenta bled heavily and hampered Dr. Osman's ability to deliver the baby. This difficulty caused Dr. Osman to lengthen her incision multiple times. The baby was successfully delivered, but one of the lengthening incisions injured the patient's uterine artery. This injury was not detected by Dr. Osman during the surgery. The damage to the

artery and the placenta abnormality led to significant bleeding and declining vital signs.

As the patient's vital signs deteriorated, Dr. Osman instructed staff to contact Dr. Ross, a local surgeon. Dr. Ross, however, was away on a planned vacation. Dr. Osman failed to ensure the availability of a surgeon in case of complications. Due to the deteriorating circumstances, Dr. Osman contacted Dr. Johnson at MUSC. The patient was transferred to MUSC by helicopter. At MUSC, Dr. Johnson conducted an ultrasound and immediately began operating on the patient. While operating, significant bleeding was observed. A total abdominal hysterectomy was performed. The patient remained at the hospital for seven days following surgery and was discharged. Despite the positive results, all parties agree, the patient was very close to death.

This disciplinary action followed when the Board filed a formal complaint against Dr. Osman alleging approximately thirteen deviations from the standard of care. Dr. Osman filed a *pro se* response admitting to three instances of misconduct alleged in the complaint: inappropriately performing the surgery in a community county hospital with limited resources, failing to ensure surgical backup, and failing to obtain proper written consent.

Both the Disciplinary Panel for the Board and Board found misconduct as to those matters conceded by Dr. Osman. In its report, the panel recommended no sanction be issued. However, the Board elected to publically reprimand Dr. Osman, require Dr. Osman to pay the assessed costs associated with adjudicating the case, and restrict Dr. Osman from the practice of surgical obstetrics until Dr. Osman proves she has the appropriate education and training. Dr. Osman returned to her native Lebanon.

On appeal, the ALC affirmed the public reprimand and imposition of costs. The ALC, however, deleted the provision requiring Dr. Osman to establish competency in surgical obstetrics on the basis that "an anticipatory suspension is a sanction that the Board does not have the authority to impose." The Board and Dr. Osman filed cross appeals challenging the ALC's order. These appeals are before us pursuant to Rule 204(b) certification.

II.

The Board's Appeal

The Board argues the ALC erred in striking the reestablishment of competency condition. We agree.

Section 40-1-120(A)(3) of the South Carolina Code (2001) authorizes the Board to "place a licensee on probation or restrict or suspend the individual's license for a definite or indefinite time and prescribe conditions to be met during probation, restriction, or suspension including, but not limited to, satisfactory completion of additional education, of a supervisory period, or of continuing education programs." The Board's order contained the following competency reestablishment clause:

> If [Dr. Osman] should ever return to active practice in the State of South Carolina, [Dr. Osman] shall be restricted from the practice of surgical obstetrics until such time as [Dr. Osman] provides proof that is satisfactory to the Board that she has appropriate education and training in this area.

This sanction fits squarely within the parameters of the Board's statutory authority. Therefore, the ALC erred when it struck the reestablishment provision after improperly finding the Board did not have the authority to levy this sanction. We note, however, were Dr. Osman to provide the Board with proof of her competence, the decision to find this proof to be satisfactory should be made objectively and reasonably. Approval cannot be unreasonably withheld.

As the Board did not exceed its statutory authority in imposing this sanction, we reverse the ALC on this issue and reinstate the competency reestablishment provision.[1]

[1] The Board also disputed whether Dr. Osman initially appealed the imposition of the competency provision to the ALC. The Board therefore

III.

Dr. Osman's Appeal

In her cross-appeal, Dr. Osman argues the ALC erred in imposing a public reprimand and responsibility for the costs of the proceedings because her actions did not violate the rules of ethical conduct and there is no substantial evidence in the record to support these sanctions. We disagree as there is substantial evidence to support the Board's findings.

A party aggrieved by the decision of the Board may appeal to the ALC. S.C. Code Ann. § 40-1-160 (2001). The review is governed by section 1-23-380 of the Administrative Procedures Act (APA). *South Carolina Dep't of Labor, Licensing & Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 491-92 (Ct. App. 1998). Under the APA, the reviewing court may not substitute its judgment for that of the agency on questions of fact, but may reverse the agency's decision if the decision is clearly erroneous in view of the substantial evidence. S.C. Code Ann. § 1-23-380(5) (Supp. 2008).

Here, Dr. Osman, in a letter to the Board, agreed with three of the Board's allegations: use of a hospital with inadequate resources, failure to ensure proper surgical backup, and failure to provide written informed consent. Specifically, Dr. Osman agreed, "it was inappropriate . . . to perform a primary C-Section in a community county hospital setting without adequate resources immediately available, i.e.: blood products and surgical backup." Additionally, Dr. Osman agreed that she "failed to have surgery stand-by at the bedside in the event that hysterectomy became necessary. When Dr. Ross was called by [Dr. Osman] . . . it was learned that Dr. Ross was away on vacation and not available. Therefore, Dr. Osman essentially

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argued the ALC improperly struck the provision *sua sponte*. Dr. Osman seized upon this allegation and countered that if the competency provision were not part of her appeal from the Board, then the Board failed to preserve this issue in a motion for reconsideration. Upon careful review and a fair reading of the record, we hold this issue was properly preserved for our review.

had no surgical backup in the event that a hysterectomy became necessary." Lastly, Dr. Osman agreed she "deviated from the appropriate standard of care by failing to provide written informed consent to [a] patient . . . as to the possible complications and difficulties which can occur with C-Section in a patient with placenta previa."

Although Dr. Osman disputed the many other allegations made by the Board in the complaint, Dr. Osman's three concessions constitute substantial evidence in support of the Board's actions. Further, the Disciplinary Panel for the Board and the Board both limited the finding of misconduct to the three admitted deviations from the standard of care.

When reviewing the Board's opinion, the ALC observed: "The Board's public reprimand of [Dr. Osman] for her lack of good judgment is well within its sanctioning authority under Section 40-47-200,[2] and [Dr. Osman] has not demonstrated that, in exercising that authority, the Board acted arbitrarily or discriminatorily." The ALC concluded that Dr. Osman "ha[d] not established any sufficient grounds upon which to disturb the sanction imposed by the Board."

We agree with the conclusion of the ALC that substantial evidence supports the Board's decision. While we recognize Dr. Osman's overall competence and her understandable desire to avoid the public reprimand, the sanction imposed by the Board is well within the Board's statutory authority. Because Dr. Osman has shown no basis for overturning the Board's decision, we affirm this issue.

