The Supreme Court of South Carolina

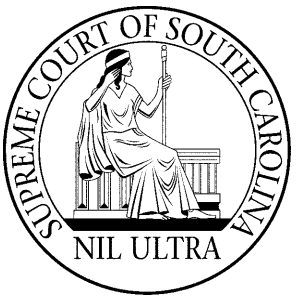
Hearing on Access to Justice

In January 2007, the South Carolina Access to Justice Commission was created by the Supreme Court of South Carolina. The primary function of the Commission is to expand access to civil legal representation for people of low income and modest means in South Carolina.

In addition to numerous other initiatives, the Commission conducted seven regional public hearings across South Carolina. During these regional hearings, the Commission heard about the barriers facing low income persons from citizens, legal service providers, lawyers and others.

At 3:00 p.m. on Wednesday, November 5, 2008, the Commission and selected speakers from the seven regional hearings will address the Supreme Court of South Carolina regarding the barriers and issues that were identified during the regional meetings. The hearing will be held in the Courtroom of the Supreme Court Building in Columbia, South Carolina. Members of the bench, bar and public are invited to attend this hearing.

Columbia, South Carolina
September 26, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37
September 29, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Deborah A. Koulpasis, Respondent.

Opinion No. 26548
Submitted August 11, 2008 – Filed September 29, 2008

DEFINITE SUSPENSION

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

Desa Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of any sanction provided for in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and suspend respondent from the practice of law in this state for two years, retroactive to the date of her interim suspension.[1] The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension, with her consent, on June 26, 2007. In the Matter of Koulpasis, 374 S.C. 163, 648 S.E.2d 582 (2007).

FACTS

I. Guilty Plea

Respondent pled guilty to one count of breach of trust in an amount not less than $1,000 but not more than $5,000 related to taking fees paid in cash to her law firm and depositing them into her personal account. She was sentenced to two years in prison, suspended, and payment of court costs.

II. Domestic Matters

Respondent was hired to represent Client A in a divorce matter. The parties to the divorce agreed to mediation without the presence of their attorneys; however, the mediation process was unsuccessful because, according to the mediator, Client A was not adequately prepared or advised. From that point on, Client A had difficulty communicating with respondent. Client A fired respondent, at which time Client A learned that three months earlier respondent left the firm she was employed by and left Client A's file with that firm.

Respondent was hired to represent Client B in another divorce matter. For several months, respondent exchanged correspondence regarding settlement with Client B's husband and later with the husband's attorney. However, thereafter, Client B had difficulty communicating with respondent. Client B filed a pro se complaint for child support, which was granted at a hearing where she appeared unrepresented. Thereafter, respondent contacted Client B and advised her to hold off on any further action until one year of continuous separation had expired. However, Client B did not hear from respondent after the time period expired. Client B fired respondent and asked for a refund of her fee. Respondent had left Client B's file with the law firm where she had been employed, and the law firm gave the file to Client B and refunded the fee.

Respondent was hired by Client C to represent him in a domestic matter. Respondent filed for an emergency hearing and filed a summons and complaint on Client C's behalf. Emergency relief was granted. Opposing counsel filed responsive pleadings, including a counterclaim. Respondent filed a reply. A temporary hearing was held. Respondent was in the process of trying to get opposing counsel to agree to a proposed order when she was fired by the law firm at which she had been employed. Respondent and the law firm wrote separate letters to Client C advising him of respondent's departure from the firm. The firm also sent a letter to Client C and opposing counsel advising that another attorney in the firm would be handling Client C's matter until Client C made a decision. Neither respondent nor the other attorney from the firm heard anything from Client C and assumed the other was handling the matter. The other attorney from the firm got the temporary order signed and filed, but took no further action. Neither respondent nor the other attorney from the firm moved to be relieved from the case. At Client C's request, respondent took the case back up and filed for a final hearing. That hearing was continued at least three times because of respondent's difficulties with her pregnancy and maternity leave. After the third continuance, respondent changed her membership in the South Carolina Bar to inactive status. She did not timely inform Client C or the court of her change in status. Thereafter, the court issued a 365 day notice. Client C then went back to the other attorney from respondent's former firm, who negotiated a new fee agreement and pursued the case to final decree.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information); Rule 1.16(a)(2) (a lawyer shall not represent a client or, where

representation has commenced, shall withdraw from the representation of a client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client); Rule 1.16(b)(1) (a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client); Rule 1.16(c) (a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation); Rule 1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d)(it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e)(it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent admits her misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime); and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute).

Conclusion

We find a two year suspension, retroactive to the date of interim suspension, is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent accordingly. Respondent shall not be eligible for reinstatement or readmission until she has successfully completed all

conditions of her sentence, including, but not limited to, any period of probation or parole. Rule 33(f)(10), RLDE, Rule 413, SCACR. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Edward Whitner, Appellant.

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

Opinion No. 4436
Heard June 4, 2008 – Filed September 24, 2008

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

KONDUROS, J.: Edward Whitner appeals his convictions for (1) possession with the intent to distribute (PWID) marijuana within close proximity of a school; (2) PWID crack cocaine within close proximity of a school; (3) PWID marijuana; and (4) trafficking crack cocaine. Whitner contends the trial court erred in failing to suppress a statement he made before he was informed of his Miranda[1] rights. Whitner further argues the trial court violated his Sixth Amendment right to confrontation by limiting his cross-examination of a witness. We affirm.

FACTS

On August 2, 2003, the Greenville County Sheriff's Office executed a search warrant for narcotics at 202 Mack Street in Greenville, South Carolina. Upon entering the house, the officers secured all individuals in the residence and advised them of the search warrant. The lead officer, Officer Torrence White, entered the house and found Teresa Smiley standing in the doorway of the back bedroom. He escorted Smiley to the front room of the residence, where the officers already had detained Aaron Garrison and Whitner, who were in the house when the police arrived. The three individuals remained detained together in the front room for over thirty minutes.

After searching the house and finding large quantities of narcotics, Officer White approached Whitner and asked him for his address. Whitner responded "202 Mack Street." Whitner gave the address again on his booking form later that day. A few months later, Whitner gave the same address on his bond form. The bond form contained the statement "the Defendant will notify the Court promptly if he changes his address from the one contained in this order."

Subsequently, both Smiley and Whitner were charged with trafficking and PWID illegal drugs. The day before Whitner's trial, Smiley pled guilty

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

to (1) trafficking in crack cocaine; (2) PWID marijuana; (3) PWID marijuana in the proximity of a school or park; and (4) PWID crack cocaine in the proximity of a school or park. However, she was not sentenced until after Whitner's trial.

At Whitner's trial, Whitner objected to and moved to suppress Officer White's testimony regarding Whitner's providing 202 Mack Street as his address during the search. Whitner argued the State did not meet its burden of establishing Whitner was informed of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966), before eliciting the statement. The trial court overruled the objection. Additionally, Officer White testified Smiley informed him while they were executing the search warrant she and Whitner lived at the residence.

Smiley testified for the State, alleging she and Whitner were in a romantic relationship and lived together at 202 Mack Street. She further testified the drugs found in the house belonged to Whitner. During her cross-examination, Whitner questioned Smiley about the possibility of receiving a diminished sentence for testimony favorable to Whitner's conviction. Additionally, Whitner asked, "Do you know how much time you're looking at in prison?" The State objected to the question and the trial court sustained the objection. The jury convicted Whitner of all of the charges. Whitner moved for a new trial notwithstanding the verdict, maintaining cross-examination of Smiley to determine potential bias was proper. The motion was denied. The trial court sentenced Whitner to twenty-five years imprisonment for the trafficking crack cocaine offense and three concurrent terms of ten years imprisonment for the remaining offenses. This appeal followed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). A trial court abuses its discretion when its

conclusions are controlled by an error of law or lack evidentiary support. State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 204-05 (2007).

LAW/ANALYSIS

I. Statement During Execution of Search Warrant

Whitner contends the trial court erred in admitting his statement giving 202 Mack Street as his address during the execution of the search warrant because the State failed to show the statement was voluntary and made in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). We disagree.

"If a defendant makes a custodial statement, then the trial court must not only make an inquiry into the voluntariness of the statement, but also conduct an inquiry to ensure the police complied with the mandates of Miranda and its progeny." State v. Ledford, 351 S.C. 83, 88, 567 S.E.2d 904, 906-07 (Ct. App. 2002). "In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary and taken in compliance with Miranda." State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986).

Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. Miranda, 384 U.S. at 444. Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response. State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998). Whether a suspect was in "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.'" Ledford, 351 S.C. at 88, 567 S.E.2d at 907 (quoting State v. Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997)). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation,

as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003).

However, a ruling to admit or exclude evidence must affect a substantial right to constitute error. Rule 103(a), SCRE; State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). No definite rule of law governs finding an error harmless; "rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). Generally, an appellate court will not set aside a conviction because of an insubstantial error not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). In State v. Gillian, this court found the trial court's error harmless because the testimony was "largely cumulative" to testimony from other witnesses and even omitting the testimony at issue, "abundant evidence upon which one could find Gillian guilty of murder" remained. 360 S.C. 433, 456-57, 602 S.E.2d 62, 74-75 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007).

The trial court's admission of the statement is not reversible error because the statement is merely cumulative, as (1) Whitner gave the address again on both his booking and bond forms; (2) Smiley testified he lived there; and (3) Officer White testified Smiley had informed him during the execution of the search warrant Whitner lived there. See State v. Price, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006); see also State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (holding the admission of improper evidence is harmless when the evidence is merely cumulative to other evidence); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in the admission of testimony that is merely cumulative is harmless); State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence."); State v. Evans, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (holding the admission of testimony that was merely cumulative, insubstantial, and not affecting the result of the trial was harmless). Accordingly, the trial court did not commit reversible error in failing to suppress the statement.

II. Cross-Examination of Smiley

Next, Whitner alleges the trial court violated his Sixth Amendment right to confrontation by prohibiting him from questioning Smiley concerning her potential sentence. We disagree.

The scope of cross-examination is left to the trial court's discretion. Sherard, 303 S.C. at 174, 399 S.E.2d at 596. Under the Confrontation Clause, a defendant has the right to cross-examine a witness and elicit any fact showing interest, bias, or partiality of that witness. State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002). "Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). The record must clearly show the cross-examination is inappropriate before the trial court may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317. If the defendant establishes the limitation unfairly prejudiced him, the error is reversible. Id.

In the present case, the trial court did not provide an explanation for sustaining the objection or denying Whitner's motion for a new trial. Generally, the jury is not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence and could prejudice the State. Id. at 331-32, 563 S.E.2d at 317-18. However, the Confrontation Clause limits the applicability of this rule when the defendant's right to effectively cross-examine a co-conspirator witness about possible bias outweighs the need to exclude the evidence. Id.

Nevertheless, "[a] violation of the defendant's Sixth Amendment right to confront the witness is not per se reversible error," and we must determine if the "error was harmless beyond a reasonable doubt." State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). "[T]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." Van Arsdall, 475 U.S. at 682. Error is harmless when it could not reasonably have affected the trial's

outcome. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Whether an error is harmless depends on the particular facts of each case and factors including: (1) the importance of the witness's testimony in the State's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the State's case. Mizzell, 349 S.C. at 333, 563 S.E.2d at 318; see also State v. Clark, 315 S.C. 478, 482, 445 S.E.2d 633, 635 (1994).

