The Supreme Court of South Carolina

RE: Participation in Closings of Real Estate Transactions

ORDER

On March 13, 2020, the President of the United States declared a national emergency, and Governor Henry McMaster issued Executive Order No. 2020-08 declaring a State of Emergency, both based on a determination that the Coronavirus/COVID-19 ("COVID-19") poses an actual or imminent public health emergency. Since the declaration of the State of Emergency, Governor McMaster has issued subsequent Executive Orders curtailing public life in order to facilitate "social distancing" practices to slow the spread of COVID-19. The Chief Justice has likewise directed that judicial proceedings should be conducted using remote communication technology to minimize the risk to the public, litigants, lawyers, and court employees.

We have determined that the Rules of Professional Conduct impose certain requirements on the closing of real estate transactions that pose a substantial risk of harm to all participants. As a result, we find that the public health emergency created by COVID-19 requires changes to the usual operation of the Rules of Professional Conduct in terms of the normal functioning of real estate transactions.

Therefore, in order to protect the health and safety of our State's citizens,

IT IS ORDERED, that to the extent the Rules of Professional Conduct[1] may require an attorney to be physically present at the closing of a real estate

[1] The Court orders the temporary suspension of any such requirement pursuant to the inherent power of the Court to regulate the practice of law. *See* S.C. Const. art. V, § 4; S.C. Code Ann. § 40-5-10. This order does not suspend any other provisions of the Rules of Professional Conduct, and nothing in this order is intended to relieve an attorney of his or her obligation to assume full professional and direct responsibility for the entire transaction.

transaction and in close proximity to the parties to the transaction, in light of the current crisis and need for social distancing, an attorney may participate in and supervise the closing of a real estate transaction by way of a video conference;

IT IS FURTHER ORDERED, that necessary persons to a real estate transaction may, under the direction of the supervising attorney, similarly participate in the real estate closing by way of a video conference, provided any necessary person so consents; further, the supervising attorney shall ensure that the attestation of a recordable instrument is accomplished, which may be satisfied by use of real-time audio-visual communication technology, provided the identity of any necessary person is confirmed and a notary attests the signature of any necessary person. The supervising attorney shall consult with any lender(s) and any participating title insurance company to ensure that the real estate closing measures taken are acceptable to the applicable lender(s) and title insurance company.

This Order is effective immediately and remains in effect until August 1, 2020, unless earlier modified or rescinded by order of this Court. If "social distancing" guidelines remain in effect beyond August 1, 2020, this Court may consider extending this Order for an additional period of time.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 1, 2020

The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have failed to file reports showing compliance with continuing legal education requirements, or who have failed to pay the filing fee or any penalty required for the report of compliance, for the reporting year ending in February 2020. Pursuant to Rule 419(d)(2), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificates to practice law in this State to the Clerk of this Court by June 1, 2020.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 1, 2020

LAWYERS NON-COMPLIANT
WITH THE MCLE REQUIREMENTS
FOR THE 2019-2020 REPORTING YEAR
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Atlanta, GA 30326
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Sean Kevin Trundy
Sean Kevin Trundy, LLC
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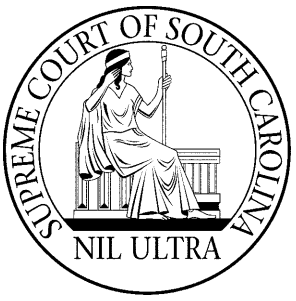
Charleston, SC 29402



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
May 6, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Wallace Steve Perry, Petitioner.

Appellate Case No. 2017-001965

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 27963
Heard March 6, 2019 – Filed May 6, 2020

REVERSED

Kerri Rupert, Murphy & Grantland, P.A., of Columbia; Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General John Benjamin Aplin, and Assistant Attorney General Vann Henry Gunter Jr., all of Columbia; Solicitor William Walter Wilkins III, of Greenville, for Respondent.

JUSTICE FEW: Wallace Steve Perry was convicted on two counts of criminal sexual conduct (CSC) with a minor in the first degree and two counts of CSC with a minor in the second degree for sexually assaulting two of his biological daughters. We find the trial court erred by not excluding under Rule 404(b) the testimony of Perry's stepdaughter that Perry also sexually assaulted her more than twenty years earlier. We reverse and remand for a new trial.

I. Facts and Procedural History

In 1993, Perry met and began dating Laura Jones. Perry and Jones never married, but had two sets of twins together. Daughter One and Daughter Two were born in 1994. Daughter Three and a son were born in 1996. Perry and Jones separated in 2000, and agreed Perry would have visitation with the children on weekends. In 2012, Daughter Three told Jones that Perry sexually assaulted her during visitation. Daughter Two then told Jones that Perry also sexually assaulted her.

A. Daughter Two's and Daughter Three's Testimony

Daughter Two testified at trial that after Perry and Jones separated, Perry moved into a three-bedroom apartment. She shared a bedroom in the apartment with her sisters. Daughter Two testified Perry first sexually assaulted her when she was between five and seven years old. When asked about the first incident, Daughter Two stated she was on Perry's bed watching television when he entered the room, lay down next to her, and digitally penetrated her vagina. After the first incident, Perry began sexually assaulting her almost every weekend during visitation. She testified that around 5:00 or 6:00 a.m. on Saturday and Sunday mornings, Perry would get in the bed she shared with her sisters and digitally penetrate her. She testified the assaults generally involved the use of physical force. Specifically, she testified, "He'd lay in the bed. I would try to pull away from him, but he would grab me with a tighter force so I couldn't get away." She also testified Perry committed oral sexual assault on her on two occasions. The first instance occurred after she fell asleep in a chair watching a movie with her brother and sisters. The second instance occurred in the bedroom she shared with her sisters. She testified Perry said if she told anyone about what happened, she "would get in just as much trouble as he would" and she would be taken away from Jones. Daughter Two stated Perry stopped sexually assaulting her

when she was about sixteen years old, and she told Jones about it shortly after Daughter Three did.

Daughter Three testified Perry began sexually assaulting her when she was approximately ten or eleven years old. She testified Perry would come into the bedroom around 5:00 or 6:00 a.m. and get in bed with them. She testified Perry digitally penetrated her vagina on five occasions, but the assaults did not progress beyond digital penetration and did not involve any use of physical force. She testified Perry stopped assaulting her before she reached the age of twelve. After it ended, Daughter Three continued visiting Perry on weekends until she told Jones about it when she was around sixteen. Daughter Three explained she waited to tell Jones because Perry said if she ever told anyone she would get in trouble, and she would be taken away from Jones.

B. Stepdaughter's Testimony

Prior to Perry's trial, the State made a motion to admit the testimony of Perry's stepdaughter from an earlier marriage that Perry sexually assaulted her twenty-two to twenty-seven years earlier. The State argued the trial court should not exclude the stepdaughter's testimony under Rule 404(b) of the South Carolina Rules of Evidence because it fit the "common scheme or plan" exception. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts . . . may . . . be admissible to show . . . the existence of a common scheme or plan . . . .").

During the pre-trial hearing, the stepdaughter testified that when she was nine years old, Perry entered her room during the night and digitally penetrated her vagina. According to the stepdaughter, Perry continued to sexually assault her periodically over the next four years, and she estimated he digitally penetrated her about twenty times. She testified that on one occasion, Perry assaulted her in the bathtub while her mother was at work. She stated she did not tell anyone because Perry threatened her. She testified, "I was told my mom wouldn't believe me and if I said anything he would make me out to be a liar and then he would hurt my family." The stepdaughter finally told her mother when she was fourteen, and they reported the crimes to authorities shortly afterward. Perry was not charged for sexually assaulting his stepdaughter.

Perry objected to the testimony of his stepdaughter, arguing it should be excluded under Rule 404(b) and did not fit the common scheme or plan exception. The trial

court initially reserved ruling on the issue. Later during trial, the court indicated it was inclined to allow the stepdaughter to testify. Perry again objected on the basis of Rule 404(b). The trial court ruled the stepdaughter's testimony was admissible under the common scheme or plan exception.

The jury convicted Perry on all counts, and the trial court sentenced him to thirty years in prison. The court of appeals affirmed. *State v. Perry*, 420 S.C. 643, 803 S.E.2d 899 (2017). We granted Perry's petition for a writ of certiorari.

II. Analysis

The analysis of the admissibility of the stepdaughter's testimony begins with the question of relevance. *See* Rule 402, SCRE ("All relevant evidence is admissible . . . ."). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The stepdaughter's testimony was clearly relevant because if Perry committed similar acts of sexual abuse against a minor in the past, he was more likely to have done it this time too.[1] However, Rule 402 also provides relevant evidence may be excluded "as otherwise provided by . . . these rules" or another provision of law.

A. Rule 404(b)

Rule 404(b) of the South Carolina Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Rule 404(b), SCRE.

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[1] Given the breadth of "Relevant evidence" under Rule 401, SCRE, the stepdaughter's testimony could be relevant for other purposes. We address in section II. E. whether the State argues any other purpose for the testimony.

The rule is often stated in terms of "propensity."

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.

Michelson v. United States, 335 U.S. 469, 475, 69 S. Ct. 213, 218, 93 L. Ed. 168, 173-74 (1948); *see also* 3 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 404:5 (8th ed. 2018) (stating "evidence of the commission of crimes, wrongs or other acts by [the defendant] is inadmissible for the purpose of showing a disposition or propensity to commit crimes"); James F. Dreher, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 35 (South Carolina Bar 1967) ("It is in criminal cases that the law must be the most sternly on guard against allowing the doing of an act to be proved by a propensity to do it."); *State v. Fletcher*, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008) (Toal, C.J., dissenting) (stating "evidence of other crimes, wrongs, or acts is not admissible for purposes of proving that the defendant possesses a criminal character or has a propensity to commit the charged crime"). Thus, Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial.

In any criminal case, however, evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity. In the words of Rule 404(b), it "prove[s] the character of [the] person" and "shows[s] action in conformity" with that character. We discussed this tendency in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). We stated, "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty," and, "Its effect is to predispose the mind of the juror to believe the prisoner guilty." 125 S.C. at 416, 118 S.E. at 807. We described this type of evidence as having "the inevitable tendency . . . to raise a legally spurious presumption of guilt in the minds of the jurors." 125 S.C. at 417, 118 S.E. at 807; *see also* 125 S.C. at 420, 118 S.E. at 808 (stating "such evidence strongly tends to

induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter"). Thus, evidence of a defendant's other crimes serves the prohibited purpose of showing he has a propensity to engage in criminal behavior.

The question for a trial court, and for this Court on appeal from Perry's conviction, is whether the evidence also serves some legitimate purpose that is not prohibited by Rule 404(b). The rule provides examples of legitimate purposes, stating evidence of other crimes "may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. To the extent a trial court finds evidence of "other crimes" does serve these dual purposes, the court must determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper purpose. This determination is bound up in the trial court's duty to balance—pursuant to Rule 403—the probative value of the evidence for its legitimate purpose against the unfair prejudice that results from its tendency to serve the improper purpose. *See State v. Clasby*, 385 S.C. 148, 155-56, 682 S.E.2d 892, 896 (2009) ("Even if prior bad act evidence . . . falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." (quoting *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)) (citing Rule 403, SCRE)).

Historically, to justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose, and thus should not be excluded pursuant to Rule 404(b), South Carolina courts have required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged. *See, e.g.*, *Gaines*, 380 S.C. at 29, 667 S.E.2d at 731 ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."); *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000) ("If the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807)).

B. *State v. Lyle*

Our 1923 decision in *State v. Lyle* is the classic South Carolina case for understanding the admissibility of a defendant's other crimes. *See State v. Anderson*, 318 S.C. 395, 403, 458 S.E.2d 56, 60 (Ct. App. 1995) (calling *Lyle* "the seminal case" on evidence of other crimes); Rule 404(b), SCRE Note (citing *Lyle*). Even after our adoption of the Rules of Evidence in 1995,[2] *Lyle* has been our primary resource for analyzing Rule 404(b) objections and rulings. *See, e.g.*, *State v. Odom*, 412 S.C. 253, 260 n.5, 772 S.E.2d 149, 152 n.5 (2015) (relying on *Lyle* for the interpretation of Rule 404(b), and stating *Lyle* "explain[s] the permissible uses of evidence of prior bad acts"); *State v. Cope*, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (relying on *Lyle* for the interpretation of Rule 404(b)); *State v. Nelson*, 331 S.C. 1, 9-10 n.11, 501 S.E.2d 716, 720-21 n.11 (1998) (discussing the role of *Lyle* in analyzing other crimes and related evidence).

In *Lyle*, the defendant was charged with issuing a forged check to a bank in the city of Aiken on January 12, 1922. 125 S.C. at 411, 118 S.E. at 805. At trial, the State introduced the testimony of five bankers that the defendant committed similar check forgeries at their banks, two in Aiken on the same day, and three in different cities in Georgia in the weeks leading up to January 12. 125 S.C. at 413-14, 118 S.E. at 806. The defendant was convicted, and appealed to this Court. 125 S.C. at 411, 118 S.E. at 805.

We began our discussion of the admissibility of evidence of the other crimes with this observation,

> [The] contention [the evidence is inadmissible] is grounded upon the familiar and salutary general rule, universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the

[2] *See* Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995.").

> prosecution's theory of the defendant's guilt of the particular crime charged.

125 S.C. at 415-16, 118 S.E. at 807.

We then set forth the standard for admissibility of evidence of other crimes:

> Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime.

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

We then engaged in the "rigid scrutiny" we held was necessary to control "the dangerous tendency and misleading probative force of this class of evidence." 125 S.C. at 417, 118 S.E. at 807. We explained that evidence of the other forgery crimes committed in Aiken on the same date as the crime charged was admissible because the evidence "refuted the defense of an alibi." 125 S.C. at 418, 118 S.E. at 808. We found this to be a sufficient logical connection between the other Aiken crimes and the crime charged. "[T]he sole issue of fact in the court below was whether the defendant was the identical person who uttered the forged check." 125 S.C. at 411, 118 S.E. at 805; *see also* 125 S.C. at 426, 118 S.E. at 810 (stating "whether defendant was the person who uttered the forged check" was "the only real issue in the case"). The evidence refuted the defendant's alibi because "the two extraneous [Aiken] crimes were committed within a few town blocks as to distance, and within a few minutes, as to time, of the crime charged." 125 S.C. at 418, 118 S.E. at 808. Referring to the two Aiken bankers who testified the defendant committed similar crimes in their banks on the same date and near the same time, we stated,

> When they say in substance that they saw this same person in Aiken in the immediate vicinity of the crime within a few minutes of the time it was committed, and that this

> person was the defendant, Lyle, the relevancy of the testimony to the vital issue made is . . . obvious.

125 S.C. at 418, 118 S.E. at 807. We held, "The connection for the purpose of establishing the identity of the accused under the issue raised as to the alibi we think is clear. The testimony of [the two Aiken bankers] was therefore properly admitted upon that ground." 125 S.C. at 418, 118 S.E. at 808. This logical connection as to time and place served the legitimate purpose of identifying the defendant as the perpetrator of the crime and refuting his alibi, without reliance on his propensity to forge checks.

C. The "Logical Connection" Standard

For over eighty years after our decision in *Lyle*, this Court consistently adhered to its narrow "acid test" of "logical relevancy" or "logical connection" for admissibility of other crimes. *See, e.g.*, *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (citing *Lyle* for the proposition the other crimes "must logically relate to the crime with which the defendant has been charged"); *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused."); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (finding no connection between the other crime and the crime charged as required by *Lyle,* reasoning "the present facts only support a general similarity, and thus are insufficient to support the common scheme or plan exception"); *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) ("It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence."); *State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes."); 279 S.C. at 192-93, 304 S.E.2d at 814-15 (finding the trial judge erred in admitting testimony from a witness who speculated the defendant intended to rape her because there was no connection made between the other act and the act for which the defendant was charged); *State v. Rivers*, 273 S.C. 75, 78, 254 S.E.2d 299, 300 (1979) ("Unable to clearly perceive the connection between the acts as required by *Lyle*, . . . we conclude that the testimony [of the defendant's other acts of sexual misconduct] should have been excluded."); *State v. Whitener*, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (allowing testimony of an "unnatural" sexual act perpetrated against the same victim some hours after the offense charged because the subsequent

sex act explained why a doctor did not find any sperm during his medical examination).

D. *State v. Wallace*

In *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), however, this Court purported to abandon the well-settled "logical connection" standard for analyzing Rule 404(b) objections. The defendant in *Wallace* was charged with CSC with a minor in the second degree for sexually assaulting his stepdaughter. 384 S.C. at 431, 683 S.E.2d at 276. The trial court permitted the State to introduce the testimony of the victim's sister that she also had been sexually assaulted by the defendant. 384 S.C. at 431-32, 683 S.E.2d at 277. The trial court admitted the testimony under the common scheme or plan exception to Rule 404(b), 384 S.C. at 432, 683 S.E.2d at 277, and the jury convicted him, 384 S.C. at 431, 683 S.E.2d at 276.

The court of appeals reversed his conviction. *State v. Wallace*, 364 S.C. 130, 133, 611 S.E.2d 332, 333 (Ct. App. 2005), *rev'd*, 384 S.C. 428, 683 S.E.2d 275 (2009). In an opinion written by then Chief Judge Hearn, the court of appeals "review[ed] the underlying facts of *Lyle* in order to fully understand the common scheme or plan exception." 364 S.C. at 136, 611 S.E.2d at 335. The court also reviewed the primary cases we relied on in *Lyle* to formulate "[t]his notion of a *connection*." *See* 364 S.C. 130, 137-39, 611 S.E.2d 332, 336-37 (discussing *People v. Molineux*, 61 N.E. 286 (N.Y. 1901) and *People v. Romano*, 82 N.Y.S. 749 (N.Y. App. Div. 1903)). The court of appeals found the sister's testimony should have been excluded because "the trial court did not address any connection between the two crimes" and the evidence "falls far short of the threshold for the admission of a prior crime under the common scheme or plan exception." 364 S.C. at 141, 611 S.E.2d at 338. Relying on a decision of this Court, the court of appeals concluded "the appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases." 364 S.C. at 139, 611 S.E.2d at 337 (citing *State v. Nelson*, 331 S.C. 1, 14 n.16, 501 S.E.2d 716, 723 n.16 (1998); *State v. Tutton*, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003)). Based on *Nelson* and *Tutton*, the court of appeals concluded—we now find correctly so—the trial court erred in finding the evidence fit the common scheme or plan exception simply "because of the close degree of similarity." 364 S.C. at 141, 611 S.E.2d at 338.

In a divided opinion, this Court reversed the court of appeals and reinstated the conviction. 384 S.C. at 435, 683 S.E.2d at 279. For the first time in our jurisprudence, contrary to over eighty years of interpretation of Rule 404(b) and its pre-Rules predecessor *Lyle*, the Court stated, "A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." 384 S.C. at 434, 683 S.E.2d at 278; *see* 384 S.C. at 436, 683 S.E.2d at 279 (Pleicones, J., dissenting) ("We have repeatedly held in non-sexual offense cases that, 'the mere presence of similarity only serves to enhance the potential for prejudice,' yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases." (citations omitted)); *State v. Perez*, 423 S.C. 491, 502, 816 S.E.2d 550, 556 (2018) (Hearn, J., concurring) (calling the majority opinion in *Wallace* "a marked departure from earlier case law requiring some connection between crimes beyond mere similarity"). We find this statement from—and the reasoning and holding in—our opinion in *Wallace* is based on a misunderstanding of Rule 404(b) and our cases interpreting it, particularly the "seminal" case *Lyle*.[3] The decision in *Wallace* effectively created a new rule of evidence,[4] and rendered meaningless the restrictive application of the common

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[3] In a footnote in *Wallace* we stated the court of appeals mis-read *Lyle*. 384 S.C. at 432 n.3, 683 S.E.2d at 277 n.3. The *Lyle* Court did note "the marked similarity in technique of operation, etc.," between the other Aiken forgeries and the crime charged was part of what satisfied the logical connection standard for the other Aiken crimes. 125 S.C. at 418, 118 S.E. at 808. However, the *Lyle* Court also held the same similarity between the Georgia forgeries and the crime charged was not a sufficient connection. We held, "The mere fact that the Georgia crimes were similar in nature and parallel as to methods and technique employed in their execution does not serve to identify the defendant as the person who uttered the forged check in Aiken as charged . . . ." 125 S.C. at 420, 118 S.E. at 808; *see also* 125 S.C. at 427, 118 S.E. at 811 (finding "no such connection was shown to exist between the separate Georgia offenses and the Aiken crime" and thus evidence of the Georgia crimes "was not admissible merely to show plan or system"). In *Wallace*, it was not the court of appeals that misinterpreted *Lyle*. We did.

[4] *See Wallace*, 384 S.C. 428, 436, 683 S.E.2d 275, 279 (Pleicones, J., dissenting) (criticizing the majority's interpretation of Rule 404(b), and stating "if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence"). Federal Rules of Evidence 413 and 414 were added by Congress in 1994, and expressly permit the admission of similar crimes in

scheme or plan exception that is so deeply embedded in our precedent. Concurring in *Perez*, Justice Hearn challenged, "the Court should . . . overturn . . . *State v. Wallace* . . . [because it] so expanded the admissibility of prior bad acts in sexual offense cases that the exception has swallowed the rule." 423 S.C. at 501, 816 S.E.2d at 556 (Hearn, J., concurring). We now overrule *Wallace*.[5]

E. Admissibility of the Stepdaughter's Testimony

The State did not offer any argument that the stepdaughter's testimony served a legitimate purpose, or that a logical connection exists between Perry's abuse of his stepdaughter and the current charges. The State simply relied on *Wallace*, and argued what it called substantial similarities between the two crimes outweighed any dissimilarities. Therefore, the State argued, the stepdaughter's testimony was admissible. We disagree.

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sexual assault and child molestation cases. *See* Fed. R. Evid. 413 and 414. However, unlike other states that have adopted versions of Rules 413 and 414, we chose not to adopt these rules with our Rules of Evidence in 1995.

[5] In its opinion in *Wallace*, the court of appeals noted "some of the appellate decisions appear to focus exclusively on the alleged close similarity between the other crime and the crime charged, while others look beyond mere close similarity to consider the system or connection between the two," but stated "sorting out any apparent inconsistencies in the appellate decisions of this state is not the province of [the court of appeals]." 364 S.C. at 139 n.2, 611 S.E.2d at 337 n.2. While doing so is the province of this Court, we do not see the necessity of doing so. Rather than reconsidering the results of prior cases, our focus is on restoring the integrity of the Rule 404(b) analysis that this Court changed in *Wallace*. We do, however, single out one case: *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989). *Hallman*, which has never been meaningfully discussed by this Court, does not say no logical connection is required. In its limited analysis, however, *Hallman* offers no explanation of what could have been a sufficient logical connection. Rather, *Hallman* focuses only on similarity. 298 S.C. at 175, 379 S.E.2d at 117. Without an explanation of any logical connection, it is not possible to determine whether *Hallman* is distinguishable from *Wallace*, or from this case. Therefore, we overrule *Hallman*.

First, Perry's sexual assault of his stepdaughter is not substantially similar to his assault of his biological children; nor are the assaults of his children even substantially similar to each other.[6] Perry began sexually assaulting Daughter Two at age five to seven, his stepdaughter at age nine, and Daughter Three at age ten or eleven. He assaulted Daughter Two nearly every weekend for at least nine years until she was sixteen, his stepdaughter periodically over four years until she was thirteen, and Daughter Three five times within an approximate one-year period ending before she turned twelve. He began sexually assaulting Daughter Two in his own bedroom while she was watching television. He began sexually assaulting the stepdaughter and Daughter Three in their bedrooms while they were sleeping. He first assaulted his stepdaughter with digital penetration, committed oral sexual assault on her once,[7] and—according to the solicitor who tried the case—"progress[ed] on into actual vaginal/penile penetration." However, there is no evidence of penile penetration with his biological daughters. Perry did commit oral sexual assault on Daughter Two, but not on Daughter Three. He generally used physical restraint against Daughter Two, but did not use any physical force against his stepdaughter or Daughter Three. Finally, he threatened his stepdaughter with

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[6] The State made a strategic choice to try the crimes against Daughters Two and Three together. This was permissible because the test for whether the State may do this does not focus on similarity. *See State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002) (listing four considerations for a trial court in deciding whether to try separate crimes in a joint trial). This choice created problems, however, for the State's Rule 404(b) argument. The State's reliance only on similarity to support admission of the stepdaughter's testimony under Rule 404(b) forces the State—and this Court—to examine the lack of similarity between the charged crimes. If the charged crimes are not substantially similar to each other, then Perry's crimes against his stepdaughter can have a "close degree of similarity" to only one of them. Though dissimilarities between charged crimes are not integral to the joinder analysis, the State's choice to try them together made their dissimilarity directly related to the Rule 404(b) analysis.

[7] Although not specifically discussed in her pre-trial testimony, the stepdaughter testified during trial Perry committed oral sexual assault on her on one occasion.

violence against her family if she disclosed what he had done,[8] but neither of his biological daughters testified he threatened any violence.

The State argues the children's ages were similar because "all of the abuse began when the victims were at a pre-pubescent age." This is a clever attempt to make dissimilarities sound similar, but assaulting one child beginning at age five to seven and another at age ten or eleven is not a similarity. Perry began assaulting the stepdaughter at age nine, which is not similar to age five. Age nine may be similar to ten, but in terms of the age at which a sexual predator begins sexually assaulting a daughter, ages nine and seven hardly seem to show "a close degree of similarity." The State also argues the location where the sexual assaults occurred is similar because "the sexual abuse occurred within the home." We find this is too general to be considered a meaningful similarity. The fact Perry began assaulting one child in the father's bedroom and the other children in their own bedrooms is not a similarity. Finally, Perry assaulted his stepdaughter while bathing her in the bathtub, but there is no allegation he did that with his biological daughters.

Certainly, there are similarities. In addition to the general similarities discussed above, the State emphasized the specific similarity that Perry was the only father figure in the lives of each victim. There is nothing in this record, however, that amounts to "a close degree of similarity," as *Wallace* purports to permit. *Wallace*, 384 S.C. at 434, 683 S.E.2d at 278.

We make one final point regarding similarity. Referring to a statement we made in *Lyle*, the State argues "the defendant . . . had a monopoly on the methods and means in committing sexual abuse against these children because he was the father figure in the home." *See Lyle*, 125 S.C. at 420-21, 118 S.E. at 808 (stating, "There is nothing to indicate that the defendant held any monopoly of the methods and means used in passing the forged checks in Georgia, or that they were unique in the annals of crime."). The statement from *Lyle* does not help the State. We made the statement in a passage in which we explained that the required connection cannot be made "from mere naked similarity of the crime." 125 S.C. at 421, 118 S.E. at 808. Our

[8] The stepdaughter testified at the pre-trial hearing, "I was told my mom would not believe me and if I said anything he would make me out to be a liar and then he would hurt my family." Threatening physical violence—as testified to by the stepdaughter—is quite different from telling Daughters Two and Three they would get in trouble and be taken away from their mother.

point was that if a defendant did hold a "monopoly" on the method used, or if the "methods and means" were truly unique, then—in contrast to the Georgia crimes in *Lyle*—a good argument could be made that the connection is sufficient. Like the Georgia crimes in *Lyle*, however, Perry's "methods and means" are not unique. Rather, in our significant collective experience dealing with crimes of this nature, a very high percentage of sexual crimes against children are committed just like Perry's alleged crimes: by father figures, in the home, in a bedroom, beginning in the pre-pubescent years. The fact Perry's crimes fit this general pattern does not give Perry a "monopoly" on his criminal method.

Second, the stepdaughter's testimony must serve some legitimate purpose beyond propensity. At oral argument, the State correctly argued, "A piece of evidence can appear to be propensity, but it can also have a proper purpose and be admissible." In support, the State cited *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000), in which we addressed the admissibility of other burglary convictions to prove an element of first degree burglary. 338 S.C. at 153-54, 526 S.E.2d at 229. Recognizing the inherent tendency of evidence of other crimes to show propensity, we stated, "Propensity evidence is admissible if offered for some purpose other than to show the accused is a bad person or he acted in conformity with his prior convictions." 338 S.C. at 156, 526 S.E.2d at 230. The legitimate purpose for which the State offered the other burglary convictions in *Benton* was "to prove a statutory element of the current first degree burglary charge." *Id.* We specifically noted the State did not offer the convictions for the improper purpose—propensity. We stated the State's purpose was "not to suggest appellant was a bad person or committed the present burglary because he had committed prior burglaries." *Id.*

In this case, however, the State has never suggested there is any legitimate purpose for the stepdaughter's testimony. At trial, the State did not identify any fact in the crimes charged that was made more or less likely to be true by the testimony of the stepdaughter. At oral argument, the Court pressed the State to explain how the stepdaughter's testimony helped the jury to understand the current charges. The State had no answer, instead contending only the crimes were similar under *Wallace*.

As we explained earlier, part of the task of this Court on appeal in this case is to determine whether the stepdaughter's testimony has sufficient probative force for serving a legitimate purpose. Under Rule 403, the danger of the evidence being used only for the improper purpose of propensity must not substantially outweigh the probative value of any legitimate use. With no fact in issue in the crimes charged

that is made more or less likely by the stepdaughter's testimony—other than "he did it"—the probative force lies only in the use of the testimony to prove character, and from that character to prove he acted in accordance. In other words, the stepdaughter's testimony served only one purpose—propensity.

It is not enough to meet the "logical connection" standard for admission of other crimes under the common scheme or plan exception to Rule 404(b) that the defendant previously committed the same crime. "Repetition of the same act or same crime does not equal a 'plan.'" *Perez*, 423 S.C. at 502, 816 S.E.2d at 556 (Hearn, J., concurring) (quoting *Daggett v. State*, 187 S.W.3d 444, 451 (Tex. Crim. App. 2005)). When evidence of other crimes is admitted based solely on the similarity of a previous crime, the evidence serves only the purpose prohibited by Rule 404(b), and allows the jury to convict the defendant on the improper inference of propensity that because he did it before, he must have done it again. *See United States v. Krezdorn*, 639 F.2d 1327, 1331 (5th Cir. 1981) (reversing the district court's admission into evidence of similar forgery crimes because they "would, at best, merely demonstrate the repetition of similar criminal acts, thus indicating [the defendant]'s propensity to commit this crime. Evidence of other crimes is not admissible for this purpose"). Quoting Justice Hearn one final time from her concurrence in *Perez*, "the repeated commission of the same criminal offense [is] offered obliquely to show bad character and conduct in conformity with that bad character." 423 S.C. at 502, 816 S.E.2d at 556 (Hearn, J., concurring) (quoting *Daggett*, 187 S.W.3d at 452).

The common scheme or plan exception demands more. There must be something in the defendant's criminal process that logically connects the "other crimes" to the crime charged. For example, in *McClellan*, we upheld the admission into evidence of other crimes under the common scheme or plan exception because the State proved the defendant used the same particularly unique method of committing two uncharged crimes that he used to commit the charged crime. We explained,

> All three daughters testified concerning the pattern of this and prior attacks. According to them, these attacks commenced about their twelfth birthday, at which time Appellant began entering their bedroom late at night, waking them, and taking one of them to his bedroom. There he would explain the Biblical verse that children are to "Honor thy Father," and would also indicate he was

> teaching them how to be with their husbands. The method of attack was common to all three daughters.

283 S.C. at 391, 323 S.E.2d at 773. The defendant in *McClellan* developed a particularized plan for sexually assaulting his children through which he invoked the Bible, placed a duty on the children to "honor" him, and placed himself in the role of "teaching" them to submit to sexual violence. The fact he carried out his plan in its unique detail when assaulting all three children warranted the admission of the uncharged crimes into evidence. The evidence had a logical connection to whether a crime was committed and to who committed it. We emphasize today that *McClellan* represents the proper application of Rule 404(b) and remains good law.

We provide two other examples of the proper use of the common scheme or plan exception with our opinions today in *State v. Durant*, Op. No. 27964 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 64), and *State v. Cotton*, Op. No. 27965 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 75).

In *Durant*, the defendant was charged with CSC in the second degree for sexually assaulting a young girl at the church where the defendant served as pastor. The State offered into evidence the testimony of three other girls the defendant sexually assaulted as evidence of a common scheme or plan. We affirmed the trial court's admission of the "other crimes" because the defendant used a "particularly unique method of committing his attacks" and that method was "common to all the girls." We noted there were differences between the crimes, but relying on our opinion in this case, refused to engage in a "mathematical exercise where the number of similarities and dissimilarities are counted." Rather, we relied on the fact "the method of his attack was more than just similar," it was unique, and because of its uniqueness "'reasonably tended to prove a material fact in issue.'" *Durant*, (Shearouse Adv. Sh. No. 18 at 64, 68) (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807). As to the particular facts supporting the use of the common scheme or plan exception, we explained,

> Durant exercised his position of trust, authority, and spiritual leadership to hold private prayer meetings with teen girls who had grown up in his church. He told them he was praying for their health and good fortune, and represented that part of this process was touching them sexually and having intercourse. Durant then warned the

> girls of misfortune if they refused or told anyone. Moreover, he used scripture as a means of grooming the children into performing sex acts . . . . Indeed, the trial court noted it was one of the more compelling cases of common scheme or plan evidence it has ever seen.

Durant, (Shearouse Adv. Sh. No. 18 at 64, 69).

In *Cotton*, the defendant was charged with CSC in the first degree and kidnapping. The State offered into evidence the testimony of another victim who testified the defendant committed a remarkably similar sexual assault and kidnapping against her seven months earlier. We affirmed the admission of the evidence under the common scheme or plan exception. The similarities between the two incidents were extensive. The trial court discussed these similarities at length in its pre-trial ruling. But the "other crimes" evidence in *Cotton* had more than just similarity. As the State argued in its brief in that case, "Even if the similarities alone are not sufficient for admission of the testimony, the testimony clearly establishes a logical relevance to the underlying crime." Brief for Resp't at 18, *State v. Cotton,* (Shearouse Adv. Sh. No. 18 at 75). The State went on to explain its theory of a logical connection to a specific, disputed fact.[9] In addition, the trial court in *Cotton* conducted an extensive, on-the-record analysis of the balance between the unfair prejudice that would result from the evidence against the probative value in the logical connection. "Using the new framework set forth in [this case], we [found] the admission of the second victim's testimony satisfied the requirements of Rules 404(b) and 403, SCRE," and we affirmed. *Cotton*, (Shearouse Adv. Sh. No. 18 at 75, 77).

III. Conclusion

As we said in *Lyle*, "Whether evidence of other . . . crimes properly falls within any of the recognized exceptions . . . is often a difficult matter to determine." 125 S.C. at 416-17, 118 S.E. at 807. Rule 404(b) of our Rules of Evidence provides, "Evidence of other crimes, wrongs, or acts . . . may . . . be admissible to show . . .

[9] The defendant denied being with the victim on the day of the crime, and offered an innocent explanation of how his DNA was found on the victim's clothing. The State argued the "other crime" refuted his alibi because "the existence of the prior bad act refuted Petitioner's contention regarding how his DNA appeared on the victim's jeans." Brief for Resp't at 10, *State v. Cotton,* (Shearouse Adv. Sh. No. 18 at 75).

the existence of a common scheme or plan . . . ." The trial court's standard for making this determination is the *Lyle* "logical connection" test. The State must demonstrate to the trial court that there is in fact a scheme or plan common to both crimes, and that evidence of the other crime serves some purpose other than using the defendant's character to show his propensity to commit the crime charged.

Similarity can be important to meeting that burden, but as we held in *Lyle* and in all our decisions for over eighty years afterward, there must be more. The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes "reasonably tends to prove a material fact in issue." 125 S.C. at 417, 118 S.E. at 807. The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden "should be subjected by the courts to rigid scrutiny," considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807. In this case, the State did not meet its burden.

We **REVERSE** Perry's convictions and **REMAND** for a new trial.

BEATTY, C.J., and HEARN, J., concur. KITTREDGE, J., dissenting in a separate opinion in which JAMES, J., concurs.

JUSTICE KITTREDGE: Admissibility of Rule 404(b) prior bad acts evidence[10] often presents thorny and difficult issues on which reasonable minds can differ. While I agree with the majority that a careful review of the common scheme or plan exception to Rule 404(b) is warranted, I believe the majority goes too far in overruling *State v. Wallace*[11] and *State v. Hallman*.[12] As described below, I believe this Court's historic approach to common scheme or plan evidence requires a showing that the prior bad acts are somehow connected to the charged crime. Importantly, similarities between the prior bad acts and the charged crime may sometimes, but not always, establish the requisite connection, in that the similarities standing alone may establish the defendant has a common criminal system that he repeatedly implements. *See, e.g.*, *State v. Bell*, 302 S.C. 18, 28–29, 393 S.E.2d 364, 370 (1990) (determining the prior bad acts evidence "connected Bell to the commission of the murder . . . by demonstrating the similarities between the [other two] murders"); *State v. Tutton*, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003) ("Where there is a pattern of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan."); 2 John Henry Wigmore & Arthur Best, *Wigmore on Evidence* § 304 (Chadbourn rev. 1983 & Supp. 2020-1) (explaining admissibility is not conditioned on "merely a similarity in the results, but [on] such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations" (emphasis omitted)).

Regrettably, through the years and many appellate decisions, our courts have employed the shorthand phrase of "similarities" to encompass the connection test. *See, e.g.*, *State v. Cope*, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013). In *Wallace*, the defendant specifically sought to ensure that the connection test remained viable, pointing to *Tutton* to support his contention a

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[10] *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.").
[11] 384 S.C. 428, 683 S.E.2d 275 (2009).
[12] 298 S.C. 172, 379 S.E.2d 115 (1989).

connection was required. *Wallace*, however, held that similarity alone was sufficient for admission of the prior bad acts evidence, thus rejecting the connection test. *See Wallace*, 384 S.C. at 434 n.5, 683 S.E.2d at 278 n.5. In my judgment, *Wallace* wrongly rejected the connection test. I would modify *Wallace* by restoring the connection test to the Rule 404(b) common scheme or plan exception, but allow similarities between the prior bad acts and the charged crime to show the connection. When *Wallace* is so modified, its framework fits well with this Court's extensive common scheme or plan jurisprudence, including *Hallman* and many other cases.

While I do not believe *Wallace* and *Hallman* should be overruled, there is much in common with the analytical frameworks advanced by the majority and my dissent. We part company on the proper result in this case. Because it is my judgment the court of appeals properly affirmed the trial court's exercise of evidentiary discretion in the admission of the stepdaughter's prior bad acts testimony, under *Wallace* as I would modify that decision, I would affirm the convictions of Petitioner Wallace Steve Perry. In addition, I am concerned that the majority opinion can be read to rewrite Rule 404(b) to require a *unique* scheme or plan rather than a *common* scheme or plan.

Today, the Court has filed two other opinions affirming convictions that involved challenges to Rule 404(b) common scheme or plan evidence. *See State v. Durant*, Op. No. 27964 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 64); *State v. Cotton*, Op. No. 27965 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 75).[13] Perhaps in affirming the admission of Rule 404(b) common scheme or plan evidence in *Durant* and *Cotton*, today's decision overruling *Wallace* may not foreshadow a significant change in the admission of Rule 404(b) evidence in our trial courts. Nevertheless, today's decision not only claims to repudiate *Wallace* and *Hallman*, it calls into question much of our jurisprudence in the 404(b) arena,

[13] In *Durant* and *Cotton*, we were asked to overrule *Wallace*; in this case, we were not. Nevertheless, I do not criticize the majority for reexamining *Wallace* today, for *Wallace*'s "similarity only" framework is contrary to our jurisprudence.

including, among many other cases, *State v. Whitener*,[14] *State v. Cope*,[15] and *State v. Tutton*.[16] The overruling of *State v. Hallman* in particular appears gratuitous and unnecessary, even if *Wallace* is to be cast aside.[17] Perhaps the decisions today in *Durant* and *Cotton* indicate my concern is unfounded. Time will tell.

I have further decided to include my view of *State v. Lyle*.[18] *Lyle* has been frequently cited as a landmark case concerning common scheme or plan evidence. However, I have long believed that *Lyle* is primarily an identity case, with only a cursory reference to the common scheme or plan exception. *See* Rule 404(b), SCRE (listing identity as another exception to the prohibition on prior bad acts evidence). I regret the length of this opinion, for I am aware of the burden on judges and, especially, practitioners to review opinions as they strive to keep pace with appellate court decisions. Yet with the majority's revision to our common scheme or plan evidence law and reliance on *Lyle*, I feel obligated to correct the record, as I see it, as to *Lyle*'s proper place in our Rule 404(b) jurisprudence.

I.

I begin with the charges against Petitioner. He was indicted on two counts of criminal sexual conduct with a minor in the first degree and two counts of criminal sexual conduct with a minor in the second degree. A jury convicted Petitioner on all counts. The victims are Petitioner's daughters. The State introduced evidence of Petitioner's sexual abuse of his stepdaughter (Stepdaughter) years earlier. The experienced trial judge admitted this Rule 404(b) evidence under the common scheme or plan exception. In a well-

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[14] 228 S.C. 244, 89 S.E.2d 701 (1955).
[15] 405 S.C. at 317, 748 S.E.2d at 194.
[16] 354 S.C. at 319, 580 S.E.2d at 186.
[17] *See, e.g.*, *State v. Parker*, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993) ("The analysis adopted in *Hallman* was a clarification of the *McClellan* [] test." (citing *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984))). Despite the majority overruling *Hallman*, the Court—as a whole—reaffirms the continued viability of *McClellan* today in *Perry*, *Durant*, and *Cotton*.
[18] 125 S.C. 406, 118 S.E. 803 (1923).

reasoned opinion, the court of appeals affirmed. *State v. Perry*, 420 S.C. 643, 803 S.E.2d 899 (Ct. App. 2017). I would affirm the court of appeals and uphold Petitioner's convictions for sexually abusing his daughters.

A.

At the time of the alleged abuse, Petitioner and the victims' mother had separated, and the children visited Petitioner on weekends.

The victim referred to as Daughter Two was twenty years old at the time of the trial. Daughter Two testified Petitioner began molesting her when she was between five and seven years old. The first instance of abuse occurred when Daughter Two was lying in bed watching television; Petitioner lay next to her and digitally penetrated her vagina. Petitioner continued to molest Daughter Two for many years, typically entering her bedroom around five or six o'clock in the morning during the children's weekend visitations. The abuse consisted of digital penetration for the most part, although Petitioner performed oral sex on Daughter Two on two occasions. Petitioner sexually molested Daughter Two until she was fifteen years old. Daughter Two did not disclose the abuse because Petitioner threatened her, telling her that she "would get in just as much trouble as he would" and would be taken away from her mother.

The victim referred to as Daughter Three was eighteen years old at the time of the trial. Daughter Three testified Petitioner began abusing her when she was around ten or eleven years old. According to Daughter Three, on five different occasions, Petitioner came into her bedroom around five or six o'clock in the morning and abused her by digitally penetrating her vagina. Similar to Daughter Two, Daughter Three did not disclose the abuse for several years because Petitioner threatened her, telling her that she would get "in trouble and [would] get taken away from [her] mom."

Ultimately, Daughter Three reported Petitioner's abuse, which emboldened Daughter Two to come forward and report her own abuse.

B.

Over Petitioner's objection, and following a proffer outside the presence of the jury, the trial court admitted the testimony of Stepdaughter under the common scheme or plan exception to Rule 404(b), SCRE, finding there was clear and convincing evidence Petitioner had abused Stepdaughter. Stepdaughter was thirty-six years old at Petitioner's trial. According to Stepdaughter, when she was around nine years old, Petitioner began abusing her. She testified that while she was between nine and thirteen or fourteen years old, Petitioner came into her room multiple times and digitally penetrated her vagina, and that on another occasion, he performed oral sex on her.[19] Stepdaughter explained the abuse occurred most often in her room, although "one incident [occurred] in the bathtub." Stepdaughter testified she did not report the abuse at the time it occurred because Petitioner threatened her and she "was scared [her] family would be hurt." Nonetheless, Stepdaughter reported Petitioner's abuse when she was fourteen years old. No charges were filed against Petitioner in connection with the abuse of Stepdaughter, in part because Stepdaughter was pregnant and, quite understandably, in a fragile state. Instead, Petitioner was allowed to enter a pretrial intervention program.

II.

Petitioner argues on appeal there was not a close degree of similarity between the allegations of his abuse of Stepdaughter and the allegations of his abuse of Daughters Two and Three. More to the point, Petitioner contends there are several dissimilarities between the charged crimes (involving Daughters Two and Three) and the prior bad acts evidence (involving Stepdaughter). I

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[19] Petitioner's abuse of Stepdaughter allegedly advanced to sexual intercourse, but the trial court found this testimony was not allowed because its probative value was substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE; *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278 (permitting the trial court to "redact dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant").

disagree the differences take Petitioner's actions against his three victims out of the realm of a common scheme or plan to abuse his daughters.

The court of appeals thoroughly, and properly in my firm judgment, analyzed Petitioner's challenge to the prior bad acts evidence. The abuse of Stepdaughter and the abuse of Daughters Two and Three were not identical in every respect, and the court of appeals so acknowledged. However, the law does not require the prior bad acts evidence to be *exactly the same* as the charged crime. The court of appeals examined the similarities in light of the law concerning the common scheme or plan exception to Rule 404(b). The court of appeals noted the "close degree of similarity" and observed: (1) the child molestation occurred during the victims' preteen and early teenage years; (2) a parent-child relationship existed between Petitioner and all of the victims; (3) the victims were molested in Petitioner's residence; (4) the abuse typically occurred in the victims' bedrooms; (5) Petitioner threatened all of the victims in a similar fashion; and (6) the abuse primarily involved digital penetration. Given how these close similarities between the abuse of the daughters and Stepdaughter demonstrated a common system of abuse repeatedly employed by Petitioner—thus connecting the prior bad acts to the crimes charged—the court of appeals concluded the trial court did not abuse its discretion in admitting the prior bad acts evidence from Stepdaughter. I would affirm that judgment. *Cf., e.g.*, *Hallman*, 298 S.C. at 175, 379 S.E.2d at 117 (holding, in the defendant's trial for the sexual abuse of one foster daughter, that testimony of three other foster daughters' sexual abuse at the hands of the defendant was admissible as demonstrative of a common scheme or plan due to the victims' similar relationship with the defendant, similar ages, and similar stories regarding the commencement of abuse)); *State v. Rainey*, 175 A.3d 1169, 1182–83 (R.I. 2018) (considering a list of factors virtually identical to those enumerated in *Wallace* and concluding those factors established a common scheme or plan to molest, "for all intents and purposes, daughters in [the defendant's] life"); *see also State v. Register*, 698 S.E.2d 464, 466, 470–73 (N.C. Ct. App. 2010) (finding evidence of the defendant's prior sexual abuse of children fourteen, twenty-one, and twenty-seven years before his abuse of the child for whom he was currently on trial was admissible as "a traditional example of a common plan" because the "evidence tended to show that defendant had engaged in strikingly similar

conduct whenever he had access to young relatives of a wife," and the significant gap in time between the victims' abuse "was the result of [the] defendant's not having access to children related to his wife" who were also within his preferred age range).

III.

The majority portrays *Wallace* as an outlier, as if it stands alone as some distant aberration in the wilderness of South Carolina law. I respectfully disagree.

A.

Wallace's focus on similarities has been a central feature of our approach to Rule 404(b). When the focus on similarities is viewed as the courts' effort to find a connection between the prior bad acts and the charged crime, I believe the common scheme or plan exception framework is complete. *See, e.g.*, *Whitener*, 228 S.C. at 265, 89 S.E.2d at 711 (stating evidence of other sex crimes may be admissible to establish a common scheme or plan when they "tend[] to show continued illicit intercourse between the same parties"); *State v. Rivers*, 273 S.C. 75, 78–79, 254 S.E.2d 299, 301 (1979) (agreeing with the defendant's argument that the prior bad acts testimony bore "insufficient similarity to the acts allegedly performed on the prosecutrix"; "The only common elements in these described activities appear to be sexual frustration and violence. . . . [T]he dissimilarity which we have above found[] nullifies the probative value of the testimony for [purposes of showing a common scheme or plan]."); *State v. Stokes*, 279 S.C. 191, 192–93, 304 S.E.2d 814, 814–15 (1983) (concluding there was no connection between the defendant's sexual assault of the prosecuting victim and the non-prosecuting victim, and therefore finding the non-prosecuting witness's testimony inadmissible because it did not demonstrate a common scheme or plan); *McClellan*, 283 S.C. at 392, 323 S.E.2d at 774 (holding evidence of prior bad acts were admissible when "the close similarity of the charged offense and the previous acts enhances the probative value of the evidence so as to overrule the prejudicial effect" resulting from the possibility the jury will use the prior bad acts as propensity evidence, and determining the facts alleged by the

prosecuting and non-prosecuting witnesses were so similar to one another that "[i]t would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence" (internal alteration mark omitted) (quoting *Rivers*, 273 S.C. at 78, 254 S.E.2d at 300)); *Hallman*, 298 S.C. at 175, 379 S.E.2d at 117 (finding admissible a pattern of abuse involving the defendant's sexual abuse of his foster daughters, even though some of the daughters were abused to a greater extent than others and they were all different ages, ranging from four to thirteen); *Bell*, 302 S.C. at 28–29, 393 S.E.2d at 370 (determining the State established the defendant's common plan to kidnap, rape, and murder "young, blonde girls" because the evidence of his prior bad acts "connected Bell to the commission of the murder . . . by demonstrating the similarities between the [other two] murders"); *Parker*, 315 S.C. at 233–34, 433 S.E.2d at 832–33 (summarizing the evolution of the common scheme or plan exception in South Carolina, and finding the prior bad acts evidence there exhibited only a "general similarity" to the charged offense and was therefore improperly admitted); *State v. Jenkins*, 322 S.C. 414, 416, 472 S.E.2d 251, 252 (1996) ("In the case of the common scheme or plan exception, there must be *a close degree of similarity or a connection* between the other crimes/bad acts and the crime charged which enhances the probative value of the evidence so as to outweigh the prejudicial effect."; and explaining that "nothing was introduced to show any similarity between these previous [crimes] and the [crime] for which petitioner was on trial," so the testimony regarding the prior bad acts was inadmissible (emphasis added) (citing, *inter alia*, *Parker*, 315 S.C. at 230, 433 S.E.2d at 831; *Bell*, 302 S.C. at 18, 393 S.E.2d at 364; *Hallman*, 298 S.C. at 172, 379 S.E.2d at 115; *McClellan*, 283 S.C. at 389, 323 S.E.2d at 772)); *State v. Wingo*, 304 S.C. 173, 176, 403 S.E.2d 322, 324 (Ct. App. 1991) (holding admissible, as evidence of a common scheme or plan, testimony the defendant had sexually abused the victim's sister in a virtually identical manner to the victim); *State v. Blanton*, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994) (affirming the trial court's decision to admit testimony of two witnesses who were sexually abused by the defendant seven to eight years before the victim because each of the victims was about the same age when the abuse occurred, each was subject to similar abuse, each act took place in the defendant's house or vehicle, and in each instance,

the defendant took advantage of his relationship with the victim for his sexual gratification), *cert. denied*, Mar. 9, 1995; *State v. Adams*, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998) (upholding the trial court's admission of the defendant's stepdaughter's testimony of eight years of extensive, uncharged sexual abuse in part because it mirrored the charged allegations made by another stepdaughter); *State v. Atieh*, 397 S.C. 641, 648, 725 S.E.2d 730, 734 (Ct. App. 2012) (determining the trial court properly admitted testimony that another victim was abused under a common scheme or plan, in part because the "similarities of both women's testimonies far outweigh[ed] the differences"), *cert. denied*, Aug. 21, 2014; *State v. Beekman*, 405 S.C. 225, 232, 746 S.E.2d 483, 487 (Ct. App. 2013) (concluding joinder of sexual abuse charges related to the defendant's stepdaughter and stepson was appropriate in part because "his sexual abuse of each of the stepchildren would have been admissible in separate trials to show a common scheme or plan," and the evidence tended to show the defendant had a common plan to sexually abuse his prepubescent stepchildren while in their family home), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2018); *State v. Scott*, 405 S.C. 489, 501–03, 748 S.E.2d 236, 243–44 (Ct. App. 2013) (affirming the trial court's admission of testimony related to the defendant's prior uncharged sexual abuse of two minors as indicative of a common scheme or plan due to peculiar similarities between those allegations and the charged offense), *cert. dismissed as improvidently granted*, 413 S.C. 24, 773 S.E.2d 912 (2015).[20]

As this extensive list of cases makes clear, *Wallace* is not the outlier portrayed by the majority. Notably, the cases cited above both pre- and post-date this Court's decision in *Wallace*, thus proving my point that *Wallace* was not an aberration, save the rejection of the connection test. Nevertheless, as the cases demonstrate, the phrase "similarities" became what I view as a shorthand description to embrace the convergence of similarity and connection. *Wallace* erred in expressly disavowing the connection test.

[20] Although the Bluebook ordinarily requires the listing of cases in reverse chronological order, I have purposefully listed the cases above from oldest to newest in an effort to demonstrate *Wallace* did not represent a sea change in our case law, as the majority contends.

If the majority simply modified (or even overruled) *Wallace* and reinstated the longstanding framework of a connection between the prior bad acts and the charged crime, I would join the Court to that extent. Yet I am firmly persuaded the Rule 404(b) evidence in Petitioner's case satisfies the connection test.

B.

It is also important to note that South Carolina's longstanding approach to Rule 404(b) is in line with the law in other jurisdictions. Although my research is not exhaustive, most jurisdictions allow prior bad acts evidence in criminal sexual conduct cases. *See generally, e.g.*, *Elliott v. State*, 600 P.2d 1044, 1047–48 (Wyo. 1979) ("Our analysis of cases from other jurisdictions leads to the conclusion that in recent years a preponderance of the courts have sustained the admissibility of the testimony of third persons as to prior or subsequent similar crimes, wrongs or acts in cases involving sexual offenses. Among the grounds relied upon for the admissibility of such evidence is that it is admissible to show motive or to show plan, with various phrases being used by the courts to describe those concepts. We note that in cases involving sexual assaults, such as incest, and statutory rape with family members as the victims, the courts in recent years have almost uniformly admitted such testimony." (internal citations omitted) (collecting cases)); *see also Ex parte Register*, 680 So. 2d 225, 227 (Ala. 1994); *Derouen v. State*, 994 So. 2d 748, 753 (Miss. 2008) (noting the "overwhelming weight of authority is that in the unusual context of" child sex abuse cases, evidence of similar sex crimes committed on non-prosecuting minors is admissible (citation omitted) (collecting cases)); 1 Kenneth S. Broun et al., *McCormick on Evidence* § 190 & nn. 66, 67, & 68 (Kenneth S. Broun & Robert P. Mosteller, eds., 7th ed. 2013 & Supp. 2016) (collecting cases); 2 *Wigmore on Evidence* §§ 304 & n.1, 357, 360, 398–402 ("[A] single previous act, even upon another [victim], *may*, with other circumstances, give strong indication of a design (*not a disposition*) to rape . . . . Courts have shown altogether too much hesitation in receiving such evidence.[] Even when rigorously excluded from any bearing it may have upon character, it may carry with it great significance as to a specific design or plan of rape." (second emphasis added) (footnote omitted)) (collecting cases).

IV.

Even were I to agree with the majority that we should overrule *Wallace* and return to the allegedly halcyon days where *Lyle* alone provided the authoritative 404(b) analysis, the majority's own factual recitation and analysis is incorrect.

A.

Initially, the majority tells us Stepdaughter's testimony "was clearly relevant [to the State's case *only*] because if [Petitioner] committed similar acts of sexual abuse against a minor in the past, he was more likely to have done it this time too." However, the majority attributes a position to the State it has never taken, namely that the State offered the evidence to show Petitioner has a propensity to sexually abuse minors. It is an unfair tactic to attribute a strawman argument to the State and then righteously tear it down.

It appears the majority frames the issue falsely as a fitting segue to its discussion of the evils of propensity evidence. Of course, if the State had argued Stepdaughter's testimony were relevant and admissible because Petitioner had a propensity to sexually abuse his children, I am confident the experienced trial judge would have summarily disallowed the testimony. Propensity evidence is forbidden, as the State is well aware. *See* Rule 404(b), SCRE ("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.").

In truth, despite the majority's incorrect portrayal of the State's position, the State has at all times relied on the common scheme or plan exception to Rule 404(b) to support the admission of Stepdaughter's testimony. Importantly, *there is a rule of evidence that allows this kind of testimony*, not "to prove the character of a person in order to show action in conformity therewith," but to show, for example, a common scheme or plan.

B.

Following the false premise that the State wanted to admit Stepdaughter's testimony on legally impermissible grounds, the majority opinion lectures on

the evils of propensity evidence. I agree with the majority that propensity evidence is inappropriate for a number of reasons, and I am confident the State readily agrees as well. As I wrote fifteen years ago,

> Perhaps no tenet of evidence law in the context of "prior bad acts" is more firmly established than the principle that propensity or character evidence is inadmissible to prove the specific crime charged. . . . This rule of evidence is universally recognized in American jurisprudence and is necessary to ensure that the presumption of innocence is not relegated to an empty phrase.

State v. Tuffour, 364 S.C. 497, 502, 613 S.E.2d 814, 817 (Ct. App. 2005), *vacated by settlement on other grounds*, 371 S.C. 511, 641 S.E.2d 24 (2007) (per curiam). While the majority's lecture on the evils of propensity evidence may make good theater, it does little to answer the question of whether the trial court abused its discretion in admitting Stepdaughter's testimony under the common scheme or plan exception to Rule 404(b).

It is also important to remember the *only* Rule 404(b) evidence admitted and challenged in this appeal was the testimony of *Stepdaughter*. The majority relies heavily on its belief that there are differences in the facts of the sexual abuse of Daughter Two and Daughter Three, which—even if true—is not Rule 404(b) evidence. While I find significant similarities in the abuse of Daughters Two and Three, the presence of any dissimilarities is wholly unrelated to the Rule 404(b) analysis. Petitioner was charged with criminal sexual conduct for his alleged sexual abuse of *both* Daughters Two and Three. In finding the abuse of Daughters Two and Three was significantly dissimilar, the majority is conflating joinder and Rule 404(b) prior bad acts evidence, with no citation to authority from this jurisdiction or any other to support its analysis.[21] Any dissimilarity between the abuse of Daughters Two

[21] Petitioner's indictments for the alleged sexual abuse of Daughters Two and Three were consolidated into a single trial. At no point has Petitioner ever contended the joinder of those indictments was improper or that the trial court erred in failing to sever the charges. *Cf. Cope*, 405 S.C. at 334–39, 340–41, 748 S.E.2d 203–05, 206 (analyzing separately, as alternative grounds for reversal, the defendant's

and Three is irrelevant to the Rule 404(b) discussion. The only relevant comparison for Rule 404(b) purposes is the similarities or dissimilarities of the sexual abuse of Stepdaughter compared to the sexual abuse of Daughters Two and Three, as that would connect Petitioner's abuse of Stepdaughter with his abuse of his two daughters.

C.

I additionally take exception to the majority's attempt to create dissimilarities where the similarities between the victims' abuse and the abuse of Stepdaughter are obvious and striking. As noted above and accurately presented by the court of appeals, all victims were of a similar age when the abuse began and ended; a parent-child relationship existed between Petitioner and all of the victims; the victims were molested in Petitioner's residence; the abuse typically occurred in the victims' bedrooms; Petitioner threatened all of the victims in a similar fashion; and the abuse primarily involved digital vaginal penetration. This evidence established the connection historically required in our Rule 404(b) jurisprudence.[22]

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contentions that prior bad acts evidence was improperly omitted for purposes of Rule 404(b) and as grounds to deny his motion to sever).

[22] Other state courts have found the concurrence of similar factors equally compelling in holding testimony regarding a defendant's prior bad acts was admissible pursuant to Rule 404(b). *See, e.g.*, *People v. Sabin*, 614 N.W.2d 888, 901 & n.11 (Mich. 2000) ("The charged and uncharged acts contained common features beyond mere commission of acts of sexual abuse. Defendant and the alleged victims had a father-daughter relationship. The victims were of similar age at the time of the abuse. Defendant allegedly played on his daughters' fear of breaking up the family to silence them. One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate/abuse. That these facts also prove the elements of a[n uncharged] criminal offense is not pertinent to our inquiry. The question is whether the circumstances surrounding the charged and other acts support an inference of a common system[, and we find they do]."); *Register*, 698 S.E.2d at 472–73 ("We hold that th[e challenged testimony regarding the defendant's prior bad acts was admissible]. The

The majority finds these similarities—and the resultant connection—meaningless.[23] For example, we learn the fact that all of the abuse "occurred

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challenged testimony showed a strikingly similar pattern of sexually abusive behavior by defendant over a period of 31 years: (1) defendant was married to each of the witnesses' mothers or aunt, (2) the sexual abuse occurred when the children were prepubescent, (3) at the time of the abuse, defendant's wife was away at work while he was home looking after the children, and (4) the abuse involved fondling, fellatio, or cunnilingus, in most instances taking place in defendant's wife's bed. This evidence presents a traditional example of a common plan. While there was a significant gap of time between [some of the four victims' tales of] abuse, that gap was the result of defendant's not having access to children related to his wife."); *Rainey*, 175 A.3d at 1183–85 (finding, in the defendant's trial for the sexual abuse of a minor, the defendant's daughter's testimony "fit[] comfortably within a Rule 404(b) exception to show [a] plan to abuse young girls of a similar age with whom he had a similar relationship," and explaining: "To start, each of defendant's indiscretions were directed against, for all intents and purposes, daughters in his life: in Anna's case, the daughter of a girlfriend who called him 'Dad,' and in Beth's case, his biological daughter. Each victim was around eight years old when the abuse first occurred, and away from their mother's supervision. Although the exact locations differed, the majority of the abuse occurred in what was at the time defendant's residence, where he had direct access to the victims: in Anna's case, the home he shared with her mother (with only two exceptions), and with Beth, an apartment in which he lived alone. Moreover, the manner of abuse was similar with each victim in that both cases involved penetration, successful or otherwise."); *see also Flanery v. State*, 208 S.W.3d 187, 190 (Ark. 2005) ("Here, though the specific acts complained of are not identical, the victim and the witness were similar in age when the abuse happened. Further, both girls were living in the home of the appellant and looked on him as a father figure at the time of the abuse. In each case, the appellant attempted to rationalize his behavior in some way. Moreover, both girls testified to inappropriate touching of the vaginal area. In light of the similarities in age and presence of the victims in the same household, we hold that the circuit court did not abuse its discretion in allowing [the witness's] testimony.").

[23] In fact, the majority opines that "a very high percentage of sexual crimes against children are committed just like [Petitioner's] alleged crimes: by father figures, in the home, in a bedroom, beginning in the pre-pubescent years." However, in listing what it views as these "general" factors, the majority omits one of the most

within [Petitioner's] home" means nothing, for it is "too general to be considered a meaningful similarity." I disagree, and this Court's precedent agrees with me. *See, e.g.*, *State v. Cutro*, 365 S.C. 366, 376, 618 S.E.2d 890, 895 (2005) (finding three instances of Shaken Baby Syndrome occurring in the defendant's home daycare were "similar in kind, *place*, and character" and therefore "clearly fit within the *Lyle* categories for common scheme or plan" (emphasis added)); *Hallman*, 298 S.C. at 175, 379 S.E.2d at 117 (holding the defendant's sexual abuse of four unrelated foster daughters demonstrated a common scheme or plan when the abuse of each girl occurred generally on the defendant's property, despite the fact that some of the victims were only abused indoors (in the bedroom and bathroom), while others were primarily abused outside (in the barn, on the tractor, or while riding a pony)).[24] Such a

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significant distinguishing factors: the type of sex act inflicted on the child victim. In many child sex abuse cases, the perpetrator commits the same, or highly similar, sex acts on the victim(s), thus establishing he has a common system of abuse that he repeatedly implements. Of the enumerable sex acts Petitioner could have inflicted on his daughters, he primarily chose digital vaginal penetration. I find this significant because *it demonstrates the connection between the allegations of abuse*. Petitioner did not rape the girls, nor did he generally choose to perform oral sex on them, nor did he abuse them in a manner requiring their active participation (such as forcing them to touch him in some manner); rather, he ordinarily committed the exact same sex act in the same manner in the same location while the girls were around the same age, threatening them similarly in order to ensure their silence. The majority overlooks the nearly-exclusive type of abuse inflicted on the girls.

[24] Additionally, in its rush to point out every possible dissimilarity between the victims' versions of events, the majority falsely claims Petitioner threatened Stepdaughter but not Daughters Two and Three. A review of the record proves this is incorrect, as Petitioner threatened all three victims. In a similar vein, the majority finds dissimilarities in the facts that the defendant abused (1) Daughter Two for the first time in front of the television, but Daughter Three and Stepdaughter for the first time in their bedrooms; and (2) Stepdaughter in the bathtub one time, whereas Daughters Two and Three were never abused in the bathroom. The majority is determined to try to split hairs in making such a fine distinction, as the television and bathtub abuse sites were, by all accounts, singular

finding amounts to the majority making its own findings of fact and ignoring our settled approach to reviewing these types of trial court determinations under an abuse of discretion standard.

Likewise, in its pursuit to show dissimilarities, the majority implies there was a large gap in the age of onset of abuse among the children. When the age ranges (regarding onset of abuse) of Daughters Two and Three are properly stated, it is easy to understand why the trial court found a sufficient age-similarity between the two daughters and Stepdaughter. The record shows Daughter Two was between the ages five and seven when Petitioner began sexually abusing her. Similarly, the record reflects Daughter Three's age at the onset of abuse was about ten or eleven years old. Stepdaughter was nine years old when Petitioner began abusing her.[25]

Notably, the most dissimilar ages of the three victims were between Daughters Two and Three (five to seven vs. ten or eleven years old), *not* Daughter Two and Stepdaughter (five to seven vs. nine years old) *or* Daughter Three and Stepdaughter (ten or eleven vs. nine years old). Thus, the majority's statement reflects a mischaracterization of the evidence and a misunderstanding of the issue on appeal by analyzing what it believes are dissimilarities involving the crimes against *Daughters Two and Three*, for which Petitioner was on trial. However, again, Petitioner never challenged being jointly tried for the alleged sexual abuse of Daughters Two and Three, and, therefore, any dissimilarity in ages between Daughters Two and Three is not properly before this Court. Rather, the only Rule 404(b) evidence was the testimony of Stepdaughter. Viewed properly, Stepdaughter's abuse onset at age nine may be characterized as similar to ages "five to seven" (Daughter Two) and "about ten or eleven years of age" (Daughter Three).

I understand why the majority is bent on calling similarities dissimilarities, but it is troubling that the majority contends that the ages of onset of abuse for the three victims were grossly dissimilar. Plainly stated, the three victims testified the abuse could have started as close together as ages seven, nine,

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occurrences given that all three victims were almost exclusively abused in their bedrooms.

[25] Moreover, the victims' ages when the abuse ended were similar: fifteen years old for Daughter Two, eleven years old for Daughter Three, and fourteen years old for Stepdaughter.

and ten. I cannot fathom how the majority has found the ages of the victims are so divergent as to remove them from a common scheme or plan to abuse young girls. While the majority acknowledges the obvious—that age nine is similar to age ten—it then concludes that ages nine and seven are not similar. I could not more strongly disagree, particularly when it appears the Court has chosen to establish this fact as a matter of law and not based on the characteristics of the children in this particular case. Regardless, even if I were to accept the majority's effort to peg the age of onset for Daughters Two and Three as far away as possible from Stepdaughter (at five, nine, and eleven years old), I would nevertheless find there is sufficient similarity in the ages of the victims such that this Court cannot properly find an abuse of discretion in the decision of the trial court, as the standard of review requires. *See Hallman*, 298 S.C. at 174–75, 379 S.E.2d at 117 (finding victims aged four to seven when the abuse began—and four to thirteen when the abuse ended—were similar enough in age to admit prior bad acts testimony).[26]

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[26] I have cited to *Hallman* extensively throughout my dissent because it predates *Wallace* and yet relies on a somewhat similar analysis to reach the same result. I find it telling the majority has not cited to or made any attempt to distinguish *Hallman*. In my opinion, *Hallman* is perhaps the most factually similar case to the present as it also involves victims of differing ages who occupied a similar relationship to the defendant and were abused in somewhat similar (but not identical) manners and in somewhat similar (but not identical) locations. I believe *Hallman* provides valuable insight into the *Wallace* factors, and specifically how those factors are guideposts for courts to analyze whether the similarities between the charged crime and any prior bad acts establish the requisite connection so as to show the defendant's common criminal system. *See Bell*, 302 S.C. at 28–29, 393 S.E.2d at 370; *Tutton*, 354 S.C. at 328, 580 S.E.2d 191; 2 *Wigmore on Evidence* § 304. Unable to distinguish *Hallman*, the majority's only recourse is to overrule it. Yet the majority insists that *Wallace* is some rogue, isolated decision in our Rule 404(b) jurisprudence. The majority cannot have it both ways. *Hallman* is perhaps the clearest demonstration in South Carolina's case law that *Wallace* did not create a new rule of evidence but, rather, is in line with this Court's longstanding interpretation of Rule 404(b) and *Lyle* in the specific context of sexual assault cases. *Cf. Parker*, 315 S.C. at 233, 433 S.E.2d at 832 ("The analysis adopted in *Hallman* was a clarification of the *McClellan* [] test."). The court of appeals'

D.

There are evidentiary challenges peculiar to criminal sexual conduct cases that have been recognized by our legislature and the Rules of Evidence. Specifically, our legislature has recognized the difficulty of prosecuting sexual assault cases, providing as a matter of substantive law that the testimony of a criminal sexual conduct victim need not be corroborated. *See* S.C. Code Ann. § 16-3-657 (2015). This same targeted treatment of criminal sexual conduct cases is found in the Rules of Evidence, specifically Rule 801(d)(1)(D), which characterizes as nonhearsay (and, thus, admissible) a statement "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident."[27] There are no other crimes where the legislature has similarly spoken by providing such specific rules, substantive and procedural. I believe the reason is obvious—criminal sexual conduct crimes are typically done under the cover of darkness with no witnesses present other than the alleged perpetrator and alleged victim, often causing the case to devolve into a "he said/she said" battle of credibility. Significantly, these criminal sexual conduct considerations apply while holding the State to its burden of proof, in

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decisions in *Wingo*, *Blanton*, and *Adams*—all of which predate *Wallace*—are much in the same vein.

[27] Similarly, Rule 412, SCRE, limits the admissibility of evidence related to the victim's sexual conduct with persons other than the defendant. *See also* S.C. Code Ann. § 16-3-659.1 (2015) (providing, *inter alia*, "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions" for criminal sexual conduct or spousal sexual battery, but if a defendant seeks to introduce the evidence for one of the few, specifically-listed purposes other than tarnishing the victim's reputation, "the defendant, prior to presenting his defense[,] shall file a written motion and offer of proof," and the court must conduct an *in camera* hearing to determine if the evidence satisfies one of the limited exceptions).

that they apply while maintaining the presumption of innocence and the panoply of rights to ensure a fair trial to an accused.

A number of our cases illustrate that the challenges inherent in sexual assault cases become heightened when the alleged victim is a child. For example, child sexual abuse cases commonly involve grooming, secrecy, delayed disclosure, and threats of reprisal.[28] A child witness is unlike an adult witness even under ordinary circumstances. However, this distinction is particularly evident in a sexual abuse situation. In child molestation cases, it is not reasonable to call an alleged child sexual abuse victim a "witness" in the ordinary sense, for a child victim of tender years often fails or—at best—struggles to comprehend the criminality of the abuse. As a result, children

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[28] *See, e.g.*, Colo. Rev. Stat. § 16-10-301(1) (2019) ("[Sex] offenses often are not reported or are reported long after the offense for many reasons, including: The frequency with which the victims are vulnerable, such as young children who may be related to the perpetrator; the personal indignity, humiliation, and embarrassment involved in the offenses themselves; and the fear of further personal indignity, humiliation, and embarrassment in connection with investigation and prosecution. These offenses usually occur under circumstances in which there are no witnesses except for the accused and the victim, and, because of this and the frequent delays in reporting, there is often no evidence except for the conflicting testimony. Moreover, there is frequently a reluctance on the part of others to believe that the offenses occurred because of the inequality between the victim and the perpetrator, such as between the child victim and the adult accused, or because of the deviant and distasteful nature of the charges."); *People v. Watkins*, 818 N.W.2d 296, 310 (Mich. 2012) ("Evidence of guilt in child molestation cases is typically hard to come by because in most cases the only witness is the victim, whose testimony may not be available, helpful, or deemed credible because of his or her age. It may also be difficult for a jury to believe that a defendant is capable of engaging in such egregious behavior with a child."); *Derouen*, 994 So. 2d at 754–55 ("Sex crimes against children are furtive, secret events usually lacking evidence other than the conflicting testimony of the defendant and the victim. The only viable proof of motive, intent, plan, knowledge, identity or absence of mistake or accident may be the pattern of abuse suffered by others at the hands of the defendant. The need for this type of evidence has influenced the law in several states." (internal quotation marks omitted)).

who have been sexually abused often are unable to pinpoint the exact date, or even year, of their abuse. The lack of precision in setting the exact date when the child sexual abuse began is understandable, given the fragility and tender years of such victims. As occurred in this case, the inability to determine with certainty the precise age of onset of abuse for a child victim is merely another illustration of the evidentiary challenges child sexual abuse cases present. Nonetheless, in its rush to overrule *Wallace*, the majority ignores the deferential abuse of discretion standard of review, giving no quarter to the three victims, nitpicking any perceived dissimilarities in their testimony, and creating distinctions in their stories of abuse when, in fact, there are very few.

V.

The majority relies on *Lyle* to support its rewriting of the common scheme or plan exception to Rule 404(b). I have long thought that *Lyle* has been wrongly cited as the gold standard for common scheme or plan evidence. I have decided this case is the proper occasion to set forth my view of *Lyle*'s appropriate place in Rule 404(b) common scheme or plan jurisprudence.

A.

In *Lyle*, the defendant was charged with a forgery committed in Aiken in which he allegedly entered a bank, presented and cashed a forged check under a pseudonym, and disappeared before the forgery could be discovered. 125 S.C. at 412–13, 118 S.E. at 805–06. With the trial court's permission, the State introduced evidence of five other forgeries conducted in similar manners, two of which were committed in Aiken the morning of the charged offense, and three of which were committed in Georgia in the weeks leading up to the charged offense. *Id.* at 413–14, 118 S.E. at 806. The defendant claimed he had an alibi. *Id.* at 411, 118 S.E. at 805. Nonetheless, the jury convicted the defendant of the charged forgery, and the defendant appealed.

In addressing the five uncharged forgeries, the Court cautioned against the use of propensity evidence, explaining it "predispose[d] the mind of the juror to believe the prisoner guilty, and thus effectually [] strip[ped] him of the presumption of innocence." *Id.* at 416, 118 at 807. Nonetheless, the Court recognized there were five well-established exceptions to the general ban on

such evidence, including motive, intent, "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others," and identity. *Id.* (quoting *People v. Molineux*, 61 N.E. 286, 294 (N.Y. 1901)). The Court continued:

> Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. . . . [I]f the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.

Id. at 416–17, 118 S.E. at 807. The Court then proceeded to address the three exceptions the State contended rendered all five forgeries admissible: identity, intent, and common scheme or plan. *Id.* at 417, 118 S.E. at 807.

Looking first at identity, the Court engaged in a lengthy discussion of how the two Aiken forgeries were more probative of identity than the three Georgia forgeries. In particular, the Court held the forgeries that occurred in Aiken were properly admissible because the evidence "tend[ed] to locate the accused in the immediate vicinity of the crime at the time of its commission, to refute the defense of alibi, and thus to identify defendant as the perpetrator of the crime." *Id.* at 417–18, 118 S.E. at 807 (describing those forgeries as "similar transaction[s]," and determining the State had established the identity exception for the uncharged Aiken forgeries because (1) the eyewitnesses from all three Aiken banks identified the defendant as the perpetrator; (2) the defendant used the same R.F.D. address for two of the three forged checks; and (3) there was a "marked similarity in technique of operation"). The Court found the testimony regarding the three Aiken forgeries essentially established the *res gestae* of the charged crime, in that it inferred "the two

extraneous crimes were committed within a few town blocks as to distance, and within a few minutes, as to time, of the crime charged, . . . each a part of one general scheme of a single expedition." *Id.* at 418, 118 S.E. at 808. Accordingly, the Court concluded, "The connection for the purpose of establishing the identity of the accused under the issue raised as to the alibi we think is clear." *Id.*

In contrast, the Court found the Georgia forgeries committed in the weeks before the charged crime, although being similar transactions, were inadmissible because "[t]here [wa]s no connection of time and place" and therefore "d[id] not serve to identify the defendant as the person who uttered the forged check in [the charged offense], unless his guilt of the latter crime may be inferred from its similarity to the former." *Id.* at 420, 118 S.E. at 808. As to the Georgia forgeries, the Court explained:

> To warrant such inference [regarding the perpetrator's *identity*,] the similarity must have established such a connection between the crimes as would logically exclude or tend to exclude the possibility that the [charged] Aiken crime could have been committed by another person. There is nothing to indicate that the defendant held any monopoly on the methods and means used in passing the forged checks in Georgia, or that they were unique in the annals of crime. That the [charged] Aiken crime could have been committed by one of innumerable other persons using like means and methods is obvious.

Id. at 420–21, 118 S.E. at 808 (internal citation omitted). Thus, the Court found, "That there was no [] obvious connection between the Georgia crimes and the offense charged in this case we think is clear." *Id.* at 422, 118 S.E. at 809.

Moving on to the State's third proposed ground for admissibility—a common scheme or plan to execute all five forgeries—the Court's discussion became

cursory, at best, discussing the entire topic in a single, short paragraph.[29] *Id.* at 427, 118 S.E. at 811. The Court explained a common scheme or plan was immaterial to the case *except as it related to identity or intent*. *Id.* Because the Court found the Georgia forgeries were not part of the *res gestae* of the charged crime and did not establish identity (or intent), the Court concluded they were inadmissible to show a common scheme or plan as well. *Id.*

B.

Lyle observed that "the relevancy of the testimony [of the uncharged Aiken forgeries] to the vital issue made [wa]s . . . obvious": the Aiken forgeries disproved the defendant's alibi defense and corroborated other witnesses' testimony identifying him as the perpetrator. *Id.* at 418, 118 S.E. at 807. Thus, *Lyle* is primarily an identity case, not a common scheme or plan case.[30] Nevertheless, to the extent *Lyle* is the leading authoritative precedent in our state as to the common scheme or plan exception, *Lyle* specifically recognizes that the methods involved in the unindicted forgeries were *not* "unique in the annals of crime," and could have been executed by any number of people. *Id.* at 420–21, 118 S.E. at 808. Even the other Aiken forgeries, which were properly admitted, were not unique.

One can conclude the methodology used in *Lyle* was not particularly distinctive, given that the same crimes were repeated in Georgia and South Carolina. Instead, in the context of the defendant's alibi defense, it was the convergence of similar methodology combined with closeness of time and place that rendered the Aiken forgeries admissible *under the identity exception*. The lack of closeness of time and place rendered the Georgia forgeries inadmissible under the identity exception because, as explained by

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[29] In contrast to the cursory discussion of the common scheme or plan exception, the Court's discussion of identity covered eight pages, and the Court's discussion of intent covered four pages.

[30] Of course, here, we have the exact opposite factual scenario as *Lyle*, where the identity of the alleged perpetrator is known, and the question is whether he actually committed the offenses of which he has been accused. As I will discuss later, this factual scenario does not invoke the identity exception, as *Lyle* did, but instead the common scheme or plan exception.

the Court, it "doubtless could have been shown[] that many similar crimes had been committed by others in practically the same manner and by the same methods." *Id.* at 421, 118 S.E. at 808.

I fail to see how the majority's apparent reliance on uniqueness, rather than a high degree of similarity, remedies its criticism of *common* scheme or plan evidence. The majority is missing an inferential step—one that is satisfied through either a repeated pattern of highly similar *or* unique criminal activity—that being "where there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion." *Tutton*, 354 S.C. at 328, 580 S.E.2d at 191. To the extent the majority opinion may be construed to require some uniqueness in the defendant's criminal process that connects the prior bad acts to the crime charged, I respectfully disagree.[31]

Rather, as I will discuss further, the convergence of a large number of similarities between crimes can also properly establish a common scheme or plan, just as occurred in *Wallace*, *Hallman*, and many other cases.

C.

As noted, *Lyle* is an identity case with only a passing reference to the common scheme or plan exception, given its cursory treatment of the topic.

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[31] *Cf. Shapiro v. State*, 696 So. 2d 1321, 1324 (Fla. Dist. Ct. App. 1997) ("Similar fact evidence of collateral crimes may be admitted as relevant even if it is not uniquely similar."); *Sabin*, 614 N.W.2d at 900 ("[T]he necessary degree of similarity [to establish a common scheme or plan under Rule 404(b)] is greater than that needed to prove intent, but less than that needed to prove identity. To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of spontaneous acts, but *the plan thus revealed need not be distinctive or unusual*." (emphasis added) (citation omitted) (internal quotation marks omitted)); *State v. Gresham*, 269 P.3d 207, 214 (Wash. 2012) (en banc) ("[T]he relevant commonality [to establish a common scheme or plan] need not be a unique method of committing the crime." (internal quotation marks omitted) (citation omitted)).

As a result, I turn to other jurisdictions for a meaningful understanding and a fuller discussion of the common scheme or plan exception.[32]

It is widely agreed that

> To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of [a] system between the offense on trial and the one sought to be introduced. *They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both*.

Molineux, 61 N.E. at 299 (emphasis added) (quoting multiple sources as standing for the proposition that "a connection between the[charged and uncharged crimes] must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish" (citations omitted)); *Bracey v. United States*, 142 F.2d 85, 88 (D.C. Cir. 1944) (describing the common scheme or plan exception, in part, as allowing evidence of prior crimes when the charged and uncharged crimes "are connected with a single purpose and in pursuance of a single object"). Generally, common scheme or plan cases take one of three forms, only one of which applies in the case before us. I will briefly mention the other types of cases for context.

In the first type of case—perhaps the easiest to determine and distinguish—the charged and uncharged crimes need not be similar at all, but instead are connected because they form the *res gestae* of the charged crime. *See, e.g.*, *Gresham*, 269 P.3d at 214 (describing the *res gestae* exception as when "several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" (citation omitted)); *see also State v. Curry*, 330 N.E.2d 720, 725 (Ohio 1975) (explaining the *res gestae* exception is necessary because "it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other

[32] There is no suggestion by the majority that the subsequent discussion synthesizing law from other jurisdictions is somehow contrary to South Carolina law.

acts"); *State v. McIntyre*, 861 A.2d 767, 769–70 (N.H. 2004) (stating that in the case of the *res gestae* exception, the charged and uncharged acts are mutually dependent on one another; however, a calculated progression of sexual abuse, such as grooming, can also satisfy the *res gestae* exception). This exception clearly is not applicable here because Petitioner's abuse of Daughters Two and Three did not hinge on his successful abuse of Stepdaughter.

The second and third types of cases have overlapping features but remain distinct. *See People v. Ewoldt*, 867 P.2d 757, 764 n.2 (Cal. 1994) (in bank) (describing the distinction as "subtle but significant"), *superseded by statute on other grounds by* Cal. Evid. Code § 1108 (West 2019) (adopting a rule similar to that found in Rules 413 and 414 of the Federal Rules of Evidence). In the second type of case, the common scheme or plan exception is entwined with the identity exception: the logical connection between the charged and uncharged crimes stems from a sufficient degree of similarity between the crimes to support an inference that they are manifestations of a common scheme or plan such that "he who committed the one must have done the other." *See Lyle*, 125 S.C. at 420–22, 118 S.E. at 808–09 (citation omitted); *Molineux*, 61 N.E. at 300 (citation omitted). Some courts refer to this as the *modus operandi* exception because the acts tend to be either distinctive (i.e., exhibit a high degree of similarity) *or* closely connected in time or place, either of which render it highly improbable they would have been committed by another. *See, e.g.*, *Lyle*, 125 S.C. at 420–21, 118 S.E. at 808; *Montgomery v. Commonwealth*, 320 S.W.3d 28, 34 (Ky. 2010); 2 *Wigmore on Evidence* §§ 304 & n.1, 306 & n.2, 416 & n.1. Notably, this exception is only available when identity is an issue in the case. *Lannan v. State*, 600 N.E.2d 1334, 1340 (Ind. 1992); *see also Ewoldt*, 867 P.2d at 764 n.2 (explaining identity is in issue when "it is conceded or assumed that the charged offense was committed by someone" but the perpetrator is unknown and the accused denies he committed the crime). Where, as here, the question is whether the

sexual abuse occurred at all, and not who the perpetrator was, the identity exception does not apply.[33]

The third type of case is the one the majority arguably diminishes, yet it is just as well-established as the first two types of cases. *See, e.g.*, *Tutton*, 354 S.C. at 325–31, 580 S.E.2d at 189–93 (explaining the third exception in great detail (citing, *inter alia*, *Sabin*, 614 N.W.2d at 900 & n.10;[34] 2 *Wigmore on Evidence* § 304)). In the third type of case, "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Gresham*, 269 P.3d at 214 (citation omitted); *see also Sabin*, 614 N.W.2d at 899. As the Supreme Court of Washington explained:

> Evidence of this [] type of common scheme or plan is admissible because it is not an effort to prove the character of the defendant. Instead, it is offered to show that the defendant has developed a plan and has again put that particular plan into action. In order to introduce evidence of th[is] type of common scheme or plan, the prior misconduct and the charged crime must demonstrate such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the two are simply individual manifestations.

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[33] Because identity is not at issue here, I would find *Lyle* inapplicable as well, despite the majority's dogged reliance on its analysis.

[34] I agree with *Tutton*'s reliance on the Supreme Court of Michigan's decision in *Sabin*. Among other reasons I find *Sabin* persuasive authority, Michigan—like South Carolina, and unlike several other states—has never adopted a "lustful disposition"/"depraved sexual instinct" exception to Rule 404(b). *Compare State v. Nelson*, 331 S.C. 1, 14 n.16, 501 S.E.2d 716, 723 n.16 (1998) ("South Carolina has not recognized [a "lustful disposition"] exception, nor are we inclined to do so."), *with Sabin*, 614 N.W.2d at 898 & n.7 (making a similar observation about the state of Michigan law).

Gresham, 269 P.3d at 214 (internal citation omitted) (internal quotation marks omitted);[35] *accord Tutton*, 354 S.C. at 325–31, 580 S.E.2d at 189–93.

As explained by Professor Wigmore, and quoted with approval by the court of appeals in *Tutton*,

> [T]he effort is to establish a definite prior design or system which included the doing of the act charged as part of its consummation. . . . [T]he result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.
>
> The added element, then, must be[] not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations*.

2 *Wigmore on Evidence* § 304. Moreover, and contrary to the majority,

> [E]vidence of similar misconduct is logically relevant [not to show propensity, but] *to show that the charged act occurred [at all]* where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.
>
> . . . The jury is not required to draw an inference regarding the defendant's character. Rather, the jury is asked to infer the existence of a common system and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred. The logical relevance of the evidence is based on the system, as shown through the similarities between the charged and uncharged acts, rather than on [the] defendant's character, as shown by the uncharged act.

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[35] The state of Washington's version of Rule 404(b)—much like South Carolina's—is a rule of exclusion, not inclusion. *See Gresham*, 269 P.3d at 213–14 (stating evidence of prior bad acts is "presumptively inadmissible").

Sabin, 614 N.W.2d at 899 & n.10 (emphasis added); *accord Tutton*, 354 S.C. at 331, 580 S.E.2d at 192 (citing this portion of *Sabin* with approval after making a similar observation).

This third type of common scheme or plan is, in my view, what is represented in the case before us. I see the convergence of similarities as objective indicia of the concurrence of common features that would demonstrate a logical connection—a common system—between the charged and uncharged acts. *See Bell*, 302 S.C. at 28–29, 393 S.E.2d at 370; *Tutton*, 354 S.C. at 328, 580 S.E.2d 191; 2 *Wigmore on Evidence* § 304.

D.

As discussed previously, the hallmark of the common scheme or plan exception is that the charged and uncharged crimes are connected in the mind of the actor by some common purpose or motive. *See, e.g.*, *Molineux*, 61 N.E. at 299. Thus, as with the *modus operandi* exception where identity is interwoven with common scheme or plan, motive can also be inextricably intertwined with a common scheme or plan. *See Cutro*, 365 S.C. at 375, 618 S.E.2d at 895 (finding the evidence established both motive and a common scheme or plan); *Bell*, 302 S.C. at 29–30, 393 S.E.2d at 370 (same); Rule 404(b), SCRE (listing motive as another of the exceptions to the prohibition on propensity evidence); *cf. Molineux*, 61 N.E. at 301 (declining to find the common scheme or plan exception applied because, although the two victims were killed in similar fashions, the motive behind each murder was entirely distinct: one murder was in retaliation for the victim's "interfere[nce] in the defendant's love affair," whereas the other murder occurred after the victim "had incurred the hatred of the defendant as the result of quarrels between them over [athletic] club matters"; and concluding if the same person had committed both murders, "*he was employing similar means [i.e., poisoning the victims] for different ends* or for some common purpose not disclosed by this record. The methods referred to are as identical as any two shootings, stabbings or assaults, but no more so." (emphasis added)).

In South Carolina, "evidence of motive is admissible as relevant and need not be necessary to the State's case." *State v. Cheeseboro*, 346 S.C. 526, 547,

552 S.E.2d 300, 311 (2001) (citing *Bell*, 302 S.C. at 29, 393 S.E.2d at 370); *Bell*, 302 S.C. at 29–30, 393 S.E.2d at 370 (declining to find error in a death penalty case in which evidence was admitted tending to show a possible sexual motive underlying the kidnapping and murder of the victim, despite the fact that the defendant's motive was already inferable from the manner in which he dressed the victim postmortem); *cf. State v. Braxton*, 343 S.C. 629, 636, 541 S.E.2d 833, 836–37 (2001) (explaining in homicide cases that evidence of previous quarrels and ill feelings or hostile acts between the parties is admissible to show that animus probable existed between the parties at the time of the homicide).

Here, I would find Stepdaughter's testimony admissible to demonstrate both Petitioner's motive and his common system of sexually abusing the daughters in his home. His alleged abuse of Stepdaughter and Daughters Two and Three are so "related to each other as to show a common motive or intent running through both." *See Molineux*, 61 N.E. at 299. Petitioner's actions clearly fall within the third type of common scheme or plan case, in which an "individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Gresham*, 269 P.3d at 214 (citation omitted). Despite the majority's assertions to the contrary, the State did not offer Stepdaughter's testimony to show Petitioner's propensity to sexually molest his daughters; rather, the State offered this evidence to "show that [Petitioner] ha[d] developed a plan and ha[d] again put that particular plan into action." *Id.* (internal quotation marks omitted); *accord Tutton*, 354 S.C. at 325–31, 580 S.E.2d at 189–93; 2 *Wigmore on Evidence* § 304 ("[T]he effort is to establish a definite prior design or system which included the doing of the act charged as part of its consummation. . . . *[T]he result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed*." (emphasis added)). The majority focuses on *Wallace* and its touting of the need for similarity only between the charged and uncharged acts. Yet the concurrence of common features between Petitioner's abuse of Stepdaughter and Daughters Two and Three—detailed by the court of appeals, as well as above—not only is what makes Stepdaughter's testimony relevant by showing the events were connected, it helps corroborate the State's theory that "the charged act[s] occurred" at all. *Sabin*, 614 N.W.2d at 899 & n.10 ("The jury is not required to draw an inference regarding the

defendant's character. Rather, the jury is asked to infer the existence of a common system and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred."); *accord Rainey*, 175 A.3d at 1188; *Gresham*, 269 P.3d at 215. Likewise, I find Petitioner's threats to all three victims particularly important to tying together the evidence into a common scheme or plan. *See Tutton*, 354 S.C. 333 n.6, 580 S.E.2d at 194 n.6 (opining that, had the defendant been related to the victims and played on their fears of breaking up the family in order to silence them, it made a "far more compelling" case for finding a common scheme or plan (citing *Sabin*, 614 N.W.2d at 901)).

VI.

As a final note, the South Carolina Commission on Indigent Defense recently acknowledged in its brief to this Court in *Cotton*, "Prior bad act testimony is needed in child sexual abuse cases because children often have difficulties in communicating such information. *This fact is also significant because most of these cases involve child molesters whose behavior is often repetitive and thus lends itself to easily establishing a pattern*." (Emphasis added.) The court of appeals made a similar observation in *Tutton*, stating:

> [C]ommon scheme or plan evidence in criminal sexual conduct cases will be admitted on a generalized basis only where there is a pattern of continuous illicit conduct. Sex crimes may be unique in this respect because they commonly involve the same victims engaged in repeated incidents occurring under very similar circumstances. The reason for the general admissibility of such evidence under these circumstances is self[-]evident—where there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion.
>
> . . . Where there is a pattern of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan.

> Presumably, this is so because the same evidence that establishes the continuous nature of the assaults will generally suffice to prove the existence of the common scheme or plan as well.

354 S.C. at 328, 580 S.E.2d at 191.

While of course evidence of general pedophilic tendencies, in and of itself, would not be admissible to show a common scheme or plan,[36] when that evidence demonstrates some sort of "logical connection" between the victims—whether due to their relationship with one another or the defendant, or via the concurrence of similar features of their allegations of abuse, or (particularly) both—I believe the admissibility threshold for such evidence has been met to show a common system. This is not to say the bar for admissibility is set lower for cases involving pedophilia; rather, exactly as the Commission on Indigent Defense has phrased it, child molesters' behavior is often repetitive and lends itself to establishing a pattern.[37]

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[36] *See, e.g.*, *Nelson*, 331 S.C. at 6–7, 501 S.E.2d at 719 (holding inadmissible evidence the defendant possessed stuffed animals, children's television shows, and pictures of children unrelated to the victim because the only possible relevance to those items—unconnected as they were to the victim—was to "reflect[] on an aspect of Petitioner's character, i.e. that he is a pedophile").

[37] This is perhaps best reflected by the fact that there are very few crimes that have a separate, designated mental health disorder classification pursuant to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V). Nonetheless, certain sex crimes, such as criminal sexual conduct with a minor (via pedophilia), have made the short list of those crimes singled out for a specific diagnosis in the psychiatric community. *Cf.* S.C. Code Ann. § 44-48-30(1) (2018) (defining a sexually violent predator as a person who "has been convicted of a sexually violent offense; and [] suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment"); *Bowden v. State*, 538 So. 2d at 1226, 1240 (Ala. 1988) (Maddox, J., concurring in part and dissenting in part) ("All indications are that persons who engage in sexual misconduct, especially child abuse, have an abnormality that motivates them to commit these acts; therefore, proof of other sexual crimes would tend to show this motivation.").

Nonetheless, it bears emphasis that finding a common scheme or plan exists is not dispositive on the question of admissibility. Rule 403 is an independent hurdle the evidence must overcome to be found properly admissible. Regardless of the logical relevance of the evidence, Rule 403 prohibits the admission of evidence when its probative value is substantially outweighed by the danger of unfair prejudice. Too often, trial courts conflate Rule 404(b) and Rule 403, without making a focused and meaningful evaluation of the potential danger of unfair prejudice. A Rule 403 analysis is an independent step in making the ultimate admissibility determination. Where a trial court determines that proffered evidence satisfies a Rule 404(b) exception, the decision on admissibility cannot be made until a Rule 403 balancing is conducted. Trial courts (and appellate courts) must be vigilant not to treat Rule 403 in a cursory manner. The importance of the trial courts' gatekeeping role under Rule 403 cannot be overstated, especially where Rule 404(b) evidence is sought to be introduced.

VII.

Because I would affirm Petitioner's convictions and sentences,[38] I respectfully dissent.

JAMES, J., concurs.

[38] I would dismiss the balance of Petitioner's certiorari petition as improvidently granted.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Larry Durant, Appellant.

Appellate Case No. 2016-001264

Appeal From Sumter County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 27964
Heard May 9, 2019 – Filed May 6, 2020

AFFIRMED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan Wilson and Assistant Attorney General William F. Schumacher, IV, both of Columbia, and Solicitor Ernest A. Finney, III, of Sumter, for Respondent.

JUSTICE HEARN: Appellant Larry Durant was convicted of second-degree criminal sexual conduct (CSC) for sexually abusing a teenage girl in his church office where he served as the pastor. Durant contends the trial court improperly permitted the State to introduce evidence of prior sexual abuse allegations as evidence of a common scheme or plan under Rule 404(b), SCRE, and that the State

committed a *Brady*[1] violation by failing to accurately disclose the criminal history of its witness. Applying the framework announced today in *State v. Perry*, Op. No. 27963 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 12), we affirm the admissibility of the girls' testimony. Additionally, while the State failed to disclose the criminal background information of its witness, we find this information was not material. Accordingly, we affirm Durant's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Durant was the founder and lead pastor at Word International Ministries, a church in Sumter. He is a double amputee below his knees and is legally blind. In 2013, four teenage girls who belonged to the church accused Durant of sexually assaulting them. Two of the girls were cousins, another was a God-sister, and the fourth was a close friend. The State indicted Durant on one count of second-degree criminal sexual conduct with a minor, stemming from an alleged sexual battery against one of the girls, and three counts of third-degree criminal sexual conduct pertaining to conduct with the other three. However, the State only proceeded to trial on one count.

During jury selection, the trial court mistakenly advised the jury pool that Durant faced all of the indicted criminal sexual conduct charges and a forgery charge. Defense counsel immediately indicated he had "something to bring up at a later time," and the court held a sidebar. Afterwards, the court explained it erroneously listed the charges Durant faced and instructed the jury not to consider them. Following the jury's dismissal, counsel stated he appreciated the court's curative instruction, but was concerned the jury panel had been tainted. Counsel explained he was "definitely not [asking for] a mistrial," but he was requesting a continuance or a new jury panel. The State responded the court had given a curative instruction almost immediately and clearly stated the charges did not exist. The circuit court acknowledged the mistake was unfortunate but believed the curative instruction "took care of it," and accordingly, denied the motion for a continuance or mistrial.

Because the State sought to call the three other girls who alleged Durant had sexually abused them in a similar fashion, the court held a *Lyle*[2] hearing. According

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

to one, Durant began abusing her when she was 13. She noted that Durant would call her to his office in the back of the church, lock the door, and pray to change her sexual orientation and to protect her against contracting any diseases. She stated that Durant began with oral sex and progressed to vaginal intercourse. Finally, she testified that Durant had pink pigmentation on his penis.

A second girl testified that Durant began to abuse her when she was 18, and that he would pray for her to make sure she did not contract any diseases and to prevent any harm to her body. She contended Durant digitally penetrated her vagina, which evolved into vaginal intercourse after he said, "God was taking him to a new level." She also testified that Durant would stand behind her during intercourse. She noted that Durant told her that she likely would not be admitted to the college of her choice if she did not have sex with him.

A third girl testified that Durant began abusing her when she was about 14 or 15 years old, and that he would also pray that she would not contract any sexual diseases. Finally, a fourth girl testified that Durant began abusing her when she was 13. She also noted that Durant would pray with her before the abuse, and that his genitalia had pink discoloration. On one occasion when she was pregnant, she stated that Durant told her that he would "bump the seed out." After comparing the similarities and dissimilarities pursuant to *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), the trial court ruled the girls could testify, as the court remarked, "[f]rankly, it's one of the more compelling 404(b) cases I've ever come across."

At trial, the girls testified, as well as another witness, Ulanda McRae, who is one of the girls' mother. McRae is also the daughter of Lizzy Johnson, a woman Durant previously dated. Durant contended that Johnson, who lived in a property purportedly owned by Durant around the time the allegations surfaced, forged a deed conveying that property to Johnson sometime earlier. When the allegations arose, a deed was recorded conveying the property back to Durant. The defense believed these fraudulent transfers served as a motive to fabricate the girls' allegations of sexual abuse. Defense counsel also stressed the lack of DNA, the fact that Durant was a double amputee and legally blind, suffered from erectile dysfunction, and had a chronic sexually transmitted disease that none of the alleged victims contracted.

Initially, the jury indicated they were at an impasse and that one juror refused to vote. The court gave an *Allen* charge and added that refusing to vote was not an option. Shortly thereafter, the jury found Durant guilty, and the court sentenced him to 20 years' imprisonment.

A few hours after sentencing, defense counsel received a call from McRae's ex-husband inquiring why he did not question McRae about her prior criminal convictions. Defense counsel did not believe McRae had a criminal background because the State previously had disclosed a report from the National Crime Information Center (NCIC) stating she did not have a criminal record. Counsel conducted a SLED CATCH search[3] using her name, date of birth, and social security number, which revealed numerous prior convictions under nine aliases for offenses such as shoplifting, fraudulent checks, and forgery spanning from 1991-2005.

Thereafter, Durant moved for a new trial, arguing the State's case was based entirely on credibility and the State's failure to disclose McRae's record prevented him from impeaching a critical witness or further developing his defense that Johnson stole the residence owned by Durant, thereby creating the need to fabricate the charges against him. The State responded it had run McRae's criminal history using the NCIC under the name "McCrae" rather than the correct spelling.[4] The State argued its failure to disclose McRae's criminal history did not amount to a *Brady* violation because it was unaware she had one and, in any event, it was immaterial to Durant's guilt. Durant disagreed, asserting the State was in possession of the criminal history for *Brady* purposes because it could have run a proper search but failed to do so.

The circuit court found the State was not in possession of the evidence and that it would not have affected the outcome of the trial. While some of McRae's convictions were likely inadmissible, the court noted it may have allowed one or more into evidence that would have been favorable to the defense, but regardless, the case boiled down to whether the jury believed the testimony of the victim and the three other witnesses regarding assaults. Thereafter, Durant appealed to the court of appeals, which transferred the appeal to this Court pursuant to Rule 204(b), SCACR.

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[3] The South Carolina Law Enforcement Division enables public CATCH searches, an acronym for "Citizens Access to Criminal Histories." SLED CATCH, https://catch.sled.sc.gov (last visited Sept. 5, 2019).

[4] The State later clarified it did not include McRae's social security number in the search because it was not in possession of that information at the time.

ISSUES

I. Did the trial court err by admitting testimony of other sexual assaults pursuant to the common scheme or plan exception under Rule 404(b), SCRE?

II. Did the circuit court err in denying Durant's motion for a new trial based on a *Brady* violation?

DISCUSSION

I. Rule 404(b), SCRE

We begin by noting this Court's opinion in *State v. Perry*, which overruled *Wallace* and clarified the proper analysis in determining whether prior acts are admissible pursuant to the common scheme or plan exception. *State v. Perry*, Op. No. 27963 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 12). The Court emphasized *Lyle's* "logical connection" test, whereby "[t]he State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *Id.* at 30 (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807). To prove a sufficient connection, the State must demonstrate that there is "something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." *Id.* at 27. This requirement filters permissible evidence of prior acts against veiled attempts to introduce propensity evidence. When the State seeks to present this evidence, its burden is a high one, as trial courts must employ "rigid scrutiny." *Id.* at 30. However, while the proper framework no longer reduces a Rule 404(b) analysis to mathematical exercise where the number of similarities and dissimilarities are counted, the common scheme or plan exception remains viable.

Accordingly, the question then becomes whether the admission of the other three girls' testimony can nonetheless be upheld under *Perry*. While the trial was conducted under *Wallace*—the parties argued for and against admissibility using that test and the trial court based its decision on it—we now determine whether the evidence would have been admissible under the framework in *Perry*. In answering this question, case law guides our analysis.

In *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984), this Court determined the trial court properly admitted evidence that a defendant had

committed previous acts of sexual abuse because the State showed a particularly unique method of committing the attacks. The Court explained:

> All three daughters testified concerning the pattern of this and prior attacks. According to them, these attacks commenced about their twelfth birthday, at which time Appellant began entering their bedroom late at night, waking them, and taking one of them to his bedroom. There he would explain the Biblical verse that children are to "Honor thy Father," and would also indicate he was teaching them how to be with their husbands. The method of attack was common to all three daughters.

283 S.C. at 391, 323 S.E.2d at 773. The Court concluded, "It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence." *Id.* at 392, 323 S.E.2d at 774.

Because *McClellan* remains good law, we believe the prior acts here are admissible. Durant had a particularly unique method of committing his attacks common to all the girls. While there were differences in their ages and the type of sex act, the method of his attack was more than just similar; instead, evidence of the prior acts "reasonably tend[ed] to prove a material fact in issue." *Lyle*, 125 S.C. at 417, 118 S.E. at 807. Durant exercised his position of trust, authority, and spiritual leadership to hold private prayer meetings with teen girls who had grown up in his church. He told them he was praying for their health and good fortune, and represented that part of this process was touching them sexually and having intercourse. Durant then warned the girls of misfortune if they refused or told anyone. Moreover, he used scripture as a means of grooming the children into performing sex acts, a striking parallel to the defendant in *McClellan*. Indeed, the trial court noted it was one of the more compelling cases of common scheme or plan evidence it had ever seen, and we agree. These facts demonstrate the requisite logical connection between the prior acts of sexual abuse and the one forming the basis of the crime charged.

II. *Brady*

Durant contends the trial court erred in declining to grant a new trial based on the State's failure to disclose the criminal history of one of its witnesses. The State asserts its failure to provide McRae's criminal history did not amount to a *Brady* violation because it was unaware that she had one, and regardless, the evidence was

immaterial because it did not impact the credibility of any of the four witnesses who testified about the sexual abuse Durant committed against them. The State asserts McRae was an immaterial witness whose testimony was cumulative to other evidence presented at trial, and further, Durant never alleged she was involved in the property dispute that caused the victims to report the abuse.

A *Brady* violation occurs when the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Such a violation is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id*. at 525, 514 S.E.2d at 325. In other words, the government's evidentiary suppression is so serious as to undermine confidence in the trial's outcome. *Id*. *Brady* applies to both impeachment and exculpatory evidence. *Id*. at 524, 514 S.E.2d at 324. Importantly, whether the prosecution acted in good or bad faith is irrelevant in determining whether a *Brady* violation occurred. *Brady*, 373 U.S. at 87.

In this case, the evidence was clearly favorable to Durant, as defense counsel could have used it to impeach McRae. Accordingly, we turn to the second element —that the State possessed the information.

Because of the absence of South Carolina case law on the possession element in this context, we are guided by decisions from two federal circuits. The Third and Fifth Circuits have held the failure to provide information that could be obtained through a NCIC search is a *Brady* violation. *United States v. Perdomo*, 929 F.2d 967, 969-73 (3d Cir. 1991); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (finding a *Brady* violation where the government did not conduct a NCIC search of one of its witnesses despite assigning no bad motive on the government). Because we find these decisions persuasive, we adopt the reasoning employed therein.

In *Perdomo*, the defendant sought a government confidential informant's criminal record. *Id*. at 968-69. The prosecution conducted an NCIC search, which revealed no prior charges or convictions, but elected not to request local records from the Virgin Islands. *Id*. at 971. When it came to light that the informant had a significant criminal record the day after trial, the defendant moved for a new trial, which the district court denied. *Id*. 968-69. The Third Circuit held the district court erred as a matter of law in concluding the prosecution had no duty to conduct the search and provide the information, and remanded for a new trial. *Id*. at 970-74. In

relevant part, the court recognized that "the prosecution, not the defense, is equipped with the resources to accurately and comprehensively verify a witness['s] criminal background." *Id*. at 973. Despite defense counsel's ability to obtain similar information through a public search, the court refused to shift the burden to the defense to obtain *Brady* information.

In *Auten*, the Fifth Circuit held the government violated *Brady* when it decided not to conduct a criminal background search on one of its own witnesses because of time constraints. 632 F.2d at 481. The government asserted that it could not suppress or withhold evidence that it did not know existed. The court rejected this approach, noting, "[W]e do not assign bad motive or bad faith to the prosecution. We do underscore, however, the heavy burden of the prosecutor to be even-handed and fair in all criminal proceedings." *Id.* at 481.

We have cited *Auten* with approval in the past by acknowledging that "information known to investigative or prosecutorial agencies may, under certain circumstances, be imputable to the State." *State v. Von Dohlen*, 322 S.C. 234, 240, 471 S.E.2d 689, 693 (1996), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). While we have also not required the State to conduct a fishing expedition to discover exculpatory evidence, *see id.* at 241, 471 S.E.2d at 693, requiring the State to provide accurate criminal background information on its own witnesses hardly can be described as such. We recognize that some jurisdictions construe *Brady's* possession requirement narrowly. *See, e.g. United States v. Young*, 20 F.3d 758, 764-65 (7th Cir. 1994) (declining to impute prosecutorial knowledge of a witness' criminal history when the government diligently searched for that information). Some courts have excused the government's failure to disclose if the information is readily available to the public. *See State v. Nikolaenko*, 687 N.E.2d 581, 583 (Ind. Ct. App. 1997) ("[T]he State will not be found to have suppressed material information where that information was available to the defendant through the exercise of reasonable diligence."). However, we believe the better approach is to hold the State responsible for fulfilling its prosecutorial duties, including the duty to disclose under *Brady*.

This rule is sound, as faulting defense counsel for failing to discover material information about the State's own witnesses "breathes uncertainty into an area that should be certain and sure" because "[s]ubjective speculation as to defense counsel's knowledge or access may be inaccurate." *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 293 (3d Cir. 2016). Shifting the burden to defense counsel lessens the State's duty to disclose exculpatory evidence and has the risk of adding

an additional element to *Brady*. *Id.* ("Adding due diligence, whether framed as an affirmative requirement of defense counsel or as an exception from the prosecutor's duty, to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny."). We agree with the Third Circuit that "[a]ny other rule presents too slippery a slope." *Id.* at 292.

With this in mind, we move to the facts of this case. Defense counsel first realized that McRae had a criminal history after her ex-husband notified him immediately after trial. The ex-husband expressed bewilderment that defense counsel did not ask about McRae's prior convictions during trial. Thereafter, counsel obtained a SLED background search using McRae's name, date of birth, and social security number, which revealed numerous prior convictions under several different aliases. While we concede this demonstrates the information was publicly available after paying for a search, this does not end the inquiry. The government not only has greater resources, *Perdomo*, 929 F.2d at 973, but also exclusive access to the NCIC database.[5] Moreover, when the State discloses *Brady* material, the defense has the right to rely on its veracity. We find it entirely unreasonable to shift the burden to the defense to independently investigate the criminal background of each of the State's own witnesses when the State has affirmatively claimed that its witness does not have a criminal background. It is not incumbent on the defense to review the State's NCIC search for misspelled names. While we do not suggest any improper motive by the State, we will not undermine a defendant's due process rights by overlooking and immunizing the State's mistake. Accordingly, we hold as a matter of law that the State was in possession of McRae's criminal background information and failed to accurately disclose it. Nevertheless, to warrant a new trial, Durant must demonstrate the trial court abused its discretion in finding the information was immaterial, a burden he fails to satisfy. *State v. Bryant*, 372 S.C. 305, 316, 642 S.E.2d 582, 588 (2007) (reviewing a *Brady* violation for an abuse of discretion).

Initially, we note McRae's criminal history included several convictions, many of them over ten years old, so it is unlikely that most of them would have been admissible. While we agree with the trial court that McRae's conviction for obtaining a signature under false pretenses likely would have been admissible, the defense never suggested that McRae—as opposed to Johnson—forged the deed. Perhaps more importantly, the State presented cumulative evidence in the form of the girls'

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[5] FBI Criminal Justice Information Services Division, *National Crime Information Center*, https://www.fbi.gov/services/cjis/ncic (last visited Sept. 5, 2019).

testimony. As a result, the jury had ample evidence supporting its verdict. Accordingly, Durant cannot demonstrate the evidence was material because there was not a reasonable probability the result of the proceedings would have been different. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

CONCLUSION

For the foregoing reasons, we affirm.[6]

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[6] Durant also contended the trial court erred in denying his motion for a mistrial due to an allegedly tainted jury pool, and his motion for a new trial based on an unconstitutionally coercive *Allen* charge and cumulative error. We affirm these grounds pursuant to Rule 220(b) and the following authorities:

1) As to the alleged tainted jury pool, see *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) (noting a decision to grant or deny a mistrial is reviewed for an abuse of discretion and "[t]he power of the court to declare a mistrial ought to be used with the greatest caution"); *Id.* at 257, 489 S.E.2d at 479 ("An instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced."). Further, the evidence was cumulative, so any purported error was harmless. *State v. Wyatt*, 317 S.C. 370, 373, 453 S.E.2d 890, 891 (1995).

2) As to the *Allen* charge, see *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) ("Whether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances."); *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) ("A trial judge has a duty to urge, but not coerce, a jury to reach a verdict."). It is apparent the trial court did not err in directing the juror to fulfill the oath he took at the outset of trial, as the court did not urge the jurors to vote in any specific way. Moreover, the court's suggestion that the jurors would have to deliberate for as long as they wanted to be there that evening does not render the charge coercive. *See Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 454-57, 772 S.E.2d 544, 554-57 (Ct. App. 2015), *cert. denied* (holding an *Allen* charge was not improperly coercive where the court instructed the jury on the Friday

AFFIRMED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice James Edward Lockemy, concur.

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before Labor Day that they could deliberate into the night, as well as Saturday, or the following Tuesday).

3) As to the cumulative error doctrine, because the trial court did not commit any reversible errors, we reject Durant's contention that a new trial is warranted. *See State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) ("Respondent must demonstrate more than error in order to qualify for reversal [pursuant to the cumulative error doctrine]. Instead, the errors must adversely affect his right to a fair trial."). Moreover, Durant never argued this ground to the trial court; accordingly, it is not preserved. *See State v. Freiburger,* 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an argument advanced on appeal that was not raised and ruled on below was not preserved for review).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Damyon Cotton, Petitioner.

Appellate Case No. 2017-002402

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 27965
Heard June 13, 2019 – Filed May 6, 2020

AFFIRMED

Lesley A. Firestone, of Moore & Van Allen, PLLC, of Charleston; and Chief Appellate Defender Robert Michael Dudek and Appellate Defender Lara Mary Caudy, both of Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney General William M. Blitch Jr., both of Columbia; and Solicitor William B. Rogers Jr., of Bennettsville, for Respondent.

PER CURIAM: In a trio of cases, this Court has been asked to reconsider the reach of the common scheme or plan exception to Rule 404(b), SCRE, particularly as it pertains to criminal sexual conduct cases and our decision in *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). Today, in the first of the three opinions, we overrule *Wallace* and clarify the requirements to satisfy the common scheme or plan exception. *See State v. Perry*, Op. No. 27963 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 12). In the second of the three opinions, using the new *Perry* framework, we affirm a pastor's criminal sexual conduct conviction in a case where the abuse of the victims was done in a method so unusual as to be unique. *See State v. Durant*, Op. No. 27964 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 64); *see also State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984). Here, in the third of the three opinions, we reconfirm the continued viability of the common scheme or plan exception.

In this case, Petitioner met a young woman (the victim) online, picked her up in his car to take her on a date, and quickly became aggressive, forcing her to perform oral sex on him in the car. He then drove to a secluded location in the woods, threatened to shoot the victim, raped her outside the car, and drove her home. Petitioner was indicted for kidnapping and criminal sexual conduct in the first degree.

Over Petitioner's objections at trial, and pursuant to the common scheme or plan exception to Rule 404(b), SCRE, the trial court admitted testimony from a second victim (another young woman) who had suffered an essentially identical assault at Petitioner's hands. According to the second victim, Petitioner met her online, picked her up in his car to take her on a date, and quickly became aggressive, hitting her and forcing her to perform oral sex on him in the car. He then drove to a secluded location in the woods, raped the second victim outside the car, and drove her home. Notably, during the assaults, both victims attempted to dissuade Petitioner from raping them by offering excuses as to why intercourse with them would be undesirable: one claimed she was menstruating, and the other claimed she was already pregnant and had a sexually transmitted disease. In both cases, Petitioner stated he did not care and would "fix that," putting on a condom and continuing with the rape.

Petitioner was subsequently convicted of kidnapping and criminal sexual conduct in the first degree, and the court of appeals affirmed those convictions. *State v. Cotton*, Op. No. 2017-UP-356 (S.C. Ct. App. filed Sept. 6, 2017).

Using the new framework set forth in *Perry*, we find the admission of the second victim's testimony satisfied the requirements of Rules 404(b) and 403, SCRE. Because there was no abuse of discretion in the admission of the second victim's testimony, we affirm Petitioner's convictions and sentence.

AFFIRMED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Richard M. Quinn, Jr., Respondent.

Appellate Case No. 2018-000494

Appeal From Richland County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27966
Heard October 15, 2019 – Filed May 6, 2020

DISMISSED IN PART, AFFIRMED IN PART

First Circuit Solicitor David Michael Pascoe, Jr., and Assistant Solicitor William Baker Allen, Jr., both of Orangeburg, for Appellant.

Matthew Terry Richardson, of Wyche Law Firm, of Columbia, for Respondent.

JUSTICE HEARN: This appeal arises from special prosecutor David Pascoe's State House public corruption probe involving former South Carolina House Representative Rick Quinn, Jr., who pleaded guilty to a charge of statutory misconduct in office in February 2018. Following the plea hearing, the State grew concerned about the plea's validity because Quinn only admitted to a limited set of

facts supporting the indictment. Believing the plea lacked a sufficient basis, the State moved to vacate the guilty plea, reconsider the sentence, and for the court's recusal. The State appeals the order denying those motions. We dismiss the State's appeal of the guilty plea and affirm the trial court's order as to the sentence and recusal issues.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Rick Quinn, Jr. is a former member of the South Carolina House of Representatives, representing constituents in Richland and Lexington counties from 1989-2004 and 2010-2017 and serving as House Majority Leader from 1999-2004. He owned and operated a mail business called Mail Marketing Strategies (MMS) in Columbia, while his father owned and operated a political consulting firm, Richard Quinn & Associates (RQ&A).

In 2014, Attorney General Alan Wilson designated First Circuit Solicitor David Pascoe as special prosecutor to conduct a State grand jury investigation into alleged public corruption committed by current and former members of the South Carolina General Assembly.[1] The present case arose from a prior State grand jury investigation of former House Speaker Bobby Harrell, which resulted in six counts of misusing campaign funds, to which he pleaded guilty. During the course of the investigation into Speaker Harrell, SLED uncovered potentially criminal conduct by Representative Jimmy Merrill and Representative Rick Quinn, and a second grand jury investigation was initiated to investigate the conduct of these two individuals. The investigation focused on Quinn's practice of using his office as House Majority Leader and leader of the House Republican Caucus to direct mailing and political services to his family's businesses.

As a result of Pascoe's investigation, Quinn was charged in May 2017 with statutory misconduct in office in violation of section 8-1-80 of the South Carolina Code of Laws, and common law misconduct in office. In October 2017, he was also charged with criminal conspiracy in violation of section 16-17-410. Quinn's father's business, First Impressions, Inc. d/b/a RQ&A, was also indicted for failing to register as a lobbyist under section 2-17-20. Thereafter, several things occurred which caused the State concern. In November 2017, the court severed Respondent's case

[1] We note the public corruption probe in these matters has extended for more than five years, and we trust that it is drawing to a close.

from his father's, despite the State's motion to consolidate the two trials, which the defense opposed on several grounds.[2] In addition, the State believed a conference call occurred on December 12, 2017, between the court, the State, and counsel for Respondent and his father in which the court inquired as to whether the parties remembered granting permission to have *ex parte* communication on a prior occasion while in Beaufort. The court disputed that any *ex parte* communication took place other than when the court and the parties spoke in chambers before the guilty plea hearing.

At the plea hearing on December 13, 2017, Respondent entered a guilty plea pursuant to an agreement with the State that resolved charges against both him and his father. Specifically, the agreement provided that Respondent would plead guilty to statutory misconduct in office, while the two remaining indictments against him would be dismissed, and that First Impressions would plead guilty and pay restitution in the amount of $3,000.00. Also as part of the plea agreement, Respondent was permitted to enter a "limited allocution"[3] and the State would make

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[2] Respondent's father opposed consolidation due to: a scheduling conflict; the possibility that the two could not be called as a witness in the other's trial; the evidence regarding Respondent would have a prejudicial effect on his father's defense; his father's age and health; and the possibility of confusion of the issues. Respondent opposed consolidation so that his trial could take place before the March 15th candidate filing deadline and also noted that his father's counsel had not had sufficient time to prepare their case.

[3] We agree with the trial court's characterization of Respondent's allocution as a limited admission of facts, rather than a traditional allocution statement. An "allocution statement" is when, after pleading guilty, a defendant is offered a formal opportunity to address the court to express remorse and explain personal circumstances that might be considered in sentencing. Allocution statements assist the court in determining whether there is a sufficient factual basis to support the charge and the plea and whether the defendant's plea was "knowingly, voluntarily, and intelligently made." A defendant is not required to exercise his right to submit an allocution statement, and lawyers are permitted to submit a statement on the defendant's behalf. *What is an Allocution Statement?* AM. BAR ASS'N (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-allocution-statement-/.

a much broader factual presentation before sentencing. In his limited allocution, Respondent agreed to the following:

> Rick Quinn agrees that in 2015, while a member of the House of Representatives, he failed to report to House Ethics Committee the name of USC, which he knew was a lobbyist principal and which in the previous calendar year leased office space for less than $30,000 total from Capitol Investments II, LLC, a business with which Rick was associated as a compensated agent by receiving a benefit from Capitol Investments II by being relieved from the payments on the mortgage note on the property as a guarantor and also by helping negotiate the mortgage note.

Although the State was provided with Respondent's limited allocution in writing prior to the plea hearing, it lacked information regarding the basis of his statement—that he had received an economic benefit from USC which he failed to report as a lobbyist's principal. During the hearing, the State presented a PowerPoint detailing the Quinn family businesses and alleging that Quinn's misconduct in office consisted of several acts occurring between April 1, 2010 and April 15, 2017, for which the State charged him with one count of a "continuing offense." Specifically, the State claimed that through his family businesses, Respondent knowingly received an improper economic benefit by virtue of his positions as House Majority Leader and leader of the House Republican Caucus. In its presentation, the State explained Respondent failed to disclose over $4 million received from lobbyist's principals, such as SCANA, AT&T, Palmetto Health, and USC, and voted as sponsor on legislation concerning those companies. The State showed the court documents indicating Respondent held himself out as an RQ&A employee despite his denial that he was associated with his father's business. The State also claimed Respondent funneled money from the House Republican Caucus's operating account to his family's businesses while he was House Majority Leader.

Respondent entered a guilty plea pursuant to the plea agreement, and the court accepted the plea, finding a substantial factual basis existed and that Respondent's decision to plead guilty was reasonably and intelligently given. There was no objection to the plea by either party during the proceeding. At the end of the hearing, due to the lateness of the hour, the court decided to defer sentencing for two months.

While awaiting that hearing, both parties filed sentencing memoranda. Respondent asked the court for probation rather than a prison sentence, arguing his

conduct did not warrant imprisonment when compared to the misconduct of other public officials. In contrast, the State, after reviewing the plea hearing transcript, raised issues for the first time regarding the plea's validity and requested the plea be cured prior to sentencing or that it be vacated entirely. The State's concern stemmed from its inability to locate any payments made by the University of South Carolina to Capitol Investments II, LLC, in 2015; accordingly, it believed that Respondent's limited allocution did not satisfy the elements of statutory misconduct in office under section 8-1-80, but rather constituted only an unintentional failure to file under section 8-13-1130. Therefore, the State specifically requested the court, prior to sentencing, to clarify whether Respondent *intentionally* failed to report to ensure the elements of statutory misconduct in office were satisfied and the plea was sufficient. The State also asked the court to consider the State's factual presentation in determining Respondent's sentence and to sentence Respondent to the maximum one-year imprisonment.[4]

On February 12, 2018, the trial court held a sentencing hearing for Respondent and First Impressions, Inc. In response to the State's request, the court conducted a second colloquy with Respondent in which it confirmed he was guilty of statutory misconduct in office for intentionally failing to report income from USC, a lobbyist's principal. In announcing the sentence, the court seemed to apply the presumption of innocence with regard to any other misconduct the State presented and to which Respondent did not admit in his limited allocution. The court then sentenced Respondent to the maximum possible punishment for statutory misconduct in office—one-year imprisonment suspended to two years' probation and a $1,000.00 fine—as well as an additional 500 hours of public service. Both before and after sentencing, the State attempted to object to the plea, but the court indicated appeal was the State's only avenue of relief. At the end of the hearing, the State requested the court to recuse itself from the proceedings, which the court refused to do. Following the sentencing hearing, the court reporter published a comment on The State newspaper's website through Facebook, stating "[w]hen a solicitor passes up a

[4] The State further elaborated its concerns regarding the plea in a letter to the court dated January 25, 2018, and requested the court cure any defects in the plea at the sentencing hearing. In the letter, the State explained that additional documents Respondent provided assuaged its concerns regarding payments by USC to Capitol Investments II, LLC.

golden opportunity to go to trial, but won't take responsibility for agreeing to a plea = classic cop out. Don't blame it on the judge."[5]

Thereafter, the State filed a motion to reconsider the sentence, or in the alternative, vacate the plea, and again requested the court to consider its factual presentation in sentencing Respondent. The court denied the motion, finding a substantial basis existed to accept the plea, reaffirming its consideration of the State's facts in sentencing, and refusing to recuse itself. The State appealed the court's denial of its motion to reconsider to the court of appeals. Respondent moved to dismiss the State's appeal, which the court of appeals denied, permitting the parties to fully brief the appealability issue along with the merits. Respondent requested this Court to certify the case for immediate review pursuant to Rule 204(b), SCACR, which this Court granted.

Following oral argument in this case, this Court requested additional briefing from the State, Respondent, and the Attorney General regarding the execution of certain corporate integrity agreements stemming from the public corruption probe. While we originally scheduled oral argument on this issue, it was cancelled due to the interruption in court operations caused by Covid-19. We will now address this issue as well as the continued authority of Solicitor Pascoe during oral arguments in *State v. Harrison*, Appellate Case No. 2018-002128.

ISSUES PRESENTED

1. Can the State appeal a guilty plea, which was entered and agreed to by the parties based on a plea agreement, and that the trial court accepted without objection?

2. Did the trial court err in sentencing Respondent based solely on his limited allocution and cloaking Respondent with the presumption of innocence regarding other misconduct described in the State's factual presentation, when Respondent pleaded guilty to an indictment for a continuing offense?

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[5] Glenn Smith, *Court reporter removed from Statehouse misconduct case after criticizing prosecutor online*, POST & COURIER (Feb. 27, 2018), http://www.postandcourier.com/news/court-reporter-removed-from-statehouse-misconduct-case-after-criticizing-prosecutor/article_a63c7afe-1bda-11e8-8874-07ffa47106ae.html.

3. Did the trial judge's conduct throughout Respondent's guilty plea and sentencing, including her solicitation of *ex parte* communications, provide sufficient evidence of judicial bias to merit her recusal on appeal?

STANDARD OF REVIEW

In criminal cases, this Court reviews only errors of law. *State v. Anderson*, 415 S.C. 441, 446, 783 S.E.2d 51, 54 (2016). Thus, the trial court's factual findings are binding on the Court unless unsupported by the evidence, clearly erroneous, or controlled by an error of law. *State v. Winkler*, 388 S.C. 574, 582, 698 S.E.2d 596, 600 (2010). On appeal, the reviewing court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. *State v. Parker*, 391 S.C. 606, 611-12, 707 S.E.2d 799, 801 (2011). Absent evidence to the contrary, this Court presumes the regularity and legality of criminal proceedings. *Weathers v. State*, 319 S.C. 59, 62, 459 S.E.2d 838, 839 (1995).

LAW/ANALYSIS

I. GUILTY PLEA

We begin by addressing the threshold question of whether the State may appeal a guilty plea of its own design and agreement, which was accepted by the trial court. Respondent contends the Double Jeopardy Clauses of the United States and South Carolina Constitutions prohibit the State from attempting to invalidate the guilty plea on appeal. Because jeopardy has attached, Respondent requests the Court dismiss this appeal. In addition, Respondent argues the State is not an aggrieved party pursuant to Rule 201(b), SCACR, because it prevailed by securing a guilty verdict through plea agreement. Respondent claims that the State cannot appeal when it loses at trial and the jury acquits, and that it likewise should not be able to appeal from a guilty plea. Even if the Court disagrees, Respondent asserts the issue is not preserved for appellate review because the State did not make a contemporaneous objection to the plea at the hearing.

We believe, under the specific facts of this case, the State cannot appeal the guilty plea accepted by the trial court. The State is not an "aggrieved party" permitted to appeal under Rule 201(b), SCACR, because it successfully secured a guilty verdict against Respondent through plea agreement. *State v. Cantrell*, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967) (noting a guilty plea has the same effect

in law as a verdict of guilty and authorizes the imposition of the punishment prescribed by law); *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997) ("[A]n aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property."). Because we hold the State may not appeal under the context presented here, we need not address whether this issue is unpreserved because the State made no contemporaneous objection at the plea hearing, nor whether double jeopardy is implicated. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues when disposition of a prior issue is dispositive). For these reasons, we dismiss the State's appeal of the guilty plea.[6]

II. SENTENCE

We now turn to whether the trial court abused its discretion in sentencing Respondent. The State contends the trial court erred in failing to consider its presentation of facts in sentencing Respondent and instead determining that Respondent was entitled to a presumption of innocence as to those facts. First, the State argues the terms of the plea agreement allowing Respondent to admit guilt to a limited set of *facts* did not establish a limited *indictment*. By considering only Respondent's limited allocution in sentencing, the court sentenced Respondent to the offense as admitted rather than as indicted. Second, the State claims the court committed an error of law by cloaking Respondent with a presumption of innocence as to those facts Respondent did not admit. In its ruling from the bench, the court seemed to indicate it was constitutionally prohibited from considering the State's allegations because they had not been proven beyond a reasonable doubt. The State believes this constituted reversible legal error. We disagree.

Rick Quinn, Jr. was duly convicted of statutory misconduct in office under section 8-1-80, pleading guilty to the indicted offense. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("[A] plea of guilty is more than an admission of conduct; it is a conviction."). *See also Woodard v. State*, 171 So.2d. 462, 469 (Ala. Ct. App. 1965) ("A plea of guilty is more than a voluntary confession made in open court. It also

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[6] The State also argues the trial court erred in finding a substantial factual basis existed to accept Respondent's guilty plea to statutory misconduct in office when Respondent's limited allocution described only a single ethics violation. Because we find, under these facts, the State cannot appeal the guilty plea, we need not address this issue. *Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

serves as a stipulation that no proof by the prosecution need by [sic] advanced, except as expressly provided by statute . . . . It supplies both evidence and verdict, ending controversy.").

Generally, a sentencing judge has great discretion in the kind of evidence she may use to assist her in determining the punishment to be imposed. *Cantrell*, 250 S.C. at 379, 158 S.E.2d at 191. Indeed, she is obligated to consider information material to punishment and may "exercise a wide discretion in the sources and types of evidence used to assist [her] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id*. *State v. Sullivan*, 267 S.C. 610, 618, 230 S.E.2d 621, 625 (1976). *See also Wasman v. United States*, 468 U.S. 559 (1984 ("The sentencing court . . . must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant . . . ."). Moreover, while the rules of evidence do not apply in sentencing proceedings, the Constitution "require[s] the evidence to be relevant, reliable and trustworthy." *State v. Gulledge*, 326 S.C. 220, 229, 487 S.E.2d. 590, 594 (1997) ("A court may consider any relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided the information has sufficient indicia of reliability to support its probable accuracy.").

Here, the court considered the information provided by the State and Respondent during the December 13, 2017 hearing and sentenced Respondent according to the evidence the court found reliable and relevant.[7] The court acted within its discretion in its consideration of the entire record and its determination of Respondent's sentence. Moreover, the court sentenced Respondent to the maximum punishment allowed by law—one-year imprisonment and a $1,000.00 fine. It was also within the court's power to suspend Respondent's sentence to two years' probation. S.C. CODE ANN. § 24-21-410 (2007); *State v. Thomas*, 372 S.C. 466, 468,

[7] Her written order stated: "The Court considered the information provided by the State and the Defendants during the December 13, 2017 hearing and sentenced the Defendants according to the evidence the Court found reliable and relevant." Thus, regardless of whether the court appeared to apply a presumption of innocence in its ruling from the bench, it did not do so in the order—which is controlling. *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 540 (2011) ("It is well settled that when there is a discrepancy between an oral ruling of the court and its written order, the written order controls.").

642 S.E.2d 724, 745 (2007) (holding that unless the criminal statute specifically provides that no part of the sentence can be suspended, the power of the sentencing judge to suspend sentence is unlimited). Therefore, the trial court did not abuse its discretion in sentencing Respondent to the maximum permitted by law.[8]

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[8] We disagree with the concurrence that the trial court was required, as a matter of law, to refuse to sentence Respondent based on all of the evidence presented at the hearing. The State's arguments claiming the trial court committed an error of law stem from the court's oral ruling from the bench, rather than its written order, and seem to have misguided the concurrence's analysis. Instead, viewing the trial court's written order as controlling—as we must do—it is apparent the court, in its discretion, considered the information the State presented at the hearing. *See Hobbs*, 394 S.C. at 149, 714 S.E.2d at 540. As to this finding, the concurrence appears to agree the trial court properly exercised its discretion. It is also clear Respondent pleaded guilty to and was duly convicted of one count of a "continuing offense" of statutory misconduct in office, and the trial court properly considered the evidence which served as the basis for the guilty plea in sentencing Respondent to the maximum allowable punishment. Indeed, at the hearing, the court conducted the plea colloquy as follows:

> THE COURT: And Mr. Quinn, do you wish to plead guilty or not guilty to this charge of misdemeanor failure to register – excuse me, I apologize – misdemeanor statutory misconduct in office, sir?
>
> MR. RICK QUINN, Jr.: Guilty.
>
> THE COURT: All right. Sir, are you pleading guilty because you are in fact guilty?
>
> MR. RICK QUINN, Jr.: Yes, ma'am.

At oral argument, upon questioning by several of the justices, counsel confirmed Respondent did in fact plead guilty to statutory misconduct in office. Accordingly, the trial court correctly convicted and sentenced Respondent based on his confession of guilt. *See* S.C. Code Ann. § 17-23-80 (2014) ("No person indicted for an offense shall be convicted thereof unless *by confession of guilt in open court*, by admitting the truth of the charge against him by his plea or demurrer, by the verdict of a jury accepted and recorded by the court or as provided in Section 17-23-40." (emphasis

III. RECUSAL

Lastly, we consider whether the trial judge's conduct throughout Respondent's guilty plea and sentencing provides sufficient evidence of judicial bias or prejudice to merit her recusal. The State believes the totality of the trial judge's conduct demonstrates bias such that she should be recused and removed from further involvement in Respondent's case and any other case stemming from the State grand jury investigation. Specifically, the State contends the court improperly severed the trials of Respondent and his father, conducted *ex parte* communications without the State's consent, failed to inform it of the substance of those communications, and imposed a lighter sentence than requested after improperly applying a presumption of innocence to the State's evidence. Further, the State believes that comments made on Facebook by the court reporter provide evidence of the judge's partiality, speculating the comments must have resulted from conversations in chambers. We disagree.

When the moving party has failed to demonstrate some evidence of judicial bias or prejudice, an appellate court will not reverse a judge's decision not to recuse. *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014). Here, the State's claim for the court's recusal is specious and wholly without merit, as it has failed to show any evidence of judicial bias or prejudice. *Roche v. Young Bros. of Florence*, 332 S.C. 75, 84-85, 504 S.E.2d 311, 316 (1998) (noting a judge should recuse himself when his impartiality "might reasonably be questioned"). There is absolutely no evidence in the record to support the State's claim that *ex parte* communications took place between the court and Respondent's counsel without its consent. Further, the State's claims involving the court reporter and the court's alleged use of the presumption of innocence fail to prove the judge was partial, biased, or prejudiced against the State in any way. Therefore, the court's decision not to recuse is affirmed.

CONCLUSION

For the foregoing reasons, we conclude that under these facts, the State cannot appeal the guilty plea, the trial court did not abuse its discretion in sentencing Rick Quinn, Jr., and there is no evidence of judicial bias or prejudice requiring the court

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added)). Moreover, we decline to address the issue of the State's corporate integrity agreements, as it has no bearing on the resolution of this case, and we express no opinion as to the propriety of these agreements at this time.

to recuse itself. Therefore, we **DISMISS** the State's appeal of the guilty plea and **AFFIRM** the trial court's order as to the sentence and recusal issues.

BEATTY, C.J., KITTREDGE and JAMES, JJ., concur. FEW, J. concurring in a separate opinion.

JUSTICE FEW: I agree with the majority to dismiss the State's appeal of Quinn's guilty plea, affirm his sentence, and affirm the trial court's refusal to recuse herself. I write separately primarily to address the actions of the State's representative.

I first address a relatively minor point of disagreement with the majority. The State accused Rick Quinn of extremely serious political corruption. Among many charges, the State accused Quinn of selling his vote on important issues before the House of Representatives in exchange for over $4 million in bribes to Quinn's affiliated companies. In his guilty plea, however, Quinn admitted only that he did not report on his ethics disclosure form that the University of South Carolina (USC) paid one of Quinn's companies $30,000 in rent. The State is not complaining that the trial court failed to consider all of the information the State presented at the sentencing hearing, including the allegations of accepting bribes. If that were the State's complaint, I would eagerly join the majority in finding the trial court properly exercised its discretion. The State contends, rather, the trial court committed an error of law.[9] The State contends, "Even though [Quinn's criminal] conduct spanned a number of years and violated numerous statutory provisions, the State made a prosecutive[10] decision that this conduct was committed for the singular

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[9] The State argues "the [trial] court held it could not consider those acts because [Quinn] was innocent until proven guilty, which is clearly an error of law." Appellant Br. 25. "This Court should hold"—the State continues—"[Quinn's] guilty plea encompassed all conduct that forms the basis of the indictment, and that the plea court committed an error of law." *Id.*; *see also id.* at 29 ("The [trial] court committed an error of law . . . ."); *id.* at 32 ("By determining that [Quinn] was 'innocent until and unless he is proven guilty' . . . , the [trial] court committed a reversible error of law.").

[10] In this context, the State used "prosecutive" to mean "strategic." In other contexts, "prosecutive" means whether or not to prosecute. *See, e.g.*, *Pascoe v. Wilson*, 416 S.C. 628, 632, 788 S.E.2d 686, 688 (2016) ("McIntosh wrote a letter to the Chief of the South Carolina Law Enforcement Division . . . asking he forward the SLED report resulting from the investigation into the redacted legislators to Pascoe 'for a prosecutive decision.'").

purpose of using [his] position as a member of the House of Representatives for the financial benefit of himself and his family." Appellant Br. 26. That is a valid point in relation to framing an indictment. However, the State's contention—that because both accepting bribes and failing to report may be labelled as misconduct in office they must be treated as one crime for purposes of sentencing—is a ruse. The trial court was legally correct not to fall for it. I would hold—as a matter of law—the trial court properly refused to sentence Quinn for committing the crime of accepting bribes because the only crime Quinn admitted committing was not reporting rental income.

Turning to my primary reason for writing separately, I believe the root of the State's arguments on appeal—the trial court erred in accepting the plea, erred in refusing to sentence Quinn as the State wished, and erred in refusing to recuse herself when the State did not get its way—is that the trial court treated the State unfairly. While I completely agree with the majority's rejection of these arguments, the "unfairness" aspect—in my judgment—warrants further discussion.

The State complains of unfair treatment in numerous respects. As an example, it complains the trial court treated the State unfairly regarding a joint trial, stating, "Proceeding without any motion or without any severance hearing, the court scheduled only [Quinn's] trial for February 26, 2018, granting a non-existent motion to sever without affording the State an opportunity to argue against the severance." Appellant Br. 10. In a footnote to this text, the State complains,

> While the court indicated she would allow [the State] to make a record opposing the severance, the court never actually stopped to permit counsel a chance to respond. Indeed, the State contends that the grounds offered by the court for severing the cases was improper but did not have the chance to make the argument.

Id. at 10 n.2.

The State also complains it was treated unfairly because it did not have an adequate opportunity to challenge the limited set of facts Quinn was willing to admit. The State noted in its brief that the trial court "incredibly never allowed

the State an opportunity to place its objections or concerns on the record" and "the State was not permitted to object to the validity of the guilty plea during the sentencing hearing." Appellant Br. 7-8. Thus, the State complains, the trial court "denied the State its due process right to be heard."[11] Finally, the prosecutor complained to the trial court it was unfairly prohibited from taking Quinn to trial because of a lack of funding, stating, "I have not gotten a dime of money from the State for this case."

To understand the significance of the "unfairness" argument to this appeal, some history of this investigation is useful. As this Court explained in *Pascoe v. Wilson*, 416 S.C. 628, 788 S.E.2d 686 (2016), the Attorney General in 2014 appointed David M. Pascoe Jr.—the elected Solicitor of the First Judicial Circuit, comprising Calhoun, Dorchester, and Orangeburg Counties—as a "designated prosecutor" to investigate Bobby Harrell, former Speaker of the House of Representatives. 416 S.C. at 631, 788 S.E.2d at 688. As Pascoe described the investigation in his brief in this case, "In the course of investigating Mr. Harrell's conduct, SLED uncovered potentially criminal conduct by . . . other state legislators," including Quinn. Appellant Br. 9. These "other state legislators" are the "redacted legislators" this Court referred to in *Pascoe v. Wilson*. *See* 416 S.C. at 631, 788 S.E.2d at 688 ("A SLED report generated during the Harrell investigation contained the redacted names of certain legislators (the 'redacted legislators'), who were allegedly implicated in unethical and illegal conduct.").

Pascoe explained how the investigation developed,

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[11] I agree the State should be given an opportunity to be heard. However, the State is not protected by the Due Process Clause. "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S. Ct. 803, 816, 15 L. Ed. 2d 769, 784 (1966). If the Fifth Amendment does not protect the State from the federal government, the Fourteenth Amendment certainly does not protect one arm of the State (prosecutors) from another arm (courts).

> This investigation initially focused on [Quinn's] practice of using his office as House Majority Leader and leader of the House Republican Caucus to channel caucus mailing and political services to a network of Quinn family businesses, thus using his official position to gain an economic advantage. However, as the investigation examined the Quinn businesses more closely, a complex scheme of cash-for-influence political "consulting" was revealed . . . . Investigation of the Quinns' businesses involved analysis of voluminous bank records, emails, and witness testimony, culminating in the indictment of [Quinn] and his father.

Appellant Br. 9.

Based on this investigation, Pascoe brought the criminal charges in this case. He made a strategic decision to frame the indictment against Quinn as one count instead of listing the separate criminal acts as individual counts. At the December 13, 2017 sentencing hearing, Pascoe described the theory behind his strategy. He began by generally describing how bad things are "up there in Columbia." He then told the judge, "There's been no one more corrupt than Rick Quinn in Columbia, South Carolina, and no entity more corrupt than Richard Quinn & Associates."

The trial court pushed back. Puzzled that Pascoe would dismiss the most serious charges against someone so "corrupt" as Quinn, and permit him to plead guilty to a relatively minor charge, the judge pressed Pascoe for an explanation.

> I need you to explain to me . . . why are you, if the evidence is as damning, in your words, and extensive against Rick Quinn and Richard Quinn, . . . why are you allowing them to plead guilty to -- ; Richard Quinn pleading guilty, and not even he's pleading guilty, the corporation is pleading guilty. There's no personal liability as to Richard Quinn. As to Rick Quinn, one count, the misdemeanor misconduct in office. I mean, why have you dismissed all the charges after four years?

Pascoe's explanation included the excuse that as Solicitor of the First Circuit he did not have funds in his budget to pay for what he said could be a ten-week trial. Pascoe stated to the trial court,

> I never let money -- I try never to let money get in the way of an investigation. Our office has already spent hundreds of thousands of dollars. . . . I don't know if you know this. I have not gotten a dime of money from the State for this case.
>
> And my office has a budget of three million dollars. Can you imagine what $500,000 would do? So that's a sixth of my budget. Those were factors as to why we considered this plea.

This Court pushed back on that. At oral argument before us on October 15, 2019, a Justice pressed Pascoe for an explanation.

> You want to go back and try this case, right, even though you said on the record to Judge Mullen in response to her question to you . . . at the end of your PowerPoint, "Why, . . . if you have all this damning evidence, why aren't you going forward . . . ?"
>
> What you relied on . . . was how expensive this trial would be. How it would exceed your budget, but you're not worried about that now?

Pascoe responded,

> I have money now. As you, your Honor knows, from the -- it's sitting in escrow. So cost is not a problem. My office isn't going to go bankrupt if I have more cases to try.

No, actually, we did not know. At the time of oral argument, there was nothing in this record that indicated Pascoe now somehow has money to prosecute this and other cases. Subsequently, however, we learned Pascoe obtained $352,000 by entering into what he calls a "corporate integrity agreement" with at least five different corporate and governmental entities.

Having learned that—on March 12, 2020—this Court unanimously ordered that the case be reargued. In the order, we stated,

> In light of new information discovered at oral argument regarding the State's corporate integrity agreements providing funding for prosecutions stemming from the public corruption probe, we now order the appeal to be reargued on April 8 . . . to address the propriety of these agreements.
>
> Accordingly, leave shall be granted to the parties to supplement the record. . . . [T]he State shall file with the Clerk of this Court a memorandum addressing the following:
>
> 1. What is the nature of the "corporate integrity agreements" referenced at oral argument?
>
> 2. What is the authority under South Carolina law of any representative of the State, including Solicitor Pascoe, to enter into a "corporate integrity agreement" in either a criminal or civil proceeding in exchange for a promise not to sue, and to demand or accept the payment of funds from a corporate or governmental entity or from an individual during the course of a criminal investigation?
>
> 3. Does Solicitor Pascoe have the authority to "direct" the expenditure of funds received pursuant to a "corporate integrity agreement" to the First Circuit Solicitor's Office, or must the funds be deposited in the State's general fund? The State shall specifically address S.C. Code Ann. § 1-7-150(B) (2005); S.C. Code Ann. § 1-7-360 (2005); and S.C. Code Ann. § 39-3-180 (1976). Immediately upon the filing of its memorandum, the State shall serve a copy upon opposing counsel and upon the Attorney General (or his designee). Within ten days of the filing of the State's memorandum, Respondent and the Attorney General (or his designee) may file a responsive memorandum.

Pascoe and the Attorney General filed their memoranda as directed, but the Court has now determined that because of the current pandemic we will go ahead and resolve this appeal without rearguing the case. Despite our receipt of the memoranda, however, we still do not know what is a "corporate integrity agreement," nor what authority exists under South Carolina law to enter into such an agreement. The term has never been used by any appellate court in this State, and the term is not used in any South Carolina statute.[12] The only legal authority Pascoe cites in his memorandum is his "unfettered discretion" as a prosecutor. Appellant's Mem. in Resp. to Ct.'s Inquiry 3. The Attorney General contends there is no authority, citing several reasons. The Attorney General wrote,

> The "corporate integrity agreements" are unprecedented and without parallel in South Carolina. Not only were these agreements, executed by the special prosecutor, far in excess of the jurisdiction given him by this Court in *Pascoe v. Wilson*, but the agreements were not authorized by South Carolina law – either

[12] The term has been used under federal law to describe a completely different thing—a settlement agreement arising out of *civil* litigation through which health care providers *pay no money*, but agree to take certain steps within their organization to ensure future compliance with the law, in exchange for which the Office of Inspector General for the United States Department of Health and Human Services agrees not to seek their exclusion from participation in Medicare, Medicaid, or other Federal health care programs. *See* OFFICE OF INSPECTOR GEN., CORPORATE INTEGRITY AGREEMENTS, https://oig.hhs.gov/compliance/corporate-integrity-agreements/index.asp; *see also Pub. Citizen v. United States Dep't of Health & Human Servs.*, 66 F. Supp. 3d 196, 200 n.1 (D.D.C. 2014) ("[Corporate integrity agreements] are part of settlement agreements . . . with companies seeking to resolve civil and administrative health care fraud cases and avoid costly exclusion from participation in Federal health care programs. In return for these benefits, . . . the companies must agree to enhanced compliance measures, subject to auditing by an outside independent party and monitoring by the [Office of Inspector General]." (citations and internal quotations omitted)).

> statute, rule of court, or judicial decision. Their existence is based only upon "prosecutorial discretion" – which is not enough. The rule of law must prevail.

Att'y General's Mem. in Resp. to Ct.'s Order 2-3.

Pascoe uses the term "corporate integrity agreement" to mean the payment of money to Pascoe's First Circuit Solicitor's Office by entities he has under investigation in exchange for a promise by Pascoe not to prosecute the entity, so Pascoe then has funds to prosecute entities or persons who either were not invited to pay or refused to pay. Pascoe entered these "agreements" with SCANA, Palmetto Health, AT&T, USC, and the South Carolina Association for Justice, each of which was under investigation by the State Grand Jury. According to the grand jury's report, at the time Pascoe entered into each agreement, the grand jury already determined probable cause existed that each entity willfully violated subsection 2-17-25(A) of the Lobbyists and Lobbying Act (2005). *See* Report of the 28th State Grand Jury (June 21, 2018) at 19, 22, 24, 27, 29.

In my dissenting opinion in *Pascoe v. Wilson*, I argued article V, section 24 of our state constitution provided the Attorney General with the authority to remove an appointed prosecutor from a case, "even one to whom he had previously given complete discretion for the prosecution," 416 S.C. at 648, 788 S.E.2d at 697 (Few, J., dissenting), unless the presiding judge finds "an actual conflict of interest on the part of the Attorney General," 416 S.C. at 647, 788 S.E.2d at 697 (Few, J., dissenting). It is clear that the result of the majority's decision in *Pascoe v. Wilson* led us directly to the problems we now face in this case.[13] Pascoe's prosecution of Quinn, Richard Quinn Sr., the other "redacted legislators," and we do not know whom else, is no longer subject to any supervision. The Attorney General has been removed from his constitutional role, and the First Circuit voters—who elected Pascoe as

[13] I also wrote, "In all likelihood, the result" of disqualifying the Attorney General "would be the same" even under my proposal. 416 S.C. at 648, 788 S.E.2d at 697 (Few, J., dissenting). However, following the procedure I argued was required by law would have left the presiding judge of the State Grand Jury with at least some responsibility or supervision.

Solicitor—are not likely to be concerned with actions he takes outside the circuit with money he did not get from taxes they paid.

As an unsupervised prosecutor, free from any oversight or control by the Attorney General or the First Circuit voters, Pascoe has created a "prosecutive" mess. On one hand, by his own description, Pascoe allowed the most corrupt politician in Columbia (Quinn) and the most corrupt entity in politics (Richard Quinn & Associates) to go essentially scot free. On the other hand, Pascoe accepted hundreds of thousands of dollars from major South Carolina corporations on the promise not to prosecute them for conduct the State Grand Jury found probable cause to believe is criminal. These and other concerns demonstrate the risks and dangers article V, section 24 was designed to protect against.

While the propriety of allowing Quinn to plead guilty and avoid the most significant charges against him is beyond the review of this Court, the "corporate integrity agreements" are not. As the majority in this case indicates, this Court now plans to address the propriety, legality, and validity of the agreements in our upcoming oral arguments in *State v. Harrison*.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Herbie Val Singleton, Jr., Appellant.

Appellate Case No. 2016-002079

Appeal From Charleston County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5722
Heard November 7, 2018 – Filed May 6, 2020

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Vann Henry Gunter, Jr., both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston; all for Respondent.

MCDONALD, J: Herbie V. Singleton, Jr., appeals his conviction for obstruction of justice, arguing the circuit court erred in denying his motion for a directed verdict after the State failed to present any direct evidence or substantial circumstantial evidence that Singleton prevented, hindered, impeded, or obstructed the administration of justice. We affirm.

Facts and Procedural History

In October 2014, Dontaviha Patterson received a laptop and other electronics from his friend Bubba. Patterson and Lamont Gregg—who knew each other through Singleton—decided to pawn the laptop and split the money; Patterson's mother drove them to the pawn shop.

On November 19, 2014, Gregg was arrested for pawning a stolen laptop and charged with obtaining goods by false pretenses. When questioned by Sergeant Dan English of the Charleston Police Department (CPD), Gregg stated Patterson gave him the laptop to pawn because Patterson was too young to pawn it himself. Patterson saw Gregg several times after Gregg was released from jail. During one of these encounters, Gregg, who was with Singleton at the time, threatened to "lay [Patterson] out" the next time he saw him.

Later that November, Patterson and Singleton began exchanging heated messages on Facebook, some of which were threatening. On the morning of December 18, 2014, Patterson told Singleton where he was because he heard Singleton was looking for him. When Singleton responded, he told Patterson that Gregg had been messaging Patterson from Singleton's account.

On the afternoon of December 18th, Singleton was driving Kevin Corley and Elijah Green to play basketball when Gregg flagged down the car. Gregg asked Singleton to drive him to Acacia Street to see Patterson. As Singleton approached Patterson's house, Gregg fired a revolver out of the car window towards Patterson, who was sitting outside with his girlfriend. One of the bullets struck and injured Patterson.

Patterson's mother recognized the car as Singleton's and informed the police; Singleton was arrested shortly thereafter. Although Singleton initially denied any involvement in the incident, he eventually admitted to driving the car from which the shots were fired. During his police interview with CPD Detectives Thomas Bailey and Paul Krasowski, Singleton identified three passengers—Corley in the front passenger seat and Green in the rear passenger seat. As to the third person in the car, Singleton falsely identified Antonio Barrett, who had no involvement with

the incident, as the shooter.[1] When asked about Gregg,[2] Singleton referred to Gregg as his "homeboy" but neither identified him as a passenger in his car nor as the shooter.

On December 19, 2014, CPD arrested Barrett and charged him with attempted murder. In describing the decision to arrest Barrett—which was based solely on Singleton's interview—Detective Krasowki explained that although Singleton lied in the early stages of his interview,

> [H]is statement evolved to the point where he was relaying information that we were able to corroborate through other witnesses. When he identified Elijah Green and Kevin Corley, that was consistent with the other information that we got at the time. So, it was suggesting that he was—there was credibility to the statement. He also stated that he did drive by and he drove by with the driver's side facing the, the incident location, the house of [Patterson]. So, everything was jiving. So, when he went on to describe this—this fourth person, which turned out to be the shooter, there was no reason not to believe him at that point when he did provide all that other corroborating information.

On December 23, 2014, Barrett's mother's fiancé called CPD to report that a neighbor could provide an alibi for Barrett. Detective Bailey asked for the individual to come to the station to provide a formal statement, but no one did so. Barrett remained in jail until he bonded out on February 13, 2015.

Green, Corley, and Barrett were indicted for attempted murder; however, the State dropped Barrett's charges on August 24, 2015, after Corley and Green had both made proffer agreements. Police arrested Gregg in connection with the shooting,

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[1] At trial, Barrett testified he was babysitting on the day of the shooting. Although he knew of Singleton, Barrett stated he had no problems with him and did not know why Singleton gave the police his name. Although Barrett knew Corley and Green from middle school, he was not close with them.

[2] Patterson told police he thought Gregg could be the shooter.

and Gregg admitted he fired the gun. In January 2016, a Charleston County grand jury indicted Singleton for attempted murder and obstruction of justice. Singleton moved to quash the obstruction of justice indictment, arguing his lies to the police constituted misprision of a felony rather than obstruction of justice. Singleton contended the State chose to indict him for obstruction of justice because he could not be charged as both a primary actor in the attempted murder and with misprision of a felony. Singleton further argued a common law obstruction of justice charge was not applicable against a private citizen but rather required a violation by "someone [who] takes an oath to administer justice." The circuit court denied Singleton's motion to quash the indictment, and the case proceeded to trial.

At the close of the State's case, Singleton moved for a directed verdict on obstruction of justice, arguing his false accusation of Barrett did not obstruct or impede the administration of justice because "[t]he correct shooter pled guilty" eventually, so he did not "prevent it." In making his directed verdict argument, Singleton incorporated his pretrial arguments and renewed his motion to quash the obstruction of justice indictment. The circuit court denied Singleton's motions.

The jury found Singleton not guilty of attempted murder but guilty of obstruction of justice. The circuit court sentenced Singleton under the Youthful Offender Act to a term of imprisonment not to exceed six years.

Standard of Review

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." *Id*. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *State v. Harris*, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015) (quoting *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011)).

Law and Analysis

Singleton argues the circuit court erred in denying his motion for a directed verdict because the State failed to present direct evidence or substantial circumstantial

evidence to establish Singleton's actions hindered, prevented, impeded, or otherwise obstructed the administration of justice. Further, Singleton asserts that absent the obstruction of a judicial proceeding,[3] "a private citizen's actions that hinder law enforcement's initial investigation into a crime, without more, cannot constitute obstruction of justice."

Relying on *State v. Cogdell*, 273 S.C. 563, 257 S.E.2d 748 (1979), Singleton argued to the circuit court:

> [T]here must be an intentional failure to perform a duty which would constitute obstruction of justice. And I would argue that that duty is when someone takes an oath to administer justice, whether it is a lawyer, whether it's a judge, whether it's a magistrate, whether—it is someone who is a part of the administration of justice, a public official, appointed or elected. It, it—I would argue the constitution does not provide that there is a duty on the ordinary citizen to come forward when they are charged with a crime and give a truthful statement.

Codgell holds that "[a]t common law it is an offense to do any act which prevents, obstructs, impedes, or hinders the administration of justice." *Id.* at 567, 257 S.E.2d at 750 (citing 67 C.J.S. Obstructing Justice §§ 2-3). Although *Codgell* addressed whether common law obstruction of justice had been statutorily preempted in the

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[3] To the extent Singleton now argues that for a private individual to be properly charged with obstruction of justice, the obstructive act must occur in the context of a judicial proceeding, we find this argument unpreserved for appellate review. *See State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 2014) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review."); *id.* ("A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below."). However, we note Singleton's false accusation resulted in Barrett's being jailed for two months on an attempted murder indictment prior to his posting of bond. Thus, as a direct result of Singleton's deliberate misidentification, Barrett was subjected to the imposition of judicial proceedings.

case of a mayor's failure to report certain traffic violations (the court found no preemption), it did not address the question of against whom an obstruction of justice charge might properly lie.

Most South Carolina obstruction of justice cases have involved public officials; however, this does not preclude a private citizen from being charged with the offense. For example, in *State v. Needs*, our supreme court recognized the existence of probable cause for an obstruction of justice charge brought against a private citizen after she lied to police and at a pretrial hearing by providing a false alibi for her boyfriend. 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998).

In that case, Needs appealed his convictions for burglary and murder, arguing the trial court erred in denying his motions to dismiss his charges due to the State's alleged intimidation of his alibi witness, Nancy Smith. *Id.* at 145, 508 S.E.2d at 862. Smith initially provided an alibi for Needs, telling police Needs was with her on the night of his stepfather's murder, other than from 11:30 p.m. to 12:30 a.m. Four months later, Smith admitted to police that she lied in her initial statement and claimed Needs had confessed his involvement in the murder. Smith changed her statement again some nine months later, in May 1994,

> giving police a similar statement which implicated [Needs], but insisting [Needs] had couched his entire story in "hypothetical" terms. The State called the case for trial in June 1994. At a pretrial hearing, Ms. Smith recanted her statements about [Needs's] confession to her and testified [he] was with her when his stepfather was murdered. She also produced a diary describing that evening with [Needs].
>
> Ms. Smith testified against [Needs] as described above at the September 1995 trial. On cross examination, she admitted her testimony directly conflicted with the testimony she gave at the June 1994 pretrial hearing. The diary she testified about at the pretrial hearing was a fake, created at [Need's] suggestion . . . . In short, Ms. Smith was first a potential witness for [Needs], then a potential witness for the State, then a potential witness for [Needs], and—finally—an actual witness for the State at trial.

Id. at 141–42, 508 S.E.2d at 860–61 (footnote omitted).

After Smith testified at the June 1994 pretrial hearing, a grand jury indicted her on charges of obstruction of justice, accessory after the fact, and misprision of a felony. *Id.* at 144, 508 S.E.2d at 862. Smith eventually pled guilty to misprision of a felony, and the State dismissed Smith's remaining indictments. *Id.* Our supreme court rejected Needs's arguments that due to the State's efforts to intimidate Smith, the trial court erred in either failing to dismiss Needs's indictments or refusing to suppress Smith's testimony against him. *Id.* at 145, 508 S.E.2d at 862. In affirming Needs's convictions, the supreme court explained, "the evidence showed that Ms. Smith had concealed information and lied to investigators to protect appellant, facts she ultimately admitted at trial. The prosecutor had probable cause to believe Ms. Smith had committed one or more of the indicted crimes, and he did not commit misconduct by pursuing the charges." *Id.* at 146, 508 S.E.2d at 863. *See also State v. Samuel*, 422 S.C. 596, 608 & n.8, 813 S.E.2d 487, 494 & n.8 (2018) (Kittredge, J., dissenting) (emphasizing the importance of trial court discretion in the analysis of a criminal defendant's right to proceed pro se and noting that although the charge was nolle prossed after his murder conviction, Samuel "was also charged with obstruction of justice for repeatedly giving false statements to police in which he identified an uninvolved person as the shooter; for snatching one of his written statements from an investigator's hand and ripping it up; and for lying to police when he claimed to have thrown a gun involved in the murder into a nearby pond—a lie that caused three separate law enforcement agencies, including a dive team from Lexington County, to expend time and resources over several days searching the pond for a non-existent gun" (footnotes omitted)).

Similarly, Singleton knowingly and intentionally lied to law enforcement to prevent Gregg's arrest. *See Cogdell*, 273 S.C. at 567, 257 S.E.2d at 750 ("At common law it is an offense to do *any act* which prevents, obstructs, impedes, or hinders the administration of justice." (emphasis added)). However, Singleton did more than simply lie to law enforcement—he intentionally misidentified someone he knew to be innocent and caused that person to be jailed and indicted. Although Singleton knew first-hand that Gregg shot Victim—because he was driving the car from which Gregg fired the shots—he falsely named Barrett as the shooter. During his police interview, Singleton provided Barrett's name and physical

description; he later signed a picture of Barrett, on which he wrote "shot fired from my car."

Based solely on Singleton's interview, the police arrested Barrett on December 19, 2014; Barrett stayed in jail for two months and was indicted for attempted murder. After being subjected to eight months of legal proceedings for a crime he did not commit, Barrett's charges were dropped. Although the police eventually arrested Gregg, Singleton's actions in lying to the police about Gregg and falsely accusing Barrett impeded and delayed the administration of justice. *See State v. Love*, 275 S.C. 55, 62, 271 S.E.2d 110, 113 (1980) ("Success in the effort to obstruct justice is not necessary to constitute the offense; it is sufficient if some act is done in furtherance of the endeavor."); *Hinder*, *Black's Law Dictionary* (10 ed. 2014) (defining "hinder" as "to slow or make difficult . . . to impede, delay, or prevent").

Viewing this evidence in the light most favorable to the State, we find evidence existed to reasonably prove Singleton's lies obstructed the administration of justice by temporarily preventing Gregg's arrest, hindering the police's investigation of Patterson's attempted murder, and causing Barrett to be indicted and jailed for an attempted murder with which he had no involvement. *See Harris*, 413 S.C. at 457, 776 S.E.2d at 366 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury."). Therefore, the circuit court did not err in refusing to direct a verdict in Singleton's favor on the obstruction of justice charge.[4]

Conclusion

Based on the foregoing, Singleton's conviction is

AFFIRMED.

KONDUROS and HILL, JJ., concur.

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[4] We recognize Singleton's concern that a broad definition of obstruction of justice could lead to potential abuse. However, in light of Singleton's conduct in this case, which led to the indictment and two-month detention of an innocent person, this is not such an instance.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shon Turner, as Personal Representative of the Estate of Charles Mikell, deceased, Appellant,

v.

Medical University of South Carolina, Respondent.

Appellate Case No. 2016-001986

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

Opinion No. 5723
Heard February 13, 2019 – Filed May 6, 2020

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Robert B. Ransom, of Leventis & Ransom, of Columbia; and Alex Nicholas Apostolou, of Alex N. Apostolou, LLC, of North Charleston, both for Appellant.

M. Dawes Cooke, Jr. and John William Fletcher, of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Respondent.

WILLIAMS, J.: In this medical malpractice action, Shon Turner, as Personal Representative of the Estate of Charles Mikell, deceased, appeals the circuit court's (1) grant of a partial directed verdict in favor of the Medical University of South Carolina (MUSC) on Turner's physician negligence claim; (2) finding Turner's negligent supervision claim sounded in ordinary negligence and that ordinary

negligence was not pled; (3) refusal to instruct the jury that Turner's physician negligence claim had been removed from consideration; (3) admitting Dr. Michael Zile's expert opinion and refusal to strike his testimony; (4) admitting medical records; and (5) admitting a blank copy of an MUSC Mayday record and testimony about Mayday records. We affirm in part and reverse and remand in part.

FACTS/PROCEDURAL HISTORY

In 2003, Charles Mikell, who had chronic heart failure, became a patient at MUSC. On October 1, 2010, at the age of forty-nine, Mikell underwent a colonoscopy at MUSC. Dr. Eric Nelson, an attending anesthesiologist, and Donna Embrey (Nurse Embrey), an attending certified nurse anesthetist (CRNA), administered anesthesia to Mikell during his colonoscopy. On the day of Mikell's procedure, Dr. Nelson was supervising Nurse Embrey and one other CRNA.

At the time of the colonoscopy, Mikell was overweight and suffered from several preexisting conditions, including sleep apnea, chronic heart failure, an elevated heart rate, chronic kidney disease, hypertension, diabetes, a genetic blood disorder, gallbladder disease, and high cholesterol. Before the colonoscopy, Dr. Nelson and Nurse Embrey developed a medical plan for administering anesthesia to Mikell based on his known health problems.

During the colonoscopy, Mikell was monitored by sensors that were connected to monitors that displayed his vital signs, such as his blood oxygen saturation levels (saturation levels), heart rate, and blood pressure. The monitors were connected to an electronic medical record software created by Picis (Picis). The Picis anesthesia record (the Picis Record) showed real time variables plotted on a data graph that could be printed in various time increments. The Picis Record also contained a narrative with information that was entered by individual anesthesia providers. Picis had an audit trail function that showed a username, date, and time stamp each time the record was accessed to create, modify, or delete an entry.

Nurse Embrey testified that at the start of Mikell's colonoscopy, the monitors were displaying Mikell's vital signs but Picis did not capture and record data for several minutes. Nurse Embrey stated she angled the computer and keyboard so she could monitor Mikell while she sent two messages and paged an information technology specialist (IT specialist) in an attempt to fix Picis. After she paged the IT specialist, but before Picis was fixed, Nurse Embrey administered an anesthetic to Mikell. Dr. Nelson testified Mikell's medical chart indicated the anesthetic was administered around 7:41 A.M., and Nurse Embrey testified Dr. Nelson was not in

the room when the anesthetic was administered. Picis did not begin to record Mikell's vital signs until 7:48 A.M., but Dr. Nelson and Dr. Scott Reeves, the Chairman of the Department of Anesthesia at MUSC, testified even if Picis was not working properly, medical providers could create a paper chart.

The following table shows Mikell's saturation levels as captured in the Picis Record from 7:48 A.M. to 8:00 A.M.:

Time	7:48	7:49	7:50	7:51	7:52	7:53	7:54	7:55	7:56	7:57	7:58	7:59	8:00
Saturation Levels	96.7	75	69.2	90.1	80.7	88	73.3	62.1	75	41.2	47.5	--	67.8

Nurse Embrey testified there were problems with Mikell's saturation levels during the colonoscopy, so she reduced the anesthetic at 7:53 A.M., turned Mikell's body to help manage his airway, and told a nurse to call Dr. Nelson, who arrived almost immediately. Mikell had low saturation levels, his heart rate slowed, his heart's electrical system stopped contracting normally, and he went into cardiac arrest. Mikell was intubated and defibrillated, and he regained a pulse. Mikell was put into a medically induced coma; experienced hypothermia and kidney failure; and received renal dialysis, a tracheotomy, and mechanical ventilation. He was hospitalized for fifty days, and he underwent physical therapy, rehabilitation, and home health care. Following his hospitalization, Mikell discontinued certain medications he took before the colonoscopy, including medications for an arrhythmia and anticlotting. On January 2, 2011, Mikell died.

Turner, as personal representative of Mikell's estate, filed this action against MUSC for medical malpractice, survivorship, and wrongful death and named MUSC and "its actual and apparent agents, servants[,] and employees" as parties to the action.

The Picis Record showed an entry from Dr. Nelson stating he was present when the anesthetic was administered at 7:48 A.M. An entry from Nurse Embrey indicated Dr. Nelson left the room at 7:51 A.M., but the Picis Record showed Nurse Embrey initially entered his departure time as 7:50 A.M. Dr. Nelson testified he went across the hall, where he could have been reached by pager or by someone yelling through the door. Dr. Nelson stated he would not have left the room if Mikell's saturation levels were not in the nineties because he would not leave the room if he thought a patient was "teetering on the edge." Dr. Nelson indicated you would intervene in a situation when the saturation levels "dipped to [eighty], and then he dipped to [seventy-three]." When asked generally about life threatening

saturation levels, Nurse Embrey testified that if the saturation level was less than ninety, there would be concerns and the method of care would be changed. Nurse Embrey stated that at 7:49 A.M., Dr. Nelson entered information at the Picis workstation. When asked if entering information at that time would be appropriate while a patient's saturation levels were seventy-five, Nurse Embrey indicated it was not appropriate, and if she or Dr. Nelson would have noticed the saturation level was that low, they would have acted differently.

The Picis Record printed on the day of the procedure showed Dr. Nelson made an entry at 8:00 A.M. that stated when he returned to Mikell's room, Mikell had low saturation levels and he had an abnormal heart rhythm and no pulse, so a Mayday[1] team was called. At trial, Dr. Nelson testified that when he came back into the room, Nurse Embrey was not using a respirator bag to deliver air to Mikell, but he indicated she began to do so when he turned Mikell and began chest compressions. The Picis Record printed the next day had the same entry, but Nurse Embrey's initials were linked to the narrative, and the narrative indicated Dr. Nelson came into the room at 7:56 A.M. At trial, Nurse Embrey testified she changed the time of Dr. Nelson's entry to make sure the times were accurate because charting is not always done contemporaneously with patient care in critical situations.

At trial, Dr. William Andrew Kofke was qualified as an expert in the areas of anesthesia and critical care. Dr. Kofke testified an anesthesiologist can properly supervise up to four CRNAs at one time and that an attending physician should be within a two-minute range from an operating room. He also testified that when Mikell's saturation levels dropped to the eighties, maneuvers should have been performed to lift the chin, open the mouth, and support the tongue to prevent a further drop in his saturation levels. He stated minutes and seconds are important in responding to a patient under cardiac arrest. Dr. Kofke indicated that when the saturation levels of a patient who is under anesthesia drop, an anesthesiologist can decide to give a higher oxygen concentration, employ a maneuver to lift the chin and jaw to open the airway, and then if that does not work, put in an oral airway, utilize a laryngeal mask, or insert a breathing tube. He opined Dr. Nelson breached the standard of care because Mikell was a tenuous patient and Dr. Nelson did not give him the necessary attention when he made only a brief stop in Mikell's room and left the room when Mikell had low saturation levels. Dr. Kofke additionally opined Nurse Embrey breached the standard of care because she did not adequately

[1] The MUSC policy manual provides that a Mayday is a respiratory or cardiac emergency or any other situation perceived by a care giver to be a life threatening situation.

focus on Mikell because she was distracted at that time by her efforts to fix Picis. Dr. Kofke explained that if Nurse Embrey or Dr. Nelson had met the standard of care, Mikell would not have suffered cardiac arrest. He opined that if they were both in the room, they would have been able to make sure Mikell's airway was clear. He testified he believed to a reasonable degree of medical certainty that Mikell's cardiac arrest was the cause of his death.

MUSC's policy required a Mayday to be documented using a Mayday record. The Mayday record from Mikell's procedure (Mikell's Mayday Record) was lost or destroyed, and at trial, MUSC introduced a blank copy of a Mayday record (the Blank Mayday Record) for the purpose of showing the type of record MUSC routinely uses for Mayday events. The circuit court admitted the Blank Mayday Record over Turner's objection.

Sheila Scarbrough, a critical interventions manager at MUSC at the time of Mikell's colonoscopy, testified the Blank Mayday Record was representative of the version of the Mayday records used at the time of Mikell's colonoscopy. She testified Mayday records generally do not include information about what occurred prior to the Mayday event because the records only contain information about the resuscitation of a patient. Dr. Mark Payne, the gastroenterologist who performed Mikell's colonoscopy, testified Mayday records contained information from the time the Mayday team arrived, including medications and what took place during the Mayday. Dr. George Guldan, who responded to Mikell's Mayday, also testified that to his knowledge, there is no documentation from before a Mayday team is called included in a Mayday record because the Mayday record is a narrative of the actual resuscitation event.

Dr. Zile, Mikell's cardiologist at MUSC, testified Mikell's chances of survival and hospitalization were the same after his cardiac arrest in 2010 as they were in 2003. Specifically, he testified Mikell's chance of dying within five years was fifty percent or greater and the chance of him being hospitalized for recurrent heart failure within any six-month period was fifty percent. Later, when Dr. Zile repeated this opinion, Turner objected and moved to strike the testimony. The circuit court found it would not allow Dr. Zile to offer expert opinion testimony about Mikell's chances of survival, and it limited Dr. Zile's testimony to his experience as Mikell's treating physician. Turner renewed his motion to strike Dr. Zile's opinion testimony, and that motion was denied. Turner also objected to Dr. Zile's testimony about Mikell being taken off of certain medications following his cardiac arrest. The circuit court found MUSC could ask general questions about whether it would be appropriate for a person with cardiac arrest to be taken off of

the medications, sustained subsequent objections about why the medications were not restarted, and then overruled Turner's objection as to why one of the medications was not restarted. Turner also objected to the admission of medical records from Dr. Zile's cardiology records pertaining to Mikell. The circuit court overruled this objection.

At the close of Turner's case and again at the close of evidence, MUSC made motions for a directed verdict on the survival and wrongful death claims, arguing Turner failed to prove a breach of the standard of care and causation. The circuit court denied both motions. At the close of evidence, MUSC made a motion for a partial directed verdict as to any negligence on the part of a licensed physician, Dr. Nelson. The circuit court granted MUSC's motion for a partial directed verdict noting, "I just have a real difficulty in figuring out what Dr. Nelson did wrong." The circuit court indicated Nurse Embrey "did what she should have done and there's no difference than what the doctor would have done, assuming he would have been in the room."

While the jury was deliberating, Turner expressed concern that a partial directed verdict was granted as to Dr. Nelson's physician negligence, but the jury was not informed they should not consider Dr. Nelson's conduct. Turner asked the circuit court to wait until the jury made a determination and, if necessary, to send the jury back to indicate on their verdict form whether they found any malpractice by Dr. Nelson or by a physician. MUSC argued the jury should be instructed they could only consider Nurse Embrey's negligence and not other MUSC personnel because the court directed a verdict for MUSC's liability as to Dr. Nelson's actions. Turner indicated he did not want the circuit court to do so, and the court did not deliver such an instruction.

As to the professional negligence cause of action, the jury did not "unanimously find by the preponderance of the evidence that [MUSC] was negligent in [its] care of Mr. Mikell[.]" Thus, the jury did not reach the survival or wrongful death causes of action. This appeal followed.

LAW/ANALYSIS

I. Directed Verdict

Turner argues the circuit court erred in granting a partial directed verdict in favor of MUSC on Turner's physician negligence claim. We agree.[2]

When considering a motion for a directed verdict, the circuit court must "view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and [must] deny the motion when either the evidence yields more than one inference or its inference is in doubt." *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc*., 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008). "When reviewing the [circuit] court's decision on a motion for directed verdict, this court must employ the same standard as the [circuit] court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party."[3] *McKaughan v. Upstate Lung & Critical Care Specialists, P.C.*, 421 S.C. 185, 189, 805 S.E.2d 212, 214 (Ct. App. 2017) (quoting *Burnett v. Family Kingdom, Inc*. 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010)). This court will reverse the circuit court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Estate of Carr*, 379 S.C. at 39, 664 S.E.2d at 86. "Essentially, this [c]ourt must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006). "On review, an appellate court will affirm the granting of a directed verdict in favor of the defendant when there is no evidence on any one element of

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[2] Turner also argues the circuit court erred in granting MUSC's motion for a partial directed verdict when it previously denied two of MUSC's motions for a directed verdict on all of Turner's claims. We find this argument is without merit. MUSC's previous motions requested a directed verdict as to both the survival and wrongful death causes of action against MUSC as a whole based on failure of proof on the breach of standard of care and causation. On the other hand, the motion for a partial directed verdict dealt with the more narrow issue of physician negligence.

[3] MUSC made a motion for partial summary judgment, but the circuit court construed the motion as a motion for a partial directed verdict. Turner did not appeal which term was used and the standard of review for a motion for a directed verdict mirrors the standard of review for a motion for summary judgment. *See Baughman v. Am. Tel. & Tel. Co*., 306 S.C. 101, 114–15, 410 S.E.2d 537, 545 (1991).

the alleged cause of action." *Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 462, 702 S.E.2d 372, 374 (Ct. App. 2010). "When considering directed verdict motions, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Estate of Carr*, 379 S.C. at 39, 664 S.E.2d at 86.

Subsection 15-79-110(6) of the South Carolina Code (Supp. 2019) defines medical malpractice as "doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances." Our supreme court has found a plaintiff is required to prove the following facts by the preponderance of the evidence to establish a cause of action for medical malpractice:

> (1) The presence of a doctor-patient relationship between the parties;
>
> (2) Recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances;
>
> (3) The medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures;
>
> (4) Such negligence being a proximate cause of the plaintiff's injury; and
>
> (5) An injury to the plaintiff.

Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014).

MUSC does not dispute the existence of a doctor-patient relationship between Dr. Nelson and Mikell, and at trial, Dr. Nelson testified he was the attending anesthesiologist during Mikell's colonoscopy. There was also evidence presented that Mikell was injured. During the colonoscopy, Mikell went into cardiac arrest and he was intubated and defibrillated before regaining a pulse. Doctors put Mikell into a medically induced coma, and he experienced induced hypothermia,

kidney failure, renal dialysis, a tracheotomy, and mechanical ventilation. Mikell was hospitalized for fifty days, and he underwent physical therapy, rehabilitation, and home health care before his death. Thus, we focus on the elements of breach of the standard of care and proximate cause.

A. Standard of Care and Breach of the Standard of Care

Expert testimony is required to establish the duty owed to the patient and the breach of that duty in medical malpractice claims unless the subject matter of the claim falls within a layman's common knowledge or experience. *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 504 (2014). Our supreme court has found that expert testimony is not required in a medical malpractice case to show that the defendant breached the standard of care when the "common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts." *Green v. Lilliewood*, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (quoting *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965) (emphasis omitted)). Furthermore, our supreme court has found expert testimony is not required to establish negligence in a medical malpractice case "when the act complained of was done in the face of a proscription known to the actor." *Cox v. Lund*, 286 S.C. 410, 417, 334 S.E.2d 116, 120 (1985).

In *Cox*, a doctor punctured a patient's colon during a colonoscopy. *Id*. at 413, 334 S.E.2d at 118. The doctor testified the colon was prepared properly and visibility was adequate, and he acknowledged an instrument in a colonoscopy should not be advanced when the doctor could not see. *Id*. at 417, 334 S.E.2d at 120. Another doctor noted the colon was "totally unprepared," and a radiologist stated an x-ray showed the presence of matter in the colon. *Id*. Our supreme court held that if the jury found the colon was not properly prepared, so that the doctor was unable to adequately see, but the doctor advanced the colonoscope anyway, a finding of negligence would fall within the "common knowledge" exception because "[e]xpert testimony is not required to establish negligence when the act complained of was done in the face of a proscription known to the actor." *Id*.

Likewise, in this case, Dr. Nelson acknowledged the standard of care—an anesthesiologist should not leave the room when a patient's saturation levels were not consistently in the nineties—when he stated, "I wouldn't have left the room if I thought [Mikell] was teetering on the edge. I would have had to see consistently his saturations were in the [nineties] before I would have stepped out of the room." He also noted "later on when [Mikell's saturation levels] dipped to [eighty], and

then he dipped to [seventy-three], those [were] a little troubling. Then you want to intervene again."

The Picis Record—containing the only evidence in the record of Mikell's saturation levels—solely showed a saturation level in the nineties at 7:48 A.M. and 7:51 A.M.[4] MUSC argues the saturation levels in the Picis Record—which are only recorded once per minute—do not necessarily indicate Dr. Nelson did not consistently see saturation levels in the nineties before he left the room because Dr. Nelson was able to continuously see Mikell's saturation levels on other monitors.[5] At 7:48 A.M.—the same time the Picis started recording Mikell's saturation levels—a note in the Picis Record indicated Dr. Nelson was present, a nasal airway was inserted, and Mikell's saturation levels were up to ninety-four. There is a question of fact regarding whether Dr. Nelson left the room at 7:50 A.M.—when the Picis Record showed Mikell's saturation level was 69.2—or at 7:51 A.M.—when the Picis Record showed Mikell's saturation level was 90.1. There is also a question of fact regarding how long Dr. Nelson stayed out of the room despite Mikell's tenuous condition—one version of the Picis Record indicates Dr. Nelson returned to the room at 7:56 A.M. while another version indicates he returned at 8:00 A.M. Furthermore, Dr. Nelson agreed that when Picis began recording the saturation levels, Mikell's saturation levels were already "headed down the Matterhorn into Death Valley."

Dr. Kofke also testified as to the applicable standard of care. *See Dawkins*, 408 S.C. at 176, 758 S.E.2d at 504 (providing expert testimony is required to establish duty and breach of duty in medical malpractice cases); *Brouwer*, 409 S.C. at 521, 763 S.E.2d at 203 (finding that to establish an action for medical malpractice, a plaintiff must establish the "[r]ecognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances"). Dr. Kofke testified an anesthesiologist may properly supervise up to four CRNAs at one time and should be within a two-minute range from an operating room. However, Dr. Kofke noted the standard of care when a patient's airway is obstructed and the patient's saturation levels drop below the nineties is to perform various maneuvers to lift the chin, open the mouth, and support the tongue in order to support the airway and

[4] Although there was testimony that a patient's vital signs would continue to be displayed on other monitors and could be charted on paper when Picis was not recording, there is no evidence that such a paper chart was created in this case.
[5] Dr. Nelson testified he was able to see Mikell's saturation levels every time Mikell's heart beat—approximately eighty times per minute.

increase the saturation levels. He stated that if such maneuvers were not successful, the standard of care would be to insert an oral or nasal airway or, ultimately, a breathing tube. Dr. Kofke indicated these actions should be taken before saturation levels begin to fall to dangerous levels.

Dr. Kofke's testimony also provided evidence of Dr. Nelson's breach of the standard of care. *See Dawkins*, 408 S.C. at 176, 758 S.E.2d at 504 (finding expert testimony is required to establish duty and breach of duty in medical malpractice cases); *Brouwer*, 409 S.C. at 521, 763 S.E.2d at 203 (providing that to establish an action for medical malpractice, a plaintiff must establish the medical professional's breach of the standard of care). Dr. Kofke opined that Dr. Nelson breached the standard of care because Dr. Nelson failed to adequately attend to Mikell—a known tenuous patient—because he (1) only made a brief stop in Mikell's room and (2) left the room even though Mikell's saturation levels were consistently low.

Based on the foregoing, we find the evidence yields more than one inference, and under the facts as liberally construed in Turner's favor, it would be reasonably conceivable for a jury to find Dr. Nelson breached the standard of care. *See Estate of Carr*, 379 S.C. at 38, 664 S.E.2d at 86 (requiring the circuit court to liberally construe the facts in favor of the party opposing a motion for directed verdict and to deny the motion if there is more than one inference or an inference is in doubt).

B. Proximate Cause

"[N]egligence may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." *James v. Lister*, 331 S.C. 277, 286, 500 S.E.2d 198, 203 (Ct. App. 1998) (quoting *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996)). "When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *McKaughan*, 421 S.C. at 190, 805 S.E.2d at 214 (quoting *Jamison v. Hilton*, 413 S.C. 133, 141, 775 S.E.2d 58, 62 (Ct. App. 2015)). "When expert testimony is the only evidence of proximate cause relied upon, the testimony must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Id.* (quoting *Hilton*, 413 S.C. at 141, 775 S.E.2d at 62). "Only on the rarest occasion should the [circuit] court determine the issue of proximate cause as a matter of law." *Id.* (quoting *Burnett*, 387 S.C. at 191, 691 S.E.2d at 175).

Dr. Kofke testified to a reasonable degree of medical certainty that if either Nurse Embrey or Dr. Nelson had met the standard of care, Mikell would not have suffered cardiac arrest and subsequent hospitalization. He stated that when Mikell's saturation levels began to drop into the eighties, if Nurse Embrey and Dr. Nelson would have (1) been in the room attending to Mikell and (2) begun supporting Mikell's airway, Mikell likely would not have gone into cardiac arrest or ended up in critical care. Dr. Kofke indicated Mikell was a large man and it would have been difficult for Nurse Embrey to support his airway by herself. Although a breathing tube was ultimately inserted, Dr. Kofke opined that minutes or seconds are important in responding to a patient that stops breathing or whose heart stops functioning properly. Thus, we find it would be reasonably conceivable for a jury to find Dr. Nelson proximately caused Mikell's injuries. *See Estate of Carr*, 379 S.C. at 38, 664 S.E.2d at 86 (requiring the circuit court to liberally construe the facts in favor of the party opposing a motion for directed verdict and to deny the motion if there is more than one inference or an inference is in doubt).

After careful review of the record, we find there is sufficient evidence for a reasonable jury to conclude the elements of medical malpractice were met. Thus, we find the partial directed verdict in favor of MUSC should not have been granted, and we reverse and remand this issue to the circuit court for further proceedings.[6]

II. Jury Instruction

Turner argues the circuit court erred in failing to instruct the jury that his physician negligence claim was removed from its consideration as a result of the partial directed verdict. We find this issue is not preserved for appellate review.

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[6] Turner also argues the circuit court erred in finding his claim that Dr. Nelson did not adequately supervise Nurse Embry was not a claim for medical malpractice, but rather sounded in ordinary negligence. We find Turner misconstrued the circuit court's holding as the circuit court merely noted that any negligent supervision by Dr. Nelson did not meet the elements of medical malpractice to overcome the grant of a directed verdict. Because our reversal of the directed verdict is dispositive of this issue, we need not address it as Turner's claim may be heard on remand. *See Futch v. McAllister Towing of Georgetown, Inc*., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

After the circuit court granted a partial directed verdict as to physician negligence, Turner requested that the circuit court submit the negligence of both Nurse Embrey and Dr. Nelson separately to the jury, arguing if the jury found Dr. Nelson was negligent, the circuit court could cure that finding with a judgment notwithstanding the verdict. However, Turner did not ask the circuit court to instruct the jury that his physician negligence claim was removed from its consideration as a result of the partial directed verdict. Therefore, this issue is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *see also Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013) (providing that a party may not raise one argument below and an alternate argument on appeal).[7]

III. **Medical Records**

Turner argues the circuit court erred in admitting a large volume of medical records without finding that the records would assist the jury and not lead to confusion. We disagree.

The admission or exclusion of evidence is within the circuit court's discretion, and the circuit court's ruling on the admissibility of evidence is not subject to reversal on appeal absent a showing of a clear abuse of that discretion. *Haselden v. Davis*, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000), *aff'd*, 353 S.C. 481, 579 S.E.2d 293 (2003). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). "To warrant

[7] Although MUSC asked the circuit court to instruct the jury that they could only consider Nurse Embrey's alleged negligence as a result of the partial directed verdict, Turner cannot bootstrap an issue for appeal by way of MUSC's request. *See Tupper v. Dorchester Cty*, 326 S.C. 318, 324 n.3, 487 S.E.2d 187, 190 n.3 (1997) (finding the appellant's argument was not preserved for appellate review because it was not raised to or ruled upon by the circuit court because even though the appellant's co-defendant raised the issue to the circuit court, the appellant could not "bootstrap" an issue for appeal through the co-defendant's objection). Furthermore, when the circuit court indicated it considered informing the jury that it should only consider any medical malpractice committed by Nurse Embrey, Turner indicated he did not want the circuit court to do so.

reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014) (quoting *Fields*, 363 S.C. at 26, 609 S.E.2d at 509).

On appeal, Turner argues the circuit court erred in failing to meet the requirements set forth in *State v. Council*[8] because the circuit court did not find (1) the medical records would assist the trier of fact in determining some fact in issue and (2) the probative value of the medical records was not outweighed by their prejudicial effect in confusing the jury. To the extent Turner argues *Council* requires the circuit court to make such findings, we find Turner misconstrues the holding of *Council* as that case addressed the admissibility of expert testimony regarding scientific evidence. *See Council*, 335 S.C. at 17–24, 515 S.E.2d at 516–20. Thus, we find the circuit court did not abuse its discretion in admitting the medical records.[9]

[8] 335 S.C. 1, 515 S.E.2d 508 (1999).

[9] Turner also notes the circuit court erroneously admitted subjective opinions contained in the medical records. The record indicates (1) the circuit court admitted the medical records subject to a review of Turner's proposal to redact them, (2) Turner submitted a redacted version of the medical records to the circuit court, and (3) the circuit court ultimately denied Turner's request to redact the medical records. However, neither the record nor Turner's appellate brief indicate which portions of the medical records Turner believed to contain inadmissible subjective opinions. Thus, we find Turner failed to meet his burden of proving the circuit court erred in admitting the medical records. *See Fowler*, 410 S.C. at 408, 764 S.E.2d at 251 ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." (quoting *Fields*, 363 S.C. at 26, 609 S.E.2d at 509)); *see also Goodson v. Am. Bankers Ins. Co. of Fla.*, 295 S.C. 400, 404, 368 S.E.2d 687, 690 (Ct. App. 1988) ("The appellant is responsible for compiling an adequate record from which this court can make an intelligent review.").

IV. Dr. Zile's Testimony

Turner argues the circuit court erred in admitting Dr. Zile's testimony regarding (1) Mikell's chances of hospitalization and death and (2) certain medications Mikell stopped taking after the cardiac arrest. We disagree.

A. Chance of Hospitalization and Death

Turner argues the circuit court erred in admitting and refusing to strike Dr. Zile's testimony regarding Mikell's chances of hospitalization and death. We find this issue is not preserved for our review.

A contemporaneous objection is required to preserve issues for appellate review. *Webb v. CSX Transp., Inc*., 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005). "Ordinarily, if an appellant fails to object the first time a statement is made, he or she waives the right to raise the issue on appeal." *Scott v. Porter*, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000). "A motion to strike testimony after it has been admitted without objection is addressed to the sound discretion of the [circuit court]." *McPeters v. Yeargin Constr. Co.,* 290 S.C. 327, 332, 350 S.E.2d 208, 211 (Ct. App. 1986).

At trial, Dr. Zile testified that when he began treating Mikell, Mikell had a fifty percent or greater chance of dying within five years and a fifty percent chance of being hospitalized for recurrent heart failure within any six-month period. Dr. Zile then opined Mikell's chances of dying and hospitalization were exactly the same after his cardiac arrest. Turner did not object to this testimony, and Dr. Zile went on to testify about types of heart failure, the concept of ejection fraction, and Mikell's cardiac history as his patient before again mentioning Mikell's chances of dying were the same after the cardiac arrest as they were when he began treating Mikell. At that point, Turner objected to the testimony and moved to strike it. The circuit court found Dr. Zile should not give opinions about Mikell's chances of survival but denied Turner's motion to strike such testimony. However, because there was no contemporaneous objection to Dr. Zile's initial testimony about Mikell's chances of hospitalization and mortality, we find Turner failed to preserve this issue for appellate review. *See Scott*, 340 S.C. at 167, 530 S.E.2d at 393 ("[I]f an appellant fails to object the first time a statement is made, he or she waives the right to raise the issue on appeal."). Likewise, we find the circuit court did not abuse its discretion in denying Turner's motion to strike Dr. Zile's opinion testimony because the same testimony was already before the jury without

objection. *See McPeters*, 290 S.C. at 332, 350 S.E.2d at 211 ("A motion to strike testimony after it has been admitted without objection is addressed to the sound discretion of the [circuit court]."); *id*. (finding the circuit court did not abuse its discretion when it sustained an objection to a question but refused to strike the witness's previous answers to similar questions).

B. Discontinuation of Medications

Turner also argues the circuit court erred in allowing Dr. Zile's testimony about whether it was proper for Mikell to discontinue and not restart certain heart medications following his cardiac arrest. We disagree. Dr. Van Bakel also testified about the discontinuation of these medications and about why the medications were not restarted, and Turner did not object to this testimony and does not challenge this testimony on appeal. Therefore, even if admission of Dr. Zile's testimony was error, it was harmless because it was merely cumulative to other evidence. *See Campbell v. Jordan*, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009) ("When improperly admitted evidence is merely cumulative, no prejudice exists, and therefore, the admission is not reversible error."); *see also Taylor v. Medenica*, 324 S.C. 200, 215, 479 S.E.2d 35, 43 (1996) (finding there was no error in admitting testimony about the plaintiff's ineligibility for certain treatment because such testimony was cumulative to other similar testimony); *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 345, 468 S.E.2d 633, 636 (1996) (finding even if it was error to allow certain witnesses to testify about the ideal placement of a catheter, such error was harmless because it was merely cumulative to other testimony).

V. The Blank Mayday Record

Turner argues the circuit court erred in admitting a blank copy of a Mayday record and in allowing a witness to provide testimony about the contents of Mayday records. Specifically, Turner argues the Blank Mayday Record was not relevant and violated the best evidence rule. We disagree.

The admissibility of evidence is within a circuit court's discretion, and absent a showing of clear abuse of that discretion, the circuit court's admission or rejection of evidence is not subject to reversal on appeal. *Haselden*, 341 S.C. at 497, 534 S.E.2d at 301. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion is without evidentiary support." *Fields*, 363 S.C. at 26, 609 S.E.2d at 509. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting

prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." *Fowler*, 410 S.C. at 408, 764 S.E.2d at 251 (quoting *Fields*, 363 S.C. at 26, 609 S.E.2d at 509). "When improperly admitted evidence is merely cumulative, no prejudice exists, and therefore, the admission is not reversible error." *Campbell*, 382 S.C. at 453, 675 S.E.2d at 805.

A. Relevance

Rule 401, SCRE provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE.

We disagree with Turner's assertion that the Blank Mayday Record was not relevant. Throughout the case, both parties referenced a Mayday record. Turner specifically attempted to elicit testimony that information regarding why a Mayday code was called could be included in a Mayday record. Thus, the inclusion of a blank version of such a record and testimony regarding what type of information would be included in a Mayday record were relevant to rebutting Turner's assertions and to showing what types of information are typically included in Mayday records.[10] Thus, we find the Blank Mayday Record was relevant.

B. The Best Evidence Rule

Rule 1002, SCRE provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required . . . ."

Turner argues the Blank Mayday Record and Ms. Scarbrough's testimony were used to describe the contents of Mikell's Mayday Record. He avers this violated the best evidence rule because Mikell's actual Mayday record should have been used. Because the Blank Mayday Record and Ms. Scarborough's testimony were

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[10] On appeal, Turner appears to argue the circuit court improperly admitted the Blank Mayday Record because MUSC only sought to use it to rebut the circuit court's adverse inference instruction. We find this argument is without merit because when the Blank Mayday Record was admitted, the circuit court had not yet decided to administer such an instruction and had specifically indicated it did not plan on giving such a charge at that time.

used to show the type of information ordinarily contained in any Mayday record, not to indicate what was specifically included in Mikell's Mayday Record, we find the best evidence rule does not apply.

Furthermore, Turner failed to show any prejudice resulting from the admission of the Blank Mayday Record. *See Fowler*, 410 S.C. at 408, 764 S.E.2d at 251 ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." (quoting *Fields*, 363 S.C. at 26, 609 S.E.2d at 509)). Turner argues he was prejudiced because the admission of the Blank Mayday Record and Ms. Scarbrough's testimony enabled MUSC to counter his attack of MUSC's witness's credibility and the adverse inference permitted under *Stokes v. Spartanburg Regional Medical Center*.[11] However, the record indicates that when the Blank Mayday Record was admitted, the circuit court had not yet decided to administer an adverse inference instruction and had specifically indicated that it did not intend to at that time. Furthermore, Ms. Scarbrough's testimony and the Blank Mayday Record were cumulative to Dr. Guldan's and Dr. Payne's testimony that a mayday record solely documented what took place during the Mayday itself. *See Campbell*, 382 S.C. at 453, 675 S.E.2d at 805 (finding evidence is not prejudicial if it is merely cumulative).

CONCLUSION

Based on the foregoing, the findings of the circuit court are

REVERSED and **REMANDED** as to the partial directed verdict and **AFFIRMED** as to the remaining issues.

GEATHERS and HILL, JJ., concur.

[11] 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (providing for an adverse inference jury charge when there has been spoliation of evidence).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Edgewater on Broad Creek Owners Association, Inc. and the Council of Co-owners of the Edgewater on Broad Creek Horizontal Property Regime Phase I, Plaintiffs,

Of which The Edgewater on Broad Creek Owners Association, Inc. is Respondent,

v.

Ephesian Ventures, LLC, Appellant.

Appellate Case No. 2016-001789

Appeal From Beaufort County
Marvin H. Dukes, III, Master-In-Equity

Opinion No. 5724
Heard February 12, 2020 – Filed May 6, 2020

AFFIRMED

M. Dawes Cooke, Jr., Kenneth Michael Barfield, and Anna Louise Strandberg, all of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Appellant.

William Weston Jones Newton and F. Ward Borden, both of Jones Simpson & Newton, P.A., of Bluffton; Michael W. Mogil, of Law Office of Michael W. Mogil, P.A., of Hilton Head Island; and James B. Richardson, Jr., of Columbia, all for Respondent.

WILLIAMS, J.: In this civil matter, Ephesian Ventures, LLC (Ephesian) appeals the master-in-equity's order granting partial summary judgment to The Edgewater on Broad Creek Owners Association, Inc. (the Association). We affirm.

FACTS/PROCEDURAL HISTORY

Broad Creek Edgewater, L.P. (Developer) planned to develop, in various phases, luxury condominiums on 23.65 acres of land (the Property) located on Hilton Head Island.[1] Developer designated 7.64 acres of the Property as Phase I and constructed a clubhouse and a condominium building containing twenty-three units. On December 31, 2002, Developer recorded a master deed in Beaufort County, which created The Edgewater on Broad Creek Horizontal Property Regime (the Regime) and subjected Phase I to the South Carolina Horizontal Property Regime Act.[2] Developer recorded various exhibits with the master deed, including the Regime's bylaws, which formed the Association to manage the operations of the Regime. By October 2006, all twenty-three units located in Phase I were sold to bona fide purchasers, and the circuit court formally constituted the Association by order dated October 30, 2006.

Pursuant to the master deed, Developer reserved the right to incorporate the remaining 16.01 acres adjacent to Phase I (the Additional Property) into the Regime in future development phases of the Property. Under the terms of the master deed, this right expired on December 31, 2010.[3] In May 2007, creditors placed Developer into involuntary Chapter 7 bankruptcy, and by order dated May 28, 2008, the United States Bankruptcy Court for the District of South Carolina approved the sale of the Additional Property to Bear Properties, LLC. In addition to Developer's ownership rights to the Additional Property, the bill of sale and quitclaim deed assigned all of Developer's reserved rights declared in the master

[1] The facts are presented in the light most favorable to Ephesian. *See Bennett v. Carter*, 421 S.C. 374, 379–80, 807 S.E.2d 197, 200 (2017) (providing that on appeal from an order granting summary judgment, this court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party).

[2] S.C. Code Ann. §§ 27-31-10 to -300 (2007 & Supp. 2019).

[3] The parties do not dispute that this right has expired.

deed as to Phase I. Thereafter, Bear Properties assigned all rights and interests to Appian Visions, LLC, which subsequently assigned its rights and interests to Ephesian on July 7, 2008.[4]

The dispute at issue in this appeal arose when the Association attempted to make improvements to undeveloped property located in Phase I. Specifically, in March 2010, the Association sought a development permit from the Town of Hilton Head Island (the Town) to construct a swimming pool in Phase I. Following a hearing, the Town approved the permit to construct the swimming pool. Thereafter, without seeking a permit from the Town, the Association commenced construction of a tabby walk in Phase I, which would connect the condominium building to the swimming pool. After receiving notice from the Town that a permit was required to construct the tabby walk, the Association filed a permit application on April 12, 2010, which the Town approved on April 15. Ephesian administratively opposed the permit to construct the tabby walk, alleging Phase I was subject to a restrictive covenant that prevented the Association from constructing amenities and recreational facilities without its approval. Consequently, the Town rescinded approval for the development permits for both the tabby walk and the swimming pool, stating it planned to hold the matters in abeyance until the covenant issue was resolved.[5]

On July 19, 2011, the Association filed a summons and complaint against Ephesian, seeking a declaratory judgment as to Ephesian's reserved rights to Phase I.[6] On February 26, 2015, the Association filed a motion for partial summary judgment, seeking a declaratory judgment as to the parties' rights regarding Phase I. Specifically, the Association sought an order stating it had the right to (1) "construct a swimming pool and other common or recreational amenities on its land, subject only to the land use requirements imposed by the Town . . . , free from interference, supervision[,] or veto by [Ephesian]" and (2) "to construct

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[4] Ephesian did not elect to submit any of the Additional Property to the Regime prior to the expiration of its right to do so. The Additional Property remains undeveloped except for an abandoned swimming pool, walkways between Phase I and the swimming pool, and a partially constructed building.

[5] Four pending administrative appeals are being held in abeyance until the resolution of this appeal.

[6] In its complaint, the Association also asserted a nuisance claim against Ephesian, which is not at issue in this appeal.

improvements on the unimproved portions of Phase I . . . subject only to the land use requirements imposed by the Town . . . , and free from interference, supervision[,] or veto by [Ephesian]."[7] On September 21, 2015, the master held a hearing on the motion and issued an order granting partial summary judgment to the Association on February 19, 2016. Ephesian subsequently filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, on March 8, 2016, and the master held a hearing on July 11, 2016. Via a Form 4 order dated July 12, 2016, the master denied Ephesian's motion. This appeal followed.

ISSUES ON APPEAL

I. Did the master err in finding the language of the master deed did not grant Ephesian an exclusive restrictive covenant regarding the construction of amenities and recreational facilities on Phase I?

II. Did the master's order exceed the scope of summary judgment such that it prejudiced Ephesian's remaining claims pending before the circuit court?

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the master pursuant to Rule 56, SCRCP. *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 203, 743 S.E.2d 850, 852 (Ct. App. 2013). Summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* "In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party." *Id.* at 203, 743 S.E.2d at 852–53. "Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of

[7] In its motion for partial summary judgment, the Association also sought relief declaring that Ephesian's claims as a successor to Developer (1) to use the existing clubhouse on Phase I as a sales office and (2) to relocate Phase I's current ingress and egress to Marshland Road had both extinguished. The master granted this relief in its order; however, these rights are not at issue in this appeal.

fact that is not genuine." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453–54 (Ct. App. 2014) (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "Summary judgment is a drastic remedy that should be cautiously invoked in order not to improperly deprive a litigant of a trial of the disputed factual issues." *HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 22, 649 S.E.2d 181, 183 (Ct. App. 2007).

LAW/ANALYSIS

I. Partial Summary Judgment

Ephesian argues the master erred in granting partial summary judgment to the Association because the master deed unambiguously reserved Ephesian the exclusive right to construct additional amenities and recreational facilities on Phase I. Ephesian therefore contends the master erred in finding the plain language of the master deed permitted the Association to construct the swimming pool and tabby walk without seeking Ephesian's approval. Ephesian contends, at a minimum, the language of the master deed regarding the extent of Ephesian's reserved rights as to Phase I is ambiguous and reasonably susceptible to more than one interpretation and, thus, the master improperly granted summary judgment. We disagree.

When a motion for summary judgment involves a question as to the construction of a deed, the master must first determine whether the language of the deed is ambiguous. *See Coker*, 375 S.C. at 23, 649 S.E.2d at 184 ("Whe[n] a motion for summary judgment presents a question as to the construction of a written contract, if the language employed by the agreement is plain and unambiguous, the question is one of law."); *Penza*, 404 S.C. at 204, 743 S.E.2d at 853 ("The construction of a clear and unambiguous deed is a question of law for the court." (quoting *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004))); *Doyle*, 381 S.C. at 242, 672 S.E.2d at 803 ("Thus, the initial determination for a court seeking to ascertain whether a grant of summary judgment based on a settlement agreement's interpretation is proper is whether the agreement is ambiguous."). "The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Penza*, 404 S.C. at 204, 743 S.E.2d at 853 (quoting *Proctor v. Steedley*, 398 S.C. 561, 573 n.8, 730 S.E.2d 357, 363 n.8 (Ct. App. 2012)). In making this determination, the master must consider the language of the entire deed rather than the effect of an "isolated clause." *Doyle*, 381 S.C. at 242, 672 S.E.2d at 803. The master "is without authority to consider parties' secret

intentions" and "words cannot be read into a [deed] to impart an intent unexpressed" when the deed was recorded. *Id.* at 241, 672 S.E.2d at 802. Therefore, "summary judgment is proper and a trial unnecessary whe[n] the intention of the parties as to the legal effect of the [deed] may be gathered from the four corners of the instrument itself." *Coker*, 375 S.C. at 23, 649 S.E.2d at 184 (quoting *First-Citizens Bank & Tr. Co. v. Conway Nat'l Bank*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984)). When the deed language contains ambiguities that require extrinsic evidence to determine the intentions of the parties, the inquiry becomes a question of fact and summary judgment must be denied. *See Doyle*, 381 S.C. at 242, 244–45, 672 S.E.2d at 803–04.

In its order granting partial summary judgment, the master found the declaratory relief sought by the Association was appropriate, stating:

> There is no restrictive covenant that is controlling to, conflicts with, or prohibits [the Association] from making improvements on the property of the Regime; any claim of [Ephesian] of a right to improve [Phase I] is *non-exclusive* and is expressly limited to improvements "pertaining to The Edgewater on Broad Creek Horizontal Property Regime."

(emphasis added). The master therefore found the Association was entitled to "construct a swimming pool and/or other common or recreational amenities on the common elements of [Phase I], subject to the land use requirements imposed by the Town . . . , but free from any prior approval or veto by [Ephesian]." We agree with the master's assessment of the plain language of the master deed.

The relevant provisions of the master deed are as follows:[8]

Section 14 entitled "Provisions and Covenants Applicable to Units" states, "The Units shall also be conveyed subject to the recorded plat and plans of the Property and Amendments thereto and those certain covenants, restrictions, easements and other matters of title as more particularly described at **Exhibit "A"** hereto."

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[8] In the master deed, Declarant refers to Developer and its assigns, such as Ephesian; Property refers to Phase I; and Exhibit A is a description of the property comprising Phase I.

Exhibit A to the master deed provides a description of Phase I and the reserved rights of Developer. It states, "[T]he Declarant *expressly reserves* the right to improve the aforementioned property by clearing, tree pruning, constructing additional parking and *common facilities, including, but not necessarily limited to recreational facilities*, drainage facilities, *lagoons, and the like*, pertaining to The Edgewater on Broad Creek Horizontal Property Regime." (emphases added). It further states "the above property is submitted to The Edgewater on Broad Creek Horizontal Property Regime subject to all easements as shown on the above plat of record."

Section 6, entitled "Areas Comprising Property," is divided into various subsections. Subsection (b), entitled "Incorporation of Additional Property," details Developer's right to add the Additional Property to the Regime through future development phases. Subsection (b) contains numerated subsections that provide "[a] general description of the plan of development." For example, subsection (b)(5) states, "Declarant, its successors and assigns may, in its sole discretion, incorporate one or more Future Phases into the Regime"; subsection (b)(6) provides, "Declarant may, in its sole discretion, vary the order of inclusion of any and all Future Phases, such that a Phase may be included out of numerical order." In particular, Ephesian's assertions rely on the language of subsection (b)(9). It provides:

> *Any additional amenities or recreational facilities, which may or may not be in the additional Phases, are solely at the option of Declarant*. The description in any sales or promotion[al] literature of the Declarant of any potential additional amenities or recreational facilities shall not, of itself, oblige the Declarant to construct such or to convey them to the Regime as Common Elements.

(emphasis added).

Viewing the facts and inferences in the light most favorable to Ephesian, we agree it maintains a right to construct additional amenities and recreational facilities on Phase I; however, we disagree that this right is exclusive and to the detriment of the Association's ability to improve its property. *See Doyle*, 381 S.C. at 240, 672 S.E.2d at 802 ("[T]he appellate court reviews all ambiguities, conclusions, and

inferences arising in and from the evidence in a light most favorable to the non-moving party."). We further find this nonexclusive right stems from the provisions contained in Exhibit A rather than the language of subsection 6(b)(9).

As to Ephesian's contention that the plain language of subsection 6(b)(9) unambiguously reserves it the *exclusive* right to construct additional amenities and recreational facilities on Phase I, we find nothing in the plain language indicates such a right. Ephesian maintains the language "which may or may not be in the additional Phases" naturally incorporates Phase I into its right and the phrase "solely at the option of Declarant" renders the right exclusive. We find Ephesian's reading of 6(b)(9) relies on a forced construction of the provision. *See Doyle*, 381 S.C. at 242, 672 S.E.2d at 803 (providing that when determining if a deed is ambiguous, the master must consider the language of the *entire deed* rather than the effect of an "isolated clause"); *id.* at 241, 672 S.E.2d at 802 (providing the master "is without authority to consider parties' secret intentions" and "words cannot be read into a [deed] to impart an intent unexpressed" when the deed was recorded); *McMaster*, 411 S.C. at 143, 767 S.E.2d at 453–54 (providing that when opposing a motion for summary judgment, "it is not sufficient for a party to create an inference *that is not reasonable* or an issue of fact that is not genuine" (quoting *Floyd*, 403 S.C. at 477, 744 S.E.2d at 166) (emphasis added)). Moreover, when reading subsection 6(b)(9) within the context of the entire master deed, we find this provision solely pertains to Developer's expired right to incorporate the Additional Property into Phase I, as it is included within that section of the master deed and the surrounding provisions relate to the scope of Developer's rights in adding the Additional Property to Phase I. *See Coker*, 375 S.C. at 23, 649 S.E.2d at 184 ("[S]ummary judgment is proper and a trial unnecessary whe[n] the intention of the parties as to the legal effect of the [deed] may be gathered from the four corners of the instrument itself." (quoting *Conway Nat'l Bank*, 282 S.C. at 305, 317 S.E.2d at 777)). Therefore, we find the master properly found the plain language of the master deed did not provide Ephesian with an exclusive right to construct additional amenities or recreational facilities on Phase I.

As to Ephesian's alternative contention that the language of subsection 6(b)(9) is ambiguous rendering summary judgment improper, we acknowledge this is a closer inquiry and that summary judgment is a drastic remedy. *See Coker*, 375 S.C. at 22, 649 S.E.2d at 183 ("Summary judgment is a drastic remedy that should be cautiously invoked in order not to improperly deprive a litigant of a trial of the disputed factual issues."). However, we find the language of subsection 6(b)(9),

though inartful, does not on its face create a factual inquiry as to whether Ephesian's reserved right to improve Phase I, as delineated in Exhibit A, is expanded into an exclusive right. *See Penza*, 404 S.C. at 204, 743 S.E.2d at 853 ("The language in a deed is ambiguous if it is *reasonably susceptible* to more than one interpretation." (quoting *Proctor*, 398 S.C. at 573 n.8, 730 S.E.2d at 363 n.8) (emphasis added)). Further, we find extrinsic evidence is unnecessary to garner the intentions of the parties as the language of the master deed as a whole is unambiguous. Thus, we hold the master did not err in finding the matter appropriate for partial summary judgment. *See Coker*, 375 S.C. at 23, 649 S.E.2d at 184 ("[S]ummary judgment is proper and a trial unnecessary whe[n] the intention of the parties as to the legal effect of the [deed] may be gathered from the four corners of the instrument itself." (quoting *Conway Nat'l Bank*, 282 S.C. at 305, 317 S.E.2d at 777)).

II. Other Issues with the Master's Order

Ephesian contends the master's order is "over broad" and improperly restricts its rights by addressing matters outside of the scope of summary judgment. Specifically, Ephesian contends the master erred in addressing issues unripe for review at the summary judgment stage. We find this issue is without merit as there is no justiciable controversy before the court. *See Sloan v. Greenville County*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) ("In general, this court may only consider cases where a justiciable controversy exists."); *id.* ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." (quoting *Pee Dee Elec. Coop. v. Carolina Power Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983))). The portions of the master's order challenged by Ephesian are admittedly not findings; rather, they are musings of the master on issues that the master acknowledges are unripe for review at the summary judgment stage. Moreover, we find this issue is unpreserved for appellate review due to Ephesian's failure to address these concerns in its Rule 59(e), SCRCP, motion or at the subsequent hearing. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [master] to be preserved for appellate review."). Accordingly, this court is foreclosed from considering this issue.

CONCLUSION

Based on the foregoing, the master's order granting partial summary judgment to the Association is

AFFIRMED.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Francis Arthur Oxner, Appellant.

Appellate Case No. 2016-001125

Appeal From Lexington County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 5725
Heard October 10, 2018 – Filed May 6, 2020

AFFIRMED

Allen Mattison Bogan and Blake Terence Williams, both of Nelson Mullins Riley & Scarborough, LLP, and Chief Appellate Defender Robert Michael Dudek and Appellate Defender David Alexander; all of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R. J. Shupe, both of Columbia, for Respondent.

MCDONALD, J.: Francis A. Oxner appeals the circuit court's order requiring him to submit to an evaluation under the Sexually Violent Predator Act[1] (the Act), arguing the circuit court erred in finding he meets the definition of a person "convicted of [a] violent offense" for purposes of the Act. He further contends the

[1] S.C. Code Ann. § 44-48-10 to -170 (2018).

lapse of time between the State's filing of its petition for Oxner's evaluation as a sexually violent predator and the hearing on the State's petition constituted an unconstitutional delay. Finally, Oxner asserts the circuit court's conducting of the hearing while he was incompetent to stand trial violated his right to procedural due process. We affirm.

Facts and Procedural History

In 1984, Oxner was arrested for assault with intent to kill and driving without a license. Oxner was diagnosed with schizophrenia while hospitalized at the South Carolina State Hospital; he was subsequently found incompetent to stand trial. The record does not indicate when Oxner was released.

On December 11, 2004, Oxner's ten-year-old great-nephew (Victim 1) reported to the Lexington County Sheriff's Department (LCSD) that Oxner had forced him to engage in oral sex on multiple occasions. After arresting Oxner for criminal sexual conduct (CSC) with a minor, investigators learned of other instances of abuse, including acts Oxner committed against his niece (Victim 2) when she was seven years old. Victim 2 is Victim 1's mother.

In March 2005, the Lexington County grand jury indicted Oxner for several offenses: a February 2005 assault with intent to commit first degree CSC upon a boy under the age of eleven; a January 2005 first degree CSC with a minor for committing a sexual battery upon a boy under the age of eleven; a January 2005 "exposure of private parts in [a] lewd and lascivious manner" for exposing his genitals to a fourteen-year-old girl; an assault with intent to commit a sexual battery upon a seven-year-old girl alleged to have occurred between August 1, 1979, and June 1, 1980; and a 1980 offense of buggery with a pony.

On April 18, 2005, psychiatrist Richard Frierson evaluated Oxner to determine his competence to stand trial. Dr. Frierson opined Oxner was incompetent but "likely to become fit to stand trial in the foreseeable future." Following a hearing, the circuit court found Oxner incompetent, but the court's June 2005 order noted Oxner might become competent in the future. The circuit court ordered that Oxner remain hospitalized and receive treatment for up to sixty days in an effort to restore competence. This effort was unsuccessful, and in a subsequent order, the circuit court found Oxner incompetent to stand trial and not likely to become competent in the future. Thus, in December 2005, Oxner's charges were *nolle prossed*, and he

was admitted to the South Carolina Department of Mental Health's (DMH) secure inpatient forensic unit for treatment. Each year following Oxner's 2005 admission, the probate court has ordered that Oxner be involuntarily committed to an inpatient state mental health facility.
On March 16, 2011, the probate court ordered Oxner to participate in an outpatient treatment program at a mental health facility for up to twelve months.

In early 2011, Oxner's DMH treatment team recommended he be discharged from the forensic unit to a structured residential care facility and referred Oxner to a multidisciplinary team for a determination of whether Oxner was a sexually violent predator. The multidisciplinary team determined Oxner met the statutory definition of a sexually violent predator and referred him to the prosecutor's review committee. The prosecutor's review committee determined there was probable cause to believe Oxner was a sexually violent predator, and on July 5, 2011, the State petitioned the circuit court for a probable cause determination.

In August 2011, the circuit court found probable cause existed to believe Oxner met the Act's criteria for a sexually violent predator. The circuit court determined the proceedings were subject to Section 44-48-100(B) of the South Carolina Code because Oxner had been found incompetent to stand trial. Section 44-48-100(B) provides:

> If the person charged with a sexually violent offense has been found incompetent to stand trial and is about to be released and the person's commitment is sought pursuant to subsection (A), the court first shall hear evidence and determine whether the person committed the act or acts with which he is charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply. After hearing evidence on this issue, the court must make specific findings on whether the person committed the act or acts with which he is charged; the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the

> person's ability to consult with and assist counsel and to testify on the person's own behalf; the extent to which the evidence could be reconstructed without the assistance of the person; and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds beyond a reasonable doubt that the person committed the act or acts with which he is charged, the court must enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this chapter.

S.C. Code Ann. § 44-48-100(B). The circuit court ordered:

> A hearing shall be held before the Court within 72 hours after Respondent [Oxner] has been taken into custody, if he is not already in custody, to require the State to prove the elements of the criminal offenses for which Respondent has been charged, as provided for in S.C. Code Ann. Section 44-48-100(B) . . . and thereafter to contest whether probable cause exists to order that Respondent remain in custody and be evaluated by an appointed expert.

The circuit court also ordered the Lexington County clerk of court to appoint counsel for Oxner. Oxner's appointed counsel filed a discovery request on September 20, 2011, but other than this, the record is silent as to any progress on the State's petition until early 2014.

In March 2014, the Lexington County grand jury reindicted Oxner for assault with intent to commit CSC with a minor in the first degree for acts against Victim 2 alleged to have occurred from August 1, 1979 through June 1, 1980.

In May 2014, the circuit court ordered that Oxner be evaluated for competence. On September 8, 2014, Dr. Frierson again evaluated Oxner and opined Oxner lacked the capacity to stand trial and was "unlikely to gain the capacity to stand trial in the foreseeable future." Dr. Frierson noted the probate court had continued to order Oxner's commitment each year since his initial commitment in 2005.

In November 2015, the Lexington County grand jury reindicted Oxner for sexual battery upon a minor less than eleven years old for acts against Victim 1 alleged to have occurred "on or about the Summer of 2004." In September 2015, the circuit court appointed new counsel for Oxner.

On April 21, 2016, the circuit court held a § 44-48-100(B) evidentiary hearing; Victim 1, Victim 2, and LCSD Lieutenant Eric Russell testified. The circuit court found "beyond a reasonable doubt" that Oxner committed CSC with a minor, first degree, upon Victim 1 and assault with intent to commit CSC with a minor, first degree, upon Victim 2. After setting forth additional findings required by the statute, the circuit court held "probable cause exists to have [Oxner] evaluated under the Act to determine whether or not he suffers 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."

Standard of Review

"Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 424 S.C. 542, 547, 819 S.E.2d 124, 126 (2018) (quoting *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (2014)); *see also In re Manigo*, 398 S.C. 149, 157, 728 S.E.2d 32, 35 (2012) ("Statutory interpretation is a question of law subject to de novo review." (quoting *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010))).

Law and Analysis

I. Statutory Definition

Oxner argues this action must be dismissed because when the State filed the SVP petition, the sexually violent offenses for which Oxner was indicted had been *nolle prossed*. Thus, without a pending charge for a sexually violent offense, the State could not satisfy the statutory prerequisite that Oxner was a person who "had been charged" but determined to be incompetent to stand trial for a sexually violent offense. We disagree.

"The cardinal rule of statutory interpretation is to determine the intent of the legislature." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622–23 (2011) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

"In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.* at 351, 688 S.E.2d at 575.

The General Assembly enacted the Sexually Violent Predator Act in 1998[2] to create an involuntary commitment process for sexually violent predators, noting:

> The General Assembly finds that a mentally abnormal and extremely dangerous group of [sexually violent predators] exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment. The General Assembly further finds that the likelihood these [sexually violent predators] will engage in repeated acts of sexual violence if not treated for their mental conditions is significant. Because the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society, the General Assembly has determined that a separate, involuntary civil commitment process for the long-term control, care, and treatment of [sexually violent predators] is necessary.

S.C. Code Ann. § 44-48-20 (2018).

[2] 1998 Act. No. 321.

A "sexually violent predator" is defined 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 not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1) (2018). Sexually violent offenses include first degree CSC with a minor, assault with intent to commit CSC, and buggery. S.C. Code Ann. § 44-48-30(2)(d), (i), (k) (2018).

> "Convicted of a sexually violent offense" means a person has:
>
> (a) pled guilty to, pled nolo contendere to, or been convicted of a sexually violent offense;
>
> (b) been adjudicated delinquent as a result of the commission of a sexually violent offense;
>
> (c) *been charged but determined to be incompetent to stand trial for a sexually violent offense*;
>
> (d) been found not guilty by reason of insanity of a sexually violent offense; or
>
> (e) been found guilty but mentally ill of a sexually violent offense.

S.C. Code Ann. §44-48-30(6) (2018) (emphasis added).

"The conviction requirement [of the Act] is used only for evidentiary purposes to show the existence of a past mental abnormality and dangerousness that is likely to recur if left untreated." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 139, 568 S.E.2d 338, 346 (2002) (noting the "the use of the word 'conviction' include[s] 'persons charged but found incompetent to stand trial, those found not guilty by reason of insanity, and those found guilty but mentally ill'" (quoting *In the Care and Treatment of Matthews*, 345 S.C. 638, 649–50, 550 S.E.2d 311, 316 (2001))); *In re Manigo*, 389 S.C. 96, 101, 697 S.E.2d 629, 631 (Ct. App. 2010) (recognizing "[t]he statutes do not use present tense language, rather they state if the person has committed [a sexually violent] offense and meets the other qualifications set out in

sections 44-48-30 and 44-48-40, then the person should be referred to the multidisciplinary team. The Act is unambiguous, and we must give meaning to its terms."), *aff'd*, 398 S.C. at 149, 728 S.E.2d at 32.

In 2005, the grand jury indicted Oxner for first degree CSC with a minor, buggery, and assault with intent to commit a sexual battery—all sexually violent offenses. These charges were *nolle prossed* after Oxner was found incompetent and not likely to become competent to stand trial. *See Mackey v. State*, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004) ("A *nolle prosequi* is an entry by the prosecuting officer indicating that he has decided not to prosecute a case."); *id.* ("[I]f the *nolle prosequi* is entered prior to the jury being empaneled and sworn, there is no bar to further prosecution for the same offense because the innocence or the guilt of the defendant would not have been adjudicated." (quoting *State v. Patrick*, 318 S.C. 352, 358, 457 S.E.2d 632, 636 (Ct. App. 1995)). The State reindicted Oxner in 2014 and 2015 on some of the sexually violent offenses committed against Victims 1 and 2.

We find the circuit court properly determined Oxner met the statutory definition of a person "convicted of a sexually violent offense" for purposes of the State's 2011 SVP petition because Oxner *had been* charged with the predicate offenses and the statute makes no distinction between pending charges and charges *nolle prossed* due to a person's lack of competence to stand trial. *See In re Manigo*, 389 S.C. at 101, 697 S.E.2d at 631 (noting the Act does not require "the person to be currently serving an active sentence for a sexually violent offense" to be a sexually violent predator under the statutory definition). Notably, for purposes of satisfying the Act's conviction requirement, § 44-48-30 defines "convicted of a sexually violent offense" to include individuals who have "been charged but determined to be incompetent to stand trial for a sexually violent offense" as well as persons who have "been found not guilty by reason of insanity [or] been found guilty but mentally ill with respect to a sexually violent offense." S.C. Code Ann. § 44-48-30(6)(c)–(e); *see also* S.C. Code Ann. § 44-48-20 (finding "*a mentally abnormal* and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment" and creating a "separate, involuntary civil commitment process for the long-term control, care, and treatment" for such persons (emphasis added)). Because the General Assembly contemplated competence issues would arise in cases involving sexually violent offenders, addressed these issues in the plain language of § 44-48-30 and § 44-48-100(B), and made no distinction between

pending charges and charges dismissed due to the very competence issues the Act seeks to address, the circuit court properly declined to dismiss this matter.

II. Unconstitutional Delay

Oxner contends the circuit court erred in finding no unconstitutional delay occurred between the State's filing of the 2011 petition and the 2016 evidentiary hearing. Oxner further asserts the circuit court should have dismissed the petition because a probable cause hearing was not held within the time mandated by the circuit court's 2011 order. We find these issues unpreserved for appellate review.

Cases involving individuals found incompetent to stand trial are complex and difficult, as our courts often have no clear mechanism for addressing the varied questions these cases present. The procedural and constitutional considerations are problematic, as is coordination among the various state agencies that may be involved. Still, neither Oxner's original appointed counsel nor his circuit court hearing counsel moved to dismiss the State's petition for lack of a timely hearing nor did they raise any prehearing procedural challenges to the speedy hearing question. Although the clerk of court appointed Oxner's new counsel in September 2015, some seven months before the circuit court's April 2016 hearing, Oxner's new counsel first raised the question of timeliness halfway through the circuit court's hearing—after the evidence had been taken. Counsel stated, "So obviously my concern goes back to my initial constitutional concern is if this was filed in 2011, certainly this hearing wouldn't be timely and I'm just now noticing that because these were supposed to be held within a certain time frame within the program."

Because Oxner failed to timely raise this issue, the State did not have sufficient notice to present evidence addressing the status of Oxner's case and the treatment issues that arose from 2011 to 2016, the time period which Oxner contends constituted an unconstitutional delay.[3] However, even if counsel's timeliness comment were sufficient for us to find Oxner properly raised the issue, the circuit court did not rule on the timeliness question either at the hearing or in its order, and Oxner—through his prior counsel—did not file a Rule 59(e), SCRCP motion seeking a ruling. Therefore, this issue is not preserved for our review. *Pye v.*

[3] During this time, Oxner remained committed under the probate court's yearly orders of commitment.

Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (recognizing that in order to preserve an issue that has been raised to the circuit court, but not ruled upon, a party must file a Rule 59(e), SCRCP motion).

III. Procedural Due Process

Oxner next argues the circuit court erred in finding his procedural due process rights were not violated because conducting SVP proceedings under § 44-48-100(B) while a person is incompetent is similar to trying a criminal defendant while he is incompetent to stand trial. We disagree.

"Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) (citing *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976)). "Due Process is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather, it is a flexible concept that calls for such procedural protections as the situation demands." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

In determining what process is due, courts must consider the private interest affected by the official action, the risk of erroneous deprivation through the procedures used, the probable value of additional or substitute procedural safeguards, and the State's interests, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Considering the *Mathews* factors, we agree with the circuit court that Oxner's procedural due process rights were not violated when the court conducted the evidentiary hearing while Oxner was incompetent to stand trial. Here, the statute provides procedural safeguards for those deemed incompetent by requiring the circuit court to first find beyond a reasonable doubt that the person committed the

acts alleged and evaluate the strength of the State's case before an individual may be committed, thus countering the risk of an erroneous deprivation of his liberty interest. S.C. Code Ann. § 44-48-100(B). Moreover, the circuit court's findings under § 44-48-100(B) may be appealed before any determination of whether an individual is to be committed as a sexually violent predator. *Id.* Oxner has not identified any additional or substitute procedural requirements—other than arguing a person must be competent to stand trial to be subject to civil SVP proceedings—that would better protect his liberty interest while balancing the State's interest in seeking an SVP determination.

Undoubtedly, the State has a compelling interest in committing sexually violent predators for treatment, whether or not issues exist that may affect their mental competence. As the General Assembly noted, "[A] mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment . . . the likelihood these sexually violent predators will engage in repeated acts of sexual violence if not treated for their mental conditions is significant." S.C. Code Ann. § 44-48-20. We find it significant that the Legislature considered the interests of incompetent individuals subject to the Act in codifying the procedures of § 44-48-100(B), including the high standard of proof mandated therein. This, along with the other procedural safeguards found throughout South Carolina's Act, provides substantial protection against an erroneous deprivation of liberty. *See In re Det. of Morgan*, 330 P.3d 774, 779–80 (Wash. 2014) (en banc) (due process does not require a detainee to be competent for his SVP trial as "[r]obust statutory guaranties in [the Act] provide substantial protection against an erroneous deprivation of liberty" and "[i]t is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions.") (quoting *In re Young*, 857 P.2d 989, 1000 (Wash. 1993), *superseded by statute on other grounds*)).

Like Washington, other jurisdictions have rejected similar due process challenges, and found mentally incompetent individuals subject to SVP commitment processes. *See Moore v. Superior Court*, 237 P.3d 530, 532 (Cal. 2010) (granting petition "to decide whether the defendant in an SVP proceeding has a due process right not to be tried or civilly committed while mentally incompetent. Consistent with the conclusion reached by every out-of-state decision to consider the issue, the answer is 'no'"); *In re Commitment of Weekly*, 956 N.E.2d 634, 652 (Ill. App. Ct. 2011) (collecting cases and "finding it persuasive that every state to consider

the issue has found that there is no due process right to be competent at a commitment proceeding under that state's version of the Act, with the limited exception of certain factual scenarios in Florida");[4] *In re Det. of Cubbage*, 671 N.W.2d 442, 448 (Iowa 2003) (rejecting a substantive due process challenge and denying detainee's request for a pre-trial competency proceeding); *In re Sykes*, 367 P.3d 1244, 1248 (Kan. 2016) (an individual does not have to be mentally competent to assist in his own defense in order to be civilly adjudicated a sexually violent predator under the Kansas Act); *Commonwealth v. Burgess*, 878 N.E.2d 921, 926 (Mass. 2008) (considering provision similar to South Carolina's § 44-48-100(B) and finding the provision "expresses an intent, on the part of the Legislature, that [SVP] commitment proceedings go forward against an incompetent person, even one who may have limited comprehension of the proceedings."); *State v. Daniel OO.*, 928 N.Y.S.2d 787, 795 (N.Y. App. Div. 2011) (joining other jurisdictions in holding that given the State's "strong interest in providing treatment to sex offenders with mental abnormalities and protecting the public from their recidivistic conduct, we conclude [the SVP statute] does not deprive an incompetent respondent of his or her right to due process); *In re Commitment of Fisher*, 164 S.W.3d 637, 656 (Tex. 2005) (concluding that because the Act is civil, "due process does not require, as in a criminal proceeding, that [an individual] be competent to stand trial").

The Legislature anticipated that some sexually violent predator commitment proceedings might impact persons deemed incompetent to stand trial and enacted § 44-48-100(B) to provide for both a hearing procedure and appellate review in these

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[4] Florida has held a person subject to a SVP proceeding has a constitutional right to be competent under limited circumstances

> only when the State intends to present hearsay evidence of alleged facts that have neither been admitted by way of a plea nor subjected to adversarial testing at trial and so are subject to dispute and counterevidence. Thus, it is the State's trial strategy that will determine whether [a respondent] must be competent.

In re Commitment of Branch, 890 So. 2d 322, 329 (Fla. Dist. Ct. App. 2004). Here, the victims testified at Oxner's evidentiary hearing, and the circuit court found their testimony credible, articulate, and compelling.

circumstances. South Carolina's Sexually Violent Predator Act includes significant procedural safeguards that protect an incompetent person from the risk of an erroneous deprivation of his personal liberty interests, while addressing the State's compelling interests in providing treatment for sexually violent predators and protecting the public. Thus, we find no due process violation and affirm the circuit court's decision to conduct Oxner's evidentiary hearing.

Conclusion

Based on the foregoing, the circuit court's order requiring Oxner to submit to an evaluation and be detained in an appropriate secure facility pending trial pursuant to the Act is

AFFIRMED.

KONDUROS and HILL, JJ., concur.