The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF JOSEPH W. GINN, III, PETITIONER

Joseph W. Ginn, III, who was definitely suspended from the practice of law for a period of nine (9) months, retroactive to October 1, 2009, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, December 3, 2010, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

November 1, 2010

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
November 8, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Greenville, Respondent,

v.

Joseph D. Bane, Appellant.

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

Opinion No. 26888
Heard September 23, 2010 – Filed November 8, 2010

REVERSED

Samuel Darryl Harms, of Greenville, for Appellant.

Robert Patrick Coler, of Greenville, for Respondent.

JUSTICE PLEICONES: Appellant, a street preacher, was convicted in municipal court of violating a city ordinance prohibiting molesting or disturbing others. On appeal, the circuit court affirmed Appellant's conviction, finding the ordinance was constitutional and that the municipal court judge properly denied Appellant's motions for a directed verdict and a new trial. This Court certified the case pursuant to Rule 204(b), SCACR. We reverse.

FACTS

Appellant was convicted of violating a City of Greenville ordinance (the ordinance), entitled "Molesting, disturbing, or following persons," which provides:

> It shall be unlawful for any person to:
>
> (1) Willfully or intentionally interfere with, disturb or in any way molest any person in the city while on any public street, lane, alley, sidewalk, park, or square or in any place of public amusement or other building or place or upon privately owned premises where such person may have entered without permission or as a trespasser;
>
> (2) Invite any person to or attempt to have any person enter an automobile for the purpose of molesting or willfully disturbing such person;
>
> (3) Molest or disturb any person by the making of obscene remarks or such remarks and actions as would humiliate, insult, or scare any person;
>
> (4) Follow any person along any street, sidewalk, or other place within the city for the purpose of molesting, disturbing, harassing, or annoying such person; or
>
> (5) Exhibit, display, or gesture in any public place and in the presence of any other person any lewd or lascivious act or condition that depicts actual or simulated sexual conduct, regardless of whether or not the person exhibiting, displaying, or gesturing exposes the private parts of his person.
>
> Greenville, S.C. Code § 24-32 (1985).

Appellant was loudly preaching against homosexuality on a public sidewalk in downtown Greenville. Officer Patricia Mullinax cited Appellant for violating the ordinance after he directed a comment to three young women as they passed by. Two of the women testified Appellant yelled to them, "Faggots, you will burn in hell." Officer Mullinax testified she cited Appellant as a result of the comment he directed at the women.

At the close of the City's evidence, Appellant moved for a directed verdict, which the trial judge denied. The jury found Appellant guilty of violating the ordinance, and the trial judge imposed a fine of $200. The circuit court affirmed Appellant's conviction.

ISSUES

I. Did the trial judge properly deny Appellant's directed verdict motion and motion for a new trial?

II. Is the ordinance unconstitutional on its face?

DISCUSSION

I. Did the trial judge properly deny Appellant's directed verdict motion and motion for a new trial?

Appellant argues the circuit court erred in affirming the municipal court's denial of his directed verdict motion. Specifically, Appellant argues the City presented no evidence that he violated any subsection of the ordinance. We agree as to subsections (1), (2), (4), and (5).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Parris, 363 S.C. 477, 481, 611 S.E.2d 501, 503 (2005). In reviewing a motion for

directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. Id. at 481, 611 S.E.2d at 502-03. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. Id. at 481, 611 S.E.2d at 503. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. Id.

The circuit court affirmed the municipal court's denial of Appellant's directed verdict motion, finding the testimony of each of the women, alone, was sufficient to submit the issue to the jury.

We find the circuit court erred in affirming the municipal court's denial of Appellant's directed verdict motion as to subsections (1), (2), (4), and (5). We find as to subsections (2), (4), and (5) the City presented no evidence that Appellant invited anyone into an automobile, followed anyone, or displayed any lewd behavior.

We also find the trial judge should have granted Appellant's directed verdict motion as to subsection (1). Viewing the evidence in a light most favorable to the City, there is no evidence Appellant was guilty of violating this subsection. Both subsections (1) and (3) criminalize molesting or disturbing others. The proscription of subsection (3) relates solely to speech that would molest or disturb others. Officer Mullinax testified she arrested Appellant only on the basis of his verbal comment. The City presented no evidence that, other than through his speech, Appellant engaged in any conduct that would disturb or molest others. We find the circuit court erred in affirming the municipal court's denial of Appellant's directed verdict motion as to these subsections.

Because we find the trial court should have directed a verdict of acquittal as to these subsections, we need not address their constitutionality. See Morris v. Anderson County, 349 S.C. 607, 564

S.E.2d 649 (2002) (Court will not unnecessarily reach constitutional questions).

II. Is subsection (3) unconstitutional on its face?

Appellant argues subsection (3) of the ordinance is unconstitutional on its face. Specifically, Appellant argues the provision is unconstitutionally vague. We agree.

In determining whether a statute is vague, the Court has held:

> The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.
>
> City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 473-74 (1993) (quoting State v. Albert, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)).

"The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." Edwards v. South Carolina, 372 U.S. 229, 237, 83 S.Ct. 680, 684, 9 L.Ed.2d 697 (1963). In Edwards, a group of African Americans were convicted of breach of peace after they marched peacefully on a sidewalk around the State House grounds to publicize their dissatisfaction with discriminatory actions against African Americans. The United States Supreme Court found the arrest, conviction, and punishment of the

defendants infringed their constitutionally protected right of free speech. Id. at 236, 83 S.Ct. at 684. The Court found the defendants were convicted of an offense "so generalized as to be not susceptible of exact definition." Id. The Court stated:

> [W]e do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.
>
> Id.

We find subsection (3) is unconstitutionally vague because the words "humiliate," "insult," and "scare" are not sufficiently definite to give reasonable notice of the prohibited conduct. This provision is subjective because the words that humiliate, insult, or scare one person may not have the same effect on another person. Therefore, people of common intelligence may be forced to guess at the provision's meaning and may differ as to its applicability. Subsection (3), like the statute in Edwards, is not precisely written in a way that would notify a person of the certain specific conduct that is prohibited. Accordingly, we find subsection (3) is unconstitutional because it is facially vague.

III. Remaining Issues

Appellant also argues the ordinance is unconstitutionally overbroad, unconstitutional as applied, and that it violates the South Carolina Religious Freedom Act. Because we find subsection (3) is unconstitutional on other grounds and that Appellant was entitled to a directed verdict as to all other subsections, we decline to address these

issues. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1998) (appellate court need not discuss remaining issues when disposition of prior issue is dispositive).

CONCLUSION

We find Appellant was entitled to a directed verdict as to subsections (1), (2), (4), and (5) of the ordinance. We further find subsection (3) is invalid because it is facially unconstitutional. Appellant's conviction is therefore

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sean J. Prendergast, Respondent.

Opinion No. 26889
Heard September 23, 2010 – Filed November 8, 2010

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Sean J. Prendergast, *pro se*, of Mount Pleasant.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct (the Commission) investigated an allegation of misconduct against Sean J. Prendergast (Respondent) involving Respondent's solicitation of a client to invest funds in a commercial real estate venture. After a full investigation, the Office of Disciplinary Counsel (ODC) filed Formal Charges against Respondent. Following a hearing,[1] a Hearing Panel of the Commission (the Panel) found Respondent had committed misconduct and recommended that the Court impose a definite suspension for a period of two years. Neither the ODC nor Respondent took exception to the Panel

[1] Respondent did not appear at the hearing.

Report.[2] Based on the admitted allegations of misconduct, we find disbarment is the appropriate sanction.[3]

I. FACTUAL/PROCEDURAL HISTORY

Respondent, who was admitted to the South Carolina Bar on June 11, 2002, represented Thomas M. Oppold, Jr. (Client) in an estate planning transaction and served as an attorney for various business entities owned by Client.

In August 2005, during the course of his representation of Client, Respondent solicited Client to invest funds in a commercial real estate venture referred to as the Wando Park Project (the "Wando Project"). Ultimately, Client invested $65,000 through WP Property, L.L.C., an entity created by Respondent. According to Client, he made the investment based on the belief that Respondent had also invested approximately $90,000 in the project.