IV.

We affirm the ALC's holding that substantial evidence supports the public reprimand and costs. We reverse the ALC's striking of the

[2] The ALC cited section 40-47-200 of the South Carolina Code (Supp. 2005). This section has been amended and a similar provision that allows the Board to order additional training is now found at S.C. Code Ann. § 40-47-120(A) (Supp. 2008).

reestablishment of competency provision, and we reinstate the provision. The judgment of the ALC is

AFFIRMED IN PART; REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Gary A. White, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
James R. Barber, Circuit Court Judge

Opinion No. 26642
Heard February 4, 2009 – Filed April 27, 2009

AFFIRMED IN RESULT

Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Warren Blair Giese, of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review a court of appeals opinion upholding the admissibility of Rule 702, SCRE, expert testimony related to dog tracking evidence. *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007). We affirm the court of appeals in result.

I.

This case arises from an armed robbery of a convenience store in Columbia, South Carolina. After midnight on April 19, 2004, Gary White and Anthony Morris were riding in a car driven by Roy Wiggins. As Wiggins drove past a convenience store, White told Wiggins to turn around and go back to the store. Wiggins complied. Wiggins drove to the store and parked behind it. White and Morris exited the car, with Wiggins staying behind in the driver's seat. White was carrying a gun.

White and Morris entered the convenience store. Gwen Anthony, the store manager, was restocking the grill area when White and Morris entered suddenly. Anthony described the robbers' entry as a "flash."

White, armed with the gun, grabbed Anthony, put his arm around her, and pointed the gun to her neck. Morris moved through the store stealing cash, lottery tickets and an 18-pack of beer while White continued to hold Anthony at gunpoint. While Morris was at the beer cooler, White, while standing up, apparently lost consciousness.

Anthony testified that White's head fell to her shoulder, and the gun dropped from her neck. Although he was unconscious for only a few seconds, Anthony observed that White's breath smelled like alcohol, his gun was black with a silver top, and his jeans were baggy and dark in color. With the 18-pack of beer in hand, Morris ran up the aisle toward the door and screamed at White, waking him. White, still holding Anthony, returned the gun to her neck and began to move toward the door, forcing her to accompany him. As they exited the store, White pushed Anthony away and ran in the opposite direction. At that very moment, Officer Rouppasong of

the Columbia Police Department pulled into the store parking lot on a routine break.

Upon his arrival on the scene, Officer Rouppasong saw two people: Anthony, waving and flagging him down and another person running away from the store. Rouppasong described the man he saw running as a black male, wearing a white t-shirt and dark colored pants, holding or carrying something in one of his hands. Rouppasong remained in his vehicle and followed White. As he followed him around the corner of the store, Rouppasong saw a car parked on the street. Rouppasong saw a black male (later identified as White) exit the car on the passenger side and flee. Rouppasong did not give chase; instead, he stayed with the vehicle and Wiggins. Officer Gunter, with the K9 unit, was called to the scene to search for the suspect.

Officer Gunter arrived on the scene approximately thirty minutes after the robbery. Once there, Rouppasong relayed the necessary information that allowed Gunter to know where to initiate the track. Gunter and his tracking dog, Aurie, began tracking and soon found White nearby sleeping next to some bushes, gun in hand. Rouppasong testified that the man he saw lying by the bushes, asleep, was the same man he saw exiting the store and fleeing the crime scene. There were two other in-court eyewitness identifications of White. Wiggins testified that White left his car with a gun, returned to his car a short time later, and then fled when police arrived. The second identification came from Morris.

White was convicted of two counts of armed robbery and kidnapping; he was sentenced to life without parole.[1] The court of appeals affirmed, rejecting the contention that dog tracking evidence must satisfy the standard for "scientific based" expert testimony under *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979). The court of appeals noted a distinction between two types of expert testimony, "scientific evidence versus experience-based knowledge." *White*, 372 S.C. at 381, 642 S.E.2d at 615. With regard to

[1] White's criminal history triggered a life without parole sentence pursuant to S.C. Code Ann. § 17-25-45 (2003).

nonscientific expert testimony (which includes dog tracking evidence), the court of appeals found that "questions about the reliability of [the dog handler] go only to the weight [of his testimony], but not admissibility." *Id.* at 376, 642 S.E.2d at 613. Because of the suggestion that an initial determination of reliability is not part of the trial court's gatekeeping role, we granted White's petition for a writ of certiorari.[2]

II.

A.

A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

White concedes the dog handler met the Rule 702, SCRE, qualifications due to his experience and training.[3] White contends the trial court failed in its gatekeeping role to vet the reliability of the dog's tracking skills, thus leaving the jury to speculate about the dog's reliability. We agree with White's premise that all expert testimony under Rule 702, SCRE,

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[2] White also asked the court of appeals to grant him a new trial based on newly discovered evidence. It appears the new trial motion was not presented to the trial court. Moreover, White did not ask the court of appeals to remand the new trial motion to the trial court. *See State v. Mercer*, 381 S.C. 149, 165-66, 672 S.E.2d 556, 564-65 (2009) (recognizing that a motion for a new trial based upon after discovered evidence must be presented to the trial court in the first instance). The court of appeals declined to address the issue "because it ha[d] not been raised to and ruled on by the trial court and [wa]s not properly before th[e] court." *White*, 372 S.C. at 387, 642 S.E.2d at 619. We affirm the court of appeals on this issue. Rule 220(b)(1), SCACR. The disposition of this issue is without prejudice to White seeking such relief in the trial court.

[3] There is likewise no challenge to the Rule 702 criteria that the evidence "will assist the trier of fact to understand the evidence or to determine a fact in issue."

imposes on the trial courts an affirmative and meaningful gatekeeping duty. To the extent the court of appeals opinion may be construed as excluding a gatekeeping role for trial courts in connection with nonscientific (or experienced based)[4] expert testimony, such construction is rejected.

All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"This language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony. . . . Hence, as a matter of language, the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord. *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (finding error in the trial court's decision to admit "unreliable" expert evidence); *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (noting that before expert evidence is admitted the trial court must determine it is reliable).

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[4] We note that case law uses the terms nonscientific expert testimony and experienced based expert testimony interchangeably. For consistency, we will use the term nonscientific expert testimony.