The trial court's refusal to allow Whitner to cross-examine Smiley on her possible sentence was not reversible error. At trial, Smiley's testimony was not the only evidence Whitner lived at 202 Mack Street. Whitner gave the address as his address on multiple occasions. Smiley's testimony was merely cumulative to Whitner's own statements. Further, the trial court only prevented Whitner from asking the question at issue; the trial court permitted him to elicit testimony from Smiley she had pled guilty to the same charges as those with which Whitner was charged and ask her if she was hoping testifying against Whitner would help her when she was sentenced. Therefore, because the limitation of the cross-examination could not have reasonably affected the outcome of the trial, the trial court did not commit reversible error. See State v. Curry, 370 S.C. 674, 682, 636 S.E.2d 649, 653 (Ct. App. 2006).

CONCLUSION

Because Whitner gave 202 Mack Street as his address two additional times after his statement to Officer White, the testimony regarding the statement was cumulative. Thus, the trial court did not commit reversible error in failing to suppress the statement. Further, the trial court's failure to allow Whitner to cross-examine Smiley regarding her potential sentence was not reversible error because Whitner's own statements indicated he lived there, and he was allowed to ask Smiley if she was hoping for a reduced sentence for her testimony. Accordingly, the decision of the trial court is

AFFIRMED.

HEARN, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angela Youmans as Personal Representative of the Estate of Deonte Elmore, **Appellant,**

v.

South Carolina Department of Transportation, **Respondent.**

Appeal From Allendale County
John C. Few, Circuit Court Judge

Opinion No. 4437
Heard September 17, 2008 – Filed September 24, 2008

REVERSED

Robert N. Hill, of Newberry, and Mark B. Tinsley, of Allendale, for Appellant.

Marshall H. Waldron, Jr., of Bluffton, for Respondent.

ANDERSON, J.: Deonte Elmore was killed after his car skidded off a wet road and flipped in the median. His mother, Angela Youmans, initiated wrongful death and survival actions against the South Carolina Department of Transportation (DOT) alleging it was negligent in failing to maintain the highway to avoid rutting and not properly maintaining the median's slope. A jury awarded Youmans nine million dollars on the wrongful death claim and two million dollars for the survival action. The circuit judge reduced the judgment by the South Carolina Tort Claims Act caps. Ten months later, the circuit judge granted a new trial pursuant to the thirteenth juror doctrine in an order stating justice had not prevailed due to (1) the brief jury deliberations and (2) because there was "no evidence to support the jury's determination that Deonte was not negligent at all in losing control of his car." We reverse.

FACTUAL/PROCEDURAL BACKGROUND

On October 17, 2003, Deonte Elmore was the driver and sole occupant in a single-vehicle rollover accident on Highway 301, in Allendale County. The sixteen year old high-school student did not survive.

After attending a football game, Deonte dropped off a friend and began to drive home in his Honda Accord. His mother, Angela Youmans, was returning home after the game and saw her son's car at a stop sign. She called Deonte on his cell phone and discovered he was going the same way. Deonte followed behind his mother, but Youmans drove faster and lost sight of his lights after going around a curve.

Behind Deonte on Highway 301 was Willie Elmore (Elmore), a distant relative who knew Youmans but did not know Deonte at the time. Elmore testified Deonte was traveling without apparent problems in the right, "slow" lane at approximately forty-five to fifty miles per hour. The posted speed limit in the area is sixty miles per hour. After easing past Deonte, Elmore heard a bang and looked in his rear view mirror to see lights "flashing up." The Honda had left the highway, entered the median, and flipped a number of times. Elmore turned around, returned to the site, and found a moaning Deonte lying in the road. Youmans, meanwhile, arrived at her house, heard the loud noise, and became nervous thinking Deonte had enough time to

arrive. Unable to reach him on his cell phone, Youmans backtracked down the road until she came upon the scene.

In May 2004, Youmans filed wrongful death and survival actions against DOT. In the complaint, Youmans alleged Highway 301 was severely rutted and Deonte lost control due to water pooled from the evening's rain. Additionally, Youmans asserted a dramatic drop-off in the median caused the Honda to roll. She claimed DOT was negligent for failing to maintain the roadway and the median's slope. DOT answered with a general denial, asserted immunities under the South Carolina Tort Claims Act, and pled the defense of comparative negligence.

The actions were consolidated for trial. Past and present DOT engineers asseverated DOT's duties to (1) inspect and cure any roads pooling water; (2) maintain median slopes to design specifications; and (3) the importance of a median's slope angle in allowing a stray driver to recover and avoid rollovers; Lorraine Williams, the current Resident Maintenance Engineer for Allendale County, admitted the median slope where Deonte wrecked deviated from the specifications. The DOT employees stated they had received no reports or complaints concerning the stretch of Highway 301 at issue. Elmore, who lives in the area, testified it had been raining the night of the wreck. He knew the road to hold water and, at the time of the accident, he said it held "enough to make a car sway." The friend who Deonte had dropped off prior to the wreck told the court Deonte always wore a seat belt, wore a seat belt that evening, and did not use drugs or alcohol. Youmans called an expert in accident reconstruction whose studies indicated the median's slope caused the car to bottom out and contributed to the rollover's severity. He estimated Deonte left the road traveling at forty-seven miles per hour. Although he could not state conclusively Deonte hydroplaned, he reported finding depressions on the road capable of collecting enough water to create the hazard. Officer James Oliver Freeman of the Allendale County Sheriff's Office was a responder to the crash site. He testified that when he arrived there was water "laying still on top of the road."

DOT called Allendale County Fire Chief Rodney Brett Stanley, Jr., who traveled on Highway 301 when responding to the accident. He did not remember water on the roadway that particular evening, but admitted on

cross examination the road holds water at times. Donald Roberts, an expert called by DOT, contended the slope of the road would not allow standing water. Roberts stated "I wasn't able to determine why the vehicle lost control. I was able to rule out the road as being a cause."

At the end of the evidence, Youmans' motion for a directed verdict on DOT's comparative negligence defense was overruled. The trial court denied DOT's motions for directed verdict on the liability issue. The jury was charged on comparative negligence, including Deonte's duties to keep a proper lookout, drive at a reasonable speed, avoid collisions, and use due care. A five question verdict form to be filled out by the jury was explained by the judge.

At 3:45 PM on June 8, 2006, the jury was sent out to begin deliberations. Shortly thereafter, the forelady submitted a request for a copy of descriptions the trial judge had read concerning grief and sorrow, loss of companionship, and mental shock. The jury returned with a verdict at 4:45 PM. On the verdict form, the jury indicated DOT was negligent and this negligence was the proximate cause of Deonte's injuries. In response to the question asking if Deonte was negligent and whether the negligence was the proximate cause of his injuries, the jury answered "No." Damages for the wrongful death action were awarded in the amount of nine million dollars and two million dollars on the survival claim.

Immediately following the jury's discharge, the circuit judge asked if there would be any motions to which the parties responded affirmatively. DOT's motion for judgment notwithstanding the verdict was denied. The judge asked DOT if they were going to move for a remittitur and a new trial to which DOT answered "Yes". When court resumed the next morning, arguments on the motions were heard. At the conclusion, the motion for a new trial absolute was denied with the judge explaining the verdict was not so excessive to shock the conscience of the court. He told the parties he would take under advisement the question of a new trial under the thirteenth juror doctrine and get a ruling out "as soon as I can." Later that day, the judgment was entered on a form that explained:

> The jury returned verdicts of $2,000,000 on the survival claim, and $9,000,000 on the wrongful death claim. Because judgments must be entered at the statute cap of $300,000 each, the parties agree it is not necessary to rule on the Defendant's motion for a new trial nisi remittitur. I find the amount of the verdict, while very generous, is not so grossly excessive that it shocks the conscience of the Court, and so I deny the motion for a new trial absolute. I am taking the motion for a new trial under the 13th juror doctrine under advisement. In the meantime, judgment shall be entered in each case in favor of the plaintiff for $300,000.

Nearly ten months later, in an order dated April 10, 2007, the circuit judge granted DOT's motion for a new trial under the thirteenth juror doctrine. The judge reiterated that DOT had moved for a new trial absolute, new trial nisi, and a new trial under the thirteenth juror doctrine. He agreed with DOT that no evidence supported the jury's determination that Deonte was free of negligence. However, the order most heavily relied upon the judge's conclusion the jury could not have given the case full deliberation in forty minutes. Thus, he determined "justice has not prevailed."

ISSUE

> Did the circuit court judge err in granting DOT a new trial under the thirteenth juror doctrine due to the length of the jury's deliberations?

STANDARD OF REVIEW

"Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is 'wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.' " Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 479, 567 S.E.2d 851, 854 (2002); Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990); S.C. State Hwy. Dep't v. Clarkson, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976); Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996); Soren Equip. Co., Inc. v. The Firm, Inc., 323 S.C. 359, 364, 474 S.E.2d 819, 822 (Ct. App.

1996). This Court's "review is limited to consideration of whether evidence exists to support the trial court's order." Folkens, 300 S.C. at 255, 387 S.E.2d at 267; Vinson, 324 S.C. at 403, 477 S.E. 2d at 722. "As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed." Norton, 350 S.C. at 479, 567 S.E.2d at 854. Further, in an appeal of an order granting a new trial pursuant to the thirteenth juror doctrine, the appellant "bears the heavy burden of demonstrating to the court that it clearly appeared that the judge's exercise of discretion was controlled by a manifest error of law." Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993) (citing Gray v. Davis, 247 S.C. 536, 148 S.E.2d 682 (1966)).

LAW/ANALYSIS

I. THE RAISON D'ÊTRE OF THE THIRTEENTH JUROR DOCTRINE

Yeomans contends the trial court erred in granting a new trial pursuant to the thirteenth juror doctrine. We agree.

The following excerpt from Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996), outlines South Carolina jurisprudential history concerning the thirteenth juror doctrine:

> The seminal case stating the "thirteenth juror" doctrine is Worrell v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938). Worrell states:
>
> > Nor does it follow that because under the law the trial judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute. As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality.
>
> Worrell, 186 S.C. at 313-14, 195 S.E. at 641.

A review of the "thirteenth juror" doctrine was undertaken by the appellate entity in Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990):

> This Court has had an opportunity to reconsider the thirteenth juror doctrine on several occasions. Each time we have refused to abolish the doctrine. We have also refused to require trial judges to explain the reasons for the ruling. The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.
>
> A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order.

Folkens, 300 S.C. at 254-55, 387 S.E.2d at 267 (citations omitted).

The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant

> new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983). See also Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion).

Vinson, 324 S.C. at 402, 477 S.E.2d at 702.

In Norton v. Norfolk Southern Railway Company, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002), the South Carolina Supreme Court explained, "the thirteenth juror doctrine is so named because it entitles a trial court to sit, in essence, as the thirteenth juror when [it] finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" (citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)). The supreme court further held, "[T]he result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict . . . ." Id. In essence, the judge, as the thirteenth juror, can hang the jury and start the trial anew.