After Client lost his entire investment, he filed a Complaint with the Commission on February 12, 2007. By letter dated February 15, 2007, the ODC notified Respondent of the Complaint and requested a response within fifteen days. Respondent failed to respond or otherwise communicate with the ODC in regard to the February 15, 2007 letter.

On April 17, 2007, the ODC sent Respondent a letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982),[4] again requesting a

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[2] We also note that neither party filed briefs with this Court. Consequently, the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations. See Rule 27(a), RLDE, of Rule 413, SCACR ("The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

[3] Respondent did not appear at the argument before this Court despite evidence that he received notification of the hearing via certified mail.

[4] See In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982) (recognizing that an attorney's failure to respond to the ODC constitutes sanctionable misconduct).

response. Respondent failed to respond or otherwise communicate with the ODC following the mailing of the Treacy letter.

On July 16, 2007, Respondent was served with a Notice of Full Investigation, which required a response within thirty days. Respondent failed to comply with the request for a response to the Notice of Full Investigation. Subsequently, a subpoena for Respondent's file concerning Client was issued on August 22, 2007, and served on Respondent on August 24, 2007. Respondent failed to comply with the subpoena for documents. A Notice to Appear, dated August 22, 2007, was served on Respondent on August 24, 2007. Respondent failed to appear on September 19, 2007, to respond to questions under oath as directed by the Notice to Appear.

As a result of Respondent's failure to respond and failure to cooperate with the above-referenced requests, this Court placed Respondent on Interim Suspension on September 21, 2007.[5] In the Matter of Prendergast, 375 S.C. 188, 651 S.E.2d 605 (2007).

Following a full investigation, the ODC filed Formal Charges on December 28, 2007. On April 7, 2008, Respondent filed a Response to the Formal Charges. During the pendency of the Formal Charges, the South Carolina Bar and ultimately this Court suspended Respondent for failure to pay license fees.

Respondent was served with notice of the Formal Charges hearing by certified mail on June 26, 2009, at the address provided by Respondent. Respondent, however, failed to appear and was not represented at the Formal Charges hearing that was held on July 29, 2009.

[5] By letter dated September 18, 2007, Respondent informed the ODC that he had just discovered the disciplinary correspondence "unopened in [his] office mailroom." Based on this claim, Respondent requested the ODC forward "all correspondences and notifications" that had been sent to him since April 2007. Additionally, Respondent requested an extension to file an Answer to Client's Complaint. Although the ODC complied with Respondent's request to send copies of the correspondence dated after April 2007, it denied Respondent's request for an extension in which to file his response.

At the beginning of the hearing, the ODC offered testimony that Respondent was notified both orally and in writing regarding the date of the Formal Charges hearing. Because Respondent failed to appear, the ODC moved for the Panel to find that Respondent was deemed to have admitted the factual allegations in the Formal Charges and to have accepted any recommendation by the ODC as to a sanction.[6] The ODC recommended disbarment as the appropriate sanction for Respondent's misconduct.

At the conclusion of the hearing, the Panel determined that Respondent had been properly served with Notice of the Formal Charges hearing.

In its report dated December 10, 2009, the Panel noted that Respondent's failure to appear at the Formal Charges hearing constituted an admission of the factual allegations contained in the Formal Charges.

After outlining Respondent's representation of Client, the Panel noted the allegations of misconduct as follows:

> Respondent failed to fully disclose the terms of the commercial business transaction to Complainant in writing and in a manner that could be easily understood by Complainant. Respondent failed to advise Complainant in writing of the desirability of seeking independent legal counsel regarding the transaction. Respondent failed to give Complainant a reasonable opportunity to seek such counsel. Respondent failed to seek informed consent, in the form of writing signed by the Complainant. Respondent failed to outline the essential terms of the transaction and Respondent's role in the transaction, including whether Respondent would be representing Complainant in the transaction. Respondent was dishonest in his representations to Complainant regarding Respondent's Ninety Thousand and no/100 ($90,000.00) Dollars Investment in the Wando Project

[6] See Rule 24(b), RLDE of Rule 413, SCACR ("If the respondent should fail to appear when specifically so ordered by the hearing panel or the Supreme Court, the respondent shall be deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance.").

> and in Respondent's representations to Complainant concerning any possible return on Complainant's investment. Complainant lost his entire investment in the commercial real estate project that Respondent had solicited him to participate in due to Respondent's dishonesty, misrepresentations and failure to fully inform and advise Complainant.

The Panel also chronicled Respondent's failure to respond and cooperate with the disciplinary proceedings.

Based on the admitted allegations of misconduct, the Panel concluded that Respondent violated the following South Carolina Rules of Professional Conduct (RPC), of Rule 407: Rule 1.8 (outlining conflict of interest involving business transactions with clients)[7]; Rule 8.1(b) ("[A] lawyer in connection with a . . . disciplinary matter, shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not

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[7] Specifically, Rule 1.8 provides in relevant part:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Rule 1.8(a), RPC, of Rule 407, SCACR.

require disclosure of information otherwise protected by Rule 1.6."); and Rules 8.4(a), (d) ("It is professional misconduct for a lawyer to: violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; or engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

Additionally, the Panel found Respondent committed misconduct with respect to the following provisions of the Rules for Lawyer Disciplinary Enforcement (RLDE), of Rule 413, SCACR: Rule 7(a)(1) ("It shall be a ground for discipline for a lawyer to violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers."); and Rule 7(a)(3) ("It shall be a ground for discipline for a lawyer to willfully violate a valid order of the Supreme Court, Commission or panels of the Commission in a proceeding under these rules, willfully fail to appear personally as directed, willfully fail to comply with a subpoena issued under these rules, or knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response or appearance under Rule 19(b)(1), (c)(3) or (c)(4).").

The Panel took into consideration the following aggravating circumstances: (1) Respondent's pattern of not responding and not cooperating with the ODC's investigation; and (2) Respondent's previous disciplinary history included a sanction for similar misconduct.

In view of these findings, the Panel recommended Respondent be suspended for a period of two years. The Panel Report did not address the issue of costs.

II. DISCUSSION

As previously stated, neither Respondent nor the ODC raise any exceptions to the Panel's report and recommendation. Because Respondent has been found in default and, thus, is deemed to have admitted to all of the factual allegations, the sole question before this Court is whether to accept the Panel's recommended sanction. See In the Matter of Jacobsen, 386 S.C. 598, 606, 690 S.E.2d 560, 564 (2010) (concluding the sole question before

the Court was whether to accept the Panel's recommended sanction where Respondent had been found in default and deemed to have admitted to all the factual allegations); In the Matter of Braghirol, 383 S.C. 379, 386, 680 S.E.2d 284, 288 (2009) (citing Rule 24, RLDE, of Rule 413, SCACR, and recognizing that this Court need only determine the appropriate sanction where Respondent is deemed to have admitted all factual allegations of the Formal Charges and the charges of misconduct).

This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record. In the Matter of Welch, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." In the Matter of Hazzard, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008).

"A disciplinary violation must be proven by clear and convincing evidence." In the Matter of Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see Rule 8, RLDE, of Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

In terms of Respondent's business dealings with Client, we find Rule 1.8(a), RPC, of Rule 407, SCACR is primarily implicated. Although Rule 1.8 does not prohibit attorney-client business relationships, it clearly delineates three mandatory requirements an attorney must satisfy in order to comply with the standards of ethical conduct. As a result, we have cautioned attorneys about engaging in business transactions with clients. See In the Matter of Harper, 326 S.C. 186, 193, 485 S.E.2d 376, 380 (1997) ("In view of the trust placed in attorneys by their clients and attorneys' often superior expertise in complicated financial matters, attorneys must take every possible precaution to ensure that clients are fully aware of the risks inherent in a proposed transaction and of the need for independent and objective advice."); In the Matter of Conway, 305 S.C. 388, 393, 409 S.E.2d 357, 360 (1991) (noting that Rule 1.8(a) does not forbid attorney-client business relationships but recognizing that "they require attorneys to maintain the highest professional and ethical standards in their dealings with clients. No

exceptions to that duty exist merely because an attorney chooses to become involved in business transactions with his clients.").