With regard to dog tracking evidence, this Court's jurisprudence (even prior to the adoption of the South Carolina Rules of Evidence in 1995) speaks to the reliability foundational requirement of such evidence. *State v. Childs*, 299 S.C. 471, 476-77, 385 S.E.2d 839, 842-43 (1989) (finding no abuse of discretion in trial court's admission of dog tracking testimony where a deputy sheriff had "'run'" bloodhounds for eleven years and finding of reliability supported by "dogs . . . characteristics of acuteness in scent as well as the power of discrimination between human and other scents"); *State v. Brown*, 103 S.C. 437, 444, 88 S.E. 21, 23 (1916) (finding trial court's admission of dog tracking evidence constituted an abuse of discretion where evidence established that the dog tracking occurred outside the "period of efficiency" and was therefore unreliable).

While we agree with White concerning the important gatekeeping role of the trial court in determining the admissibility of expert testimony under Rule 702, the trial court properly discharged its duty in this case. As noted, White concedes the qualifications of Officer Gunter as a dog handler. White's argument is that the dog tracking evidence is unreliable. The trial court permitted a thorough examination of all matters relating to admissibility, including reliability.

Beyond Officer Gunter's extensive training and experience, there was ample evidence concerning the training and reliability of the dog, Aurie. Aurie is a German shepherd that descended from a bloodline of known police and military working dogs. Through testing, Aurie has been certified in several areas of tracking, yet Aurie's strongest skill is tracking people. Officer Gunter and Aurie, as of the trial, had been "partners" in excess of seven years and had accomplished approximately 750 tracks together. The finding of reliability is well supported by the record, and we find no abuse of discretion in the admission of the dog tracking evidence.

In addition to the trial court's discharge of its gatekeeping role in assessing the admissibility of the dog tracking evidence, the court properly instructed the jury that "you are to give his testimony such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify in this trial."

B.

The court of appeals is commended for its thorough analysis of our country's jurisprudence concerning dog tracking evidence. While foundational requirements vary, "an overwhelming number [of jurisdictions] allow admission of dog tracking evidence in a criminal case to prove identity." *White*, 372 S.C. at 378, 642 S.E.2d at 614. To provide uniformity, we think it advisable to adopt the following evidentiary framework to guide our bench and bar concerning dog tracking evidence. By extrapolating from our case law and other authorities, we conclude a sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated. *See State v. Childs*, 299 S.C. at 476-77, 385 S.E.2d at 842-43; *State v. Brown*, 103 S.C. at 443-45, 88 S.E. at 22-23; *see also State v. Taylor*, 447 S.E.2d 360, 368-69 (N.C. 1994); Jay M. Zitter, Annotation, *Evidence of Trailing by Dogs in Criminal Cases*, 81 A.L.R. 5th 563 (2000).

C.

The case before us may appear straightforward, especially in light of the overwhelming evidence of guilt. Yet on appeal the State has persisted with the argument that reliability need not be shown for the admission of nonscientific expert testimony. Because the court of appeals in this case has approvingly cited *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997) in support of the State's position, we believe clarification of the analytical framework for the admissibility of nonscientific expert testimony is warranted.

At oral argument, the State argued this Court need not concern itself with the issue of reliability because the case *only* involves nonscientific

expert testimony. Presumably, the State relies on the court of appeals' decision in *State v. Morgan*, which held "[i]f the expert's opinion does not fall within [the] *Jones*[5] [standard for scientific expert testimony], questions about the reliability of an expert's methods go only to the weight, but not admissibility, of the testimony." *Morgan*, 326 S.C. at 513, 485 S.E.2d at 118. This is an incorrect statement of law.

We overrule *Morgan* to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence.[6] The familiar tenet of evidence law that a continuing challenge to evidence goes to "weight, not admissibility" has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability. Nonscientific expert testimony must

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[5] *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

[6] *Morgan* relies on this Court's opinions in *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) and *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991) to support its finding that only scientific expert testimony includes reliability as part of the foundation for admission in evidence. *Schumpert* and *Whaley* stand for no such proposition. *Schumpert* addressed the qualifications of a proposed mental health professional and her ability to give expert testimony on rape trauma syndrome. *Whaley* dealt with the admissibility of a proposed expert in eyewitness identifications. Because the area of expertise was "distinguishable from 'scientific' evidence," the *State v. Jones* scientific framework was not appropriate. *Whaley*, 305 S.C. at 142, 406 S.E.2d at 371-72. The *Whaley* Court further observed, "[a]lthough we are of the opinion that this type of testimony need not be subjected to the *Jones* test, we reject any contention that it does not comport with *Jones*." *Id.* at 142 n.2, 406 S.E.2d at 372 n.2. *Whaley* then proceeded to analyze the matter of reliability and held, in the factual context presented, the trial court abused its discretion by excluding the expert's testimony. *Id.* at 143, 406 S.E.2d at 372. In short, neither *Schumpert* nor *Whaley* contains the slightest hint that a trial court may ignore the question of reliability when considering the admissibility of nonscientific expert testimony.

satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter.

Courts are often presented with challenges on both fronts—qualifications and reliability. The party offering the expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experience, training or education." Rule 702, SCRE. With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that "defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990). Turning to the reliability factor, a trial court may ultimately take the same approach, but only after making a threshold determination for purposes of admissibility.

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) is often cited for the gatekeeping role of the trial court with regard to expert testimony under Rule 702, as well as the standard reliability factors for scientific evidence.[7] The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony. We have set forth above foundational requirements for Rule 702 expert testimony concerning dog tracking evidence.

We do not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence. Consequently, we offer no formulaic approach that will apply in the generality of cases. Yet the trial court in the discharge of its gatekeeping

[7] The *State v. Council* factors for scientific expert testimony are: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

role in determining admissibility must initially answer the always present threshold questions of qualification and reliability.

III.

We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

We affirm the court of appeals in result. The trial court properly discharged its gatekeeping role in assessing the dog tracking evidence under Rule 702, as to qualifications and reliability.

AFFIRMED IN RESULT.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Clyde A. Eltzroth, Jr., Respondent.

Opinion No. 26643
Submitted April 3, 2009 – Filed April 27, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John E. Parker, of Peters Murdaugh Parker Eltzroth & Derrick, PA, of Hampton, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the issuance of an admonition, public reprimand, or definite suspension not to exceed ninety (90) days. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a ninety (90) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent self-reported to ODC that he failed to file his state and federal income tax returns from 2000 to 2007. Respondent represents that no criminal charges are pending or anticipated.