Our supreme court recently affirmed a court of appeals' decision upholding the grant of a new trial absolute under the thirteenth juror doctrine. Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 551-52, 593 S.E.2d 504, 508 (2004). The supreme court reasoned the grant was warranted because justice was not served by the jury's verdict, and the evidence did not justify the result. Id. at 552, 593 S.E.2d at 508. The Trivelas court held granting a new trial under the thirteenth juror doctrine has the same effect as if the jury failed to reach a verdict, and the trial court is not required to give reasons for

granting a new trial. Id. at 553, 593 S.E.2d at 508 (citing Folkens, 300 S.C. at 254, 387 S.E.2d at 267).

"The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi additur." Bailey v. Peacock, 318 S.C. 13, 14-15, 455 S.E.2d 690, 692 (1995); see also Pinckney v. Winn-Dixie Stores, Inc., 311 S.C. 1, 4-5, 426 S.E.2d 327, 329 (Ct. App. 1992).

II. THE THIRTEENTH JUROR DOCTRINE/SUA SPONTE BY THE COURT

Youmans contends the circuit court raised the thirteenth juror doctrine on its own initiative. Therefore, she complains the circuit court violated the ten day time limit provided by Rule 59(d) of the South Carolina Rules of Civil Procedure when it granted a new trial ten months after the entry of judgment. Rule 59(d) states:

> **On Initiative of Court.** Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

This Court traffics in a milieu of precedential conundrums, but comes to the ineluctable conclusion based on the trial record in the case sub judice that the thirteenth juror doctrine was properly before the circuit court. Following the dismissal of the jury, the circuit court and counsel for the parties engaged in the following colloquy:

Court: All right. Are there going to be any motions?

Youmans: Yes, your honor.

DOT: Certainly, we want a judgment for an outstanding verdict.

Court: I deny the motion for judgment notwithstanding the verdict.

DOT: I would like the ten days to re-file on the motions.

Court: I want to hear them now.

DOT: Well, for a minute, I'm beyond what was offered here.

Court: You are going to move for a remittitur? Are you moving for a new trial also?

DOT: Yes, I am.

…

The court broke for the night and continued the discussion the next morning:

DOT: The defendant respectfully moves for a new trial absolute.

Court: Okay.

DOT: The grounds I would cite are: one, the defendant believes the court should have bifurcated the trial and tried the issues of liability and damages separately. Secondly, the defendant urges, would say that the court should have granted the negligence per se or, at least, allowed evidence on the negligence per se issue. Thirdly, that the evidence was insufficient to send the evidence to the jury at least on the conscious pain and suffering issue. And fourth, that a new trial absolute is required given the verdict. The defendant would support and find that the verdict was a result of improper considerations, namely reflect their intent to punish which is not part of this trial and should have been on the verdict form compensation, only.

Secondly, the defendant would move for a new trial and nisi remittitur and ask the court to reduce the verdicts to the statutory caps.

Court: All right. The motions for a new trial that relate to my evidentiary rulings and my decisions not to bifurcate the trial are denied. Now, then you had one more motion for a new trial absolute and I'm not sure I understood what that motion was.

DOT: I asked that you grant a new trial because the verdict was a result of improper considerations, namely, that due to the short amount of time the jury was out and the note they sent out evidence that they considered—it seemed to me they sailed right past liability and went right straight to damages. The tenor of their note indicated to me that they were looking—looked every way possible to add money and punish the defendant, the DOT, rather than compensate for the loss. I think that's improper consideration.

Court: All right. To the extent that your motion is based on the speculative hypothesis that the jury might have intended to punish the defendant rather than award compensation, I deny that motion.

DOT: In addition, the amount of the judgment is shocking and has to be based on improper considerations. It's way too much.

Court: All right. Well, let's focus on that motion. You have anything to argue?

. . .

Court: We're looking at the legal question of whether or not this verdict can stand under a motion for a new trial absolute based on the amount of the verdict.

Youmans: Yes, I'm sure they appreciate that. And that gets to why I'm having a hard time grasping procedurally what we're talking about, because we know that, if we look at Smalls, that the amount of the damages is not the judgment, it's not the verdict. The verdict is $600,000.00. $300,000.00 for the wrongful death and $300,000.00 for survival action and (DOT's counsel) agrees with that.

Court: Well, if we were looking at it from the standpoint of a remittitur, you would be correct. And let's talk about this because I think that if—if, I think what the law tells us, that if the verdict is within the range of reasonableness and—or short of the range of shocking the [conscience], then the only thing that the court can do, if anything, is to reduce it. We can't eliminate it and start over. However, if the verdict rises to the level that it shocks the [conscience] because of its amount, then the only thing the court can do is to start over with a new trial. Can't reduce it. And where that line is, of course, is subject to the discretion of the individual judge on the one hand and to a review for abuse of discretion by the appellate court on the other. So, I don't think we're talking about—if all we're talking about is whether or not I can or should reduce this verdict to $600,000.00 or $300,000.00 or whatever it's going to be, then that's an easy question. We can go ahead and do that and move on. But that's not what the motion is. The motion is that this verdict is so excessive—and I'm just stating what the motion is, I'm certainly not indicating any view one way or the other when I say that, but the motion is, if the amount of the verdict is so grossly excessive that it shocks the [conscience] of the court and clearly indicates that the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive, then that's the motion. And if that's what it is, then I don't think the cap comes into play because the decisions of the supreme court tell us that if that is what it is, I've got to grant a new trial. And so, that's our focus, I think, is

whether or not the amount of the verdict is so excessive as to shock the [conscience] of the court and clearly indicate that it is the result of some improper motive. Now, I will tell you, I will say, that I think the verdict is huge . . . . [M]y initial impression is that this is a very large verdict . . . . But that's my initial impression and I that's where I think the focus of my inquiry must be, is simply whether or not the amount of the verdict is so grossly excessive that it shocks the [conscience] of the court. Now, the question about how long they deliberated and other things, I mean, I think that comes up under, I think, under the—if there's a motion on a new trial based on the thirteenth juror doctrine, that's where those arguments become relevant, right now I think we're just talking about the amount of the verdict.

Youmans: And judge, this is more a procedural issue, but as I understood the court's ruling yesterday, I think you wanted the defendant to make new trial motions at that time. Well. 59B says, either you have to make an amend or at the court's discretion. You didn't exercise your discretion or make an amend on anything concerning the issue and so I would say that on this basis it is untimely.

Court: Well, I never like anybody to get tripped up on a procedural step like what you're saying. He made motion for a new trial and when I hear a motion for a new trial I'm hearing that the three bases that I have for a motion for a new trial: motion for *nisi* remittitur, motion for a new trial absolute and motion for a new trial based on the thirteenth juror doctrine. So, that's what I've been thinking about as I have gone through the last—well, overnight, last night and today.

. . .

Court: I've already ruled when I denied the motion for judgment notwithstanding the verdict that the evidence is sufficient to

support the verdict. There's no doubt in my mind about that. That based on the testimony and the record, the evidence the jury could have reasonably found that this death was 100% the fault of the Highway Department and 0% of the fault of Deonte but there's—I mean, there's several things that trouble me about it. First of all I think that getting to that point is a complicated analysis and they got there in almost no time. The jury deliberated for a total of about 30 minutes, I mean 45 minutes. About 30 minutes after they started deliberating, they came out with that question . . . .

About 5 minutes after I gave them that, they came back with the verdict so, it raises a question in my mind of whether or not the jury actually spent some quality time deliberating over the liability questions in the case, which I think, regardless of everything we just talked about, I think everything we just talked about illustrates my point, which is not who should or should not win but the liability questions were difficult. And I'm troubled by it and I think the law requires me to study whether or not the verdict here is based on a true and legitimate deliberation over all issues. If they had come back after two minutes with a defense verdict and then it might be the same way.

. . .

Court: I just don't think in light of all that that I can say that this verdict is so excessive it shocked the conscience of the court. So I'm going to deny the motion for a new trial absolute based on the excessiveness of the amount of the verdict. Which leaves me with the motion for a new trial that would have been made under the thirteenth juror doctrine. Now, let's straighten this out. Do you contend that that motion has either not been made or is not properly before me or has not been argued in such a way that I

discussed a few minutes ago or do you have any procedural position to take regarding my ruling on that motion?

Youmans: Judge, I think that it was not raised. That it was not before you within ten days of the verdict. You have the discretion to consider any motion that could have been raised. And so, certainly, you can consider it.

Court: Right. Okay. All right. Well, I'm going to take that question under advisement. I'm going to think about it. And mainly, as I said, I'm going to focus on whether or not I feel the jury sufficiently deliberated on what I see as a complicated set of liability issues in the amount of time that they took. So I'm going to take it under advisement and I'll get a ruling out as soon as I can.

. . .

Court: If either of you want to share with me any of your thoughts or you legal research on the questions of what is the role of the court in second guessing or in considering the quality of the jury's deliberation on a certain subject, then I'd be happy to see that.

. . .

Youmans: And that's in the context of the thirteenth juror doctrine?

Court: Yes. And I could just grant a new trial without even explaining my self if I wanted to under that doctrine. But I'm telling you and I want the record to reflect why—where I'm focusing and I think that the law requires the jury to deliberate. They can't just go in and say "Well, what do you think?" Now, there are some situations where the evidence is so clear one way or the other, that we don't question a verdict that is very quick. In fact, I had a verdict in a DUI case down in Beaufort where the jury deliberated

> for six minutes. And that was literally from the time they left the courtroom to the time the bailiff came back to say that the jury had reached a verdict. And no body ever called in a vote because the evidence was so clear that the defendant was intoxicated while driving. But here, as I said, I think there are complicated legal issues . . . .
>
> . . .
>
> Court: [T]he law requires the jury to deliberate. And in fact, it's implicit in the instructions. In the instructions, it's implicit in the role of a jury and it's implicit in the fact that there are 12 minds that have to come together as one decision. We also know that the inner workings of a jury are for the jury. No body gets in there and says you have to do it this way.

In granting a new trial based on the thirteenth juror doctrine, the circuit judge neither acted on his own initiative for purposes of Rule 59(d) nor did he rely upon grounds not in DOT's original motion. DOT expressed concern with the length of jury deliberations and sufficiency of evidence when asking for a new trial. Though DOT did not expressly request a new trial pursuant to the thirteenth juror doctrine, the circuit judge clarified that he considers three bases when presented with a motion for a new trial: new trial nisi remittitur, new trial absolute, and new trial pursuant to the thirteenth juror doctrine. The circuit judge categorized DOT's quality of deliberation concern as a matter relevant under the thirteenth juror doctrine.

A colliquefaction of the judicial and/or counsel statements persuades this Court that the thirteenth juror doctrine was posited to the circuit court for arbitrament.