Here, based on the admitted allegations of misconduct, we find Respondent not only misrepresented the extent of his financial investment in the real estate venture, but also the potential return on Client's investment. Furthermore, Respondent violated each of the three mandatory provisions of Rule 1.8(a), RPC, of Rule 407, SCACR. Specifically, in entering into the business venture with Client, Respondent failed to: (1) fully disclose the terms of the commercial business transaction to Client in writing and in a manner that could be easily understood by Client; (2) advise Client in writing of the desirability of seeking independent legal counsel regarding the transaction and to give Client a reasonable opportunity to seek such counsel; and (3) seek informed consent, in the form of writing signed by the Client, and to outline the essential terms of the transaction and Respondent's role in the transaction, including whether Respondent would be representing Client in the transaction.

In addition to the misconduct regarding Respondent's business relationship with Client, we must also consider Respondent's failure to respond and cooperate with the disciplinary proceedings.

Although Respondent claimed in his Answer that he could not recall whether he received the disciplinary correspondence, the ODC counsel presented evidence that Respondent had been served at the address on record with the South Carolina Bar. Moreover, the Commission notified Respondent both orally and in writing about the Formal Charges hearing. Despite this definitive notification, Respondent failed to appear for the hearing. Respondent also failed to appear for the argument before this Court.

Based on the foregoing, we conclude that disbarment is the appropriate sanction for Respondent's misconduct. See In the Matter of Brown, 361 S.C. 347, 605 S.E.2d 509 (2004) (concluding disbarment was warranted where attorney committed numerous acts of misconduct prior to and after being admitted to the South Carolina Bar, including a joint real estate venture with a client that involved defrauding lenders); Conway, 305 S.C. at 393, 409 S.E.2d at 360 (finding disbarment was the appropriate sanction for attorney's

unauthorized appropriation of funds from a real estate development corporation that he had formed with a client); see also Jacobsen, 386 S.C. at 607-08, 690 S.E.2d at 564-65 (outlining cases involving an attorney's failure to respond to disciplinary proceedings; concluding disbarment was the appropriate sanction where attorney was charged with multiple allegations of misconduct arising out of his bankruptcy practice, failed to respond to formal charges, and failed to appear at the hearing); In the Matter of Murph, 350 S.C. 1, 564 S.E.2d 673 (2002) (finding disbarment was the appropriate sanction where attorney was charged with eighteen different matters of misconduct and failed to answer the formal charges or appear at the hearing).

In addition to disbarment, we order Respondent to pay the costs of the disciplinary proceedings. Although the Panel did not address costs in its report, we find the payment of costs is a crucial component of a sanction for attorney misconduct. See In the Matter of Thompson, 343 S.C. 1, 13, 539 S.E.2d 396, 402 (2000) ("The assessment of costs is in the discretion of the Court."); Rule 27(e)(3), RLDE, of Rule 413, SCACR ("The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct."); Rule 7(b)(6), RLDE, of Rule 413, SCACR (stating sanctions for misconduct may include the "assessment of the costs of the proceedings, including the cost of hearings, investigations, prosecution, service of process and court reporter services").

III. CONCLUSION

In accordance with the facts and conclusion set forth above, it is ordered that Respondent be disbarred from the practice of law in this state. Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, of Rule 413, SCACR, and shall surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Further, within thirty (30) days of the date of this opinion, Respondent is ordered to reimburse the Commission and the ODC for costs incurred in the investigation of this matter.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Allendale County Magistrate
Carl M. Love, Respondent.

Opinion No. 26890
Submitted October 19, 2010 – Filed November 8, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Cory Howerton Fleming, of Moss Kuhn & Fleming, PA, of Beaufort, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR.[1] The facts as set forth in the Agreement are as follows.

[1] Respondent no longer holds judicial office. Consequently, a public reprimand is the most severe sanction which the Court can

FACTS

On or about November 9, 2007, respondent was indicted in Allendale County for misconduct in office under South Carolina Code Ann. § 8-1-80 (1986). The indictment alleged that respondent: engaged in ex parte communication with certain defendants; used his judicial position to advance the private interests of a litigant; used a procedure for handling fines and bond services for certain defendants which was not in accordance with the orders of the Chief Justice of the Supreme Court of South Carolina; and appropriated public funds for his own use and benefit. On or about June 1, 2010, respondent pled guilty to the indictment. He was sentenced to one (1) year imprisonment, probated to six (6) months home incarceration, payment of a fine and costs of $1,202.53, and ordered to pay restitution in the amount of $11,427.50.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity and independence of judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge all avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment; judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; judge shall not convey or permit others to convey the impression that they are in a special

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impose. See In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

position to influence the judge); Canon 3 (judge shall perform duties of judicial office impartially and diligently); Canon 3(B)(2) (judge shall be faithful to the law and maintain professional competence in it; judge shall not be swayed by partisan interests, public clamor, or fear of criticism); Canon 3B(7) (judge shall not initiate, permit, or consider ex parte communications); and Canon 3C(1)(judge shall diligently discharge administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and cooperate with other judges and court officials in the administration of court business). Respondent also admits he has violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall not apply for, seek, or accept any judicial position whatsoever in this State without the prior express written authorization of this Court after due service in writing on ODC of any petition seeking the Court's authorization. Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of St. George and
Cottageville Municipal Court
Judge Michael Evans, Respondent.

Opinion No. 26891
Submitted October 19, 2010 – Filed November 8, 2010

REMOVED FROM OFFICE

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Michael Evans, of Walterboro, pro se.

PER CURIAM: In this judicial disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RJDE, Rule 502, SCACR. The facts as set forth in the Agreement are as follows.

FACTS

In February 2008, respondent attended the South Carolina Summary Court Judges Association Staff/Judges Seminar in Myrtle

Beach, South Carolina. Jane Doe (fictitious name), a twenty year old female, attended the seminar with respondent and his staff, although not as an employee of his court. Respondent and Doe stayed together at a hotel in the Myrtle Beach area. The hotel room was a suite and respondent denies any inappropriate sexual conduct with Doe during the seminar.[1]

Doe had been charged with possession of drug paraphernalia in the jurisdiction of Cottageville. Respondent admits that, in allowing Doe to share his hotel suite, he created an appearance of impropriety that could undermine public confidence in the judiciary.

In St. George and Cottageville, respondent operated an alternative sentencing program known as the "Judge Michael Evans' Program" or "Adjournment to Dismiss." Doe was enrolled in respondent's alternative sentencing program in Cottageville; she paid approximately $565.00 to enroll in the program and the funds went to the general fund of the Town of Cottageville.

Respondent's alternative sentencing programs were not administered or approved by the Solicitor's Office for the Fourteenth Judicial Circuit or First Judicial Circuit. Respondent admits that he acted in contravention of an order of the Supreme Court of South Carolina in that he operated the programs without the specific approval of the Circuit Solicitors.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be

[1] On February 22, 2008, the Court placed respondent on interim suspension.

preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); and Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). By violating the Code of Judicial Conduct, respondent admits he has also violated Rule 7(a)(1) and Rule 7(a)(9) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent, remove respondent from office, and bar him from holding any judicial office within the unified judicial system in South Carolina. See Rule 7(b)(1), RJDE, Rule 502, SCACR. It is therefore ordered that respondent be removed from office as of the date of the filing of this opinion.

REMOVED FROM OFFICE.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dorothy M. Graves, Appellant,

v.

Horry-Georgetown Technical College, Respondent.

Appeal From Horry County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No.4757
Heard October 10, 2010 – Filed November 3, 2010

AFFIRMED

Shannon Lee Felder, of Winnsboro, for Appellant.

Charles J. Boykin, of Columbia, for Respondent.

PER CURIAM: After resigning from her position, Dorothy M. Graves filed suit against her former employer, Horry-Georgetown Technical College

(the College), for constructive discharge, and the circuit court directed a verdict in favor of the College. Graves appeals, arguing the directed verdict was improper because the College committed "official acts" that precipitated her discharge and excused her from the requirement that she exhaust her administrative remedies before filing suit. We affirm.

FACTS

In 1974, Graves began working for the College in its accounting department. In 1999, after working at various positions within that department, Graves was promoted to Procurement Manager. As Procurement Manager, Graves ensured the College's purchases complied with the state-issued Procurement Code and prepared a brochure to assist College employees in understanding the Procurement Code's requirements.

In 2004, the College hired Harold Hawley as Vice President of Business Affairs. According to Graves, in her first meeting with Hawley, she learned he wanted to replace her as Procurement Manager. Graves testified that over the course of approximately six months, Hawley attempted once to re-assign her to a different job and encouraged her on three other occasions to resign. Graves noticed that people stopped coming to her for procurement issues and instead "would try to go around [her]." By her final month at the College, Graves noticed "not a whole lot of procurement" came through her.

In February 2005, following Graves's refusal to approve payment for an item Hawley wanted approved, Hawley called her and two other employees of the College into his office. Graves testified that Hawley told her "he was tired of [her] and he was not going to put up with [her] anymore," that employees from the maintenance department to Graves's own department had complained about her, and that Hawley himself had been hired "to take care of" Graves. Graves testified Hawley stated her attitude, her personality, and her management style "stank." According to Graves, he stated: "It's three o'clock. You got [until] 3:15 to do something – uh – put yourself together." Following this meeting, Graves testified, she felt her life was in danger and "was just too fearful to be around him anymore." She submitted her

resignation to the personnel department on February 23, 2005, with an effective date of March 11, 2005. The College promptly acknowledged in writing its receipt and acceptance of her resignation. At the time of her resignation, Graves had participated in the Teacher and Employee Retention Incentive Program (TERI)[1] for two years and nine months.

In conjunction with her resignation, on March 7, 2005, Graves completed a termination questionnaire provided by the College. Her responses to the questionnaire did not mention Hawley's repeated suggestions that she resign or any harassment. She noted she resigned because of her working conditions and for a "reason that would appear to be discriminatory on the basis of race, color, sex, religion, national origin, age, handicap, or abuse." However, she did not explain these answers.

After delivering her letter of resignation to the personnel office, Graves telephoned the College's president, Neyle Wilson. Graves testified that when she met with Wilson a couple of days later, she told him Hawley had stated Wilson wanted her resignation. She explained that she needed her job to meet her financial obligations and that she felt what had been done to her was wrong. Graves asked him for a list of the complaints the College had received about her. According to Graves, Wilson responded in a letter stating he had discovered no complaints about her. Graves then asked Wilson to talk to the area commissioner, but he refused the request.

Graves initially filed suit in the United States District Court for the District of South Carolina. Her suit was assigned to a federal magistrate, who recommended granting the College's motion for summary judgment. On September 28, 2007, the federal court entered summary judgment in favor of the College as to Graves's claims under the Older Workers' Benefit Protection

[1] S.C. Code Ann. § 9-1-2210 (Supp. 2009) (providing when an eligible state employee returns to work under TERI, her retirement benefits are held in trust and disbursed to her when she ceases working under TERI; limiting TERI participation to a maximum of five years; and explaining TERI participation does not operate as a guarantee of employment).

Act and the Equal Pay Act, then remanded the case to South Carolina's judicial system for determination of the constructive discharge claim.

The Court of Common Pleas for Horry County heard this matter on April 23, 2008. At the close of Graves's case, the College moved for a directed verdict based upon Graves's failure to prove the College intentionally caused her working conditions to be intolerable. The College also argued the circuit court should direct a verdict in its favor because Graves failed to avail herself of the grievance process either before or after resigning. According to the College, Graves failed to put forth evidence that the College intentionally caused her working conditions to be intolerable. Furthermore, the College argued Graves effectively waived her right to a judicial determination by failing to pursue her administrative remedies. On the other hand, Graves argued that, because she was forced to resign, the grievance process was not available to her, and her only recourse was to file an action for constructive discharge. Ultimately, the circuit court granted the College's motion. This appeal followed.

STANDARD OF REVIEW

An appellate court will reverse the trial court's grant of a directed verdict when any evidence supports the party opposing the directed verdict. Milhouse v. Food Lion, Inc., 289 S.C. 203, 203, 345 S.E.2d 739, 739 (Ct. App. 1986). The appellate court must determine "whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his [or her] favor." Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Id.

LAW/ANALYSIS

Graves asserts the trial court erred in directing a verdict in favor of the College on the ground that she failed to exhaust her administrative remedies. We disagree.

In ruling on motions for directed verdict, "the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions whe[n] either the evidence yields more than one inference or its inference is in doubt." Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). When either the evidence yields more than one inference or its inference is in doubt, the trial court should deny the motions. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "However, this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury." Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006). In essence, the trial court must determine whether a verdict for the opposing party "would be reasonably possible under the facts as liberally construed in his [or her] favor." Id. at 293, 628 S.E.2d at 503 (quoting Harvey v. Strickland, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002)).

I. The Two Issue Rule

The College contends the two issue rule requires us to affirm the trial court because Graves failed to appeal the issue of whether working conditions at the College were so intolerable that a reasonable person would have been forced to resign. In support, the College states it argued in favor of a directed verdict not only because Graves failed to exhaust her administrative remedies, but also because Graves failed to prove the elements of constructive discharge. The College argues this court must affirm because although both bases for a directed verdict were before the trial court, Graves appealed only the exhaustion of administrative remedies.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Here, the record reveals little about the basis for the trial court's decision. Although the trial court briefly entertained arguments on the substantive issue, the principal discussion related to whether Graves had exhausted her administrative remedies. In any event, the basis for his ruling was largely unilluminating. In mentioning a possible relationship between the Tort Claims Act and the State Grievance Procedure,[2] the trial court noted: "it seems to me that there is some comparison in terms of policy . . . that the [S]tate . . . limits the . . . type of actions that may be filed against the [S]tate . . . by statute." The trial court's Form 4 order directing a verdict in favor of the College stated no basis for the ruling.

In view of the arguments presented, the lengthy discussion regarding exhaustion of remedies, and the trial court's explanations, we find the trial court based its ruling upon procedure and did not evaluate the sufficiency of the evidence Graves presented regarding whether her working conditions were intolerable. The reference to statutory limitations upon the types of actions that individuals may bring against the State suggests the trial court agreed that Graves's failure to exhaust her administrative remedies precluded her from filing suit. It does not suggest that the trial court considered whether Graves bore her burden of proof. Consequently, the two issue rule does not apply, and we proceed to the merits of Graves's argument.

II. Federal Requirement to Exhaust Administrative Remedies

We affirm the trial court's conclusion that federal law requires an employee in Graves's situation to exhaust the administrative remedies available to her. Title VII of the Civil Rights Act of 1964 prohibits the discharge of an employee on the basis of her "race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1) (2003). Actions arising under Title VII for a hostile work environment fall into one of two categories: "(1)

[2] S.C. Code Ann. §§ 8-17-310 to -380 (1986 & Supp. 2009).

harassment that culminates in a tangible employment action, for which employers are strictly liable, and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense." Penn. State Police v. Suders, 542 U.S. 129, 143 (2004) (internal quotation marks and citations omitted). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

In the absence of a tangible employment action, an employee is entitled to relief for a constructive discharge if her "employer deliberately makes the working conditions intolerable in an effort to induce the employee to quit." Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 186 (4th Cir. 2004) (internal quotation marks and citation omitted). The employee must prove that the employer's actions were deliberate and motivated by an unlawful bias (such as race) and that the working conditions were objectively intolerable.[3] Id. at 186-87. When an employer answers a claim of vicarious liability for harassment by a supervisor, it may defeat the claim by establishing the affirmative defense that it "exercised reasonable care to prevent and correct" the supervisor's harassing behavior and that the "employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Suders, 542 U.S. 145-46 (internal quotation marks omitted).

[3] However, the federal courts caution that while an employee must not be subjected to unreasonably harsh working conditions designed to secure his resignation, the law does not guarantee him a working environment free of stress or frustration. Goldsmith v. Mayor & City Council of Baltimore, 987 F.2d 1064, 1072 (4th Cir. 1993). Furthermore, recognizing that "the claim of constructive discharge is . . . open to abuse by those who leave employment of their own accord," the Fourth Circuit carefully limits its application. Paroline v. Unisys Corp., 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., dissenting), cited with approval in Paroline v. Unisys Corp., 900 F.2d 27, 28 (4th Cir. 1990).