LAW

Respondent admits that his misconduct constitutes grounds for discipline pursuant to Rule 7, RLDE, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). Further, he admits he has violated Rule 8.4(b) of the Rules of Professional Conduct, Rule 407, SCACR (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Brandi L. Holder, Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 26644
Heard March 18, 2009 – Filed May 4, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; and Solicitor Robert Mills Ariail, of Greenville, for Respondent.

JUSTICE BEATTY: Brandi L. Holder was convicted of homicide by child abuse for the death of her son, Bobby (Bo) Holder, and was sentenced to twenty-five years in prison. Holder appeals, arguing the trial court committed reversible error (1) in allowing a police investigator to testify regarding statements made by a codefendant during interrogation, (2) in admitting testimony from a coworker regarding her behavior, (3) in admitting autopsy photographs, and (4) in admitting photographs taken of her son one month before his death that suggested prior abuse. We affirm.

I. FACTS

Holder's son, Bo, was born on January 3, 2000. Holder started working at a hair salon in January 2002, and she thereafter met Mark Martucci, who worked at a carpet store next door. Holder and her son moved in with Martucci sometime in early 2002. Martucci was not Bo's biological father.

Between 12:00 p.m. and 1:00 p.m. on Wednesday, July 17, 2002, Bo, who was two-and-a-half years old, was brought unconscious to the emergency room at Allen-Bennett Hospital in Greenville, South Carolina by Martucci and another man, identified as John Parker.[1] Bo was not breathing and had no heartbeat. Martucci told hospital personnel that Bo had fallen off an All-Terrain Vehicle (ATV) earlier that week and had injured himself. When Holder later arrived at the hospital, she also told hospital personnel that Bo had been involved in an ATV accident.

Extensive efforts were made to resuscitate Bo, but they were unsuccessful and he was pronounced dead. Dr. Michael Eugene Ward, a pathologist who conducted the autopsy of Bo, testified that Bo's injuries were not caused by an accident. Bo had bruising in the pattern of knuckle marks

[1] Parker, who had been staying with Martucci and Holder, pled guilty to aiding and abetting homicide by child abuse and testified at the trial in this matter. Parker stated he had repeatedly urged Martucci to take Bo to the hospital on the morning of Bo's death, but Martucci had initially refused. Parker also testified that he had witnessed Martucci abusing Bo on several occasions.

on his face, and the inside of his lip had been split. Bruising was present around his mouth and face. Bo also had numerous bruises all over his body that were in various stages of healing. Dr. Ward concluded Bo died as a result of blunt force trauma to the abdomen. Specifically, Bo sustained trauma to the visceral organs of his abdomen with a tear in the small intestine, trauma to his pancreas, and bleeding into the abdominal cavity that caused his body to shut down.

Holder gave a statement to the police initially denying any knowledge of abuse. When she was told by investigators that they had discovered there had been no ATV accident, Holder indicated that she wanted to tell what had happened and she gave a second statement in which she admitted having knowledge of repeated incidents of Martucci's abuse of Bo.[2]

At a joint trial, Holder and Martucci were convicted of homicide by child abuse in the death of Bo. Holder was sentenced to twenty-five years in prison. Martucci did not appear for trial, so his sentence was sealed. Martucci subsequently appeared to receive his sentence and was ordered to serve life in prison. See State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008).

II. LAW/ANALYSIS

"A person is guilty of homicide by child abuse if the person . . . causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2003).

"Child abuse or neglect" is defined for purposes of the statute as "an act or omission by any person which causes harm to the child's physical health or welfare." Id. § 16-3-85(B)(1). "Harm to the child's physical health or welfare" occurs when someone "inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment." Id. § 16-3-85(B)(2)(a).

[2] At trial, Holder repudiated her police statement in which she admitted knowledge of abuse, maintaining it had been fabricated by the authorities.

(A) Statements by Codefendant

Holder asserts the trial court erred in allowing Doug Kelly, an investigator with the Greenville County Sheriff's Office, to relate what codefendant Martucci told him during interrogation. Martucci's redacted oral statement was allowed in to the effect that he had noticed some bruises on Bo, and "he felt like she had been inflicting them." Holder contends her Sixth Amendment right to confront and cross-examine witnesses was denied, citing Bruton v. United States, 391 U.S. 123 (1968), because Martucci did not testify at trial. Holder alleges the redaction of Martucci's statement was insufficient in this case.

The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses. Richardson v. Marsh, 481 U.S. 200, 206 (1987).

In Bruton, the Supreme Court held that, in a joint trial, admission of a non-testifying codefendant's statement that expressly inculpates the defendant violates the defendant's rights under the Confrontation Clause, as the use of only a limiting instruction is insufficient to remove any prejudice to the defendant. 391 U.S. at 136-37.

In Marsh, the Supreme Court remarked that the rule announced in Bruton is a "narrow" one that applies only when the statement implicates the defendant "on its face"; the rule does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony. Marsh, 481 U.S. at 207-08. The Supreme Court also noted Bruton can be complied with by the use of redaction:

> Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with

> by redaction--a possibility suggested in that opinion itself. *Id., at 134, n. 10, 88 S.Ct., at 1626, n. 10.* If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial.

Id. at 208-09.

In Gray v. Maryland, 523 U.S. 185 (1998), a 5-4 decision, the Supreme Court considered Bruton's application when the redaction consists of replacement of the defendant's name with an obvious blank space, a symbol, or a word such as "deleted." The Court noted the Richardson decision had limited the scope of Bruton to instances where the reference to the defendant was on the face of the statement. However, the majority in Gray held that a statement that "substituted blanks and the word 'delete' for the petitioner's proper name[] falls within the class of statements to which *Bruton*'s protections apply." Id. at 197.

The majority reasoned that one must look at the kind of inferences that are necessary to make a connection to the defendant, not the simple fact that there are inferences, to determine the applicability of Bruton. Id. at 196. Richardson involved statements that did not directly refer to the defendant, but which became incriminating only when linked to other evidence developed at trial. Id. at 196. However, the Gray Court stated "[t]he inferences at issue here [in Gray] involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even [if the statement was] the very first item introduced at trial." Id. Thus, the statements are protected under Bruton because in such instances the defendant is implicated almost as if there was a direct reference, and the connection does not depend on other evidence introduced at trial. Id. at 196-97.