III. LENGTH OF JURY DELIBERATIONS AND THE THIRTEENTH JUROR DOCTRINE

In his order granting a new trial, the circuit judge stated his agreement with DOT that no evidence supported the jury's decision that Deonte was free of negligence. However, the quiddity and hypostasis of the order is the

court's concernment and advertence to "the quality and length of the jury's deliberations." In the order, the judge stated:

> "Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed." Vinson v. Hartley, 324 S.C. 389, 404 (Ct. App. 1996.) Defendant argues there is no evidence to support the jury's determination that Deonte was not negligent at all in losing control of his car. I agree. More importantly, however, the Court's real concern in the quality and length of the jury's deliberations. Observing the jury during the trial, the closing arguments, the jury charge, and the several exchanges during the deliberations, I was left with the firm belief the jury had not deliberated the case adequately.
>
> This is supported by the length of time of the deliberations. In a case of complicated and difficult liability on the part of Defendant, in addition to the difficult question of why Deonte left the road in the first place, it is inconceivable that the jury could have given the case a full deliberation in less than 40 minutes.
>
> The integrity of the justice system demands that all participants in a trial perform their duties faithfully. This is particularly true of the jury, which is entrusted with virtually unreviewable discretion as finders of the facts. Every jury has a duty to deliberate the case before them completely. When the jury fails to carry out this duty, then the fact finding process is flawed, and "justice has not prevailed."
>
> I want to make clear that I do not believe there is any bright line past which a jury must deliberate the confidence of the Court that they have performed their duty. In some cases, even some of significant complexity, a deliberation time of less than 40 minutes would not raise any concern. In this case, however, I have three major concerns. First, the time of the deliberation is inadequate to discuss the complicated issues in the case. Second, there is no evidence to support the jury's finding of no

> comparative fault. Finally, I drew a very strong impression during the last few phases of the trial, particularly the deliberation phase and when the verdict was announced, that the jury had not in fact deliberated the case. For those reasons, I am convinced that "justice has not prevailed."

Youmans presented the following testimony for the jury's consideration: (1) eyewitness Elmore stated Deonte was traveling below the speed limit at an estimated forty-five to fifty miles per hour; (2) Youmans' expert opined from his tests that Deonte's car entered the median traveling forty-seven miles per hour; (3) the expert found the Honda's tires to be in good condition; and (4) the friend who rode in Deonte's car prior to the accident said Deonte wore his seatbelt and was sober. Because any negligence on Deonte's part was raised by DOT's defense, the burden was on DOT to prove that negligence. Comparative negligence is an affirmative defense. Ross v. Paddy, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). The defendant asserting an affirmative defense bears the burden of its proof. See, e.g., Cole v. S.C. Dep't of Elec. & Gas, Inc., 362 S.C. 445, 452, 608 S.E.2d 859, 863 (2005) ("It is well-settled that assumption of the risk is an affirmative defense which the defendant bears the burden of proving."); Sabb v. S.C. State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002) (governmental entity bears burden of establishing discretionary immunity as affirmative defense). Our review of the record shows DOT presented no evidence of Deonte's negligence. Indeed, DOT's expert witness merely concluded, "I wasn't able to determine why the vehicle lost control. I was able to rule out the road as being a cause of the rollover." Insofar as this portion of the circuit judge's order is upon the facts, we find it is wholly unsupported by the evidence.

A spate of juridical writings confirms the strict parameters placed upon courts attempting to police jury deliberations based upon a timekeeper mentality. Despite the discretion given a judge by the thirteenth juror doctrine, it does not allow the court to overstep these boundaries in toto. Additionally, granting a new trial due to suspicions of deliberation quality is a flagrant deviation from premising a new trial upon the facts. See Fallon v. Rucks, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950) (reversing order for new trial pursuant to thirteenth juror doctrine when granted not upon the facts, but

on "wholly untenable ground of objection to the verdict's form" before amended by jury by consent).

> As a general rule, the shortness of time taken by a jury in reaching its verdict has no effect upon the validity of the verdict. The brevity of jury deliberations does not indicate by itself, improper behavior, or that the verdict was the result of error. In this regard, while the verdict should be the result of sound judgment, dispassionate consideration, and conscientious reflection, and the jury should, if necessary, deliberate patiently and long on the issues which have been submitted to them, they may render a valid verdict on very brief deliberation after retiring, especially where the facts are clearly drawn. A court cannot infer misconduct from the duration of the jury's deliberation. The length of time that a jury deliberates has no bearing on, nor does it directly correlate to, the strength or correctness of its conclusions or the validity of its verdict.

89 C.J.S. Trial § 792 (2001). "The fact that the jury remained out only a short time before bringing a verdict is not itself ground for a new trial." 66 C.J.S. New Trial § 75 (1998).

Our supreme court heard a challenge to a verdict based on the jury's short deliberation in Thomas v. Atlantic Coast Line R. Co., 221 S.C. 462, 71 S.E.2d 403 (1952). Thomas brought an action under the Federal Employers' Liability Act, 45 U.S.C.A., § 51 et seq., for damages for personal injuries suffered on the job. The defendant appealed the verdict favoring Thomas arguing it should be set aside as the result of passion or prejudice due to "(1) its excessiveness in view of the injuries and (2) the fact that the jury deliberated only twenty minutes." Id. at __, 71 S.E.2d at 407. Our supreme court first opined the evidence was sufficient to support the jury's verdict and then explained:

> While it was unusual for the jury to arrive at its verdict in so short a time, we would not be justified in concluding therefrom that the jury acted capriciously or that it was [actuated] by passion or prejudice.

> "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." Fairmount v. Cub Fork Coal Co., 287 U.S. 474 [1933]."

Id.

The brevity of a jury's deliberations did not provide sufficient grounds to warrant a new trial following a murder conviction in State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1971). In Holland, the appellants alleged their motion for a new trial should have been granted because the jury verdict was the result of prejudice and passion. The jury was given the case at 5:15 PM, returned to the courtroom to ask a question at 6:00 PM, and rendered a verdict at 6:55 PM. Id. at 499, 201 S.E.2d at 123. Our supreme court ruled:

> In State v. Chandler, 126 S.C. 149, 119 S.E. 774, we held in a murder prosecution that the defendant had a fair and impartial trial, though the jury took only nineteen minutes to arrive at a verdict. In the recent case of State v. DeWitt, 254 S.C. 527, 176 S.E.2d 143, we held:
>
> > "There is no prescribed length of time for a jury to reach a verdict. Such must of necessity be left to the judgment of the jury. Something more must appear, therefore to warrant interference with a jury's verdict than the mere brevity of their deliberations. 23A C.J.S. Criminal Law § 1368, at page 976."

Holland, 261 S.C. at 499, 201 S.E.2d at 123.

This Court addressed the subject in Parker v. Evening Post Publ'g Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994), a libel and invasion of privacy case. The defendants' motion for a directed verdict on the privacy claim was granted, and the jury returned a verdict for the defendants on the libel claim. On appeal, Parker's arguments included the assertion that the trial court

improperly denied his new trial motion based on the thirteenth juror doctrine. We affirmed the denial and noted:

> Parker also appears to argue that the jury did not give due and serious consideration to the case, because it returned the verdict in one hour, thereby ending their deliberations one-half hour before the NCAA basketball tournament was to begin on television. This is rank speculation without any evidentiary support, and we find it to be manifestly without merit.

Id. at 247 n.7, 452 S.E.2d at 647 n.7. See also State v. Cox, 221 S.C. 1, 68 S.E.2d 624 (1951) (affirming capital conviction when jury deliberated only twenty-four minutes); Bratton v. Lowry, 39 S.C. 383, 17 S.E.2d 832 (1893) (no new trial when verdict hastened due to fire alarm in town); Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 529 S.E.2d 758 (Ct. App. 2000) (finding no abuse of discretion in trial judge's denial of motion for new trial absolute after jury deliberated approximately twenty minutes).

IV. OTHER JURISDICTIONS

The jurisprudence of other state courts similarly abides by this general rule. "It is the evidence and not the time that the jury may have taken in reaching its verdict that is controlling in the consideration of a motion for a new trial." Mahoney v. Smith, 78 A.2d 798, 800 (R.I. 1951)

Arkansas has refused to grant new trials based on the length of jury deliberations. D.B. & J. Holden Farms Ltd. P'ship v. Arkansas State Hwy. Comm'n, 218 S.W.3d 355 (Ark. Ct. App. 2005), was a condemnation case in which the jury returned a verdict after five minutes. Holden, the landowner, raised in his appeal the issue of juror misconduct. The appellate court affirmed the trial court's denial of a new trial. After Holden was unable to prove jury misconduct or show prejudice, the court annunciated:

> The length of time of jury deliberation is not, of itself, a ground for a new trial. Dovers v. Stephenson Oil Co., 345 Ark. 695, 128 S.W.3d 805 (2003), Wingfield v. Page, 278 Ark. 276, 644

S.W.2d 940 (1983); Breitenberg v. Parker, 237 Ark. 261, 372 S.W.2d 828 (1963). As the supreme court stated in Breitenberg:

> The fact that the jury returned a verdict in about eight minutes after having the case submitted to them does not indicate to use that Beach did not receive a fair trial when the issues of fact were so clearly drawn. It is true that a verdict should be the result of dispassionate consideration and the jury, if necessary, should deliberate patiently until they reach a proper conclusion concerning the issues submitted to them. Yet where the law does not positively prescribe the length of time a jury shall spend in deliberation, the courts will not apply an arbitrary rule based upon the limits of time.

237 Ark. At 265, 372 S.W.2d at 831 (quoting Beach v. Commonwealth, 246 S.W.2d 587 (Ky. 1952)).

Id. at 359. See also Walker v. Montana Power Co., 924 P.2d 1339 (Mont. 1996) (where relative complexity of issues narrowed by court and counsel, and verdict form contained seven questions, not error to refuse to set aside verdict rendered after forty minutes of deliberation); Locksley v. Anesthesiologists of Cedar Rapids, P.C., 333 N.W.2d 451 (Iowa 1983) (three hours spent in deliberations not basis for a new trial).

Orders for new trials based on hasty deliberations have been reversed. The Florida District Court of Appeals, Third District, reversed the grant of a new trial on damages in wrongful death and survival actions in Park v. Belford Trucking Co., 165 So.2d 819 (Fla. Dist. Ct. App. 3rd Dist. 1964). The plaintiff argued in part that the jury spent only twelve minutes deliberating liability thus "evidencing an utter lack of regard for the performance of their sworn duties . . . ." Id. at 822. In this case of first impression, the appellate court determined the trial judge erred and observed:

> The courts which have considered this problem universally hold that the length of time within which a jury confers is not *in and of*

> *itself* sufficient grounds to grant a new trial. We agree with those courts.
>
> . . .
>
> We do not disagree with the proposition that a trial judge may grant a new trial where it is evident that the jury has not followed the law as instructed or has generally abrogated or failed to fulfill their functions according to law, but a jury verdict arrived at in a short period of time is not *sufficient* evidence to establish the fact that the jury failed to fulfill its function. The short period of time would be *some* evidence, but without more it would be error for the trial judge to grant a new trial.

Id. See also Lappe v. Blocker, 220 N.W.2d 570, 574 (1974) (trial court erred in granting new trial because "shortness of time taken by a jury arriving at its verdict has no effect upon the validity of the verdict….").

Federal courts have considered the topic and are not persuaded to grant new trials due to brief jury deliberations alone. The United States Court of Appeals for the First Circuit has instructed, "[n]o matter how complicated the case, brevity in jury deliberations is not, in itself, a basis for scuttling a verdict. Courts cannot hold a stopwatch over a deliberating jury." Verdana Beach Club Ltd. P'ship v. W. Sur. Co., 936 F.2d 1364, 1383 (1st Cir. 1991) (citations omitted) (no error denying new trial when jury resolved inconsistency between verdict and answer to a special question in fifteen minutes).