Graves's argument that she was not required to exhaust her administrative remedies because official acts by the College precipitated her departure is not properly before us. Her brief indicates that she intends "official acts" to mean "tangible employment action" as discussed in Ellerth and Suders. However, a party may not present one argument to the trial court and another on appeal. Crawford v. Henderson, 356 S.C. 389, 409, 589 S.E.2d 204, 215 (Ct. App. 2003); see also Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Graves had ample opportunity to present her official acts argument to the trial court but failed to do so. Instead, she averred that there was "no controlling . . . case law . . . in these circumstances." She theorized that she was entitled to recover because her voluntary resignation excluded her from pursuing administrative remedies under the College's employee grievance procedure (EGP). In support, she argued Honor entitled her to recover because she resigned after her employer made her working conditions intolerable. In her arguments to the trial court, she did not identify the significance of tangible employment action or its impact upon the employer's right to assert an affirmative defense. Consequently, her argument is not properly preserved, and we affirm the trial court's determination that federal law required Graves to exhaust her administrative remedies prior to filing suit.

III. Administrative Remedies Available under State Law

We turn next to the administrative remedies available to Graves. The General Assembly codified a grievance procedure for employees of the State "for the protection and in the interests of both the employee and the agency via a neutral method of dispute resolution and fair administrative review." S.C. Code Ann. § 8-17-310 (Supp. 2009). In accordance with these statutes, each state government agency is required to have a written employee grievance procedure approved by the Office of Human Resources. S.C. Code Ann. § 8-17-330 (Supp. 2009). The College's EGP mirrors the statutory requirements. This procedure defines termination of employment as "the action taken against an employee to separate the employee involuntarily from

employment." Cf. S.C. Code Ann. § 8-17-320(26) (Supp. 2009). Both the statute and the EGP specify that termination is a grievable event. § 8-17-330. However, according to the EGP, an employee who voluntarily resigns "shall waive any and all rights to file a grievance or an appeal concerning such actions."

The EGP outlines a formal employee grievance procedure consisting of four steps and culminating in review by the State Human Resources Director.[4] The EGP specifies that these steps are available only to covered employees, a group which excludes "returning retirees." Under this definition, Graves would not have qualified as a covered employee because she worked at the College under the TERI program as a retiree who returned to work for a maximum of five years. See S.C. Code Ann. § 9-1-2210 (Supp. 2009) (outlining a retired employee's return to work under the TERI program). However, the version of the EGP in the record was last revised February 14, 2007, nearly two years after Graves left the College and state law on TERI employees' grievance rights changed. The record does not reflect whether the version of the EGP in effect in February 2005 excluded returning retirees or TERI employees from filing formal grievances. Consequently, we look not to the 2007 EGP but to the statutes in effect in February 2005 to determine whether Graves had grievance rights.

In February 2005 when Graves resigned, TERI employees were not statutorily excluded from using the State's employee grievance procedures. S.C. Code Ann. § 8-17-370 (Supp. 2004); see also S.C. Code Ann. § 9-1-2210(E) (Supp. 2004) ("For employment purposes, a [TERI] participant is considered to be an active employee, retaining all other rights and benefits of an active employee"). The bar to TERI employees' use of those procedures was implemented on July 1, 2005, more than four months after Graves

[4] The EGP also provides an informal complaint process which permits an employee to file a written complaint with the Assistant Vice President for Human Resources and Employee Relations. It is unclear whether this process was available to employees who were not covered by the EGP. Furthermore, there is no indication pursuing such a complaint could have resulted in a judicially reviewable final agency decision.

tendered her resignation. S.C. Code Ann. § 8-17-370(17) (Supp. 2009) (exclusion of TERI employees originally effective July 1, 2005). Furthermore, in September 2004, our supreme court quoted a portion of the TERI guidelines for state government that specifically stated TERI employees had grievance rights at that time: "Employees who enter the TERI program gain no new employment rights and are subject to the employment policies and procedures associated with whatever position(s) they occupy during the program period, to include those policies and procedures related to salary, benefits, and grievance rights." Med. Univ. of S.C. v. Arnaud, 360 S.C. 615, 617 n.1, 602 S.E.2d 747, 748 n.1 (2004) (quotation marks omitted; emphasis supplied). Accordingly, we find that at the time she tendered her resignation, Graves was eligible to file a grievance.

Section 8-17-330 of the South Carolina Code (Supp. 2004) required that each state government agency establish an employee grievance procedure. Each agency submitted its procedure in writing to the State Office of Human Resources for approval and, once approved, provided a copy to each employee. Id. Section 8-17-320(7) of the South Carolina Code (Supp. 2004) defined the term "covered employee" in a manner that did not exclude TERI employees. Cf. Arnaud, 360 S.C. at 617 n.1, 602 S.E.2d at 748 n.1. These state-mandated procedures were available to employees dissatisfied with "terminations, suspensions, involuntary reassignments, and demotions." § 8-17-330. Like the current statute, the 2004 version defined "termination" as "the action taken by an agency against an employee to separate the employee involuntarily from employment." § 8-17-320(26).

Each agency's procedure was required to incorporate a timetable prescribed by statute for timely resolution of employee grievances. § 8-17-330. The timetable required the employee to initiate her grievance "within fourteen calendar days of the effective date of the action" and the agency to issue its decision within forty-five days of the date the grievance was filed. Id. Within ten days of receiving the agency's decision, the employee could file a written appeal of the decision with the State Human Resources Director. Id. Failure to do so timely "constitute[d] a waiver of the right to appeal." Id.

The plain language in the definition of "termination" does not distinguish a forced resignation from a termination. Rather, we find "the action taken against an employee to separate [her] involuntarily from employment" contemplated intolerably oppressive or discriminatory behavior by a superior aimed at forcing the employee to resign. This language does not require the action to be official or sanctioned by the College President; it need only be directed toward the employee. By the same token, these terms do not refer to firing the employee, but rather to taking action against her to separate her from her job against her will.

Although the trial court made no specific findings, it heard extensive arguments on the question of whether a forced resignation was a type of termination. The trial court's ultimate ruling required an implicit finding that a forced resignation amounted to a grievable termination. The trial court observed two possible outcomes. On one hand, if Graves were ineligible to grieve her separation from the College, she had the right to pursue her claim in court. If, on the other hand, Graves was required to but failed to file a grievance, she effectively waived her right to seek relief in court.

The record supports a finding that Graves failed to avail herself of her grievance rights by failing to submit a written grievance within the applicable time limit. In addition, the trial court reviewed Graves's exit questionnaire, which did not indicate she felt pressured to resign. In that document, Graves indicated she left for a reason "that would appear to be discriminatory on the basis of race, color, sex, religion, national origin, age, handicap or Vietnam Era Veteran." Nonetheless, she made no effort to explain her reason for leaving, either on the questionnaire or in her letter of resignation. Graves testified that she did not report Hawley's behavior before she resigned but that the College knew her reasons for leaving because she "told Mr. Wilson." However, Graves did not speak with Wilson until a couple of days after she resigned. When she did speak with him, she did not ask him to reinstate her

employment or correct the wrongs done to her.[5] Instead, she confronted him about Hawley's intent to force her out and asked him to provide her with the names of the people who had complained about her. After receiving Wilson's letter of response to this request, Graves sent Wilson a letter asking him to talk to the area commissioner, but Wilson declined. Consequently, the record supports a finding that Graves failed to pursue her grievance rights prior to filing suit, and the trial court did not err in directing a verdict in the College's favor.

CONCLUSION

We find federal law did not excuse Graves from exhausting her administrative remedies before filing suit. Furthermore, we find that at the time of Graves's resignation, she had a statutory right to pursue her grievance under the State Employee Grievance Procedure. She failed to do so before filing suit. Accordingly, we affirm the trial court's grant of a directed verdict in favor of the College.

AFFIRMED.

HUFF and GEATHERS, JJ., and CURETON, A.J., concur.

[5] During oral argument, counsel for the College conceded that if Graves had requested reinstatement in writing and the College had refused, she could have grieved the College's failure to reinstate.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Waltroric U. Moses, Appellant.

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

Opinion No. 4758
Heard September 15, 2010 – Filed November 5, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott,

and Assistant Attorney General Julie M. Thames, all of Columbia; Robert Mills Ariail, of Greenville, for Respondent.

PIEPER, J.: Waltroric U. Moses appeals his conviction for assault and battery of a high and aggravated nature (ABHAN) and sentence pursuant to the Youthful Offender Act. On appeal, Moses argues the trial court erred in: (1) ruling his statement was voluntarily made; (2) refusing to dismiss the charges due to the State's destruction of and failure to disclose videotaped evidence; (3) refusing to grant the motion to quash the indictments; and (4) admitting statements by a witness under Rule 613, SCRE, as prior inconsistent statements. We affirm.

FACTS/PROCEDURAL HISTORY

On September 28, 2006, Moses, a special education student at Hillcrest High School, was involved in a physical altercation with a school police officer. The altercation took place during a lunch period when Moses went to the cafeteria to wish a cafeteria worker happy birthday. Moses walked towards a lunch line being monitored by a biology teacher, Brian Carl. As Moses approached, Carl told him not to cut in line. Moses did not respond and Carl followed him, indicating that Moses had to go to the end of the line. Moses continued to ignore Carl and proceeded through the lunch line. After tugging on Moses' backpack, Carl repeated for a third time that Moses could not cut in line. Refusing to cooperate, Moses told Carl not to touch him and that he better get away from him. Consequently, in accordance with school procedure, Carl took Moses' identification badge from his backpack and asked Officer Morris Madden, the school resource officer, to handle the situation with Moses.

Thereafter, Moses walked behind Carl to the administrator's table to retrieve his badge. When Moses walked back toward the lunch line, Carl turned around and put his hand on Moses' shoulder. Moses responded by raising his hand up and stating, "don't f_ _ _ing touch me." When Madden saw Moses raise his hand, Madden stood up, grabbed Moses by the hand, and

told him to sit down at the administrator's table. Instead of sitting down, Moses "pushed" his chair toward Madden and told Madden to get off of him. Moses then pushed Madden. Moses started to walk away and Madden caught up with him and attempted to place him under arrest. When Madden attempted to grab Moses and arrest him, Moses turned around, shoved Madden with both hands, and told him, "get the f_ _k away."

After Moses pushed Madden a second time, Madden attempted to push Moses to the ground in order to gain control of him. However, Madden was unable to keep Moses down. Once Moses was able to stand up, he grabbed Madden around his waist and pushed him backwards. Madden used his arms to come underneath Moses' grip and then punched him. Moses then punched Madden in the left temple area of his head, knocking off his glasses. As a result, Madden suffered multiple facial fractures.

Moses immediately ran out of the cafeteria and exited the building while Madden and Officer Matthew Smith followed him. Smith asked Moses to stop. Moses finally stopped and told Smith to keep Madden away from him. Smith placed Moses into custody and transported him to the Simpsonville Police Department. At the police department, Smith took Moses into the squad room where he removed Moses' handcuffs. Smith read Moses his rights verbatim from the "Waiver of Rights" form and asked Moses if he understood his Miranda[1] rights. Moses replied that he understood his rights and signed the waiver. Smith then took Moses' written statement by writing down everything Moses said.

Moses was indicted for ABHAN, malicious injury to personal property, and disturbing schools. The case proceeded to trial in Greenville County on October 29, 2007. Following jury selection, the court denied the defense's pretrial motions relating to a Brady[2] violation involving production of the school's surveillance tapes, the voluntariness of Moses' statement, and the alleged irregularity of grand jury proceedings. At trial, the court also

[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] Brady v. Maryland, 373 U.S. 83 (1963).

overruled two evidentiary objections by defense counsel on the basis of hearsay and relevance.

The trial court granted a directed verdict on the indictment for malicious injury to personal property, finding no evidence of intent. The jury found Moses guilty of ABHAN, but not guilty of disturbing schools. The court sentenced Moses to incarceration for a period not to exceed six years, which is the maximum sentence for ABHAN under the Youthful Offender Act. This appeal followed.

ISSUES ON APPEAL

(1) Did the trial court err in ruling that Moses' custodial statement was admissible as voluntarily made?

(2) Did the trial court err in refusing to dismiss the charges against Moses as the result of the State's alleged destruction of and failure to preserve or disclose videotaped evidence?

(3) Did the trial court err in refusing to grant the motion to quash the indictments?

(4) Did the trial court err in admitting as substantive evidence prior statements made by a defense witness under the theory that the statements were admissible as prior inconsistent statements under Rule 613, SCRE, and did the court err in denying the motion to strike when the State's witness referenced Moses' prior bad act of assaulting a teacher?

STANDARD OF REVIEW

In criminal cases, the appellate court only reviews errors of law and is bound by the trial court's factual findings unless the findings are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "On appeal, the trial judge's ruling as to the voluntariness of the confession

will not be disturbed unless so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). Likewise, rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. State v. Stokes, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009).

LAW/ANALYSIS

Moses first argues the trial court erred in failing to suppress Moses' custodial statement on the ground the statement was not knowingly or voluntarily given. Moses argues that under the totality of the circumstances, the statement, taken from a learning-disabled student, unaccompanied by his parents, was improperly admitted into evidence. However, because defense counsel failed to make a contemporaneous objection, this issue is not preserved for our review. "[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). Notwithstanding, if the court makes a ruling on the admission of evidence immediately prior to the evidence at issue being introduced at trial, then the aggrieved party need not renew the original objection. Id. (emphasis added). Here, Moses does not meet the exception to the rule because the evidence was not immediately introduced following the court's ruling at the pretrial hearing. Thus, it was necessary for defense counsel to renew her objection to the introduction of Moses' custodial statement in order to preserve the issue for appellate review.

Moreover, the record supports the trial court's ruling that Moses' statement was freely, knowingly, and voluntarily made. In Jackson v. Denno, 378 U.S. 368 (1964), the United States Supreme Court indicated "that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." 378 U.S. at 376. Accordingly, a defendant has the right to object to the use of the confession

and to have a fair hearing and a reliable determination on the issue of voluntariness. Id. at 376-77. In order to introduce into evidence a confession arising from custodial interrogation,[3] the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).[4]

"The main purpose of Miranda is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." Berghuis v. Thompkins, 130 S.Ct. 2250, 2261 (2010). Both of these Miranda rights protect the privilege against compulsory self-incrimination. Id. at 2260. The United States Supreme Court has now recognized there is no principled reason to adopt differing standards for determining when an accused has "invoked" the right to remain silent or "invoked" the right to counsel. See id. As such, a suspect must "invoke" these rights "unambiguously." See id. "A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that avoid[s] difficulties of proof and . . . provide[s] guidance to officers on how to proceed in the face of ambiguity." Id. (internal quotation marks and citation omitted). Otherwise, "[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'" Id. (quoting Davis v. United States, 512 U.S. 452, 461). Suppression under these circumstances would place a "significant burden on society's interest in prosecuting criminal activity." Id.

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[3] Custodial interrogation is not in dispute herein.

[4] Once introduced, the State must prove to the jury (or fact finder) beyond a reasonable doubt that the statement was freely, knowingly, and voluntarily made. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009); Goodwin, 384 S.C. at 602, 683 S.E.2d at 507.

Here, Moses did not unambiguously "invoke" his right to remain silent or his right to counsel. Additionally, Moses has not challenged on appeal his right to counsel; thus, we need only consider whether Moses "waived" his right to remain silent due to his assertion that his statement was not freely and voluntarily given. See Berghuis, 130 S.Ct. at 2260 ("Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [Miranda] rights when making the statement.") (internal quotation marks and citation omitted). The Supreme Court has indicated two dimensions to this waiver inquiry: (1) the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and (2) the waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Id. (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). As both the United States Supreme Court and our state supreme court have indicated, the prosecution need not show that a waiver of Miranda was express. Berghuis, 130 S.Ct. at 2261; State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) ("An express waiver is unnecessary to support a finding that the defendant has waived the right to remain silent or the right to counsel guaranteed by Miranda." (citing North Carolina v. Butler, 441 U.S. 369 (1979))). An implicit waiver is sufficient. Id. Regardless of whether the waiver is express or implied, the waiver must be given freely, knowingly, and voluntarily. Accordingly, we must assess Moses' waiver under this standard.