Violations of the Confrontation Clause are subject to a harmless error analysis. State v. Murphy, 270 S.C. 642, 644, 244 S.E.2d 36, 36-37 (1978) (observing where a wealth of evidence exists against the appellant, it

eliminates any error in the admission of a codefendant's statement). "A [C]onfrontation [C]lause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that we are persuaded, beyond a reasonable doubt, that the violation did not affect the verdict." State v. Vincent, 120 P.3d 120, 124 (Wash. Ct. App. 2005). "Considerations include the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case."[3] Id.

In the current appeal, Holder argues the substitution of her name with the pronoun "she" was insufficient to obscure her identity because the jury could readily determine that the statement referred to her as she was the only female defendant. We find the redaction in this case is analogous to that discussed in Gray because, despite the redaction, it was apparent that Martucci was referring to Holder, and this inference was one that could be readily made even without reliance on the other testimony developed at trial. Thus, we find the admission of the redacted statement violated Holder's rights under the Confrontation Clause as Martucci did not testify and was not subject to cross-examination.

However, even though the redacted statement was admitted in error, we hold the error was harmless beyond a reasonable doubt in the context of the entire record. Holder admitted in her own statement to the police that she observed numerous instances where Martucci abused her child, including dunking him in the bathtub to stop him from crying while he gasped for air; striking him on the legs, back, and face; and taping his mouth shut, among

[3] In Vincent, the Washington Court of Appeals stated that, although the use of "the other guy" had been upheld as a proper substitution in previous cases, the exact words used for redaction must be evaluated in context to determine whether the reference to the defendant was adequately obscured. Thus, there could be some instances where this identical phrase would not be sufficient, such as where the implication of the defendant is apparent. The court concluded, however, that any error in this case was harmless beyond a reasonable doubt because the evidence of the defendant's guilt was overwhelming and the disputed statement was merely cumulative to other, admissible evidence. Id. at 156-57.

other things. In her police statement, Holder stated Martucci's abuse of Bo began when Martucci lost his job and he began babysitting Bo.

Holder also initially told hospital personnel that Bo was injured in an ATV accident, and then later admitted there was no accident. Holder was at home with Martucci and her son on the Sunday, Monday, and Tuesday prior to her son's death on Wednesday, July 17, 2002, so she was present during the time frame the pathologist testified the fatal injuries occurred. According to the medical authorities, Bo's distress would have been acute and impossible to ignore, and had Bo been taken to the hospital when the injuries occurred, he could have been saved. This failure to timely seek medical attention for Bo is evidence of extreme indifference to human life.

Coworkers and neighbors also testified that they had seen bruising on Bo while he was in the company of Holder and that they had voiced their concerns to her. In fact, Holder was present when a neighbor took photographs to document the injuries. Holder also fabricated statements to coworkers and even to hospital personnel on the day of her son's death to hide the true source of Bo's injuries. Thus, Holder undoubtedly was aware of and was complicit in the severe abuse of her son, leading to his eventual death by beating at the age of two-and-a-half years. Thus, it was established beyond a reasonable doubt that Holder was guilty of the offense of homicide by child abuse independent of the challenged statement so the error was harmless in the context of the entire record.

(B) Coworker's Testimony Regarding Holder

Holder next contends the trial court erred in allowing a coworker, Angela Eccles, to testify that Holder began dressing differently and talked less about her child once her relationship began with Martucci. Holder argues the testimony was inadmissible character evidence under Rule 404(a) of the South Carolina Rules of Evidence (SCRE) because it implied Holder "was acting in conformity with this bad trait of her character by putting her relationship with Martucci ahead of her own child's best interests."

Eccles testified that she is a hair stylist at Capelli's Hair Salon in Mauldin and had worked there for seven years. Holder started working at the salon in January 2002. Mark Martucci worked at a carpet store next door. Martucci was one of Holder's first clients, and Eccles was aware that the two had developed a relationship and moved in together.

Eccles stated that when Holder brought her son, Bo, to the salon for a haircut in early July 2002, she noticed that Bo "had bruises along the sides of his face." Her impression, based on his appearance, was that somebody had squeezed his face. Eccles asked Holder about it, and Holder said her son had been pushed into a swimming pool by a dog at the home of Martucci's sister. Eccles testified that Holder "added that she wouldn't have believed it herself, except it got caught on video because Mark's sister was videotaping at the time."[4]

Eccles said that during this July visit to the salon, Holder's son seemed upset compared to the three or four times she had previously seen him and he was crying. Holder told her son, "You better behave or I'm going to take you home to Mark." At that point, the child fell to the floor and cried and screamed, which Eccles said concerned her because she "thought it was odd."

When asked to generally describe Holder during the time she worked with her, Eccles stated:

> When she first started working there, she talked more about Bo and -- it's hard to explain. She was a little more soft-spoken. She dressed a little more conservatively. And over a period of weeks, it started to change, especially now looking back at the change of her dress. She started dressing a little different.

Defense counsel objected to this last response quoted above, summarily stating, "reasonable objection under Rule 404, Your Honor, placing her character in evidence." The trial court overruled the objection. Eccles concluded her testimony on this particular point by stating that Holder did not talk as much about Bo and starting talking about "Mark, Mark, Mark"

[4] No videotape of this alleged event was offered at trial.

basically "all the time" once they met. She stated she did "know if it's just because we're all moms, but we [the other salon employees] all talk[ed] about our kids, kids, kids."

Eccles later testified, without objection, that Holder had stopped speaking to her parents, although Holder said they had tried to call her. Eccles stated, "I don't remember if it was her or Mark that had told her she didn't need to talk to them or if she herself just did not want to have anything to do with them anymore."

The State contends the testimony was relevant to Holder's state of mind as it was required to prove that Holder caused the death of her child while committing abuse or neglect, and the death occurred under circumstances manifesting an extreme indifference to human life. Thus, the evidence about Holder's relationship with Martucci, her changed appearance, and her failed relationship with her parents[5] was relevant to Holder's state of mind.

"The admission or exclusion of testimonial evidence falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent abuse resulting in prejudice." State v. Brannon, 341 S.C. 271, 277, 533 S.E.2d 345, 348 (Ct. App. 2000).

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE. An exception to this rule exists for "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Id. Rule 404(a)(1).

"The term 'character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness." State v. Nelson, 331 S.C. 1, 7, 501 S.E.2d 716, 719 (1998). "Generally speaking, character refers to an aspect of an individual's personality which is

[5] No objection was made to the testimony concerning Holder's relationship with her parents.

usually described in evidentiary law as a 'propensity.'" Id. (citations omitted).