The United States Court of Appeals for the Fourth Circuit held jury deliberations lasting four minutes provided no grounds for a new trial. Segars v. Atl. Coast Line R.R. Co., 286 F.2d 767 (4th Cir. 1961). In a case arising from a fatal railroad crossing accident, presentation of the evidence required two days. After the verdict favoring the defendant was read, the plaintiff moved for a new trial arguing the haste of deliberations indicated the jury did not consider the evidence. The court disagreed:

> We know of no rule of law which prescribes how long a jury should be required to deliberate before returning its verdict. Of course, as was observed by the District Judge, the verdict should be the result of conscientious deliberation, but the fact that the verdict was returned within a few minutes does not necessarily show that the jury disregarded this duty, and is not sufficient in itself to justify a new trial.

Id. at 770.

In Will v. Richardson-Merrell, Inc., 647 F. Supp. 544 (S.D. Ga. 1986), parents brought negligence and strict liability actions against the manufacturer of a drug alleged to have caused their child's birth defect. Following an eight day trial involving extensive testimony about drug research, the jury deliberated approximately one hour before returning a verdict for the defendant. The parents' motions for judgment notwithstanding the verdict or new trial were denied. On appeal, numerous arguments were offered by the parents including the assertion the brevity of the deliberations meant the jury did not consider the entirety of the vast evidence. Id. at 549. The court disagreed stating, "[g]enerally, a short period of deliberation by a jury before returning a verdict does not establish the proposition that the jury did not properly perform its duty. To prevail, plaintiffs must show something more than the mere fact that the deliberations were short." Id. Cf. Kearns v. Keystone Shipping Co., 863 F.2d 177 (1st Cir. 1988) (granting new trial when brief jury deliberation was accompanied by verdict contrary to great weight of evidence).

In Wilburn v. Eastman Kodak Co., 180 F.3d 475 (2nd Cir. 1999), an employment discrimination action, the Court of Appeals for the Second Circuit found no abuse of discretion in denying the employee's motion for a new trial. Although the jury deliberated twenty minutes, the court explicated, "[a] jury is not required to deliberate for any set length of time. Brief deliberation, by itself, does not show that the jury failed to give full, conscientious or impartial consideration to the evidence." Id. at 476.

The thirteenth juror doctrine entitles a trial court to act as a thirteenth juror when it finds the evidence does not justify the verdict and it may then

grant a new trial based solely on the facts. Howard v. Roberson, 376 S.C. 143, 153, 654 S.E.2d 877, 882 (Ct. App. 2007) (citing Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)). Though the circuit judge in the case sub judice concluded no evidence supported the jury finding Deonte free of negligence, this determination is contrary to the record. The only remaining justification in the circuit court's order, the brief jury deliberations, fails to provide sufficient grounds for a new trial.

CONCLUSION

We decline to place our approbation and imprimatur upon this thirteenth juror order based upon length of time of deliberations. The Latin phrase abundans cautela non nocet (abundant or extreme caution does no harm) is efficacious. Judicial interference with a jury verdict based upon the time of jury deliberations is at best fraught with doctrinal vulnerability.

The jury verdicts as reduced pursuant to the South Carolina Torts Claims Act in the total sum of $600,000 are reinstated.

The order granting a new trial pursuant to the thirteenth juror doctrine is

REVERSED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Mark A. Martucci, **Appellant.**

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

Opinion No. 4438
Heard September 16, 2008 – Filed September 24, 2008

AFFIRMED

Appellate Defender Elizabeth A. Franklin, of Columbia, for Appellant.

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

ANDERSON, J.: Mark A. Martucci (Martucci) appeals his conviction for homicide by child abuse. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Martucci lived with Brandi Holder (Holder) and her two-year old son (Child) in July 2002. Child died on Wednesday, July 17, 2002. Martucci and Holder were indicted for homicide by child abuse under Section 16-3-85 of the South Carolina Code. Martucci did not appear for trial and was tried in his absence February 6-9, 2006. The jury convicted Martucci, and his sentence was sealed. On March 6, 2006, Martucci appeared in court and was sentenced to life in prison.

A priori, the Court embarks on a juridical journey encapsulating a temporal and spatial analysis of the evidentiary record. Nurse Ladye Kelly testified that Martucci and John Parker (Parker) brought Child to the emergency room of Allen-Bennett Hospital. Kelly declared Child appeared lifeless. He "had multiple bruises over most of his body." She described "a very odd pattern" of marks on his face which appeared to be knuckle prints. She stated Child "had multiple bruises on his legs, on his arms. His eyes were blackened. He also had a place around his mouth that was scratches or abrasions . . . and had a lot of bruising." Child had "a purple black mark that . . . covered most of his back." Kelly substantiated the bruises "were all in different stages of healing. Some of them were very fresh looking dark-purplish blue colors. Others were yellow, barely noticeable that had healed and were in between those two things. Some were darker than others. Some were lighter than others." She recalled that Child's abdomen was "very swollen." He was "very pale. He was blue around the mouth," which showed he had not been breathing.

Kelly assisted emergency room doctor Kevin Gregg in trying to revive Child, but they were unsuccessful. Dr. Gregg asserted the Child was "freshly dead. He was cooler—his temperature was cooler than 98.6, but it was warmer than room temperature." Dr. Gregg recollected that Martucci and Parker told him about a "four-wheeler ATV accident" earlier in the week. Dr. Gregg declared they told him that Child was not wearing a helmet on an ATV and "flipped or was ejected out of the ATV, so the story went. The

story was that he looked okay after the injury so the family didn't feel a need to bring him to the ER to get checked." Holder and Martucci advised Dr. Gregg that Child appeared weak and had vomited several times the day before. Dr. Gregg professed Martucci claimed that he performed mouth-to-mouth resuscitation, and Child "bit him on the upper lip." Dr. Gregg annunciated this story was implausible because "that is something I've never seen before. I've never head of it before. When you do rescue breathing on somebody, they are unconscious. And an unconscious person can't bite. . . . I don't understand why an unconscious boy would bite somebody on the lip. . . . If he's conscious, he doesn't need mouth to mouth resuscitation." Dr. Gregg recalled that Martucci had an open cut on his lip, but he did not treat Martucci's injury.

Dr. Gregg opined Child's injuries were inconsistent with the kind of accident described. He explained Child "had bruises. He didn't have cuts. He didn't have abrasions. He didn't have the usual signs of wear and tear you see on a two-and-a-half-year-old boy. He didn't have skinned knees. He didn't have scraped up palms from playing or rolling or falling off the porch. He had bruises."

John Parker (Parker) asseverated that he visited Martucci and Holder's home "[f]rom time to time." He saw Martucci interact with Child. He testified without objection:

> Parker: There was an incident where we were in his living room and [Child] was crying. And Mr. Martucci had told him on numerous occasions to . . . He was asked—Mr. Martucci asked him—or told him on numerous occasions to stop crying. And [Child] did not do so. He then proceeded to tape his mouth shut with tape.
>
> . . .
>
> There were episodes where he would be in the bathroom and Mr. Martucci would be giving him a bath. I would hear [Child] crying. And I would walk in to see what he was crying about and Mark would be pouring water over his head. And [Child] would

continue to keep crying. He would tell him that crying is for pussys. And he would dunk his head under water. He did that on numerous occasions.

Assistant Solicitor: When you say "dunk his head under water," was it a quick dunk?

Parker: No, ma'am. I'd say, at least, a couple of seconds at a time.

Assistant Solicitor: How was [Child] reacting to that?

Parker: He would swallow water almost like he was choking on the water. And then he would pull him up. And then no sooner—he would barely even catch his breath and he would do it again.

. . .

Assistant Solicitor: Did you witness anything else abusive?

Parker: We were in the van—no, I take that back. We were outside sometimes and then there was a couple of occasions in the inside of his house where he would be crying and Mr. Martucci would slap him in the face on both sides of his face.

Assistant Solicitor: Can you sort of demonstrate in some way what you're talking about? What kind of slap or force was used?

Parker: The only way I can describe it is the way a person would smack a dog to make them mean, back and forth.

Assistant Solicitor: That's what he did to [Child's] head?

Parker: Yes, ma'am. I've seen him grab his face like that when he wouldn't stop crying and try to tell him to be quiet.

Assistant Solicitor: Did you ever see bruises or marks on [Child]?

Parker: I did notice the bruises on his face from the way he was grabbing him. And I believe I did notice the bite on his wrist. They—it did seem that they went out of their way to make sure he kept clothes on. I very rarely seen him without clothes, except for the incidents in the bathroom.

Dr. Michael Eugene Ward, Greenville County's chief medical examiner, was called to the hospital soon after Child was pronounced dead. He declared:

On initial examination at Allen Bennett Hospital, there were numerous bruises to [Child] about the face, the chest, the back, and the extremities. There were injuries that were present around the perineum or the penis, and to one of the arms that were especially disconcerting to us. And so we took samples of them at that time.

Dr. Ward performed an autopsy on Child. Photographs of Child and his internal organs were admitted into evidence over Martucci's objection. Dr. Ward used the photographs to explain Child's injuries:

This is a photograph of the left back leg of [Child]. This is right in the crux of the leg. And, as you can see, there are these bruises and superficial abrasions of the skin running in a linear fashion across the skin. These indicating that this is a result of blunt injury.

So it's not a sharp injury that you would expect from a knife or from some sort of cutting instrument. And it's not from a penetrating injury like a gunshot wound, but it's a blunt injury where the skin is compressed and there's disruption of underlying blood vessels resulting in a bruise, as well as a superficial abrasion or a scratching of the skin.

So this is linear injuries or line-shaped contusions to the back of [Child's] leg.

Assistant Solicitor: Dr. Ward, in your experience and training, are there any particular mechanisms of inflicting such a linear bruise?

Dr. Ward: There are. There are numerous instruments that can be used that will cause a linear-type bruise. Generally, they are things that are longer than they are wide. Certain things can be—they can be cords. They can be belts or even fingers if a slap is applied in a hard enough fashion that create these linear and sort of semi-circular type bruises as with this.

. . .

This is a photograph of the perineal region of the body of [Child]. This is the abdomen here, the pelvis, the penis, and the scrotum. Here at the base of the penis is a bruise, a sort of butterfly-shaped, if you will, bruise approximately one and a half inch in greatest dimension. There's a smaller bruise in this region here.

And right here at the base of the penis where the skin of the penis attaches to the pelvic skin, there's a superficial laceration or tear of the skin in this region. I took microscopic sections—at the time of autopsy, I took microscopic sections of the skin through this region here. It demonstrated acute hemorrhage or bleeding into the skin. But it indicated that there was no evidence of any healing. There was no inflammation. There was no granulation tissue. There was no evidence of repair to this region here or here.

Assistant Solicitor: And what did that indicate to you?

Dr. Ward: That is was a recent injury only a—no more than a few hours old. And as we will see with other injuries that there were, there was—which have evidence of healing that this act most

very likely occurred at a different time than the other injuries—some other injuries. This is the result of blunt trauma. I believe that this is a blunt injury to this region here with superficial tearing of adjacent skin.

. . .