In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession. See Goodwin, 384 S.C. at 601, 683 S.E.2d at 507 (citing Dickerson v. United States, 530 U.S. 428, 434 (2000)). Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his

or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep. See, e.g., Withrow v. Williams, 507 U.S. 680, 693-94 (1993) (length of interrogation, location, continuity, and defendant's maturity, physical condition, education, and mental health); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (noting the following factors as relevant: age, education, advice of constitutional rights, length of detention, repeated and prolonged nature of questioning, and use of physical punishment such as deprivation of food or sleep); Goodwin, 384 S.C. at 601, 683 S.E.2d at 507 (police coercion, length of interrogation, its location, continuity, and defendant's maturity, education, physical condition, and mental health); Simmons, 384 S.C. 163-64, 682 S.E.2d 28-29 (awareness of constitutional rights, coercion, hunger, promise of leniency); State v. Dye, 384 S.C. 42, 47-48, 681 S.E.2d 23, 26-27 (Ct. App. 2009) (defendant's awareness of rights, coercion, environment, education); State v. Parker, 381 S.C. 68, 85-93, 671 S.E.2d 619, 627-32 (Ct. App. 2008) (age, education, physical and mental state of defendant, misrepresentations of evidence by police, coercion, effect of juvenile's request for parent and advice of parent); Miller, 375 S.C. at 384-86, 652 S.E.2d at 451-52 (direct or implied promise of leniency). This list of factors is not an exclusive list. See Withrow, 507 U.S. at 693-94. Moreover, no single factor is dispositive and each case requires careful scrutiny of all surrounding circumstances. Schneckloth, 412 U.S. at 226-27; State v. Pittman, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007).

Here, Smith testified during the hearing that only he and Moses were present during his interview, although he acknowledged that several officers walked in and out of the room. The record does not indicate Moses was threatened by Smith. Rather, Smith, aware that Moses was seventeen years old and enrolled in special education classes, took the time to write Moses' statement himself after reading each line of the "Waiver of Rights" form to Moses, who then signed the form. Additionally, Moses testified on two separate occasions that he understood his Miranda rights. He further testified

that Smith did not tell him what to say during his statement. The record does not indicate that Moses was detained for an extended period of time. Finally, although Moses could only read and write at a third grade level, he was able to earn an occupational diploma. Although the trial court failed to specifically mention his mother's alleged request to be present during questioning, we find that factor standing alone is not dispositive. Ultimately, upon review of the totality of the circumstances in this case, the record supports the trial court's conclusion that Moses' statement was freely, knowingly, and voluntarily made, regardless of his age, learning disability, and separation from his mother. Thus, we find no abuse of discretion by the trial court.

Next, Moses argues the trial court erred in refusing to dismiss the charges due to the failure of the State to preserve or disclose videotaped evidence from the incident in the cafeteria which would have been helpful to Moses in identifying student witnesses. Because of his expulsion, Moses was not allowed to go back to the school to look for student witnesses who were in the cafeteria at the time of the incident. If he had been presented with the entire surveillance recording, defense counsel asserts he may have been able to locate, interview, and present favorable testimony from student witnesses.

The State's duty to disclose evidence favorable to the defendant is addressed by Brady v. Maryland, 373 U.S. 83 (1963). "The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady, 373 U.S. at 87. In South Carolina, an individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching.[5] Riddle v. Ozmint, 369 S.C. 39, 44, 631

[5] Likewise, under Rule 5, SCRCrimP, defendants, upon request, are entitled to disclosure of their statements, criminal records, and any documents or tangible objects material to the preparation of their defense or intended for use by the prosecution. Rule 5(a)(1), SCRCrimP. For purposes of Rule 5, "material" is used in the same context as it is in a Brady analysis. State v.

S.E.2d 70, 73 (2006); State v. Carlson, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct. App. 2005). The court in Riddle recognized the United States Supreme Court's emphasis on the prosecutor's responsibility for fair play. Riddle, 369 S.C. at 46, 631 S.E.2d at 74. In describing this responsibility, the court stated:

> The prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id. (internal quotation marks and citation omitted). As such, it is imperative for prosecutors to abide by this rule as "[o]ur judicial system relies upon the integrity of the participants." Id. Whether the prosecutor's failure to reveal evidence pursuant to Brady is due to negligence or an intentional act is irrelevant because a court may find a Brady violation regardless of the good or bad faith of the prosecutor. Gibson v. State, 334 S.C. 515, 528, 514 S.E.2d 320, 327 (1999). Because Brady is founded upon a sense of fairness and justice, the focus in a Brady analysis should not be on the misconduct of the prosecutor, but rather on the fairness of the procedure. Id. As noted in Brady, "[t]he principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not

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Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). Once there is a Rule 5 violation, a court will only reverse "where the defendant suffered prejudice as a result of the violation." Id. 331 S.C. at 453-54, 503 S.E.2d at 220.

only when the guilty are convicted but when criminal trials are fair[.]" Id. (quoting Brady, 373 U.S. at 87). "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." Id. (quoting United States v. Agurs, 427 U.S. 97, 110 (1976)).

Generally, "[t]here are three categories of Brady violations: (1) cases involving nondisclosed evidence or perjured testimony about which the prosecutor knew or should have known; (2) cases in which the defendant specifically requested the nondisclosed evidence; and (3) cases in which the defendant made no request or only a general request for Brady material." Carlson, 363 S.C. at 609, 611 S.E.2d at 295. Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police. Kennerly, 331 S.C. at 452-53, 503 S.E.2d at 220. Moreover, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985); accord Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); see also Riddle, 369 S.C. at 45, 631 S.E.2d at 73 ("The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'" (quoting Kyles, 514 U.S. at 434)); State v. Hill, 368 S.C. 649, 661, 630 S.E.2d 274, 280-81 (2006) (stating evidence is material if the cumulative effect of the suppressed evidence results in a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different); Fradella v. Town of Mount Pleasant, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct. App. 1997) ("A defendant shows a Brady violation by demonstrating that 'favorable evidence could [have been presented] to put the whole case in such a different light as to undermine confidence in the verdict.'"). Evidence is not considered "material" if the defense discovers the information in time to adequately use it at trial. Kennerly, 331 S.C. at 453, 503 S.E. 2d at 220; Sheppard v. State, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2004) (finding no

Brady violation when defense counsel was given witness's statements in time for cross-examination, and, thus, there was not a reasonable probability the outcome of the trial would have been different had the statements been disclosed prior to trial).[6]

While Brady imposes a duty on the State to disclose material evidence favorable to the defendant, the State has the additional duty, albeit not an absolute duty, to preserve evidence that is favorable to the defendant. Although under Brady the good or bad faith of the State is irrelevant when the State fails to disclose material, exculpatory evidence, the United States Supreme Court has clarified that a different analysis is required when the State fails to preserve evidence that might have exonerated the defendant. In Arizona v. Youngblood, 488 U.S. 51 (1988), the Court explained the reason for this difference:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the

[6] Although this case involved a trial, the Brady standard is also applicable to guilty plea cases. See Gibson, 334 S.C. at 525, 514 S.E.2d at 325 (adopting essentially the same standard that is applied in the context of a trial: "A Brady violation is material when there is a reasonable probability that, but for the government's failure to disclose Brady evidence, the defendant would have refused to plead guilty and gone to trial.").

> part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

488 U.S. at 58.

South Carolina has adopted the duty to preserve analysis of Arizona v. Youngblood in its jurisprudence. While recognizing that the State does not possess an absolute duty to preserve potentially useful evidence, our state supreme court has held that a defendant must demonstrate either that the State destroyed evidence in bad faith, or the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, 306 S.C. 355, 358-59, 412 S.E.2d 386, 388 (1991); see also State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) (finding "[t]he State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant.") (emphasis added); State v. Singleton, 319 S.C. 312, 317, 460 S.E.2d 573, 576 (1995) ("[I]f the evidence possesses exculpatory value that is apparent before its destruction, its disposal constitutes a denial of due process." (citing Youngblood, 488 U.S. at 56 n.3)).