"A person is guilty of homicide by child abuse if the person . . . causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2003) (emphasis added).

For purposes of the homicide by child abuse statute, "extreme indifference" has been defined as "a mental state akin to intent characterized by a deliberate act culminating in death." McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002)).

We conclude Eccles's testimony regarding Holder is not inadmissible character evidence. Rather, the coworker was merely recounting her version of events leading up to the time Holder's child was killed, as well as her impression of Holder during this time frame. The State's purpose for offering the testimony was not to show Holder had a propensity to abuse her child in conformance with a character trait. Rather, it was to show Holder's strong desire to please Martucci instead of protecting the welfare of her child and to establish an element of the offense, that she manifested an extreme indifference to the well-being of her son.

Moreover, the impact of this brief evidence was minimal in light of the record as a whole, and it was cumulative to other evidence along these same lines that was admitted without objection. See, e.g., State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-55 (2001) (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection).

(C) Autopsy Photographs

Holder next argues the trial court committed reversible error in admitting autopsy photographs, especially those showing Bo's internal injuries, into evidence.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." Id.

"To constitute unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

In the current appeal, the pathologist, Dr. Michael Eugene Ward, testified, in camera, that the photographs would help him in "demonstrating the anatomic relationships and the disruption of those anatomic relationships. There may be some lack of knowledge of internal anatomy [among the jurors]." Dr. Ward stated he could explain the injuries to the jury without the photographs, but he was not sure if he could "explain it to their understanding." He also noted that this "would be the best way by not only demonstrating the anatomic relationships, but also showing the injuries."

During his testimony, Dr. Ward explained that some of Bo's internal injuries showed signs of trying to heal, so they had been inflicted more than a day before his death. Dr. Ward stated Bo also had external bruising on his abdomen that was probably inflicted closer to the time of his death. The pathologist also indicated blunt trauma force was used and noted the extensive bruising over the child's body. Dr. Ward used the photographs to explain the evidence and the reasons for his findings.

We find the photographs clearly demonstrate the extent and nature of the injuries in a way that would not be as easily understood based on the testimony alone. The photographs corroborated the pathologist's testimony about the extensive bruising on the child, which was in various stages of healing, and showed that even internal organs manifest signs of bruising. This is particularly helpful to jurors who are unversed in medical matters. Although Holder testified she was unaware of any marks on her son prior to his death and thought he was suffering from simple food poisoning, it is abundantly clear from the extensive bruising on the child, which was in various stages of healing, and the torn internal organs, that he had been seriously injured. These photographs demonstrate that the damage to the child would have been difficult to ignore.

Although the photographs were graphic, the facts in this case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis. We hold the trial court properly exercised its discretion in admitting the autopsy photographs in this case. See, e.g., State v. Ward, 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007) (holding the trial court did not abuse its discretion in allowing two autopsy photographs to illustrate a graze wound on the murder victim's back as the jury's understanding of the graze wound was necessary to rebut the defense's argument about the angle of the shot); State v. Jarrell, 350 S.C. 90, 106-07, 564 S.E.2d 362, 371 (Ct. App. 2002) (finding the trial court properly admitted several autopsy photographs in a case of homicide by child abuse because they were necessary for the jury to comprehend the pathologist's testimony regarding the extent of the baby's injuries and the nature of the abuse; the court noted that, "while some of 'the photograph[s] are graphic, the facts of the case are very graphic' and the photos helped the jury understand the pathologist's testimony" (alteration in original)).

(D) Photographs Showing Prior Abuse of the Victim

Holder lastly argues the trial court erred in admitting State's Exhibits 16 and 17, photographs taken of her son approximately a month before his death, because they were intended to imply her son had previously been abused. Holder contends the photographs were inadmissible evidence of

prior bad acts and the State failed to prove the prior abuse by clear and convincing evidence. Holder asserts the photographs "show minor injuries at best [even] if they were intentionally inflicted."

State's Exhibit 16 shows a woman kneeling next to Bo, whose back is facing the camera. The woman has pulled Bo's T-shirt up to reveal faint bruising on his back. In State's Exhibit 17, the same woman is holding Bo's right arm straight out with the inside of the arm facing up. A small, triangular mark resembling a burn is visible just below the child's elbow. Both photographs bear the date June 20, 2002.

Elizabeth Jane Venesky testified that she lived next door to Martucci, Holder, and Bo, and that she is the woman who appears in the two photographs. She said the photographs were taken by her husband, Ronald Venesky, on or about June 20, 2002, and Holder was present. Venesky stated when Holder came over that day with Bo, she noticed Bo had a bruise on his shoulder, a burn mark, and "a busted lip." Venesky's son, who played with Bo, mentioned seeing bruises on Bo, so Venesky decided to have some photographs taken because she thought "something is not right [with] this." Venesky explained, "And so that's how we came to take the pictures. Because I thought, well, if something happens or we see he's being abused, at least, we'll have some kind of pictures."

Venesky further testified that, around the same time the photographs were taken, Holder and Bo spent the night with her after Holder told her Martucci had kicked them out. The next day, Venesky arranged for her step-cousin to take care of Bo for a day after Holder told her she needed someone to keep him and did not want to contact her parents.

Venesky stated Holder thereafter called her and was angry that photographs had been taken of her son. Venesky reminded Holder that she had been present when the photographs were made. Venesky recalled that Holder stated at one point during their conversation that "she was just mad, that she smacked Bo in the mouth when he back-talked her."

Robin Center, Venesky's step-cousin, testified that when Holder left Bo with her, she noticed Bo had a triangular burn mark, which looked like it was caused by the end of an iron, as well as a swollen, lacerated lip. Bo also had a large black bruise on the back of his neck, as well as "purplish-looking" bruises on the small of his back and some additional, lighter bruising. Center stated "there's just so much that I s[aw] on him" and it was "really shocking."

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. "It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Id. Evidence of prior bad acts that are not the subject of a conviction must be establishing by clear and convincing evidence. State v. Smith, 300 S.C. 216, 218, 387 S.E.2d 245, 246-47 (1989). "The evidence admitted 'must logically relate to the crime with which the defendant has been charged.'" State v. Stokes, 381 S.C. 390, ___, 673 S.E.2d 434, 441 (2009) (quoting State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000)).