This is a photograph taken at the time of autopsy showing the intraabdominal cavity of [Child]. There were bruises on the outer surface of the skin. As we dissected beneath, there was—there were bruising beneath the skin and above the muscles of the abdomen.

When we reflected those muscles of the abdomen, we were able to demonstrate that there was over 250 milliliters of blood present in the peritoneal cavity or in the abdominal cavity. 350 milliliters is about the size of a can of Coke. So this is almost the amount of blood that's in a can of Coke or a little bit less than that.

This is the small intestine here. And this is the large intestine. As you can see, there's a space between here that should not normally be. There's a fatty ligament that normally attaches this large intestine to the underlying structures of the abdomen. This has been torn. It's been torn away from the underlying surface of the large intestine. And in this region here, there is blood that is hemorrhaged within the outer surface of the large intestine, as well as—

. . .

State's Exhibit No. 13, again, demonstrates the tearing of the ligament that normally attaches the large intestine to the stomach demonstrating that it has been torn away along this broad surface of the transverse colon, hemorrhage within the outer surface of the colon, as well as hemorrhage deep down in the structures of the abdomen. Within this region here, it's the head of the pancreas. There have been trauma and hemorrhage to the head of

the pancreas with the soft tissue surrounding the pancreas with hemorrhage.

And the interesting thing about this injury is that when I took microscopic sections from this region, it did show evidence of healing, that there were evidence—there were areas that showed not only acute hemorrhage, but there were other areas that showed hemorrhage that had been there for a period of time, several hours to a couple of days such that the body had started to react to this injury. It had started to try to repair it. And there was—there were fibrous tissues being laid down. There were new blood vessels there. There were cells that come in and try to clean up this blood.

So we have two different ages of trauma here in the abdomen. We've got some that shows evidence of healing, and some that show no evidence of healing and only fresh blood.

. . .

The blunt injuries to [Child's] gastrointestinal system would, basically, cause his small and large intestine to no longer function in the way that we know it to do. The small intestine, basically, takes food, water, and other products from the stomach and allows it to pass and begin to digest on its way down to the large intestine. When you traumatize the small intestine, as [Child] had with tearing of the mucosa, then the muscles—the smooth muscles in the small intestine are no longer going to work together to move things down the system. So they're going to back up.

And the most common presentation of someone with trauma to the small intestine like that and no longer moving fluids out would be vomiting, in that anything that goes in is going to sit on the stomach and not be able to be passed down. The pressure is going to be increased. And then the person would have nausea and vomiting. Certainly, I would expect it to be, obviously fairly

> painful in that he may even show some guarding and not want you to touch his stomach.

Elizabeth Venesky (Venesky) lived next door to Martucci and Holder. Her husband took two pictures of her and Child while he visited their house on June 20, 2002. In the pictures, Child was not wearing a shirt. Dr. Ward discussed:

> These bruises here [in Venesky's pictures] are not—although they're in the same location, they're not the same bruises that we saw at the time of autopsy. So he has bruises here at this time. He has separate and distinct bruises in virtually the same place at the time of autopsy.

ISSUES

I. Did trial judge err in admitting autopsy photographs of Child's internal organs and other injuries?

II. Did the trial judge err in admitting evidence of prior incidents of alleged abuse of Child by Martucci in the weeks immediately preceding his death?

III. Did the trial judge err in admitting evidence of Martucci's character, specifically Parker's testimony that Martucci had a temper and had pistols in the house?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004)); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004); State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004). "This court is bound by the trial court's factual findings unless they are clearly erroneous." Preslar, 364 S.C. at 472, 613 S.E.2d at 384; accord State v.

Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Quattlebaum, 338 S.C. 441, 442, 527 S.E.2d 105, 111 (2000)). The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. Mattison, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001); accord State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (citing State v. Bailey, 276 S.C. 32, 37, 274 S.E.2d 913, 916 (1981)); Wright v. Craft, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006); State v. Broaddus, 361 S.C. 534, 539, 605 S.E.2d 579, 582 (Ct. App. 2004). "A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); accord Preslar, 364 S.C. at 472, 613 S.E.2d at 384; State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218-219 (Ct. App. 2004); State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999); see State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) ("The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard."); State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) ("[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown."). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001) (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995)); accord State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d

202, 204-205 (2007); State v. Adkins, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003).

"To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." White, 372 S.C. at 374, 642 S.E.2d at 611 (citing Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)); accord Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). "Error is harmless when it 'could not reasonably have affected the result of the trial.' " State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)); accord State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991); Broaddus, 361 S.C. at 542, 605 S.E.2d at 583; State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003); see also Chapman v. California, 386 U.S. 18, 22 (1967) ("[S]ome constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."); State v. Rice, 375 S.C. 302, 316. 652 S.E.2d 409, 415 (Ct. App. 2007) ("The commission of legal error is harmless if it does not result in prejudice to the defendant."); Visual Graphics Leasing Corp., Inc. v. Lucia, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993) ("An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, [an appellate] court should not set aside a conviction because of errors not affecting the results." Broaddus, 361 S.C. at 542, 605 S.E.2d at 583 (citing Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002)).

LAW/ANALYSIS

The Legislature has criminalized homicide by child abuse:

> (A) A person is guilty of homicide by child abuse if the person:
>
> (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(B) For purposes of this section, the following definitions apply:
(1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
(2) "harm" to a child's health or welfare occurs when a person:
(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;
(b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or
(c) abandons the child resulting in the child's death.

S.C. Code Ann. § 16-3-85 (2003).

I. AUTOPSY PHOTOGRAPHS OF CHILD

Martucci asserts the trial judge committed reversible error in admitting autopsy photographs of Child's internal organs and other injuries. We disagree.

The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation. State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Haselden, 353 S.C. 190, 199, 577 S.E.2d 445, 450 (2003); State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999); see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (stating that trial judge has considerable latitude in ruling on admissibility of evidence and his rulings will not be disturbed absent showing of probable prejudice). The trial judge must balance the prejudicial effect of

graphic photographs against their probative value. State v. Vang, 353 S.C. 78, 87, 577 S.E.2d 225, 229 (Ct. App. 2003). A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. State v. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593. Admitting photographs which serve to corroborate testimony is not an abuse of discretion. Rosemond, 335 S.C. at 597, 518 S.E.2d at 590; see State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002). However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). A trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive. Davis v. Traylor, 340 S.C. 150, 530 S.E.2d 385, 387 (Ct. App. 2000).

In the present case, the photographs were introduced to corroborate the testimony of Dr. Ward, who testified regarding the various injuries inflicted on Child, including the discoloration of the bruises and the internal trauma which caused his death. The photographs were relevant to prove Child was abused, that the abuse was the cause of his death, and that the abuse manifested an extreme indifference to human life, all of which support the charge of homicide by child abuse. See S.C. Code Ann § 16-3-85(A)(1) (2003). Furthermore, the photographs were necessary to depict the severity of the bruises and the resulting trauma, which was inconsistent with accidental injury or play. The photographs were relevant and necessary, and they were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury. The trial judge did not abuse his discretion in admitting the photographs. See Jarrell, 350 S.C. at 106, 564 S.E.2d at 371 (upholding the admission of graphic autopsy photographs in homicide by child abuse case because they corroborated testimony and demonstrated the extent of the injuries); see also State v. Nichols, 325 S.C. 111, 121, 481 S.E.2d 118, 124 (1997) (admitting a photograph of the victim's face because it demonstrated the angle and distance from which the victim was shot); State v. Nance, 320

S.C. 501, 508 466 S.E.2d 349, 353 (1996) (holding trial court did not err in admitting photographs during trial which (1) corroborated testimony regarding the various places in which the victim was stabbed; (2) corroborated testimony indicating the likelihood the victim died of the stab wounds; (3) were used to show malice, an element of the crime charged; and (4) were later reviewed by the supreme court and found not to be unduly prejudicial to the defendant).

II. EVIDENCE OF PRIOR INCIDENTS OF ALLEGED ABUSE OF CHILD

Martucci argues the judge committed reversible error in admitting (1) Parker's testimony alleging prior incidents where Martucci abused Child and (2) photographs taken by Elizabeth Venesky showing external bruising to Child several weeks before his death. We disagree.

The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion. Brazell, 325 S.C. at 78, 480 S.E.2d at 72. 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. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis, such as an emotional one. Saltz, 346 S.C. at 127, 551 S.E.2d at 247.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to

establish: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the perpetrator. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Sweat, 362 S.C. 117, 123, 606 S.E.2d 508, 511 (Ct. App. 2004). If not the subject of a conviction, proof of prior bad acts must be clear and convincing. State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999). When considering whether there is clear and convincing evidence, this court is bound by the trial judge's findings unless they are clearly erroneous. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. Id. at 329, 580 S.E.2d at 192. Even though the evidence is clear and convincing, and falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Id. at 324, 580 S.E.2d at 189. If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

a. Intent/Absence of Mistake or Accident

In a prosecution for homicide by child abuse, "extreme indifference" is in the nature of "a culpable mental state . . . and therefore is akin to intent." Jarrell, 350 S.C. at 98, 564 S.E.2d at 366; see also State v. McKnight, 352 S.C. 635, 644, 576 S.E.2d 168, 172-73 (2003).

The prior abuse or neglect at issue was admissible as proof of intent and the absence of accident. The State contended Martucci killed Child while committing child abuse or neglect under circumstances manifesting an extreme indifference to human life. The prior abuse or neglect at issue in the weeks before the infliction of the fatal injuries was relevant to the material issue of Martucci's state of mind. Martucci's hostility, cruelty, and abuse toward Child could be established by evidence that, during the weeks before he died, Martucci abused Child by slapping his face, taping his mouth shut, and dunking his head in the bathtub until he choked to stop him from crying. The presence of bite marks and bruises, and the fact that Martucci kept

Child's skin covered and rarely let him out of the house in the apparent attempt to conceal the abuse, is further evidence of Martucci's state of mind to inflict the fatal injuries. Because Martucci disputed the motive and intent to commit homicide by child abuse, evidence of the prior abuse or neglect was highly probative of his guilt on the homicide charge. The evidence was necessary to establish a material fact or element of the crime charged. See State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999) (defendant's prior criminal domestic violence conviction admissible to establish his intent to kill and the absence of mistake or accident); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) (evidence of a prior episode of domestic violence was admissible in prosecution for first-degree burglary, assault and battery with intent to kill, and assault of a high and aggravated nature; to show defendant's motive, that defendant was driven by anger over ex-girlfriend causing him to go to jail and terminating their relationship, and that he intended to "get his property"; and intent, that defendant maliciously sought to inflict harm upon ex-girlfriend and her new boyfriend).

Chief Justice Toal recently articulated the difficulty the State faces in proving child abuse:

> Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help. It is also not uncommon for child abuse victims to be so young that they are incapable of offering testimony against the abuser. For these reasons, proving the crime of child abuse is extremely difficult.

State v. Fletcher, Op. No. 26527 (S.C. Sup. Ct. filed Aug. 4, 2008) (Shearouse Adv. Sh. No. 32 at 26) (Toal, C.J., dissenting).

When a child is brought to an emergency room with injuries in various stages of healing, there is evidence of recurring child abuse. If the multiple, separately occurring injuries are not admissible in child abuse prosecutions, the crime would be virtually impossible to prove. Martucci and Holder both informed hospital personnel and police that Child was injured in a four-wheeler accident and that he frequently fell. The prior abuse or neglect at issue was so close in time to the infliction of the fatal injuries that the evidence was relevant and probative to refute their claims and demonstrate Martucci intended to hurt Child. The prior evidence was logically relevant to Martucci's intent and absence of mistake or accident at the time of Child's death.

b. Identity

Martucci advances he did not abuse Child; instead, he said "she" did it. On the other hand, Holder eventually told police that "he" abused Child and admitted she did nothing to stop it. In order to identify Martucci as the likely perpetrator of Child's injuries, the prior abuse or neglect at issue was relevant to establish his identity as the person or one of the persons who fatally abused Child. See State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996) (finding evidence that defendant was the gunman during a robbery was relevant to establish it was the defendant who actually killed the victim); State v. Good, 315 S.C. 135, 432 S.E.2d 463 (1993) (evidence that defendant robbed grandmother's home four months earlier and the theft of items belonging to her were admissible to establish identity of her killer). The fact that Martucci exhibited such cruelty and abuse toward Child within a relatively short period of time prior to his death circumstantially identified him as Child's killer. See State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

c. Common Scheme or Plan

The evidence at issue established a pattern of continuous abuse or neglect necessary to prove homicide by child abuse and clearly supported the existence of a common scheme or plan, which made it more probable Child was a victim of "child abuse or neglect." The prior abuse or neglect at issue is highly relevant to Martucci's common scheme or plan rather than his character. The evidence showed Martucci followed a pattern of continuous

conduct over a period of time from June to Child's death on July 17, making its logical relevance apparent and the evidence admissible. See Tutton, 354 S.C. at 329, 580 S.E.2d at 192.

In the case of the common scheme or plan exception, a close degree of similarity between the prior bad act and the crime for which the defendant is on trial is necessary. State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997). Prior bad act evidence is admissible where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect. State v. Raffaldt, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995). The degree of remoteness between the other crimes and the one charged is one factor to be considered in determining the connection between them. Id. As the similarity becomes closer, the more likely the evidence will be admissible. State v. Aiken, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct. App. 1996). "The acid test of admissibility is the logical relevancy of the other crimes." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

When a criminal defendant's prior bad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan. State v. Weaverling, 337 S.C. at 471, 523 S.E.2d at 792-93. In Weaverling, the defendant repeatedly raped the same child. Id. This Court held the defendant's prior acts were admissible even though the acts were not charged. Id. at 469, 523 S.E.2d at 791. This Court articulated that "[w]here the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to overrule the prejudicial effect, it is admissible." Id. (citing Raffaldt, 318 S.C. 110, 456 S.E.2d 390).

The present case is distinguishable from State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997). In Pierce, testimony of the defendant's fellow employee about the defendant's rough treatment of the child one year prior to his death was held to be inadmissible under the common scheme or plan exception because there was no connection between the prior bad act and the crime of homicide by child abuse. However, as with cases of sexual abuse, child abuse generally involves the same perpetrator committing abuse against the same helpless victim. And where, as here, the perpetrator is the parent or

a person with exclusive custody and control over the victim, proving the abuse becomes extremely difficult.

As a result of the difficulties in proving child abuse, "evidence which shows a pattern of abuse becomes even more probative than it might otherwise be." Pierce, 326 S.C at 182, 485 S.E.2d at 916 (citing State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984)) (Burnett, J., dissenting). Justice Burnett further elaborated: "[c]ontinued illicit intercourse is analogous to a pattern of child abuse, and the only difference between [child abuse] and McClellan is that this case involved child abuse, not sex abuse." Id.

Pierce can be reconciled with this case. In Pierce, the prior abuse occurred one year before the child's death. The prior abuse or neglect at issue in the case sub judice occurred about a month and a half up to a few weeks before Child's death. The evidence of prior abuse against the same victim was not remotely disconnected in time from the conduct giving rise to the homicide by child abuse and was part of the same pattern of abuse showing extreme indifference to human life. It was logically relevant to proving Child died of multiple, non-accidental blunt force injuries and that his death was the result of child abuse. There should be no distinction between continued illicit intercourse by the same perpetrator against the same victim and continued child abuse by the same perpetrator against the same victim. The State had the burden of proving that Martucci's conduct caused Child's death. Because the prior abuse or neglect was probative of a pattern of abuse by Martucci against Child, it was admissible under the "common scheme or plan" exception to Lyle.

d. Clear and Convincing Evidence

Martucci did not argue at trial that the State failed to show the prior acts by clear and convincing evidence. The issue cannot be considered on appeal. See State v. Luckabaugh, 327 S.C. 495, 499, 489 S.E.2d 657, 659 (Ct. App. 1997) (issue not preserved when a defendant failed to object to testimony as less than clear and convincing); see also Nichols, 325 S.C. 111, 481 S.E.2d 118 (an objection must be on a specific ground); State v.

Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (an appellant "is limited to the grounds raised at trial").

In any event, the photographs of Child taken by Venesky's husband were admissible. The appellate court "does not conduct a de novo review to determine if the evidence is clear and convincing." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 310 (2001) (noting that court cannot re-revaluate the facts based on its own view of the preponderance of the evidence but must simply determine whether the trial judge's ruling is supported by any evidence). Here, Parker testified about his direct observations of the prior incidents. Further, other witnesses testified about the bruises and burns depicted in the photographs. Thus, there was clear and convincing evidence of the prior abuse to admit it at trial. The credibility of this evidence was for the jury, not this Court, to determine. Id.

e. Res Gestae

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

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)). The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Wood, 362 S.C. 520, 608 S.E.2d 435; State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. Hough, 325 S.C. 88, 480 S.E.2d 77. Even if the evidence is relevant under this theory, prior to admission the trial judge should determine whether its probative value clearly outweighs any unfair prejudice. Rule 403, SCRE; State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990).

Martucci argues the prior incidents were neither factually nor temporally related to the charged crime. In this case, the time period and similarity of the incidents involved must be examined overall because of the nature of the crime charged. The overall view of the facts provides the context in which the crime occurred and demonstrates the culminating impact on Child. The incidents were relevant to establishing Martucci's state of mind and whether or not he manifested an extreme indifference to human life. The alleged child abuse occurred in the month and a half to several weeks before the fatal trauma was inflicted. The evidence was necessary to establish the crime charged. Its admission was essential and relevant to a full presentation of the evidence in this case. The testimony regarding the prior bad acts was relevant to show the complete, whole story relating to the charge of homicide by child abuse. Moreover, the probative value of the evidence outweighed its prejudicial effect. See Owens, 346 S.C. at 653, 552 S.E.2d at 753. The trial judge did not err in admitting the evidence of alleged prior abuse pursuant to the res gestae doctrine.

III. PARKER'S TESTIMONY OF MARTUCCI'S CHARACTER

Martucci argues the trial judge committed reversible error in allowing Parker's testimony about his temper and that he had pistols in the house. He

contends this evidence improperly introduced his bad character to the jury and was inadmissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). We disagree.

Parker witnessed several occasions when Martucci abused Child while he stayed at the house. Parker testified that when Martucci abused Child, "it would upset me to the point to where I would have to walk outside. I couldn't listen to it anymore." On direct examination, the Assistant Solicitor asked Parker:

> Assistant Solicitor: Did you ever think about trying to call for help for [Child]?
>
> Parker: I thought about it, yes, ma'am. Me and Mr. Martucci had—we had had conflicts in the past. And I knew of his temper from hanging out with him a lot—
>
> Defense Counsel: Your Honor, I would object to any character evidence of Mr. Martucci.
>
> The Court: I'll allow this. Go ahead.
>
> Parker: We had—I knew of his attitude. I knew he had pistols in the house. I knew that he—we had had conflicts in the past to the point—we had—there was one episode in Myrtle Beach to where me and a few friends of mine were down there as well as—
>
> Defense Counsel: Your Honor, I hate to object—
>
> The Court: Yes. This is getting a little bit too far now, Solicitor.
>
> Assistant Solicitor: Your Honor, I will say that this is relevant to his state of mind and—
>
> The Court: All right. I'm going to stop it here. I think it's gone far enough. Move on, please.

Parker's direct examination continued. Parker averred he was afraid of Martucci because of prior incidents. Parker noted he was "pretty small" in comparison to Martucci. Parker said he did not get help because, "I was afraid of him and I knew the—what could happen scared me."

Where a defendant objects and the objection is sustained but he does not move to strike the evidence, the issue is not preserved for appellate review. State v. McFadden, 318 S.C. 404, 410, 458 S.E.2d 61, 65 (Ct. App. 1995) (no issue is preserved for appeal where the court sustains a party's objection to improper testimony and the party does not move to strike the testimony); State v. Wingo, 304 S.C. 173, 177-78, 403 S.E.2d 322, 325 (Ct. App. 1991) (a motion to strike is necessary where a question is answered before an objection has been interposed, even though the objection is sustained); see also State v. Kelsey, 331 S.C. 50, 75, 502 S.E.2d 63, 73, 76 (1998) (any prejudice to the defendant could have been removed if the defendant had requested the trial judge to strike the objected-to testimony and to give a curative instruction to the jury).

In the case at bar, Martucci objected to Parker's testimony about the presence of guns in the house and a prior incident in Myrtle Beach. The trial judge sustained the objection by stating, "it's gone far enough." He then instructed the Assistant Solicitor to "move on." Martucci failed to request the trial judge either strike the objectionable testimony or to instruct the jury to disregard the reference, and he did not move for a mistrial. His failure to request appropriate relief precludes appellate review of this issue. Id.

When Parker later testified about his fear of Martucci based on prior incidents and because he knew "what could happen to me," there was no objection. Because the jury heard this other evidence, the fact they heard the previous testimony was not prejudicial to Martucci. See Haselden, 353 S.C. at 196, 577 S.E.2d at 448 (stating the erroneous admission of prior bad act evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in the admission of evidence cumulative to other unobjected-to evidence is harmless).

Parker's testimony was an isolated comment regarding Martucci's temper and his possession of pistols that did not prejudice Martucci. The State did not attempt to introduce evidence of any prior convictions or otherwise highlight his character in this regard. See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony that he compared defendant's fingerprints with a fingerprint card agency had on record was not so prejudicial to defendant as to warrant a mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior); State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (holding that, even if the testimony created the inference in the jury's mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime); State v. Creech, 314 S.C. 76, 81-82, 441 S.E.2d 635, 638 (Ct. App. 1993) (holding trial judge did not abuse his discretion in denying defendant's motion for a mistrial when officer testified that he obtained warrants for defendant's arrest and contacted "the Probation Officer"). Accordingly, Martucci is not entitled to a new trial.

IV. HARMLESS ERROR

Assuming, arguendo, that the trial judge did err in admitting Parker's testimony, such error was harmless. Whether an error is harmless depends on the circumstances of the particular case. In re Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003); Taylor, 333 S.C. at 172, 508 S.E.2d at 876; State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151.

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. at 63, 584 S.E.2d at 897; Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 610, 486 S.E.2d 762, 764 (Ct. App. 1997). Generally, appellate courts will not set

aside convictions due to insubstantial errors not affecting the result. Sherard, 303 S.C. at 176, 399 S.E.2d at 597; Adams, 354 S.C. at 380-81, 580 S.E.2d at 795. Thus, an insubstantial error not affecting the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978); Weaverling, 337 S.C. at 471, 523 S.E.2d at 793; see also State v. Williams, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996) (instructing that error in admission of evidence is harmless where it is cumulative to other evidence which is properly admitted).

There was overwhelming and independent evidence of Martucci's guilt. Parker testified about Martucci's prior abuse of Child and that Martucci was the last person with Child before he died. Martucci lied to the police and hospital personnel about the cause of Child's injuries. Holder told the police about Martucci's physical abuse of Child just before his death. This evidence, together with other physical evidence in this case, clearly demonstrates Martucci's guilt of homicide by child abuse was conclusively proven by competent evidence such that no other rational conclusion could be reached. Given this substantial and overwhelming evidence of Martucci's guilt, the challenged evidence was cumulative and its admission is not a ground for reversal. Baccus, 367 S.C. at 55-56, 625 S.E.2d at 224; Adams, 354 S.C. at 381, 580 S.E.2d at 795.

There was other evidence demonstrating Parker's fear of Martucci which was admitted without objection. Deputy Wesley Smith interviewed Parker at the law enforcement center on the day of Child's death. Smith testified Parker "was cooperative. He really acted like he was scared of Mr. Martucci and what his involvement in the case would be and what would happen to him." Smith vouched Parker "was always kind of hesitant" about answering questions. He advanced Parker "cried some" during the interview because he told him that he was afraid of Martucci. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (stating admission of improper evidence is harmless where it is merely cumulative to other evidence); Broaddus, 361 S.C. at 542, 605 S.E.2d at 583-84 (holding error in

admission of drug evidence was harmless where it was cumulative to other unobjected-to testimony at trial regarding drug use and drug dealing); State v. Richardson, 358 S.C. 586, 596-97, 595 S.E.2d 858, 863 (Ct. App. 2004) (holding that even if the challenged testimony constituted improper "character evidence," any error in its admission was harmless where the testimony was cumulative to other similar testimony that was admitted without objection); see also State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (Ct. App. 2001) (holding any error in admitting evidence of murder defendant's violent character was harmless as properly admitted evidence of the defendant's use of force during his argument with victim the previous day clearly demonstrated defendant's propensity to become violent).

If the admission of Parker's testimony was erroneous, it was clearly harmless beyond a reasonable doubt because its impact was minimal in context of the entire record.

CONCLUSION

We hold the trial court properly admitted autopsy photographs which were relevant to prove Child was abused, that the abuse was the cause of his death, and the abuse manifested an extreme indifference to human life, all of which support the charge for which Martucci was under indictment. The evidence of Martucci's prior abuse of Child was admissible to show intent, the identity of the abuser, the absence of mistake or accident, and a common scheme or plan of abuse. We determine any error in the admission of Parker's testimony about Martucci's character is not preserved. Had the issue been preserved, the testimony would be cumulative to unobjected-to testimony and concomitantly harmless.

Accordingly, Martucci's conviction is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Bickerstaff, M.D. and
Barbara Magera, M.D., Appellants,

v.

Roger Prevost d/b/a Prevost
Construction, Inc., Respondent.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4439
Heard June 4, 2008 – Filed September 25, 2008

AFFIRMED

Patrick J. McDonald and Steven L. Smith, both of Charleston, for Appellants.

Frank M. Cisa, of Mt. Pleasant, for Respondent.

HEARN, C.J.: Charles Bickerstaff and Barbara Magera (collectively Appellants) appeal the circuit court's award of prejudgment interest to Roger Prevost and Prevost Construction Company (Prevost). We affirm.

FACTS

Appellants entered into a contract with Prevost for interior remodeling of their home. The home experienced significant water damage when a broken water line to the washing machine flooded the first floor of the residence. Thereafter, Appellants brought an action against Prevost alleging negligence and breach of implied warranty of workmanship as a part of the remodeling work. Prevost answered Appellants' complaint, and counterclaimed for breach of contract, implied contract/quantum meruit, and foreclosure of its previously filed mechanic's lien. Included in Prevost's counterclaims was a request for interest on any payment due pursuant to the contract, at the agreed-upon "daily rate of 1%."

A jury trial resulted in a verdict in favor of Prevost in the amount of $6,437.62. After the jury had been excused, Prevost made a post-trial motion for attorneys' fees and prejudgment interest under the contract. The contractual provision at issue stated: "Payment due under this Contract but not paid shall incur a daily interest rate of 1% from the date the payment is due." The circuit court took the matter under advisement and then issued an order awarding Prevost prejudgment interest as defined under the contract. The award of prejudgment interest is the only issue before us on appeal.

LAW/ANALYSIS

I. Entitlement to Prejudgment Interest/Question of Fact for the Jury

Appellants contend the issue of prejudgment interest was a question of fact that should have been submitted to the jury. Additionally, Appellants contend the circuit court's award of prejudgment interest to Prevost under the contract was in error. We disagree.

Initially, we note neither party appears to have argued during the presentation of evidence that the issue of prejudgment interest should be submitted to the jury. The circuit court issued a post-judgment order granting Prevost prejudgment interest as specified in the contract, but did not make a finding as to whether the prejudgment interest was a question of law or fact.[1] Appellants made no Rule 59(e), SCRCP, motion to alter or amend the judgment requesting the court rule on its finding. However, Appellants' argument also fails on the merits. It is well settled in this state that the award of prejudgment interest is a function of the trial court, and has never been held to be an issue of fact requiring its submission in a jury trial. See Smith-Hunter Constr. Co. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005); Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993).

South Carolina law permits prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty. Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421 (citing Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993)). As explained in a recent supreme court case, "prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties . . . [t]he fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006). Thus, "[t]he proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421.

Here, Appellants and Prevost entered into a contract found by the circuit court to be for a definite amount of $27,865; therefore, the measure of recovery was fixed by conditions existing at the time the claim arose. It is of

[1] It is presumably implicit in its order granting interest that the court found this issue to be a question of law.

no consequence that each party claimed damages under the contract, or that the jury returned a verdict for less than the liquidated damages requested by Prevost. Therefore, we find the circuit court properly considered the applicable law on prejudgment interest, and was correct in its determination that Prevost is entitled to interest on the amount of damages awarded by the jury.

II. Consumer Protection Code Prohibits the Interest Rate under the Contract; Interest Rate Is Punitive In Nature, and Violates the Constitution and the Public Policy of This State

Appellants next contend the South Carolina Consumer Protection Code prohibits the imposition of interest in excess of twelve percent per annum. Additionally, they maintain the award of interest at the rate of one percent per day was grossly disproportionate to the amount of the principal, making it punitive in nature, and violative of the United States Constitution and the public policy of this state. Appellants present these arguments for the very first time on appeal. As a result, they were not ruled upon by the circuit court, and are not preserved for our review. See Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939) (stating the questions presented for appellate review must first have been fairly and properly raised in the circuit court and passed upon by that court); see also State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) (finding constitutional arguments are no exception to the rule, and if not raised to the trial court are deemed waived on appeal).

AFFIRMED.[2]

[2] We note this court is not blind to the inequity that results from the imposition of the rate of one percent daily interest on this jury award. The circuit court found interest was due under the contract beginning on June 1, 2004, a finding that was not appealed, and the jury award of $6,437.62 in damages occurred 725 days later, on May 26, 2006. If the provision is interpreted to provide prejudgment interest on any payment due under the contract as a one percent daily penalty fee, i.e. taking an amount of one percent of the award due each day according to the circuit court's order, then the prejudgment interest due on the award would be $46,672.75 (calculated

KONDUROS, J., concurs. SHORT, J., concurs in part, dissents in part in a separate opinion.

SHORT, J., (concurring in part, dissenting in part): I concur in part and respectfully dissent in part.

I agree with the majority that Appellants' Consumer Protection Code and constitutional arguments are not preserved for review. However, I find the issue of whether the prejudgment interest should have been presented to

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simply by multiplying one percent of the award by 725). However, if the provision is interpreted to provide daily one percent compounding interest, then the prejudgment interest due on the award would be $8,744,225.12 (calculated by multiplying the $6,437.62 award, by 1.01 to the 725th power). The circuit court's order does not set out a method for calculating the interest, nor does it quote the actual dollar interest award. Appellants estimate the interest at $60,000-plus, failing to explain how they arrived at that number, and Prevost does not state a number in its brief. Although the contractual interest rate term itself is potentially ambiguous, as opposed to the academic argument of entitlement to prejudgment interest, and although a court could find alternatively that the term is unconscionable or would lead to an absurd result, we are nonetheless confronted with the insurmountable obstacle that Appellants neither made these arguments below, nor presented them to us on appeal. See I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating an appellate court may affirm for any reason appearing in the record, but may reverse only for a reason raised to and ruled upon by the trial court and argued on appeal); see also Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984) rev'd on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."); contra State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) (addressing an issue sua sponte); 15 SC Juris Appeal and Error §§71-73 (1992 and Supp. 2007) (outlining the rules and exceptions for preserving and presenting error for appellate review).

the jury is not preserved for review.[3] Furthermore, I would remand the action for the trial court to set the amount of prejudgment interest.

As noted by the majority in footnote 2, the issue of the amount of interest due is still unsettled. As there is something remaining to be done prior to full resolution of this case, I would remand to the Honorable Deadra L. Jefferson for a hearing to determine the amount of prejudgment interest to award Prevost. See TranSouth Fin'l Corp. v. Cochran, 324 S.C. 290, 297, 478 S.E.2d 63, 66-67 (Ct. App. 1996) (remanding for an additional hearing to determine the amount of the final judgment where the parties disputed, inter alia, the prejudgment interest due on an undisputed principal amount due). See generally Adams v. South Carolina Dep't of Health & Envtl. Control, 303 S.C. 251, 255, 399 S.E.2d 788, 790 (Ct. App. 1990) (remanding case due to legal error because agency failed to make critical findings).

The inequity arising from an award of prejudgment interest of 725 times the amount of the judgment, as is the case here as calculated by the majority, and the parties' confusion as to the amount of the judgment including prejudgment interest, requires me to respectfully concur in part and dissent in part.[4]

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[3] After the jury returned its verdict, Appellants argued the prejudgment interest rate was a matter for the jury. The trial judge stated: "I am inclined to believe, although I'm not fixed in that opinion, that the one percent that would be due on the debt is a matter of law for the Court." The judge required the parties to submit orders on the issue of, inter alia, prejudgment interest. In the final order, the court concluded Prevost was entitled to prejudgment interest at the contract rate without ruling on the issue of whether the interest should have been decided by the jury. Appellants filed no post-trial motions. See Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (stating a party must file a motion to reconsider when an issue has been raised, but not ruled on, to preserve issue for appellate review).

[4] I recognize parties are free to contract for higher interest rates within legal limits. See Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, 372

S.C. 89, 99, 641 S.E.2d 459, 464 (Ct. App. 2007). However, the prejudgment interest, as calculated by the majority at $46,672.75, is 725 times the amount of the judgment. Clearly, this is beyond any legal rate of interest and is unconscionable. See S.C. Code Ann. § 34-31-20(A) (Supp. 2007) (setting legal rate of interest on accounts stated at 8.75 percent per annum).