In this case, defense counsel failed to establish a due process violation resulting from the intentional destruction of, or failure to preserve, relevant evidence. The record fails to establish bad faith on Smith's part. The State argued to the trial court during pretrial motions that the surveillance system in place at Hillcrest High School was very antiquated and only captured still images, not live video. As the State further explained, a live video could not be obtained from the surveillance system because it is a delayed still image process. Instead, if not yet automatically deleted, delayed pictures could be obtained, such as the one produced by Smith to defense counsel. Further, the solicitor indicated to the trial court that she had given a hard copy of the picture and a copy of the disk to defense counsel; this statement was not contested at the time made. The State also invited the defense expert to Hillcrest High School to examine the surveillance system. Thus, based on

the information provided, the record supports the trial court's finding that the State did not destroy any evidence in bad faith.[7]

Furthermore, the testimony of record fails to establish the exculpatory value of this evidence. The defense asserts the tape "would most likely" have allowed it to identify witnesses who may reasonably have presented favorable evidence or evidence which could have lead the defense to impeachment evidence. Standing alone, this assertion is insufficient. Moreover, Moses failed to show that he could not obtain other evidence of comparable value by other means; in fact, the State provided defense counsel with a high school yearbook to help Moses in identifying other witnesses who were present in the cafeteria. See, e.g., United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990) (finding no Brady violation when exculpatory information was not only available to the defendant, but also available in a source where a reasonable defendant would have looked); see also Cheeseboro, 346 S.C. at 538-39, 552 S.E.2d at 307 ("To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means."); Mabe, 306 S.C. at 358-59, 412 S.E.2d at 388 ("A defendant must demonstrate either that the state destroyed evidence in bad faith, or that the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means."). Accordingly, we find no reversible error in the trial court's denial of Moses' motion to dismiss the case based on the alleged destruction of relevant evidence.

Moses next asserts on appeal that the trial court erred in refusing to grant the motion to quash the indictments on the ground the grand jury process followed in this case violated due process and constitutional guarantees. Moses asserts that the Greenville County Grand Jury returned over four hundred indictments on the day the indictments against him were

[7] Although defense counsel suggested that others had mentioned the "alleged" video, the defense never proffered that testimony for the record.

returned; thus, he argues that the devotion of only two minutes per indictment constituted evidence that the grand jury proceedings were not regular. We disagree.

"A grand jury is not a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." State v. Capps, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981). Grand jury proceedings are presumed to be regular unless clear evidence indicates otherwise. State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). Any speculation regarding "potential" abuse of grand jury proceedings cannot suffice as evidence of "actual" abuse in order to quash an indictment. Id. at 502, 409 S.E.2d at 424.

In State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980), the court dealt with a strikingly similar issue. The defendant appealed his conviction for murder and argued, among several other grounds, that the trial court erred in failing to quash his indictment. 274 S.C. at 380, 264 S.E.2d at 422. At trial, Duncan's motion to quash the indictment was based entirely on the number of indictments returned by the grand jury on the day his indictment was returned, arguing it was impossible for the grand jury to have had enough time to weigh the evidence presented against him. Id. at 380-81, 264 S.E.2d at 422. The supreme court affirmed the trial court's decision to deny the motion, holding that the Fifth Amendment only requires the indictment to be returned by an unbiased jury and to be valid on its face. Id. at 381, 264 S.E.2d at 422. Moreover, the court stated the time spent deliberating a matter does not control the effectiveness of the indictment. Id.

Similar to the argument made in Duncan, Moses' argument is based on the number of indictments returned on a single day. Here, Moses asserts that all three indictments should be quashed because the grand jury processed 418 indictments on the day it returned his indictments. At trial, Moses argued that based on the number of indictments returned that day, the grand jury would have processed one indictment every 2.3 minutes, not allowing much time and consideration for the volume of evidence presented in this case. Although the court in Duncan never mentioned the number of indictments

returned that day, the court stated, "[t]he length of time spent deliberating a matter, even if it could be established, does not control the effectiveness of the deliberation." Id. at 381, 264 S.E.2d at 422. Furthermore, this evidence is not clear evidence of any actual abuse justifying the quashing of the indictments but rather, it is tantamount to mere speculation regarding potential abuse. See Thompson, 305 S.C. at 502, 409 S.E.2d at 424. In addition, the average time suggested herein by Moses discounts the equal possibility that the grand jury spent more time on some cases and less on others. Accordingly, without direct evidence, which we acknowledge is difficult to provide due to the secretive nature of the grand jury proceedings, Moses failed to demonstrate irregular grand juror proceedings. Thus, we find no reversible error in the trial court's denial of the motion to quash the indictments.

Turning to the next issue on appeal, Moses argues the trial court erred in admitting statements made by Amy Gahagan, Moses' teacher, as prior inconsistent statements under Rule 613, SCRE. He argues that no foundation was made for the introduction of the statements and, further, that the court erred in denying the defense motion to strike when the State's witness referenced Moses' assault of a teacher. We disagree.

According to Rule 613, SCRE:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 613(b), SCRE. "A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." State v. Stokes, 381 S.C. 390, 398-99, 673 S.E.2d 434, 438 (2009). Unlike the federal rule, the South Carolina rule requires that a proper foundation must be laid before admitting a prior inconsistent statement. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). Thus, "[i]t is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement." Id.

The trial court did not err in allowing Coach Robert Searfoss to testify regarding Gahagan's prior inconsistent statement. "Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement." State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct. App. 2003); see also State v. Carmack, 388 S.C. 190, 201-02, 694 S.E.2d 224, 230 (Ct. App. 2010) (holding witness did not unequivocally admit making a prior inconsistent statement; therefore, the trial court did not abuse its discretion in allowing extrinsic evidence of the statement). This wide latitude extends to a witness indicating an inability to recall or to remember a previous statement:

> If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Blalock, 357 S.C. at 80, 591 S.E.2d at 636 (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)). Here, the proper foundation was laid for the admission of Gahagan's inconsistent statement. Gahagan's testimony was not an unequivocal admission. She merely stated she could not remember having

asked Searfoss in the fall of 2006 to take Moses into his classroom. Gahagan was advised by the State of the substance of the statement she made to Searfoss, the time and place it was allegedly made, the person to whom it was made, and she was given the opportunity to explain or deny the statement. See Rule 613(b), SCRE. Moreover, the State even rephrased the question to Gahagan to allow her a sufficient opportunity to explain or deny the statement. We find no abuse of discretion by the trial court.

Moses also argues the trial court improperly denied the defense motion to strike Searfoss's testimony regarding Moses' prior assault in Laurens County. During his testimony, Searfoss stated, "Mrs. Gahagan told me that Walt could be confrontational at times. And one of the reasons he was at Hillcrest now is because he assaulted a teacher at Laurens High School . . . ." Defense counsel objected to the statement on the ground of relevance and moved to strike the statement. The trial court instructed the jury as follows: "[t]he comment about Laurens [referring to the assault on a teacher] is not admissible. You should disregard that." The court further instructed the jury that the previous statement regarding what Gahagan told Searfoss should only be used to evaluate the credibility of Gahagan. According to the court's statement to the jury to disregard the testimony regarding the Laurens County incident, the trial court in effect granted the motion to strike. We do not think the semantics of the court's ruling prejudiced Moses or affected the outcome of the trial. Instead, the defendant's procedural objective of the motion to strike achieved the remedy of the court directing the jury to disregard the testimony:

> The general rule is indisputably established that, when in the course of a trial incompetent statements of witnesses are brought in either from accident, or when they might be reasonably, though erroneously, thought by counsel to be competent, the only remedy that the court can afford is to grant a motion to strike out and instruct the jury to disregard the testimony. The injury resulting from the jury having heard the incompetent statement is regrettable, but the trial

> cannot be stopped because of such accidents and mistakes liable to occur in every trial.

Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 399, 171 S.E.2d 352, 354 (1969). Thus, we find no prejudicial, reversible error as to this issue.[8]

CONCLUSION

Based on the foregoing, the trial court's decision is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

[8] Moses further asserts the trial court erred in allowing the State to offer general evidence of Moses' bad character on the ground the defense opened the door to the evidence by presenting positive evidence of Moses' work habits, his disability, and the fact he had passed a drug test. While this argument appears in Moses' brief, we note it is not mentioned in the issues on appeal. "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. Moreover, the argument advanced in the brief makes no reference to any supporting authority. See State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Accordingly, we need not reach the merits of this argument.