The probative value of the evidence must outweigh the danger of unfair prejudice. Rule 403, SCRE. The determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

"A person is guilty of homicide by child abuse if the person . . . causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2003).

For purposes of the homicide by child abuse statute, "child abuse or neglect" is defined as "an act or omission by any person which causes harm to the child's physical health or welfare." Id. § 16-3-85(B)(1). The statute defines "harm" as occurring when a person "inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment." Id. § 16-3-85(B)(2)(a) (emphasis added).

"Extreme indifference" as used in the statute has been defined as "a mental state akin to intent characterized by a deliberate act culminating in death." McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002)).

"The statute makes clear that child abuse may be committed by either **an act or an omission** which causes harm to a child's physical health." State v. Smith, 359 S.C. 481, 492, 597 S.E.2d 888, 894 (Ct. App. 2004) (emphasis in original). "Additionally, harm to a child's health occurs when a person either **inflicts, or allows to be inflicted** physical injury upon a child." Id. (emphasis in original). In Smith, the court concluded there was evidence of homicide by child abuse where, among other things, the medical evidence indicated the injuries to the child were so severe that they were the result of child abuse that would have been readily apparent. Id.

We hold the trial court did not abuse its discretion in admitting the photographs in this instance. Under section 16-3-85, the State was required to show Holder manifested an "extreme indifference" to her child's well-being. These photographs tend to establish Holder was aware of ongoing abuse of her child, which is directly relevant to whether her acts or omissions resulted in the death of Bo. They are thus relevant to establish elements of the offense, including "extreme indifference."

Further, the photographs established a pattern of continuous abuse and neglect, which made it more probable that Bo was a victim of child abuse or neglect rather than a mere accident. The State's primary theory in this case was that Holder had allowed Martucci to abuse Bo in the months prior to his death. Holder's culpability for homicide by child abuse arose from her

complicity in the abuse, which culminated in the death of Bo on July 17, 2002 from severe internal injuries that had been inflicted in the day or days prior to his death.

The injuries to Bo at the time these photographs were taken, including the bruising on his back and the mark on his arm, were similar to the injuries he had sustained prior to his death, as the pathologist noted extensive bruising on Bo's back and an unusual mark on his arm, among other injuries. Bo also had a lacerated mouth at the time of his death, which is similar to the split lip the witnesses testified they observed in June 2002. See, e.g., State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008) ("Where there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the Court of Appeals have held prior bad acts are admissible to demonstrate a common scheme or plan.").

The photographs also corroborated other evidence that was admitted on this point without objection. Venesky and Center both testified without objection about the injuries they observed on Bo, including the bruising on his back and the burn mark, and Holder admitted that she had hit her son in the face. Thus, we find there was clear and convincing evidence of prior abuse of Bo and conclude the photographs were properly admitted by the trial court.

III. CONCLUSION

Based on the foregoing, the conviction and sentence of Holder are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The American Petroleum Institute and BP Products North America Inc., Petitioners,

v.

South Carolina Department of Revenue, The State of South Carolina, Andre Bauer, in his official capacity as President of the South Carolina Senate and Glenn F. McConnell, in his official capacity as President Pro Tempore of the South Carolina Senate, and Robert W. Harrell, Jr., in his official capacity as Speaker of the House of Representatives, Respondents.

The South Carolina Petroleum Marketers Association, Intervenors.

ORIGINAL JURISDICTION

Opinion No. 26645
Heard January 6, 2009 – Filed May 4, 2009

ACT DECLARED UNCONSTITUTIONAL

Dwight F. Drake, C. Mitchell Brown, B. Rush Smith, III, and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, of Columbia, for Petitioners.

Bradley S. Wright and Charles F. Reid, both of Columbia, for Respondent Robert W. Harrell, Jr.

Michael R. Hitchcock and Kenneth M. Moffitt, both of Columbia, for Respondents Andre Bauer and Glenn F. McConnell.

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JUSTICE PLEICONES: We accepted this matter in our original jurisdiction to address Petitioners' claim that Act 338 enacted by the General Assembly in 2008 violates the one subject rule of the South Carolina Constitution, Article III, § 17. We agree with Petitioners.

The General Assembly ratified 2008 Act No. 338 on June 5, 2008. The Governor vetoed the legislation days later and the General Assembly then voted to override the veto. The final version of the bill contains three main sections and a fourth section providing the effective date. The first section, entitled "Sales tax exemption," amends S.C. Code Ann. § 12-36-2120 to provide that certain energy efficient products purchased for noncommercial use are exempted from sales tax. The second section, entitled "Sales tax exemption; Second Amendment Recognition Act," amends S.C. Code Ann. § 12-36-2120 to provide that sales of handguns, rifles, and shotguns during the "Second Amendment Weekend" are exempted from sales tax. The third section, entitled "Terminal and other requirements," amends Article 3 of Title 12, Chapter 28 by adding the following section:

> Section 12-28-340.
> (A) Regardless of other products offered, a terminal, as defined in Section 12-28-110(56), located within the State must offer a petroleum product that has not been blended with ethanol and that is suitable for subsequent blending with ethanol.
>
> (B) A person or entity must not take any action to deny a distributor, as defined in Section 12-28-110(17), or retailer, as defined in Section 12-28-110(52), who is doing business in this State and who has been registered with the Internal Revenue Service on Form 637(M) from being the blender of record afforded them by the acceptance by the Internal Revenue Service of Form 637(M).
>
> (C) A distributor or retailer and a refiner must utilize the Renewable Identification Number (RIN) trading system.

> Nothing in this section should be construed to imply a market value for RINs.

The Act was originally introduced in the Senate and contained only the language that ultimately became the first section, relating to sales tax exemptions for energy efficient products. The House then amended the bill to add a sales tax holiday for firearms.[1] Finally, upon return to the Senate, the section regarding fuel blending was added, over the objection of the sponsor of the original form of the Act. The Governor vetoed the Act and returned it to the Senate. Among the stated reasons for the veto was the Governor's finding that the Act was unconstitutional as violative of Article III, § 17 of the South Carolina Constitution. The House and Senate then overrode the Governor's veto.

Petitioners filed a complaint seeking a declaratory judgment that section 3 of the Act is unconstitutional as violating the one subject provision of Article III, § 17 of the South Carolina Constitution. Petitioners asked this Court to entertain the matter in its original jurisdiction and to temporarily enjoin implementation of section 3 of the Act. We granted the petition and issued the temporary injunction as to section 3.

STANDARD OF REVIEW

Article III, § 17 is to be liberally construed so as to uphold an Act if practicable. Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005). Doubtful or close cases are to be resolved in favor of upholding an Act's validity. Id.

[1] The sales tax holiday for firearms took place prior to the argument of this case.

ANALYSIS

A. Act 338 violates the one subject rule of the S.C. Constitution.

Article III, § 17 of the South Carolina Constitution is entitled "One subject" and provides that "[e]very Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. art. III, § 17. The purpose of Article III, § 17 is: (1) to apprise the members of the General Assembly of the contents of an act by reading the title; (2) to prevent legislative "log-rolling"; and (3) to inform the people of the State of the matters with which the General Assembly concerns itself. S.C. Pub. Serv. Auth. v. Citizens and S. Nat'l Bank of S.C., 300 S.C. 142, 162, 386 S.E.2d 775, 786-87 (1989).

The title of an act "need not be an index to every provision of the act" in order to "apprise members of the General Assembly" and "inform the people of the State." Carll v. S.C. Jobs-Economic Dev. Auth., 284 S.C. 438, 442, 327 S.E.2d 331, 334 (1985). Here the title is in fact an index to each of the three provisions, so both the General Assembly and people are on notice.

What remains for consideration is whether the Act constitutes legislative log-rolling, thus invalidating the Act in part or in its entirety. "Log rolling" is a "legislative practice of including several propositions in one measure . . . so that the legislature . . . will pass all of them, even though these propositions might not have passed if they had been submitted separately." Black's Law Dictionary 849 (7th ed. 1999). To prevent this practice, our constitution requires that an act relate to only one subject. Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980).

Petitioners contend that section 3 of the Act violates the one subject rule. Respondents do not contend that section 3 is related, noting in brief that they "do not seek to defend the constitutionality of Section 3, but rather submit that Sections 1 and 2 relate to one subject in compliance with Article III, § 17 . . . ."

Intervenor South Carolina Petroleum Marketers Association (Intervenor) argues that all three sections pertain to one subject since (1) sections 1 and 2 provide tax exemptions while section 3 protects a tax credit and (2) all three sections provide a direct benefit to South Carolina businesses.

We are not persuaded by Intervenor's arguments. Intervenor's assertion that all three sections deal with either tax exemptions or tax credits requires an unduly expansive and conjectural view of section 3. While sections 1 and 2 specifically set forth tax exemptions, protection of a tax credit is not specifically mentioned in section 3. Instead, section 3 requires, among other things, that motor fuel terminals offer petroleum products that have not been blended with ethanol and that distributors, retailers, and refiners utilize the Renewable Identification Number Trading System. The legislature may have any number of reasons for these requirements. Moreover, the statute mandates only delivery of the unblended fuel to local "jobbers." There is no requirement that the fuel actually be blended for purposes of the federal tax credit. Intervenor's second point is similarly speculative.[2]

It is also significant that the heading for section 3, found in the body of the Act, makes no mention of taxes, though the headings for sections 1 and 2 do so explicitly. Section 1 is entitled "Sales tax exemption," section 2 "Sales tax exemption; Second Amendment Recognition Act," and section 3 "Terminal and other requirements."

For the reasons stated above, we find that the provisions of Act 338 do not relate to one subject. The Act is therefore violative of Article III, § 17 of the South Carolina Constitution.

[2] Intervenor candidly acknowledged that if jobbers were to "splash blend" unblended fuel, they would be afforded a significant economic benefit in the form of tax credits. This serendipitous by-product of the legislation does not remove its infirmity.

B. Act 338 is unconstitutional in its entirety.

Having found a violation of the constitution, we must consider whether any portion of the Act is severable. Both Petitioners and Respondents urge us to sever section 3 from the Act, as the "offending provision," if we find that the one subject rule is violated. However, we find that to sever only part of the unconstitutional act would require this Court to go beyond its proper role and to intrude into the province of the legislature. We therefore are constrained to find the entire Act violative of Article III, § 17.

Recent precedent from this Court stands for the proposition that an Act which offends Article III, § 17 of the South Carolina Constitution may merely be shorn of its "offending provision" where "the constitutional portion of the legislation remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." Wilkins, 362 S.C. at 439, 608 S.E.2d at 584. We take this opportunity to reconsider the remedy for violations of the one subject rule.

First, we find that the notion that the Court may excise an "offending provision" is inherently flawed since all provisions in an act which does not address one subject are "offending" provisions. In the instant case, sections 1 and 2 offend the one subject provision of our constitution equally as much as section 3.

Second, in order to sever the "unconstitutional portion" of an act so as to bring it into harmony with the one subject rule, this Court must ascertain which subject is the "proper" subject, that is, the one actually intended by the General Assembly. In the instant case, while this Court may find that the three provisions of the statute do not concern the same subject, current practice would require the Court to decide whether the proper subject is, for example, sales tax exemptions or fuel blending in order to determine which provision(s) to sever. To examine an act passed in package form, and to then choose which portion to excise and which to keep would require the Court to

usurp the prerogative of the General Assembly and thus act as a super-legislature.

We therefore hold that Act 338 is unconstitutional in its entirety, though we emphasize that our holding shall not apply to acts passed prior to or contemporaneous with the act considered in the instant case. We again recognize that we are departing from recent precedent, including S.C. Pub. Interest Found. v. Harrell, 378 S.C. 441, 663 S.E.2d 52 (2008). We are compelled to do so out of respect for the proper functions of the legislature and of the judiciary. See Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) ("it is not the province of this Court to perform legislative functions."); State v. Byrd, 267 S.C. 87, 91-92, 226 S.E.2d 244, 246 (1976) ("when a court is called upon to determine the constitutionality of a legislative enactment, it must be careful not to usurp the legislative function."); Hadden v. S.C. Tax Comm'n, 183 SC. 38, 46, 190 S.E. 249, 253 (1937) (Supreme Court is not a lawmaking body.). The "bright-line" rule announced today will deter log-rolling, provide certainty, and avoid arbitrary judicial enforcement of the one subject rule.

CONCLUSION

It is for the General Assembly to enact legislation and, in so doing, to determine the proper subject of an act. It is the duty of this Court to determine if, in enacting legislation, the General Assembly has exceeded the bounds of our constitution.

For the reasons stated above, we find that Act 338 violates Article III, § 17 of the South Carolina Constitution. Therefore, we declare that the Act is unconstitutional in its entirety.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur.