OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 1, 2002

ADVANCE SHEET NO. 9

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

(Darlington, Judge Paul M. Burch)

2002-UP-240 State v. Anthony B. Maybin
(Newberry, Judge J. Derham Cole)

2002-UP-241 State v. Glenn A. Rouse
(Anderson, Judge H. Dean Hall)

2002-UP-242 State v. Brian Clyburn
(Spartanburg, Judge J. Derham Cole)

2002-UP-243 State v. Paul Allen Gregg
(Florence, Judge John L. Breeden, Jr.)

PETITIONS FOR REHEARING

3420 - Brown v. Carolina Emergency	Denied 3-29-02
3436 - United Education Dist. v. Education Testing Service	Pending
3445 - State v. Rosemond, Jerry	Denied 3-29-02
3446 - Simmons v. City of Charleston	Pending
3449 - Bowers v. Bowers	Pending
3450 - Mixson, Inc. v. American Loyalty Ins.	Pending
3453 - State v. Lionel Cheatham	Pending
3454 - Thomas Sand Co. v. Colonial Pipeline	Pending
3455 - Southern Atlantic v. Middleton	Pending
3459 - Lake Frances Property v. City of Charleston	Pending
3460 - State v. Roger Dale Cobb	Pending
2001-UP-522 - Kenney v. Kenney	Pending
2001-UP-548 - Coon v. McKay Painting	Pending

2001-UP-560 - Powell v. Colleton City	Pending
2002-UP-038 - State v. Corey Washington	Pending
2002-UP-062 - State v. Carlton Brown	Pending
2002-UP-064 - Bradford v. City of Mauldin	Pending
2002-UP-124 - SCDSS v. Hite	Pending
2002-UP-125 - Scott v. Parkinson	Pending
2002-UP-131 - State v. Lavon Robinson	Pending
2002-UP-146 - State v. Etien Brooks Bankston	Pending
2002-UP-148 - Marsh v. Springs Industries	Pending
2002-UP-151 - National Union Fire Ins. v. Houck	Pending
2002-UP-159 - Beasley for Governor v. Collins Entertainment	Pending
2002-UP-160 - Fernanders v. Young	Pending
2002-UP-174 - RP Associates v. Clinton Group	Pending
2002-UP-175 - Whitfield v. DPS of Charleston	Pending
2002-UP-176 - Ratcliffe v. Ratcliffe	Pending
2002-UP-179 - Elvis v. DesLauriers	Pending
2002-UP-186 - Benson v. Farris	Pending
2002-UP-189 - Davis v. Gray	Pending
2002-UP-198 - State v. Leonard Brown	Pending
2002-UP-224 - Bulsa v. Moss	Pending
2002-UP-186 - Benson v. Farris	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3263 - SC Farm Bureau v. S.E.C.U.R.E.	Pending
3271 - Gaskins v. Southern Farm Bureau	Pending
3314 - State v. Minyard Lee Woody	Pending
3362 - Johnson v. Arbabi	Pending
3382 - Cox v. Woodmen	Pending
3386 - Bray v. Marathon Corporation	(2) Pending
3393 - Vick v. SCDOT	Pending
3403 - Christy v. Christy	Pending
3404 - State v. Charles M. Stuckey, Jr.	Pending
3405 - State v. Jerry Martin	Pending
3408 - Brown v. Stewart	Pending
3413 - Glasscock v. United States Fidelity	Pending
3414 - State v. Duncan R. Proctor #1	Pending
3415 - State v. Duncan R. Proctor #2	Pending
3416 - Widman v. Widman	Pending
3417 - Hardee v. Hardee	Pending
3418 - Hedgepath v. AT&T	Pending
3419 - Martin v. Paradise Cove	Pending
3425 - State v. Linda Taylor	Pending
3426 - State v. Leon Crosby	Pending
3429 - Charleston County School District v. Laidlaw	Pending

3430 - Barrett v. Charleston County School District	Pending
3437 - Olmstead v. Shakespeare	Pending
2001-UP-016 - Stanley v. Kirkpatrick	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. State	Pending
2001-UP-304 - Jack McIntyre v. State	Denied 3-6-02
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-360 - Davis v. Davis	Pending
2001-UP-384 - Taylor v. Wil Lou Gray	Pending
2001-UP-391 - State v. Jerome Hallman	Pending
2001-UP-399 - M.B. Kahn Construction v. Three Rivers Bank	Pending
2001-UP-403 - State v. Eva Mae Moss Johnson	Pending
2001-UP-419 - Moak v. Cloud	Pending
2001-UP-425 - State v. Eric Pinckney	Pending
2001-UP-452 - Bowen v. Modern Classic Motors	Pending
2001-UP-455 - Stone, Walter v. Roadway	Pending
2001-UP-461 - Storage Trailers v. Proctor	Pending
2001-UP-470 - SCDSS v. Hickson	Pending
2001-UP-476 - State v. Jeffery Walls	Pending
2001-UP-477 - State v. Alfonso Staton	Pending
2002-UP-478 - State v. Leroy Stanton	Pending
2001-UP-479 - State v. Martin McIntosh	Pending
2002-UP-518 - Abbott Sign Company v. SCDOT	Pending
2001-UP-528 - State v. Kenneth Allen Barnes	Pending

2001-UP-538 - State v. Edward Mack	Pending
2001-UP-543 - Benton v. Manker	Pending
2002-UP-006 - State v. Damien A. Marshall	Pending
2002-UP-009 - Vaughn v. Vaughn	Pending
2002-UP-046 - State v. Andrea Nicholas	Pending
2002-UP-050 - In the Interest of Michael Brent H.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronald Wilson Legge, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Florence County
Ralph King Anderson, Jr., Trial Judge
John L. Breeden, Jr., Post-Conviction Judge

Opinion No. 25433
Submitted February 21, 2002 - Filed April 1, 2002

REVERSED

Timothy Edward Meacham, of Jebaily, Glass & Meacham P.A., of Florence, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, and Assistant Attorney General W. Bryan Dukes, all of Columbia, for respondent.

JUSTICE MOORE: We granted this petition for a writ of certiorari to determine whether the post-conviction relief (PCR) court erred by finding petitioner had received ineffective assistance of appellate counsel. We reverse.

FACTS

Petitioner was convicted of one count of criminal sexual conduct with a minor (CSC) and one count of a lewd act on a minor. He was sentenced to respective imprisonment terms of fifteen years and five years, to be served concurrently. On direct appeal, the Court of Appeals affirmed his convictions. State v. Legge, Op. No. 95-UP-225 (S.C. Ct. App. filed July 25, 1995). We denied a petition for a writ of certiorari from that decision.

Petitioner then filed an application for post-conviction relief. After a hearing, the PCR court found appellate counsel ineffective for failing to raise an issue on appeal. The PCR court granted petitioner a review of the issue pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).[1] Petitioner's remaining allegations were denied.

ISSUE

Whether appellate counsel was ineffective for failing to raise an issue on appeal regarding testimony of petitioner's lack of

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[1]We note the PCR court's grant of the issue pursuant to White v. State is in error because petitioner in fact had an appeal and, as such was not denied his right to an appeal. White v. State is inapplicable because it provides the right to a belated appeal when the applicant did not knowingly and intelligently waive his right to an appeal. The State, however, did not raise this issue.

remorse?[2]

DISCUSSION

For petitioner to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000).

Appellate counsel was not ineffective for failing to raise the lack of remorse issue. Had appellate counsel raised the issue, it would not have been preserved for the appellate court's review. *See* State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, *cert. denied*, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459

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[2]The testimony of which petitioner complains follows:

Detective Ken McPherson:	I advised [petitioner] that [the child] had told me that he had been sexually assaulted and that he had named him . . . as the perpetrator.
Solicitor:	. . . what reaction, if any, did you observe from [petitioner]?
McPherson:	He said that he didn't do it but he would hope that we would find out who did.
Solicitor:	And what concerns, if any did [petitioner] register regarding the child's sexual abuse?
McPherson:	*He showed no concern towards his child.*

(1998) (issue must be raised to and ruled upon by trial court to be preserved for review); State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal).

At trial, trial counsel objected to Detective McPherson's testimony on the ground that he was not competent to give testimony on petitioner's demeanor and on Miranda[3] grounds.[4] However, at the PCR hearing, petitioner stated he wanted appellate counsel to argue on appeal that the testimony should have been objected to because the testimony was an attempt to show petitioner lacked remorse. Because the issue would not have been preserved for appeal, appellate counsel cannot be ineffective for failing to raise the issue.

Accordingly, we reverse the PCR court's grant of relief.[5]

REVERSED.

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

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[3]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4]Defense counsel's Miranda objection was based on the allegation that the testimony was a comment on petitioner's right to silence and that the testimony was meant to infer an admission of guilt.

[5]In any event, petitioner's claim that the elicitation of the "lack of concern" testimony allowed the State to introduce evidence that suggested he lacked remorse in violation of State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996), is without merit. In the instant case, Detective McPherson's comment that petitioner "showed no concern towards his child" does not rise to the level of being a comment on petitioner's lack of remorse.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dexter L. Faile and Lesa L. Faile, individually and as parents and natural guardians of Brandon Chase Faile, Respondents,

v.

South Carolina Department of Juvenile Justice, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Chester County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 25434
Heard October 18, 2001 - Filed April 1, 2002

AFFIRMED
AND REMANDED

William H. Davidson, II, and Andrew F. Lindemann, both of Davidson, Morrison & Lindemann, of Columbia, for petitioner.

Lex A. Rogerson, Jr., of Lexington; and Steven Randall Hood, of Law Offices of James C. Anders, of Rock Hill, for respondents.

JUSTICE BURNETT: We granted certiorari to review the decision of the Court of Appeals overturning the trial court's grant of summary judgment to the South Carolina Department of Juvenile Justice ("DJJ") on the ground DJJ was entitled to quasi-judicial immunity under the South Carolina Tort Claims Act.[1] Faile v. S.C. Dep't of Juvenile Justice, Op. No. 99-UP-1811 (S.C. Ct. App. filed June 9, 1999). We affirm in result and remand.

FACTUAL/ PROCEDURAL BACKGROUND

On April 15, 1993, Fredrico R. ("Fredrico"), age 12, violently assaulted Brandon Chase Faile, the nine-year old son of Dexter and Lesa Faile ("Respondents"). Fredrico was a juvenile delinquent on probation at the time of the attack, with nine prior referrals to DJJ on his record.

In February 1992, Fredrico was charged in the Family Court of Chester County with grand larceny of a bicycle. After pleading guilty, Fredrico was committed by Judge Barrineau to the DJJ Reception and Evaluation Center ("R&E") for the purpose of evaluation and

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[1]When a plaintiff claims an employee of a state agency acted negligently in the performance of his job, the South Carolina Tort Claims Act requires a plaintiff to sue the agency for which an employee works, rather than suing the employee directly. S.C. Code Ann. § 15-78-70(c) (Supp. 2001). Whether the DJJ was the proper defendant-agency is discussed in part III of this opinion.

recommendation for disposition.

R&E expressed concern over Fredrico's aggressive behavior, recognizing he was impulsive and explosive at times. After receiving the R&E's recommendation, Judge Barrineau, in April 1992, ordered continued probation for one year, a suspended commitment to DJJ, 25 community service hours, placement in a therapeutic foster home, and counseling sessions for Fredrico's parents.

Fredrico was placed in a new foster home in January 1993. However, on April 7, 1993, he was expelled from that home for stealing a knife and gun from a school police officer. He used the gun to threaten his foster mother. Max Dorsey ("Dorsey"), Fredrico's DJJ probation counselor, removed him from the foster home and placed him in the Greenville Group Home for the night of April 7, 1993. Dorsey placed Fredrico with his biological mother on April 8, 1993, claiming that no alternative placement was available for Fredrico.

Five days **after** placing Fredrico with his biological mother, Dorsey filed a Rule to Show Cause with the Family Court to have Fredrico brought before the judge to show why his probation should not be revoked. Judge Barrineau signed the Rule and scheduled a hearing for April 21, 1993. Dorsey told the judge Fredrico had been expelled from his foster home where he was temporarily staying with his family, and Dorsey intended to recommend Fredrico be committed to DJJ. Dorsey failed to inform the judge the placement violated the earlier court order. Judge Barrineau did not indicate he knew the placement violated his earlier order. Dorsey did not request a modification of the earlier order. On April 15, 1993, **before** the hearing was held, Fredrico assaulted Brandon Faile.

Respondents instituted this action against DJJ, alleging DJJ was grossly negligent in placing Fredrico in his family home, and claiming damages of $64,000.00. DJJ moved for summary judgment. The trial court granted DJJ's motion on the ground that DJJ was entitled to quasi-judicial immunity pursuant to S.C. Code Ann. § 15-78-60(1) (Supp. 2001).

Respondents appealed.

The Court of Appeals reversed the trial court, holding a question of fact remained whether the trial judge ratified Dorsey's administrative act (placing Fredrico at home), thereby converting it into a judicial act entitling DJJ to quasi-judicial immunity.

DJJ petitioned for certiorari, asserting the Court of Appeals erred in reversing the trial court's grant of summary judgment. The following issues are before us on certiorari:

I. Did the Court of Appeals err in failing to recognize that DJJ was entitled to quasi-judicial immunity under the South Carolina Tort Claims Act because Dorsey's placement of Fredrico in his family home was a judicial act?

II. Did the Court of Appeals err in refusing to consider DJJ's additional sustaining grounds?

III. Is the trial court's decision to grant summary judgment supported by the following additional sustaining grounds:

   A. DJJ is not the proper party to the lawsuit;

   B. DJJ is entitled to discretionary immunity under the Tort Claims Act;

   C. DJJ is entitled to immunity under the juvenile release exception to the Tort Claims Act; or

   D. DJJ did not owe a duty of care to Respondents' child.

LAW/ ANALYSIS

I. Quasi-Judicial Immunity

A. Judicial Act Requirement

DJJ argues Dorsey's placement of Fredrico in his family home was a judicial act for which he was entitled to quasi-judicial immunity, and therefore the Court of Appeals erred in reversing the trial court's grant of summary judgment to DJJ. We disagree.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Id. The governmental entity claiming an exception to the waiver of immunity under the Tort Claims Act has the burden of establishing any limitation on liability. Strange v. S. C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). Provisions establishing limitations on liability must be liberally construed in the State's favor. S.C. Code Ann. § 15-78-20(f) (Supp. 2001).

The issue of whether juvenile probation officers are entitled to quasi-judicial immunity under the Tort Claims Act is one of first impression in South Carolina. Section 15-78-60(1) provides: "the governmental entity is not liable for a loss resulting from: legislative, judicial, or quasi-judicial action or inaction." In addition to the judicial immunity under the Tort Claims Act, common law judicial immunity was expressly preserved in South Carolina under the Tort Claims Act. O'Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998), cert. denied 1999 Shearouse Adv. Sh. No. 10 at p. iv.

South Carolina recognizes three exceptions to judicial or quasi-

judicial immunity. Judges and other officials are not entitled to judicial immunity if: (1) they did not have jurisdiction to act; (2) the act did not serve a judicial function; or (3) the suit is for prospective, injunctive relief only. Id. at 385, 498 S.E.2d at 692. The second exception, which emphasizes the importance of the act, as opposed to the actor, is relevant here. Under the second exception, even judges are not insulated by judicial immunity when they act in an administrative capacity. Id. (citing Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)). In determining whether an act is judicial, the Court looks to the nature and function of the act. Id.; Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).[2] Therefore, we must determine whether probation officer Dorsey's placement of Fredrico had the nature and function of a judicial act, thereby entitling him, and thus DJJ, to quasi-judicial immunity.

Much of the analysis of judicial immunity has been made in the federal arena. Several federal circuits have granted probation officers quasi-judicial immunity, but only when carrying out certain functions the courts have deemed to be judicial. The Tenth Circuit has held that federal probation officers are absolutely immune when the action challenged is "intimately associated with the judicial phase of the criminal process." Tripati v. United States Immigration & Naturalization Serv., 784 F.2d 345 (10th Cir. 1986) (finding probation officer immune for damages resulting from reporting

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[2]The United States Supreme Court extends absolute immunity to protect some quasi-judicial actors, such as prosecutors and witnesses, who perform judicial functions. Briscoe v. LaHue, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983); Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). However, determining whether an individual is entitled to absolute immunity requires the court to consider the function performed by the individual, rather than the individual's position. Forrester, supra (denying absolute immunity for parole officer's detainment of parolee, but recognizing functions, such as testifying at a parole hearing, for which a parole officer is entitled to absolute immunity).

plaintiff's conviction to immigration authorities). The Tenth Circuit has made clear the immunity arises from protected functions, not from protected individuals. Mee v. Ortega, 967 F.2d 423 (10th Cir. 1992); Forrester, supra. The key element is whether the officer was engaged in adjudicatory duties when the challenged act occurred. Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986).

Other federal circuit courts have granted probation officers absolute immunity in preparing pre-sentencing reports, and in other situations when they act "as an arm of the court." Gant v. United States Probation Office, 994 F. Supp. 729, 733 (S.D. W. Va. 1998) (citations omitted). Many of these courts, however, find no absolute immunity for the same type of officer when the officer is acting in his executive capacity. Gant, supra; Ray v. Pickett, 734 F.2d 370 (8th Cir. 1984); Ortega, supra; see also Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986) (denying absolute immunity of probation officer for charging appellant and presenting evidence against him at a parole hearing, because those were his duties as a parole officer).

If the individual is acting pursuant to a direct court order, courts are more likely to grant quasi-judicial immunity for that action. In Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), a father sued the state for the actions of two social workers who placed his daughters in a home where they were sexually abused. The social workers placed the girls temporarily in the abusive home in April 1982. Id. at 449. The juvenile court confirmed the placement by order in May 1982. The sexual abuse did not occur until sometime after May. Id. Plaintiffs argued the social workers were not entitled to immunity for the temporary placement of the girls before the court order was issued. The court discounted this argument as irrelevant, however, on the grounds the abuse did not occur until **after** the court had confirmed the placement. Id.

Respondents argue the court's confirmation of the placement was essential to the court's finding of judicial immunity in Babcock. Conversely, DJJ cites Babcock as holding that placement is a judicial act even if not made pursuant to a direct court order. DJJ's argument, however, overlooks that the

judge formally confirmed the placement **before** the injury took place. In the present case, Judge Barrineau's mere knowledge that Fredrico was placed in his family's home, in the absence of any further act by him, does not amount to confirmation or ratification of Dorsey's act.

Viewing the facts and all inferences that can be drawn in the light most favorable to Respondents, as the non-moving party, the trial court erred in granting summary judgment to DJJ on this ground. We agree with our Court of Appeals' conclusion that the placement of juveniles by a probation counselor is an administrative function. We find persuasive the precedent discussed above from other jurisdictions which supports this analysis. Just as police officers are not granted absolute immunity when they apply for arrest warrants, probation officers generally are not immune in performing their enforcement duties. See Gant, supra; Acevedo v. Pima County Adult Prob. Dep't, 690 P.2d 38 (Ariz. 1984)(holding that supervision of probationers is an administrative task, unconnected with the performance of a judicial function). Dorsey's placement of Fredrico was administrative. The Family Court's mere knowledge that Dorsey placed Fredrico with his family, without more, is insufficient to convert that placement into a judicial act.

For the forgoing reasons, we conclude DJJ is not entitled to quasi-judicial immunity.

B. Agent of the Court

DJJ argues a juvenile probation officer acts as an agent and representative of the Family Court, and, therefore, Dorsey's placement of Fredrico was a quasi-judicial act entitling him to immunity under the Tort Claims Act, S.C. Code Ann. § 15-78-60(1). We disagree.

DJJ cites Fleming v. Asbill, 326 S.C. 49, 483 S.E.2d 751 (1997), for the proposition that "non-judicial officers are entitled to quasi-judicial immunity for carrying out a function assigned by the court." In Fleming, we granted absolute judicial immunity to a court-appointed guardian ad litem based on common law theories. Id. This Court did not apply the Tort Claims

Act in Fleming because we found the guardian ad litem was not an employee of the state as defined by section 15-78-30(c) of the Act. We held, however, that common law judicial immunity protected the guardian from liability in the performance of her official duties, despite a line of cases holding guardians ad litem liable for negligence. Id.; see McIver v. Thompson, 117 S.C. 175, 108 S.E. 411 (1921). We distinguished those cases based on the dramatically different role of court-appointed guardians ad litem in child custody suits today. Fleming, supra.

In Fleming, this Court based the grant of immunity for court-appointed guardians on the necessity for guardians to be able to act without fear of lawsuits as well as the inequity of holding guardians liable for negligence. DJJ argues that the guardians were awarded immunity merely for being representatives of the court. Although we indicated the guardians were representatives of the court, it was not the decisive factor in our decision to grant guardians immunity. A primary role of the guardian is to be an advocate within the courtroom. However, guardians are not "acting on 'behalf' of the court; [they] do not affect legal relationships between the court and third parties." Fleming, 326 S.C. at 53. Their job is to represent their ward's interest before the court, unlike probation officers whose duties extend far beyond the courtroom.

Additionally, the role of a court-appointed guardian is distinguishable from the role of a DJJ probation officer because the guardian's participation ends when the court renders its decision. The DJJ officer's role does not. Instead, the officer is essentially charged with executing the court's orders. While the officer may be entitled to judicial immunity when executing those orders, the present case involves an officer who, at least for summary judgment purposes, deviated from the explicit terms of the order.

For these reasons, we decline to hold that DJJ is entitled to summary judgment for judicial immunity as an agent of the Family Court.

II. Additional Grounds

Additional grounds are raised to support the trial court's granting of summary judgment. Though we are not required to do so we address each in the interest of judicial economy. Our conclusions are based upon the facts before us and the parties are not precluded from further development of the issues we address.

A. Proper Party

DJJ contends the Family Court, not DJJ, is the proper party to this litigation. DJJ argues Dorsey was not acting on its behalf, but on behalf of the family court since the court retained authority over Fredrico. We disagree.

The Tort Claims Act requires a plaintiff to sue "only the agency . . . for which the employee was acting." S.C. Code Ann. §15-78-70(c) (Supp. 2001). An agency is defined as the state entity "which employs the employee whose act or omission gives rise to a claim." S.C. Code Ann. § 15-78-30(a) (Supp. 2001). There is no disagreement Dorsey's actions gave rise to this claim. The question is whether Dorsey was acting on behalf of the family court or DJJ.

As discussed above, this Court in Fleming, supra, determined whether a guardian ad litem was an employee under the Tort Claims Act. The Court held that while the guardian is appointed as a court representative to assist the court, it is "not acting on 'behalf' of the court." Id. at 53, 483 S.E.2d at 753. "The relationship between the Court and a guardian ad litem is not an agency relationship" nor an "employee-employer relationship." Id. Like a guardian ad litem, the juvenile probation officer is characterized as an "agent of the court." See S.C. Code Ann. § 20-7-8335 (C) (Supp. 2001). Like the guardian, the probation officer is not acting on behalf of the family court, but is there to assist the court. The probation officer is responsible for conducting investigations, providing relevant information to the court, and taking charge of a child if ordered by the court. See id.

A probation officer is an employee of DJJ, not the family court.

As stated by the Court of Appeals in Chavis v. Watkins, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (Ct. App. 1971), there are four factors used to determine whether a person is an employee of a particular entity. The factors are: (1) who has the right to control the person; (2) who pays the person; (3) who furnishes the person with equipment; and (4) who has the right to fire the person. A juvenile probation officer is directed to perform duties by the director of DJJ. See S.C. Code Ann. § 20-7-6840 (Supp. 2001). DJJ does not deny it pays Dorsey, furnishes him with the equipment needed to perform his job, and has the ability to discharge him. DJJ argues, however, that since probation officers are agents of the court, they are controlled by it. While the family court has a right to direct a probation officer to perform certain tasks, this fact alone is not dispositive of whether Dorsey is an employee of the court. See Simmons v. Robinson, 305 S.C. 428, 409 S.E.2d 381 (1991). More important is the Fleming rule that the court "agent" is assisting the court, but is not acting as a true agent on its behalf.

It is also important to look at the plain meaning of sections 15-78-70(c) and 15-78-30(a). In attempting to harmonize the two sections, we determine a plain reading to be that "only the entity employing the employee whose act gives rise to the claim may be sued." DJJ's argument would lead to a cramped interpretation of the statute. If followed by this Court, DJJ's interpretation would immunize all officials whose duties bring them under some direction of a court.

We conclude, based on the facts before us, DJJ is the properly named defendant.

B. Discretionary Immunity

DJJ argues its motion for summary judgment can be sustained on the ground it is entitled to discretionary immunity under the Tort Claims Act. We disagree.

A governmental entity is not liable for losses resulting from an exercise of discretion by its employees. Section 15-78-60 (5) of the South Carolina Tort Claims Act exempts governmental entities from liability for losses resulting from "the exercise of discretion or judgment by the

governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." Discretionary immunity is an affirmative defense requiring DJJ to prove Dorsey evaluated competing alternatives and made a "judgment" call based on applicable professional standards. Foster v. South Carolina Dep't of Highways & Pub. Transp., 306 S.C. 519, 413 S.E.2d 31 (1992).

In determining whether Dorsey's action was discretionary, it is helpful to compare the two classifications for the duties of public officials. The duties of public officials are generally classified as either ministerial or discretionary. Jensen v. Anderson County Dep't of Soc. Servs., 304 S.C. 195, 403 S.E.2d 615 (1991) "The duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts." Id. at 203, 403 S.E.2d at 619. The duty is discretionary if the governmental entity proves it actually weighed competing considerations, faced with alternatives, and made a conscious decision based upon those considerations. Id. (citing Niver v. Dep't Highways & Pub. Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990)).

In Jensen, this Court affirmed the Court of Appeals' finding that insufficient evidence was submitted to determine whether the Department of Social Services ("DSS") made a discretionary decision. Id. In the case, a teacher reported a potential child abuse case to DSS. A DSS social worker interviewed the child, and noted the presence of bruises and the child's fear of the mother's boyfriend. However, the social worker failed to follow up on the interview and eventually closed the file. One month later, the child's brother was beaten to death in the home. The Court held that DSS had a duty to conduct a thorough investigation before deciding to close the file. The Court concluded that conducting the investigation was ministerial but closing the file was discretionary because it required applying facts discovered through investigation to reach a decision. Id. Despite the fact that closing the file is discretionary, the Court held that there was insufficient evidence to grant discretionary immunity, because the decision was due to failure to complete the investigation, an administrative function, rather than a weighing of competing considerations. Id.

In the present case, DJJ claims Dorsey's decision to place Fredrico in his home after he was expelled from his foster home was a discretionary decision. Respondents claim Dorsey placed Fredrico in his family home because he thought no one else would take him. However, Respondents argue there was alternative placement available in the Greenville Group Home, which had agreed earlier to take Fredrico in an emergency. Therefore, Respondents claim if Dorsey had weighed competing alternatives, he would have placed Fredrico in the Greenville Group home. Based on our holding in Jensen and the evidence before us, DJJ is not entitled to discretionary immunity.

In addition, even if we held Dorsey exercised discretion, the performance of discretionary duties does not give rise to immunity if the public official acted in a grossly negligent manner. See Jackson v. South Carolina Dep't of Corr., 301 S.C.125, 390 S.E.2d 467 (Ct. App. 1989) aff'd, 302 S.C. 519, 397 S.E.2d 377 (1990). "Gross negligence is the intentional, conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988). It is the failure to exercise even the slightest care. Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993). This Court has also defined it as a relative term that "means the absence of care that is necessary under the circumstances." Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952).

Gross negligence is ordinarily a mixed question of law and fact. See Clyburn v. Sumter County School District # 17, 317 S.C. 50, 451 S.E.2d 885 (1994). When the evidence supports but one reasonable inference, it is solely a question of law for the court, otherwise it is an issue best resolved by the jury. Id. In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury.

In Jackson, supra, a jury found the Department of Corrections grossly negligent for placing a prisoner with strong violent tendencies into a minimum security prison, where he killed a fellow inmate. The Court of

Appeals found the Department of Corrections transferred the inmate even though they knew he had multiple disciplinary violations, including the killing of a fellow inmate. The Court of Appeals held the jury could view the transfer as gross negligence since it demonstrated a "conscious indifference to the threat posed to the safety of other inmates." Jackson, 301 S.C. at 125, 390 S.E.2d at 468.

In the instant case, Dorsey placed Fredrico into a home where DJJ workers noted there was no proper supervision. Furthermore, Dorsey knew of Fredrico's violent tendencies. He even wrote before the incident that he "wouldn't give (Fredrico) two weeks with his mother before he would get into big trouble."

Based on the facts before us, DJJ is not entitled to discretionary immunity as a matter of law. At a minimum, Faile has presented enough evidence to overcome DJJ's summary judgment motion on the matter.

C. Juvenile Release Exception

DJJ argues it is entitled to summary judgment because it is granted immunity under the juvenile release exception to the Tort Claims Act. We disagree.

Under Section 15-78-60(21), a governmental entity is not liable for "the decision to or implementation of release, discharge, parole, or furlough of any person in the custody of any governmental entity, including but not limited to a prisoner, inmate, juvenile, patient, or client, or the escape of these persons." DJJ argues that the present case falls squarely within this exception based on Respondents' allegations that Fredrico was in the DJJ's custody and was negligently released from that custody.

Despite the Respondents' factual allegations, however, it does not appear Fredrico was released from his relationship with the DJJ, whether it was a custodial relationship or not. Neither Respondents nor DJJ present any case law on this exemption. However, on its face, the exemption appears

to apply to a narrower set of circumstances than those presented in this case. The language of the exemption indicates the custodial entity must make a conscious, if not formal, decision to terminate the relationship before this immunity is triggered. DJJ did not do so in this case. Dorsey placed Fredrico in his home temporarily and appears to have had the authority to remove him at any time. Without further evidence, we conclude the juvenile release exemption does not protect the DJJ from liability.

Furthermore, although § 15-78-60(21) does not contain a gross negligence exception, this Court has recognized that "when a governmental entity asserts various exceptions to the waiver of immunity . . . [the court] must read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard." Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999). Therefore, even if Dorsey's actions fell within the release exception, a jury could find his actions were grossly negligent.

D. Duty of Care

DJJ argues the trial court's grant of summary judgment is supported because DJJ owed no legal duty of care to the Respondents' son when he was assaulted by Fredrico. We disagree.

In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff. Steinke, supra. "If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." Steinke, 336 S.C. at 387, 520 S.E.2d at 148.

Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. Rogers v. South Carolina Dep't of Parole & Cmty Corr., 320 S.C. 253, 464 S.E.2d 330 (1995); Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1998), cert. denied, 298 S.C. 204, 379 S.E.2d 133 (1998); Restatement (Second) of Torts § 314 (1965) . We recognize five exceptions to this rule: 1) where the defendant has a special relationship to

the victim;[3] 2) where the defendant has a special relationship to the injurer;[4] 3) where the defendant voluntarily undertakes a duty;[5] 4) where the defendant negligently or intentionally creates the risk;[6] and 5) where a statute imposes a duty on the defendant.[7] See generally, Hubbard & Felix, The South Carolina Law of Torts 57-72 (1990).

The present case, based upon the facts before us, falls within the second category. The Restatement provides no duty exists "to control the conduct of a third person as to prevent him from causing physical harm to another unless ... a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." Restatement (Second) of Torts § 315 (a) (1965). Section 319

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[3] See, e.g., Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986) (duty of Fraternity to protect an intoxicated person based on its relationship with the victim); Restatement (Second) of Torts § 315 (b) (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless ... a special relation exists between the actor and the other which gives to the other a right to protection.").

[4] See Rogers, supra. When a party is in a position to monitor, supervise, and control a person's conduct, a special relationship between the defendant and the dangerous person may trigger a common law duty to warn potential victims of the danger posed by the individual. This special duty is limited to situations where the person under the defendant's control has made a "specific threat directed at a specific individual." Id. at 256, 464 S.E.2d at 332.

[5] See, e.g., Caldwell v. Jim Walter Homes, Inc., 293 S.C. 229, 359 S.E.2d 518 (Ct. App. 1987); Restatement (Second) of Torts §§ 323-24A (1965).

[6] See, e.g., Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 195 S.E. 247 (1938); Restatement (Second) of Torts §§ 321-22 (1965).

[7] See, e.g., Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation, supra.

provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319 (1965).

Our courts have customarily applied § 315 and § 319 in conjunction with duty to warn cases. See Bishop, supra; Rogers, supra; Rayfield, supra. We have held a defendant has a duty to exercise reasonable care by issuing warnings after the third party has made specific threats to a specific individual. The rationale behind this line of cases is an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control. However, where the custodian knows of a specific, credible threat from a person in their care the injury is no longer speculative in nature.

The application of § 319 is not limited to duty to warn cases. The use of the § 319 custodial duty of care in such cases is a slight misnomer. Duty to warn cases normally involve a defendant who has legally released a third party from direct custodial control or who releases the third party after medical evaluation. See Bishop, supra (defendant discharged third party mental patient from its care); Rogers, supra (defendant released third party to furlough program); Rayfield, supra (defendant released third party on parole). More importantly, those cases deal with claims of a defendant's duty to **warn**. Plaintiffs in none of these cases asserted a breach by the defendant of a common law duty to **control** a dangerous person in their custody. See Bishop, supra (plaintiff claimed defendant failed to warn victim of third parties release from a mental hospital); Rogers, supra (plaintiff argued defendant failed to warn victim of a dangerous third party's furlough); Rayfield, supra (plaintiff asserted defendant was liable for breaching its statutory duties in paroling third party).

In the present case, Respondents do not assert DJJ had a duty to warn potential victims. Instead, Respondents assert a breach of the duty to supervise and control a dangerous juvenile by the custodial entity. Therefore, Respondents argue DJJ had a specific § 319 duty to control a dangerous

person legally placed in its direct custodial care. While this Court has never explicitly recognized such a duty, at least two appellate decisions mention a similar duty in dicta. See Jackson, supra; Rayfield, supra.

In Jackson we addressed the issue of discretionary immunity and the standard for gross negligence. The Court of Appeal's decision, which we affirmed, seems to presume, without argument, that the Department of Corrections had a duty to control a knowingly violent inmate in its custody from harming another inmate. See, Jackson, 301 S.C. at 126, 390 S.E.2d at 468 ("if the Department was grossly negligent in its duty to control... [the attacker] and this negligence proximately caused [victim's] death, its immunity from liability under the Act is waived.").

Rayfield addressed many issues including plaintiff's assertion that the Department of Corrections had a special relationship with the third party which gave rise to a duty to prevent the third party from injuring the plaintiff. The Court of Appeals quotes § 319 to support the assertion. See Rayfield, 297 S.C. at 109, 374 S.E.2d at 918. However, in denying a duty existed, the court wrote:

> We do not question this rule of law [§319]. When applied to the facts of this case, however, it affords no basis for the Rayfields' cause of action. The mere knowledge that Lucas was drug addicted and potentially violent did not create a special relationship. A special relationship arose, if at all, from the custody the Department of Corrections exercised over Lucas. While the Department had charge of Lucas, it arguably owed a duty of care to others to prevent foreseeable harm Lucas might do them. But once the Department's custody of Lucas ended, it no longer had charge of him, and the special relationship based on custody ended.

Id., 297 S.C. at 109-10, 374 S.E.2d at 918.

Though not controlling, the Court of Appeals clearly presumed a

§ 319 duty is a recognizable duty where a defendant has custodial care of a dangerous third party.

The Fourth Circuit, in a case factually similar to the case *sub judice*, found an independent duty to control a dangerous individual under § 319. Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976), cert. denied sub nom., Folliard v. Semler, 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976) . Semler involved Steven Gilreath ("Gilreath"), a mental patient found guilty of murder. A state court judge suspended Gilreath's sentence on the condition he be confined to receive treatment at the Psychiatric Institute of Washington ("Institute").

Gilreath's probation officer requested weekend passes over the next few months, based on a doctor's recommendation. The judge granted the weekend passes. Eventually, the judge modified the order to give the probation officer discretion to issue Gilreath weekend passes. As Gilreath proceeded with treatment, his doctor and probation officer agreed to transfer him from twenty-four hour supervision to day care status at the Institute. The judge approved the transfer.

Based on a doctor's recommendation, the probation officer gave Gilreath a three-day pass to investigate the possibility of moving to Ohio. Later, the probation officer gave Gilreath a fourteen-day pass to return to Ohio to prepare his transfer. The probation officer did not submit either pass for judicial approval.

Anticipating Gilreath's transfer to Ohio, the Institute, contrary to the court order, discharged him. Although the Institute notified the probation officer, the court remained uninformed. When Ohio rejected Gilreath's parole transfer, the probation officer ordered his return to Virginia. The Institute re-admitted Gilreath to its program, but only on an out-patient basis, requiring him to meet in a group setting two nights a week. The change in status was contrary to the latest court order.

Additionally, Gilreath no longer lived with his parents as he had

when he was in day care status, but instead lived alone, unsupervised. The probation officer never informed the judge of the new arrangement. Two months after returning to Virginia, Gilreath murdered another individual.

The Fourth Circuit, in upholding a civil verdict against the Institute and the probation officer, held each owed a duty to the victim. The court noted the judge ordered Gilreath "to receive treatment at and remain confined in the Psychiatric Institute until released by the Court." Id., 538 F.2d at 124. The Institute and probation officer argued the order's purpose was to rehabilitate Gilreath, therefore it created a duty only to him and not to any third party victims. The court held the order's purpose was twofold: to provide care for Gilreath and to protect the public from Gilreath. The Fourth Circuit noted the trial court was particularly concerned that Gilreath, who had a known history of attacking young girls, presented a foreseeable risk to the public.

Releasing Gilreath from the day care program violated the judgment of the court which determined confinement was in the best interest of the community. "The special relationship created by the probation order, therefore, imposed a duty on [the Institute and probation officer] to protect the public from the reasonably foreseeable risk of harm at Gilreath's hands [which] the state judge had already recognized." Id., 538 F.2d at 125.

The Fourth Circuit, construing § 319 of Restatement (Second) of Torts (1965), ruled the order itself provided the boundaries of the custodian's duty. Id. The Institute and the probation officer were obligated by the court order to retain custody over Gilreath until the court released him. "No lesser measure of care would suffice...they could not substitute their judgment for the court's with respect to the propriety of releasing him from confinement." Id.

In the present case, Judge Barrineau's April 1992 order placed Fredrico on probation for one year. The order suspended commitment to DJJ if Fredrico was placed in a therapeutic foster home. Fredrico's parents were ordered to undergo counseling. After his expulsion from the foster home, the

probation counselor placed him in a group home for a night, then with his biological mother.

Dorsey placed Fredrico into a home without proper supervision. Dorsey was aware of Fredrico's violent tendencies. More importantly, Dorsey returned Fredrico to his mother's home in direct contradiction to the court order.

While Semler does not equate the § 319 duty with the "custodial entity's duty to obey court orders," we find § 319 to be, as decided by the Fourth Circuit, "close to the point." Id. This Court is reluctant to impose the duty to control unless there is an established authority relationship and a substantial risk of serious harm. See Hubbard & Felix, supra, at 64-65. Here, DJJ had custody of a known dangerous individual. It had an independent duty to control and supervise Fredrico to prevent him from harming others as long as it retained custody of him by court order.

CONCLUSION

For the foregoing reasons, we **AFFIRM IN RESULT** and **REMAND** this case to the Circuit Court for proceedings consistent with this opinion.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Jerry S. Rosemond, Appellant.

ORDER WITHDRAWING ORIGINAL OPINION
AND SUBSTITUTING SUBSEQUENT OPINION,
AND DENYING PETITION FOR REHEARING

PER CURIAM: Opinion No. 3445, filed in the appeal above on February, 11, 2002, is hereby withdrawn and the following opinion is substituted therefor. Furthermore, after a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

AND IT IS SO ORDERED.

s/ Carol Conner, J.

s/ William L. Howard, J.

s/ Ralph King Anderson, Jr., J.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Jerry Rosemond,

Appellant.

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

Opinion No. 3445
Heard January 8, 2002 - Filed February 11, 2002
Withdrawn & Substituted March 29, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor Robert M. Ariail, of

Greenville, for respondent.

ANDERSON, J.: Jerry Rosemond was convicted of strong arm robbery, resisting arrest, and assault and battery with intent to kill (ABIK). He appeals his conviction for strong arm robbery, arguing the trial court erred in failing to grant a directed verdict because there was no evidence he committed a larceny by using violence or intimidation. We affirm.

FACTS/PROCEDURAL BACKGROUND

This appeal arises out of the alleged robbery of the Sphinx filling station, located on Pendleton Street in Greenville, South Carolina, on November 18, 1997. A witness to the event was Barbara Murray, a cashier working the second shift from 2:00 p.m. to 10:00 p.m.

According to Murray, a man walked into the store around 9:00 p.m. and went directly to the restroom. He stayed in the restroom for approximately five minutes and then came out and walked straight to the counter. Murray was just a few feet away on the other side of the cash register, sweeping in order to get ready for the next shift to take over.

Murray testified she did not think anything was unusual at first when the man walked up to the counter, as customers did that all the time, but she became frightened when he walked behind the counter:

The Solicitor:	And when he came out of the … bathroom, where was the first place that he went?
Murray:	He just walked straight up to the counter.
The Solicitor:	Straight up to the counter?
Murray:	Uh-huh.
The Solicitor:	And what did you do at that point?

Murray: At the time, I didn't think nothing about it because people do it all the time. And then when he came behind the counter, I just stood there and looked and I ran behind the freezer door and went back where they cook.

The Solicitor: **And why did you run behind the freezer door?**

Murray: **I was scared.**

The Solicitor: You were scared?

Murray: (Witness nods.)

The Solicitor: **And what was it that scared you?**

Murray: **Just the way he looked.** I mean, he didn't say anything. He didn't move toward anybody, he just looked, that's all, **it was like a glare.**

(emphasis added).

Murray testified the man proceeded to flip the cash register up in the air and slam it to the ground while she stood a few feet away:

The Solicitor: What did he do when he came there?

Murray: Well, coming up -- like I said, he stumbled over the step. He got -- he caught hisself (sic), he came around. He still did not say anything at all. He walked over to the register, he just pushed on the buttons, couldn't get it open. So he grabs the bottom of it, it's a two piece register. **He grabbed the bottom of it and just flips it up in the air. [It] fell on the floor. He picked it up**

and just slammed it down and it pops open. He grabbed the money and run back out to the left side of the — well, I think the left side and ran out of it.

The Solicitor: **How close were you to this person when this happened**?

Murray: About —

The Solicitor: And you can use objects in the courtroom to say how close you were?

Murray: About from this end to that end right there.

The Solicitor: From the end of the witness box?

Murray: Yeah, this corner right here to the beginning of that piece of wood right there.

The Solicitor: To the beginning of the jury box?

Murray: Yeah.

The Solicitor: **So just a few feet?**

Murray: **Yeah.**

(emphasis added).

Murray explained she was frightened by the man's actions in slamming the cash register to the ground:

The Solicitor: When you said he took the cash register drawer and - - tell me again what he did with that?

Murray: He just put his hands on the bottom side and picked it up. He just picked it up and it still wasn't open at that time, so he picked it up and slammed it on the floor and it popped open.

The Solicitor: **And did that frighten you?**

Murray: **Yeah, they're pretty heavy registers.**

The Solicitor: **They were pretty heavy registers?**

Murray: **Yeah**.

(emphasis added).

Murray stated she ran outside and saw the perpetrator running out of the side door and by the store. Murray acknowledged she was intimidated by the man:

The Solicitor: Ms. Murray, did you feel intimidated when the defendant came behind the cash register?

. . . .

Murray: When I seen him flip the register up in the air, that's when it scared me.

The Solicitor: It scared you?

Murray: Yeah.

Murray identified Rosemond at trial as the perpetrator. In contrast, Rosemond admitted he walked into the Sphinx on the evening in question, but testified he turned around and walked back out because he did not see anyone in the store. Rosemond stated he was arrested as he walked down the street. He

denied committing the robbery or attacking the arresting officers.

Defense counsel moved for a directed verdict on the strong arm robbery charge, arguing there was no evidence that Rosemond acted with force or intimidation based on Murray's testimony that the perpetrator did not brandish a weapon and did not make any threats or comments directly towards her or anyone else. The trial court denied the motion.

Rosemond was convicted of strong arm robbery, resisting arrest, and ABIK. He received concurrent sentences of six years in prison on each of the charges. In addition, he was ordered to successfully complete a drug diversion program. Rosemond appeals his conviction for strong arm robbery.

STANDARD OF REVIEW

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001) (citation omitted). "On a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight." State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). "If the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt could be fairly and logically deduced, the case must go to the jury." Id.

"On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State." McHoney, 344 S.C. at 97, 544 S.E.2d at 36 (citation omitted). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury." Id. (citation omitted).

LAW/ANALYSIS

Rosemond contends the trial court erred in denying his motion for a directed verdict on the charge of strong arm robbery because there was no evidence from which a jury could find that he committed a larceny with force

or intimidation. We disagree.

Initially, a question arises as to whether this issue is preserved for review as defense counsel did not specifically renew his directed verdict motion on the strong arm robbery charge at the close of all the evidence.

When the prosecution rested, defense counsel first stated he "would like to renew all of [his] previous objections." Defense counsel next moved for a directed verdict as to strong arm robbery, which was denied. After the defense presented evidence, the trial court specifically asked defense counsel whether he had any motions, and counsel responded: "Just renew my previous objections."

Based on the foregoing, it is arguable the directed verdict issue is not preserved as defense counsel did not specifically renew his directed verdict motion at the conclusion of the evidence. Rather, he made only a general reference to renewing his "previous objections," a statement he made earlier which did not include his directed verdict motion. See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (finding defense counsel's statement at the end of all the evidence that he was making the "standard motions" did not preserve the issue of directed verdict for appeal); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (noting a general or nonspecific objection presents no issue for appellate review); see also State v. Parler, 217 S.C. 24, 59 S.E.2d 489 (1950) (holding, under former Circuit Court Rule 76, the denial of the defendant's directed verdict motion was not preserved for appeal where he failed to renew the motion after presenting evidence); Note to Rule 19, SCRCrimP (stating the rule "is substantially the substance of Circuit Court Rule 76"); State v. Adams, 332 S.C. 139, 144, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (finding appellant's directed verdict motion was not preserved where the argument raised on appeal was not presented to the trial court, and "[m]oreover, the record does not reflect that Adams renewed the motion at the close of his case") (citing, inter alia, State v. Parler, 217 S.C. 24, 59 S.E.2d 489 (1950) and the Note to Rule 19, SCRCrimP); State v. Harry, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct. App. 1996) ("A motion for a directed verdict made at the close of the [state's] case is not sufficient to preserve error unless renewed at the close of all the evidence, because once the defense has come forward with its proof, the propriety of a

directed verdict can only be tested in terms of all the evidence.") (alteration in original) (citation omitted).

Because the issue was probably preserved by reference to the original motion for directed verdict, we address the merits.

Common law robbery and "strong arm" robbery are synonymous terms for a common law offense whose penalty is provided for by statute.[1] See Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000).

"Robbery is defined as the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence **or by putting such person in fear**." State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995) (emphasis added) (citation omitted); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) ("Strong arm robbery is defined as the 'felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'") (quoting State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987)). Thus, "[r]obbery is larceny from the person or immediate presence of another by violence **or intimidation**." Dukes v. State, 248 S.C. 227, 231, 149 S.E.2d 598, 599 (1966) (emphasis added); see also State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979) ("The common-law offense of robbery is essentially the commission of larceny with force [or intimidation].") (citation omitted).

"A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." Commonwealth v. Homer, 127 N.E. 517, 520 (Mass. 1920).

Generally the element of force in the offense of robbery may

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[1] S.C. Code Ann. § 16-11-325 (Supp. 2001) ("The common law offense of robbery is a felony. Upon conviction, a person must be imprisoned not more than fifteen years.").

> be actual or constructive. Actual force implies physical violence. **Under constructive force are included "all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking * * *. No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished**, if the transaction is attended with such circumstances of terror, such as threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, **the victim is put in fear**." 46 Am. Jur. 146.

North Carolina v. Norris, 141 S.E.2d 869, 872 (N.C. 1965) (emphasis added) (quoting North Carolina v. Sawyer, 29 S.E.2d 34, 37 (N.C. 1944)).

The trial court charged Rosemond's jury that "for the purpose of robbery, a thing is in the presence of a person if it be within his or her reach, inspection, observation or control so that he or she could retain possession of it if not overcome by violence or prevented by fear."

In the current appeal, Rosemond contends he was entitled to a directed verdict on the charge of strong arm robbery because there was no evidence that he made any direct threats or committed any acts of violence against Murray or anyone else. However, strong arm robbery may be accomplished by **either** force **or** intimidation. Murray made numerous references during her testimony to being frightened of the perpetrator during this incident. She specifically noted she was scared by both the man's "glare" as he walked to the counter and the force he used in flipping the heavy cash register into the air and slamming it to the ground. Murray was obviously intimidated by the man's appearance **and** his actions, and thus acquiesced in the robbery because she had an apprehension of danger. She was standing only a few feet away as Rosemond wrestled with the cash register and it is readily apparent from her testimony that the cash register was sufficiently within her reach, inspection, observation, or control that she would have, if not prevented by fear, retained her possession of it, and that Murray was put in fear sufficient to suspend the free exercise of her

will or to prevent resistance to the taking.

Murray's fears of being harmed by the perpetrator were reasonable based on the record before us. The arresting officers responding to the call testified Rosemond punched and struggled with them, at one point attempting to take the weapon of one of the officers. Rosemond lifted the second officer about three feet in the air and then slammed him violently to the ground. Rosemond was obviously a man of some size and strength and was capable by his actions of creating fear in Murray, as evidenced by her express testimony to this effect. We conclude there was sufficient evidence on all of the necessary elements to submit the offense of strong arm robbery to the jury.

CONCLUSION

We hold the element of force in the offense of strong arm robbery may be **actual** or **constructive**. Actual force implies physical violence. Constructive force includes all demonstrations of force, menaces, and all other means by which the person robbed is put in fear sufficient to overcome the free exercise of the person's will or prevent resistance to the taking. Regardless of how slight the cause creating the fear is or by what other circumstances the taking is accomplished, if the transaction is accompanied by circumstances of terror, such as threatening by word or gesture, as in the common everyday experiences of life are likely to create an apprehension of fear and induce a person to give up the property, the victim is placed in fear.

The trial court did not err in denying Rosemond's motion for directed verdict. Rosemond's conviction for strong arm robbery is

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Anthony King,

Appellant.

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3467
Heard March 5, 2002 - Filed March 25, 2002

AFFIRMED

Assistant Appellate Defender Katherine Carruth Link, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Randolph Murdaugh, III,

of Hampton, for respondent.

ANDERSON, J.: Anthony King appeals his conviction for possession with intent to distribute crack cocaine, asserting the trial court erred in its rulings regarding: (1) the validity of a search warrant; (2) evidence of prior drug activity and incarceration; and (3) the solicitor's closing argument. We affirm.

FACTS/PROCEDURAL BACKGROUND

On May 25, 1999, King was arrested at a trailer in rural Beaufort County pursuant to a bench warrant in a matter unrelated to this appeal. The arresting officer was John Gobel, a narcotics investigator with the Beaufort County Sheriff's Department and a member of the Drug Enforcement Agency Task Force. According to Officer Gobel, King said he resided at the trailer. The trailer was owned by Frank Harris.

While in jail, King telephoned his mother, who in turn set up a three-way call to Eugenia Kirken. King and Kirken were friends and had known each other for approximately a year. King was unable to reach Kirken; however, he left her a recorded message that purportedly directed her to go to the trailer where he was staying and get his "shit" out. He eventually spoke to her several times expressing the same concern using this terminology.

Kirken interpreted King's statements as a directive to remove crack cocaine belonging to King from the trailer. According to Kirken, King often referred to drugs by the pejorative "shit." During the year they had known each other, Kirken had purchased crack cocaine from King at least twenty times. In addition, Kirken witnessed King selling the drug to others on at least forty occasions. Much of this activity occurred at the trailer referenced by King in his telephone message.

Instead of following King's directive, Kirken contacted Corporal Michael Riley of the Beaufort County Sheriff's Department. Kirken met with Corporal Riley and his supervisor, Staff Sergeant David Rice, and told them of King's

message and her knowledge of what King meant.

Though Kirken was once addicted to crack and had a felony record, Corporal Riley and Sergeant Rice considered Kirken's information credible because she was a confidential informant for the Beaufort County Drug Task Force and had provided accurate information in several past investigations. Based on Kirken's information, Corporal Riley and Sergeant Rice obtained a warrant to search the trailer. During their search, deputies discovered 2.7 grams of crack cocaine in the bedroom reportedly used by King. The police found King's South Carolina identification card in the same room.

King was indicted for possession with intent to distribute crack cocaine. He was convicted as charged and sentenced to ten years in prison. This appeal followed.

STANDARD OF REVIEW

An appellate court reviewing the decision to issue a search warrant should "decide whether the magistrate had a substantial basis for concluding probable cause existed." State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995) (citation omitted). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). The appellate court should give great deference to a magistrate's determination of probable cause. Id.; see also State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997).

LAW/ANALYSIS

I. Validity of Search Warrant

King first contends the trial court erred in admitting evidence seized pursuant to the search warrant because the warrant was based on information from an unreliable informant and was not supported by probable cause. We disagree.

Defense counsel moved in limine to suppress the crack cocaine seized

pursuant to the search warrant because the warrant was not supported by probable cause. Counsel argued Kirken was "clearly unreliable" as a confidential informant because she was a convicted felon and crack addict and admitted using cocaine during the time she was working for the Sheriff's Department. Counsel contended this information was not provided to the magistrate and that Kirken gave the Sheriff's Department only general information about where the crack could be found. The trial court denied the motion to suppress the drug evidence, finding the probable cause requirements were met. On appeal, King asserts the trial court erred in admitting the drug evidence because the search warrant was not supported by probable cause.

Initially, we question whether this issue is preserved for our review. Although defense counsel made an in limine motion to suppress the introduction of the crack cocaine, counsel did not renew his objection at trial when the crack cocaine was actually entered into evidence. In fact, when the solicitor moved for admission of the drug evidence, defense counsel affirmatively stated, "Without objection." The trial court then admitted the drugs into evidence, noting, "Without objection received into evidence."

Since no objection was renewed at the time the evidence was offered, the matter is not preserved for appeal. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("In most cases, '[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.") (citation omitted); see also State v. Mitchell, 330 S.C. 189, 193 n.3, 498 S.E.2d 642, 644 n.3 (1998) ("We have consistently held a ruling in limine is not final, and unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.") (citation omitted); State v. Floyd, 295 S.C. 518, 521, 369 S.E.2d 842, 843 (1988) (**"We caution Bench and Bar that these pretrial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence."**) (emphasis added); State v. Gagum, 328 S.C. 560, 564-65, 492 S.E.2d 822, 824 (Ct. App. 1997) ("Because a ruling in an in limine motion is not final, the losing party must renew his objection at trial when the evidence is presented in order to preserve

the issue for appeal.") (citations omitted); cf. State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997) (**noting the general rule that a court's ruling on *in limine* motion is not a final decision, but applying *State v. Mueller* and holding where objection is made during trial and there are no intervening witnesses before the disputed testimony, the decision is final and the objection need not be renewed**); State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995) (holding objection to use of prior convictions for impeachment purposes was preserved where motion was made during trial, rather than during an in limine proceeding, and no evidence was received between the ruling and the disputed testimony).

In Forrester, our Supreme Court noted a defendant's in limine motion to suppress evidence should be renewed at trial to preserve the issue for review, but found the defendant's objection to admission of crack cocaine evidence was preserved in that particular case based on Mueller because the trial court's ruling was obtained **immediately** prior to the admission of the drug evidence. Id. at 642-43, 541 S.E.2d at 840 (emphasis added). These circumstances are not present in King's case. Thus, King was required to renew his in limine motion.

Adverting to the merits, we find no error in the trial court's admission of the drug evidence and its determination regarding the validity of the search warrant.

A magistrate may issue a search warrant only upon a finding of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); see also S.C. Code Ann. § 17-13-140 (1985) (providing search warrants may be issued "only upon affidavit sworn to before the magistrate … establishing the grounds for the warrant.").

This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999); State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995); State v.

Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994).

Sergeant Rice completed a form affidavit in support of the search warrant. In response to the question asking the affiant to state the reason for the belief that the property sought was on the subject premises, Sergeant Rice answered as follows:

> In that on 5-26-99 BCSO DTF officers received information from a BCSO C.I., who has proven reliable on at least 1 occasion in the past. The C.I. was contacted by Anthony "Jazz" King, a resident of the premises described above. King is currently incarcerated in the Beaufort County Detention Center. King advised the C.I. that he did not want BCSO to get his "shit" and to make arrangements to get the items out of the residence. King is known to the C.I. and to DTF officers as being active in illicit narcotics activity. The C.I. confirmed to DTF officers that King's referral to "shit" meant narcotics, probably cocaine[,] and that the C.I. has seen King in possession of ounce quantities of cocaine in the past.

In State v. Williams, 297 S.C. 404, 377 S.E.2d 308 (1989), the affidavit contained the following information: the investigating officer stated he had been told by an informant that the defendant's home contained illegal drugs; the informant had seen the drugs in the defendant's home within seventy-two hours of the swearing of the affidavit; and the informant had provided the sheriff's department with truthful information in the past, which led to convictions. Upon review, our Supreme Court held: "[T]he totality of the circumstances here provided the issuing magistrate a substantial basis upon which to make the probable cause determination." Id. at 406, 377 S.E.2d at 309.

In King's case, although Kirken had been in trouble with the law in the past, she had proven herself reliable to the Beaufort County authorities during prior investigations. Further, she personally had engaged in or witnessed many drug transactions involving King at the trailer within the year leading up to the Drug Task Force's search. We conclude the search warrant is valid under the totality of the circumstances and the drug evidence was properly admitted.

II. References to Prior Drug Activity and Incarceration

A. Lyle Analysis

King next contends the trial court erred in allowing testimony concerning his prior drug activity and incarceration and in allowing Kirken to testify as to her interpretation of his alleged message based on this prior drug activity. We disagree.

During pretrial proceedings, King moved to suppress testimony from Kirken about her drug transactions with King, as well as her observations of King's drug sales to others. The following exchange occurred:

> Defense Counsel: I have some motions to suppress statements that would violate the law of this Court, State v. Lyle[.] I would ask that no statements from Beaufort County Sheriff's Office or other witnesses be made referencing my client as a drug dealer or a suspected drug dealer. This type of evidence is impermissible and improper.
>
> The Court: Okay.
>
> The Solicitor: Your Honor, in this situation what we have is we have the defendant calling the confidential informant in this case and telling her — excuse my language, this is the language that was used — "You need to get my shit."
>
> All right. The surrounding facts upon that is going to be the determination what he meant and also the fact that we have the issue here of possession with intent to distribute.

. . . .

> She can provide firsthand knowledge of her activities with the defendant, his drug dealings, in order to provide the framework so that she can state that she knew what he meant.

Ultimately, the court determined Kirken could testify concerning King and his drug-related activities. The parameters of her testimony were closely defined by the court:

> The Court: Well, I think she can testify about her relationship with him, whatever it was, including whether she's bought drugs before. The jury, I'm talking about.
>
> The Solicitor: Right.
>
> The Court: And the conversation that she had with him, and that's it. I don't think she can talk about anything else, but that's all the State's asking for, isn't it?
>
> The Solicitor: That's correct, Your Honor. Just the information, the relationship, the information that he conveyed to her, and then for her to tell us the information that she conveyed to the Drug Task Force.

Evidence of a defendant's crimes, wrongs, or acts is generally not admissible. Rule 404(b), SCRE. Our courts view a defendant's previous distribution of drugs as a past bad act. See, e.g., State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992) (determining the testimony of a police officer concerning the defendant's past drug distribution activities constituted evidence of prior bad acts).

In State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and incorporated in Rule 404(b), SCRE, a defendant's prior bad acts may be admitted to show: (1) motive; (2) identity; (3) the existence of a common scheme or plan; (4) the absence of mistake or accident; or (5) intent.

To admit prior bad acts regarding drugs under the Lyle exception, there must be a logical relevance between the acts in question and the purpose for introduction. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused."). "Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001), cert. pending; see also State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).

Additionally, evidence of drug use or distribution must be clear and convincing. State v. Dickerson, 341 S.C. 391, 399, 535 S.E.2d 119, 123 (2000) ("The evidence of the prior bad acts must be clear and convincing to be admissible.") (citation omitted). Concomitantly, pursuant to Rule 403, SCRE, the prejudice resulting from the admission of this evidence must be outweighed by its probative value.

The State contended Kirken's testimony concerning her purchases of drugs from King and her observations of King's other drug transactions was admissible to show King's intent to distribute the crack cocaine found during the search. Testimony relating to a defendant's past drug distribution activities is admissible to establish the element of intent. State v. Gore, 299 S.C. 368, 384 S.E.2d 750 (1989).

In Gore, the defendant was convicted of possession of cocaine with intent to distribute and conspiracy to distribute cocaine. The Circuit Court permitted the State to enter evidence showing the defendant had sold cocaine from his trailer on previous occasions to establish the defendant's intent regarding the cocaine the police seized. On appeal, our Supreme Court ruled the trial court's admission of this evidence was proper. Similarly, in the current appeal, proof of intent was integral to the State's case against King.

Relying upon State v. Wilson, 337 S.C. 629, 524 S.E.2d 411 (Ct. App. 1999), King argues that evidence of his past drug sales did not meet the "clear and convincing" standard because the evidence was based upon "the uncorroborated testimony of a person who 'unquestionably has a stake in the outcome' by virtue of her own involvement in illegal drug activity and her pending prosecution for possession of crack." App. Brief at 8 (quoting Wilson, 337 S.C. at 632, 524 S.E.2d at 413). In other words, King asserts the trial court should not have admitted evidence regarding his past drug transactions because Kirken lacked credibility.

In Wilson, police officers executed a search warrant on a motel room occupied by the defendant and his girlfriend. Officers found a South Carolina identification card belonging to the defendant, a beeper, razor blades, and .78 grams of crack cocaine. They also found more than $700 in currency, a beer can fashioned into a pipe, and four small cellophane bags. Both the defendant and his girlfriend were arrested and charged with possession of crack cocaine with intent to distribute. The girlfriend pleaded guilty to possession of crack cocaine in return for her testimony against the defendant.

During trial, the defendant objected to the girlfriend's testimony concerning an alleged drug transaction involving the defendant that she claimed to have witnessed in the hallway of the motel two days before the arrest. At the in camera hearing that followed, the girlfriend testified she saw the defendant hand a woman a plastic bag containing what appeared to be a white rock in exchange for twenty dollars. The girlfriend characterized the substance as "drugs," but during cross-examination explained that her basis for this assumption was that she recognized the person who took it as someone "who usually smoke[s]." The defendant objected to the testimony on the ground that it was not "clear and convincing" and more prejudicial than probative. The trial court rejected the argument and admitted the evidence.

On appeal, this Court reversed and remanded the conviction, finding the girlfriend's testimony did not provide "clear and convincing" evidence of the defendant's past crimes because the girlfriend lacked credibility: "We … note that [the girlfriend] unquestionably had a stake in the outcome by virtue of her involvement in the crime. To the extent she could place the blame for

possession of the drugs upon [the defendant], she obviously benefitted in her plea negotiation and in lessening her degree of culpability for sentencing purposes." Id. at 632, 524 S.E.2d at 413.

This holding, however, was reversed by our Supreme Court in State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). The Supreme Court found it was error for this Court to have considered the girlfriend's credibility when considering the admission of Lyle testimony. Id. at 6-7, 545 S.E.2d at 829. The credibility of a witness, the Court stated, is an issue solely reserved for the jury. Id. at 7, 545 S.E.2d at 830.

The Wilson Court defined the proper scope of review of a trial court's ruling on the admissibility of other bad acts: "**If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal.**" Id. at 6, 545 S.E.2d at 829 (emphasis added) (footnote omitted). Applying this standard, we uphold the trial court's admission of Kirken's testimony. Kirken averred at trial that she bought crack cocaine from King at least twenty times and saw King engage in forty additional drug transactions with other persons. These experiences factually support the admission of Kirken's testimony as evidence of King's prior drug transactions.

B. Rule 403, SCRE

King attacks the admission of Kirken's testimony by asserting the trial court did not perform the necessary Rule 403, SCRE analysis concerning the probative value of his prior bad acts. King's argument is facially valid in light of the mandate that the trial judge conduct an "on-the-record" analysis in matters pertaining to the admission of prior bad acts. See State v. Beck, 342 S.C. 129, 136, 536 S.E.2d 679, 683 (2000) ("After conducting a Lyle analysis and finding evidence both relevant and admissible as a prior bad act, the trial court must conduct a Rule 403, SCRE analysis to determine whether or not the evidence is unduly prejudicial.").

The trial record does not reflect a comprehensive Rule 403 consideration by the trial court. Though an on-the-record Rule 403 analysis is required, this Court will not reverse the conviction if the trial judge's comments concerning

the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of King's prior bad acts. Cf. State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001), cert. granted (**holding that, although the trial judge must perform a comprehensive, on-the-record Rule 609 analysis before admitting evidence of a defendant's prior convictions for purposes of impeachment, his failure to do so does not constitute error if the record reveals the judge was — at a minimum — aware of Rule 609's requirements**).

During his direct examination of Kirken, the solicitor sought to elicit testimony regarding Kirken's experiences with King:

The Solicitor:	Okay. Did the defendant ever sell crack at that house [the trailer]?
Kirken:	Yes, sir.
The Solicitor:	Did he ever sell crack out of that room?
Kirken:	Yes, sir.
The Solicitor:	Have you ever seen crack in that room [in which the crack in this case was seized]?
Kirken:	Yes, sir.
The Solicitor:	All right.
Defense Counsel:	Your Honor, I'm going to object, I would like to be heard on the record about those two last questions that the solicitor asked this witness. Thank you.
	. . . .
	(Jury excused.)

Defense Counsel: Your Honor, for the record at this time I'm going to renew my objection in reference to this witness's testimony specifically about buying drugs from my client 20 times and him selling drugs 40 times.

The last two questions that the solicitor asked were specific instances of conduct that he questioned her about, not a general relationship that she had with him regarding any drug activity that he had.

The solicitor asked her specifically, you know, did you ever see him sell drugs out of that room, did he ever — did you ever see this activity take place. It's a specific question about a specific activity at a specific time. And I renew my objection.

The Court: Well, to my mind logically, and correct me if I'm wrong if you got some authority, but that goes to the sense he's charged with possession with intent to distribute drugs found right there, it's establishing his nexus or contact with that and she's been there, seen that and all that. To my mind, it's fair.[1]

---

[1] To the extent King challenges this particular testimony as to prior bad acts of selling drugs to Kirken twenty times and to others forty times, no objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.

While the trial court's ruling is a compressed Rule 403/404(b) analysis, it is some indicia of his consideration of whether admission of the testimony was fair to King (i.e., more probative than prejudicial). We find no error in the trial court's ruling. Evidence of King's past drug-related activities was integral to proving his intent to distribute the crack cocaine seized from the trailer.

C. Incarceration

Finally, to the extent King claims the trial court improperly allowed testimony from the State that referenced his incarceration when he called Kirken, we find King did not brief this issue with any specificity. Instead, he simply stated: "The portions of the tape that alluded to appellant's incarceration on another matter were … improper, as that information had no bearing on any issue in the case and was inherently prejudicial. The court erred in allowing those excerpts to be played." This argument is conclusory and contains no citation support other than a reference to Rule 403. Accordingly, this issue is deemed abandoned. See State v. Colf, 332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998) (deeming abandoned a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule).

III. Solicitor's Closing Argument

King lastly contends the trial court erred in allowing improper comments by the solicitor concerning his failure to testify. We disagree.

During his closing argument, the solicitor stated:

> When you look at the facts in this case, look at Eugenia Kirken. You're dealing with an individual who has come to this court, admitted having a crack problem, admitted that she has committed crimes in the past. What she's also come to the court and stated was that through this experience[,] she has known the defendant, that the defendant has sold her crack cocaine, that the defendant has sold her crack cocaine on approximately 20 times and has witnessed him sell it on 40 other occasions.

> The other thing that you're faced with her is the fact that [Kirken] receives the call from the defendant. She has explained to you that the defendant has explained to her that he wants her to get his shit out of there before the police discover it. I believe you heard the tape that goes into that as well. **I assert to you that that testimony's uncontradicted**. We have no other definition of what went on there that day.

(emphasis added).

Defense counsel immediately objected and the parties held a sidebar conference with the court. Following the sidebar, the solicitor continued his closing argument without any instruction or comment from the court.[2]

During jury deliberations, defense counsel placed his objection on the record:

> Defense Counsel: I would like to make sure that we put on the record your ruling on my objection to the State's closing, and my position that it was a comment on my client's right not to testify and —
>
> The Court: In other words, what you're saying is if you use the word that it's uncontradicted, then that implies that the evidence is uncontradicted since he didn't himself

[2] After the trial court's initial jury instructions, a bench conference was held off the record, upon which the trial court additionally charged the jury that the defendant was presumed innocent and his failure to testify did not create any presumption against him and could not be considered "in the slightest degree," as the burden of proof remained upon the State and the defendant was not required to testify.

contradict it?

Defense Counsel: Yes, sir.

The Court: I don't think it's quite that broad, I don't interpret it to be that. I see what you're saying, but I mean, you know, sometimes you cross-examine the State's witnesses and all and sometimes he was — if it could have been construed by that I think it's a stretch, and I don't see anything wrong with it that it would have — that it could have possibly resulted in any prejudice to the defendant. But your objection is duly noted.

On appeal, King argues the solicitor's statement regarding the lack of any contradiction by the defense concerning Kirken's interpretation of King's telephone message was an improper comment on King's decision not to testify. We disagree.

A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). Moreover, the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987) ("When an accused asserts a constitutional right, it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right.") (citation omitted).

The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477

U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); see also State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996) (ruling test of granting new trial for alleged improper closing argument of counsel is whether defendant was prejudiced to extent that he was denied a fair trial).

The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). The appellate tribunal will not disturb the trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981).

As a rule, a solicitor cannot comment directly or indirectly upon a defendant's failure to testify at trial. Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001); see Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (holding an accused has the right to remain silent and the exercise of that right cannot be used against him).

"However, even improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant." Gill, 346 S.C. at 221, 552 S.E.2d at 33 (citation omitted). "The defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of a fair trial. Furthermore, even if the solicitor makes an improper comment on the defendant's failure to testify, a curative instructive emphasizing the jury cannot consider [the] defendant's failure to testify against him will cure any potential error." Id. (citations omitted).

"Where the solicitor refers to certain evidence as uncontradicted and the defendant is the **only** person who could contradict that particular evidence, the statement is viewed as a comment on the defendant's failure to testify." State v. Sweet, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000) (emphasis added) (citation omitted).

In Sweet, the defendant did not testify. During closing arguments, the

solicitor stated **only** the defendant could rebut the testimony of two accomplices who incriminated him. On appeal, this Court reversed the defendant's conviction, finding the solicitor's comments constituted a prejudicial comment on the defendant's failure to testify. Id. at 352, 536 S.E.2d at 96. We noted the solicitor's statement was a direct comment on the defendant's failure to testify, that the court should have immediately addressed defense counsel's objection by issuing a curative instruction or declaring a mistrial, and the error was not harmless because the evidence in the case was "less than overwhelming." Id.

In the current appeal, unlike the circumstances in Sweet, the defendant is not the only person who could have contradicted the evidence characterized by the solicitor as "uncontradicted." King contacted Kirken through a three-way telephone call orchestrated by his mother. King's mother was therefore privy to the call to Kirken. King could have called her to testify about what she believed King to mean by his reference to "shit" in the recorded message. In our view, the solicitor's reference to Kirken's testimony as "uncontradicted" was not a comment on King's failure to testify as articulated by the rule in Sweet.

Alternatively, even if the solicitor's comments were improper, such comments do not automatically mandate reversal if they do not result in prejudice to the defendant. Gill, 346 S.C. at 221, 552 S.E.2d at 33; State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); see also State v. Mizell, 332 S.C. 273, 285, 504 S.E.2d 338, 345 (Ct. App. 1998) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one.") (citation omitted).

When a Doyle violation is alleged, this Court must apply a harmless error analysis as set forth in State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). To be harmless, the record must establish: (1) the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; (2) the solicitor did not tie the defendant's silence directly to his exculpatory story; (3) the exculpatory story was totally implausible; and (4) the evidence of guilt was overwhelming. Id. at 531, 466 S.E.2d at 366; State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (Ct. App. 2000), cert. granted. "[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Pickens, 320 S.C. at 531, 466 S.E.2d at 366.

Based on the totality of the record, we find the solicitor's comment, if viewed as an impermissible reference to King's failure to testify, was harmless error. First, the reference was limited to one isolated instance. Second, the comment was not directly related to King's exculpatory story, i.e., that other persons had access to the trailer where the search warrant was executed. Finally, we find the evidence of King's guilt overwhelming based on the testimony that: (1) the crack cocaine and King's identification were recovered from the trailer; (2) King had previously admitted this was his residence; and (3) that he had previously sold drugs to the confidential informant and others from this same room, which was pertinent to the issue of intent.

CONCLUSION

For the foregoing reasons, King's conviction and sentence for possession with intent to distribute crack cocaine are

AFFIRMED.

CURETON and GOOLSBY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

United Student Aid Funds, Inc.,

Appellant,

v.

The South Carolina Department of Health and Environmental Control, an Agency of the State of South Carolina; Grady L. Patterson, in his official capacity as Treasurer for the State of South Carolina; and James A. Lander, in his official capacity as Comptroller General for the State of South Carolina,

Respondents.

Appeal From Richland County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3468
Formerly Unpublished Opinion No. 2002-UP-565
Heard January 12, 2000 - Filed March 25, 2002

AFFIRMED

Lil Ann Gray and Charles F. Cooper, II, both of Cooper, Coffas, Moore & Gray, of Columbia, for appellant.

Elizabeth F. Potter, Staff Counsel of South Carolina Department of Health and Environmental Control; and Attorney General Charles M. Condon and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for respondents.

HUFF, J.: United Student Aid Funds, Inc. (USA Funds) brought this action seeking an order directing the South Carolina Department of Health and Environmental Control, the State Treasurer, and the Comptroller General (collectively, DHEC) to garnish the wages of a DHEC employee.[1] The garnishment was to collect on the defaulting employee's student loan. USA Funds sought the order pursuant to the wage garnishment provision in 20 U.S.C.A. § 1095a (West 2000), which governs the guarantee of student loans. The trial court dismissed the action, finding 20 U.S.C.A. § 1095a is not applicable to the states and their agencies. USA Funds appeals. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

USA Funds is a nonprofit, Delaware corporation, which operates as a student loan guaranty agency. In 1990, USA Funds guaranteed a promissory note in the principal amount of $2,200.00 for a student loan obtained by Brenda L. Irons. Irons subsequently defaulted on the loan.

USA Funds guaranteed Irons's student loan pursuant to Federal Family Education Loan Program, 20 U.S.C.A. § 1071 et seq. (West 2000 & Supp. 2001). Under this Act, the United States Congress enacted a program in which the federal government encouraged the making of loans by private

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[1] USA Funds alleged the Treasurer and Comptroller General are responsible for overseeing state funds and the production of payroll checks of all South Carolina state employees and to making disbursements therefrom.

lenders to finance the post secondary education of eligible students. See 20 U.S.C.A. § 1071 (West 2000). A guaranty agency guarantees payment of a loan made by an eligible lender and pays the holder of the loan if the student defaults. 20 U.S.C.A. § 1078 (West 2000 & Supp. 2001). The United States Secretary of Education reimburses the guaranty agency for all or part of these payments under a reinsurance agreement with the agency. 20 U.S.C.A. § 1978(c)(1)(A) (West 2000). Further, a guaranty agency also receives funds on behalf of the Secretary, including collecting defaulted student loans upon which the guaranty agency has paid the holder and received reimbursement from the Secretary. 20 U.S.C.A. § 1078(c)(2) (West 2000). When a guaranty agency collects money on a defaulted student loan, it retains a portion for the costs of collection and forwards the remainder to the Secretary. 20 U.S.C.A. § 1078(c)(2)(D) & (6) (West 2000).

To assist the Secretary of Education and guaranty agencies in collecting defaulted student loans, the United States Congress gave guaranty agencies the authority to administratively issue "orders" to the employers of defaulting borrowers that require the employers to withhold up to 10% of the disposable wages of the borrower after the employee is provided with notice and an opportunity for a hearing. 20 U.S.C.A. § 1095(a). The portion of 20 U.S.C.A. § 1095(a) being challenged provides:

> the employer shall pay to the Secretary or the guaranty agency as directed in the withholding order issued in this action, and shall be liable for, and the Secretary or the guaranty agency, as appropriate, may sue the employer in a State or Federal court of competent jurisdiction to recover, any amount that such employer fails to withhold from wages due an employee following receipt of such employer of notice of the withholding order, plus attorneys' fees, costs, and, in the court's discretion, punitive damages, but such employer shall not be required to vary the normal pay and disbursement cycles in order to comply with this paragraph . . . .

20 U.S.C.A. § 1095a(a)(6) (West 2000).

On October 27, 1995, USA Funds paid Irons's note holder $2,770.08 pursuant to its guarantee and received an assignment of the note. USA Funds then undertook collection of the note. USA Funds served Irons with notice on July 29, 1997 of its intent to initiate withholding proceedings. Irons did not request a hearing on the proposed garnishment within thirty days as permitted under the federal statute. USA Funds thereafter issued an "Order of Withholding from Earnings" to Irons's employer, DHEC, on September 4, 1997. The order instructed DHEC to withhold up to 10% of Irons's disposable income every payday until the amount then outstanding, $4,089.02, had been paid in full.

DHEC did not remit any of Irons's wages in accordance with the withholding order. USA Funds sent DHEC two additional notices on October 10, 1997 and January 14, 1998 requesting compliance with the first order. On May 18, 1998, counsel for USA Funds sent a demand letter requesting compliance with the withholding order. However, DHEC still did not withhold Irons's wages.

USA Funds filed this action on July 17, 1998 seeking an order directing DHEC to withhold a portion of Irons's wage in accordance with 20 U.S.C.A. § 1095a until the defaulted loan was paid either in full or until Irons no longer worked at DHEC. USA Funds also sought recovery for the amount DHEC should have withheld since the date of USA Funds's first withholding notice. DHEC moved to dismiss pursuant to Rules 12(b)(6) and 12(h)(2), SCRCP, arguing, inter alia, that there is no provision in 20 U.S.C.A. § 1095a for its application to the states and their agencies, and it is not an "employer" as that term is used in the statute.

The trial court dismissed USA Funds's complaint, finding 20 U.S.C.A. § 1095a inapplicable to the State of South Carolina and its agencies. It found the act does not define the word "employer" or otherwise indicate that it would apply to the states. It ruled that Congress may not subject states to generally applicable laws unless "it expresses with

unmistakable clarity an intent to do so." Thus, the court concluded: "The Wage Garnishment law does not apply to the State Defendants herein because it lacks a clear statement of congressional intent to apply the law to the State."

LAW/ANALYSIS

USA Funds argues the trial court erred in ruling 20 U.S.C.A. § 1095a does not apply to the State of South Carolina and its agencies. We disagree.

The United States Constitution establishes a system of dual sovereignty between the States and the Federal Government. Gregory v. Ashcroft, 501 U.S. 452 (1991). Thus, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Id. at 457. Although Congress may legislate in areas traditionally regulated by the states, this is an extraordinary power in a federalist system and one which the courts will assume Congress does not exercise lightly. Id. at 460.

Furthermore, the Court has recognized the "ultimate guarantee of the Eleventh Amendment[2] is that nonconsenting States may not be sued by private individuals in federal court." Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001). The Court further extended the Eleventh Amendment's recognition of States' sovereignty to apply to private suits in state courts, as well as in federal courts in Alden v. Maine, 527 U.S. 706 (1999). The Court elucidated,

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

Id. at 758.

It explained that unlimited congressional power to authorize suits in state court to recover damages from the States' treasuries would give Congress a power and leverage over the States that is not contemplated by our constitutional design. Id. at 750. It further found such suits would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens by impinging on the States' allocation of resources. Id. at 751. Thus the Court held that the powers delegated to Congress under Article I do not include the power to subject nonconsenting states to private suits for damages in the state courts. Id. at 754.

However, when acting pursuant to a valid grant of constitutional authority, Congress may abrogate the States' Eleventh Amendment immunity when it unequivocally intends to do so. Garrett, 531 U.S. at 363.

When determining whether Congress intended for legislation to apply to the States, the United States Supreme Court has recognized the "plain statement rule," which is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory v. Ashcroft, 501 U.S. 452, 461 (1991). Under this rule:

> If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute. . . . Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 460-61 (citations and internal quotation marks omitted); see also Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 206 ("When the issue to be resolved is one of statutory construction, of congressional intent to impose monetary liability on the States, the requirement of a clear statement by Congress to impose such liability creates a rule that ought to be of assistance to the Congress and the courts in drafting and interpreting legislation.").

As the trial court noted, where Congress has intended for States to be subject to its law, it has said so. See e.g., Federal Debt Collection Act, 28 U.S.C.A. § 3002 (10) (West 1994) (expressly defining "person[s]" subject to its terms as including a "State or local government."); Fair Labor Standards Act, 29 U.S.C.A. § 203(d) (West 1998) (defining "employer" to include a public agency); Age Discrimination in Employment Act [ADEA] 29 U.S.C.A. § 630(b)(2) (West 1999) (definition of employer amended in 1974 to include the States).

In addition to applying the plain statement rule in determining the applicability of the statute to the States, we also consider the doctrine of constitutional doubt, which provides that when a statute is susceptible of two constructions, courts interpret the statute to avoid "grave and doubtful constitutional questions." Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998).

Irons resigned from her employment with DHEC effective October 1, 1998.[3] Therefore, USA Funds' action is one for money damages.

We look to the language of the statute to determine whether Congress intended 20 U.S.C.A. § 1095a to infringe upon the States' sovereignty. The word "employer" is not defined with the statute. We find no evidence of Congress's "clear and manifest" intent for the statute to authorize a suit for money damages against the States. Accordingly, we find the trial court did not err in concluding the federal wage garnishment provision in 20 U.S.C.A. § 1095a does not apply to this action against the State of South Carolina and its agencies.[4]

CONCLUSION

For the foregoing reasons, the decision of the trial court dismissing USA Funds' action is

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.

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[3] South Carolina law prohibits employment by a State agency of a person considered in default of a guaranteed, federally insured student loan. S.C. Code Ann. § 59-111-50 (1990).

[4] Because we find Congress did not intend for 20 U.S.C.A. § 1095a to apply to the States, we need not address USA Fund's contention that the State of South Carolina consented to being considered an employer.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Universal Benefits, Inc.,

Appellant,

v.

James H. McKinney,

Respondent.

Appeal From Sumter County
John M. Milling, Circuit Court Judge

Opinion No. 3469
Heard December 5, 2001 - Filed March 25, 2002

AFFIRMED

Kristi F. Curtis, of Bryan, Bahnmuller, Goldman & McElveen, of Sumter, for appellant.

George C. James, Jr., of Lee, Erter, Wilson, James, Holler & Smith, of Sumter, for respondent.

HOWARD, J.: This suit was initiated by Universal Benefits, Inc., ("Universal") against its former employee, James H. McKinney, to enforce a covenant not to compete. The action was dismissed with prejudice when Universal failed to appear at a pre-trial conference and roster meeting. Universal did not move to alter or amend the order of dismissal, nor did it appeal. Universal moved to set aside the order of dismissal pursuant to Rule 60(b)(4), SCRCP, asserting the order was void because Universal had no notice of the pre-trial conference. Universal appeals from the denial of its Rule 60 motion. We affirm.

FACTS/PROCEDURAL HISTORY

Universal filed this action against McKinney, a former employee, to enforce a covenant not to compete.[1] On June 29, 1999, Universal's attorney filed a motion to be relieved as counsel. Universal did not appear at the subsequent hearing on this motion. By written order dated July 23, 1999, Circuit Court Judge Howard P. King granted the motion and ordered Universal to obtain new counsel and be prepared for trial by August 2, 1999.

On August 23, 1999, presiding Judge Alison Lee held a roster meeting at which Universal failed to appear. Judge Lee granted McKinney's motion to dismiss the action with prejudice based upon Universal's failure to prosecute the action.[2] Judge Lee's order was served on Universal's managing officer on August 30, 1999. No appeal was taken from this order, and no motion to reconsider was filed.

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[1]McKinney counterclaimed for interference with a contractual relationship and for commissions he claims Universal owes him.

[2]McKinney's counterclaims were referred to a master-in-equity.

On February 2, 2000, Universal moved to set aside Judge Lee's order pursuant to Rule 60(b)(4), SCRCP.[3] By written order dated March 17, 2000, presiding Circuit Court Judge John Milling denied relief from the order of dismissal, finding that it was not void for lack of jurisdiction, but was merely voidable. Judge Milling concluded that Universal was not entitled to any relief because it had failed to timely move for reconsideration or appeal from Judge Lee's order. Universal appeals from this adverse ruling.

DISCUSSION

Universal argues Judge Lee's order is void for lack of notice of the August 23, 1999 roster meeting. Universal contends it was denied due process of law. We disagree.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] . . . the judgment is void." Rule 60(b)(4), SCRCP. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect." Thomas & Howard Co. v. T.W. Graham and Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996). A judgment is not rendered void by irregularities which do not involve jurisdiction. Thomas & Howard Co., 318 S.C. at 291, 457 S.E.2d at 343.

In the present case, without question the circuit court had subject matter and personal jurisdiction over Universal and McKinney. "It is fundamental that

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[3] Attached to Universal's memorandum of law is an uncontested affidavit by the Assistant Clerk of Court of Sumter County, which states, in part, "[t]that there is no record that Universal Benefits, Inc. was ever provided with notice of the August 23, 1999 roster meeting."

no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected." Tyron Fed. Sav. & Loan Ass'n v. Phelps, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992). Generally, a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property. Id.

The requirements of due process not only include notice, but also include an opportunity to be heard in a meaningful way, and judicial review. Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); S.C. Dep't of Soc. Servs. v. Holden, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).

However, Universal was afforded notice of Judge Lee's order. It is undisputed that on August 30, 1999, Universal received written notice of the order dismissing its action. Thus, Universal was not denied the opportunity to be heard. As Judge Milling correctly determined, Rule 59, SCRCP, provided Universal an opportunity to timely move for reconsideration, and the South Carolina Appellate Court Rules ("SCACR") provided an avenue for appeal from Judge Lee's order. Universal availed itself of neither procedural remedy in a timely manner.

There is a difference between a want of jurisdiction, in which case the court has no power to adjudicate, and a mistake in the exercise of undoubted jurisdiction, in which case the court's action is not void, but is subject to direct attack on appeal. Thomas & Howard, Co., 318 S.C. at 291, 457 S.E.2d at 343. The failure of Universal to invoke the procedural remedies provided under Rule 59 and the SCACR is a result of its own inaction and not a denial of due process. See id. ("A judgment will not be vacated for a mere irregularity which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him.").

CONCLUSION

Based on the reasons stated above, the order of Judge Milling denying Universal's Rule 60 (b)(4) motion is

AFFIRMED.

CONNOR and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sandra G. Etheredge,

Employee,

Appellant,

v.

Monsanto Company,

Employer,

and

Pacific Employers Insurance Co. n/k/a Cigna Property & Casualty Co.,

Respondents.

Appeal From Greenwood County
Joseph J. Watson, Circuit Court Judge

Opinion No. 3470
Heard March 3, 2002 - Filed April 1, 2002

REVERSED

Hardwick Stuart, Jr., of Berry, Quackenbush & Stuart, of Columbia, for appellant.

H. Mills Gallivan and Deborah Casey Brown, both of Gallivan, White & Boyd, of Greenville, for respondents.

ANDERSON, J.: In this workers' compensation case, claimant Sandra Etheredge appeals the Circuit Court's denial of her claim for benefits. Etheredge argues the Circuit Court erred in finding she did not provide her employer with timely notice of her injury pursuant to S.C. Code Ann. § 42-15-20. We reverse.

FACTS/PROCEDURAL HISTORY

Etheredge began working with Monsanto Company/Solutia ("Solutia") in 1996 as a draw/twist operator. In 1997, she was reassigned as a draw/wind operator, where she worked for the remainder of her employment with Solutia and where she contends her medical problems started.

On August 4, 1998, Etheredge saw her family physician, Dr. Deborah Grate, with complaints of chest pain. In her records, Dr. Grate noted "[Etheredge] has been having this problem off and on for approximately the p[ast] year since the beginning of the job." Etheredge again visited Dr. Grate on August 18, 1998. On that date, Dr. Grate prepared the following statement addressed to Etheredge's supervisor:

> Ms. Sandra Etheredge has acute muscles [sic] strain and spasms of her neck and shoulder muscles. Having to do overhead work aggrevates [sic] her problems because these are the muscles groups that are used. She may return to work doing a job which does not require her to raise arm [sic] above the level of her shoulders. She has been referred to physical therapy.

Tracy Williamson, a Solutia nurse, testified the normal procedure for an injured employee regarding forwarding medical information to Solutia about injuries was to give the information directly to a company nurse, put it in one of the company's drop boxes, or fax it to a specially designated facsimile machine. It was a practice of Solutia to accept faxes from doctors' offices and that is what Solutia instructed its employees to have arranged. Williamson received Dr. Grate's letter via facsimile on August 19, 1998. She testified "[Dr. Grate's] statement released [Etheredge] back to work in a position that [did] not require her to raise her arms above the level of her shoulders. And I made a work accommodation for her and brought her back to work at that time."

The Workers' Compensation Commissioner found Etheredge sustained a compensable injury by accident arising out of and in the course of her employment. The Commissioner further determined "[n]otice was given within ninety (90) days as required by statute when the Employer on August 19, 1998 received Dr. Grate's letter of August 18, 1998, which indicated that the work was, at the least, aggravating the neck and shoulder muscles." The Appellate Panel of the Workers' Compensation Commission affirmed the decision of the Single Commissioner. On appeal, the Circuit Court affirmed the Appellate Panel's finding Etheredge had sustained an injury by accident arising out of and in the course of her employment, but reversed the Panel's findings that Etheredge had provided timely notice to her employer as required by statute. Etheredge appeals. We reverse.

STANDARD OF REVIEW

The Full Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. See Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989); see also Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) (Full Commission is fact finder and it is not within the appellate court's province to reverse Commission's findings if they are supported by substantial evidence). Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own

findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992); see also Brayboy v. Clark Heating Co., 306 S.C. 56, 409 S.E.2d 767 (1991) (Full Commission may review award of Single Commissioner and make its own findings of fact and conclusions of law). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Ross, 298 S.C. at 492, 381 S.E.2d at 730; Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). Where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive. Rogers, 312 S.C. at 380, 440 S.E.2d at 403; see also Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991) (regardless of a conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive).

The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998); Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); see also Baggott v. Southern Music, Inc., 330 S.C. 1, 496 S.E.2d 852 (1998) (decision of Workers' Compensation Commission will not be overturned by reviewing court unless it is clearly unsupported by substantial evidence in the record); Smith v. Squires Timber Co., 311 S.C. 321, 428 S.E.2d 878 (1993) (under the applicable scope of review, Commission's denial of Workers' Compensation benefits must be affirmed if supported by substantial evidence in the record). It is not within this Court's province to reverse findings of the Commission that are supported by the evidence. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986); see also Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) (appellate court must affirm findings of fact made by Commission if they are supported by substantial evidence). The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. Cline v. Nosredna Corp., 291 S.C. 75, 352 S.E.2d 291 (Ct. App. 1986); Lowe v. Am-Can Transport Servs., 283 S.C. 534, 324 S.E.2d 87 (Ct. App.

1984).

A court "may not substitute its judgment for that of any agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) (citation omitted); see also Clade v. Champion Labs., 330 S.C. 8, 496 S.E.2d 856 (1998); Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998). "Substantial evidence is 'not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.'" Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994) (citation omitted); see also Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991); Tiller, 334 S.C. at 338, 513 S.E.2d at 845. A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law. Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2001).

LAW/ANALYSIS

Etheredge argues the Circuit Court erred in finding Dr. Grate's letter did not provide timely notice to her employer of her workers' compensation claim. We agree. This Court finds Dr. Grate's note, combined with the other facts and circumstances surrounding the situation, gave Solutia the required statutory notice.

The statutory notice requirements are provided in § 42-15-20 as follows:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of

> the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Title prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person. No compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

For adequate notice, there must be "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." Larson's Workers' Compensation Law § 126.03[1][b] (2001) (footnotes omitted). "Generally, in order that the knowledge be imputed to the employer, the person receiving it must be in some supervisory or representative capacity, such as foreman, supervisor … physician, or nurse." Id. at § 126.03[2][a] (footnotes omitted). In the instant case, Williamson admitted she received Dr. Grate's note within the 90 days required by statute. Because of Williamson's position as company nurse, her knowledge is imputed to Solutia.

The Circuit Court relied in part on Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998), in support of its decision. This was error. The issue in Clade was whether the Commission's decision that the claimant's injury did not arise out of her employment was supported by substantial evidence. The Clade Court did not address whether the notice was timely as required by § 42-15-20.

In Hanks v. Blair Mills, 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1995), at issue was whether the claimant had given notice within 90 days as required by statute. This Court found claimant's employer was put on notice based on the

claimant's medical and work history and by a letter from the company doctor, which stated the claimant was suffering from chronic lung disease and recommended a transfer to an area having a dust level at or below the permissible exposure limits. The Court stated: "[T]he object [of providing timely notice under § 42-15-20] being that an employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." Id. at 381, 335 S.E.2d at 93 (citing Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952)).

The provisions of § 42-15-20 regarding notice should be liberally construed in favor of claimants. Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409, 63 S.E.2d 50 (1951). In Mintz, our Supreme Court held:

> It is concluded there, upon many authorities, that the provision for notice should be liberally construed in favor of claimants, but there are limitations upon that rule and the statutory requirement cannot be disregarded altogether. Its purpose is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer.

Id. at 414, 63 S.E.2d at 52 (citations omitted).

The parties stipulated that the only possible documentation that could be construed as notice within the ninety days required by statute is Dr. Grate's letter. We find the employer received timely notice in the form of the letter from Dr. Grate, just as the employer did in Hanks. Dr. Grate's letter was in addition to Etheredge's known work history as a draw/wind operator, which required her to lift heavy spools above her head. This notice afforded the employer an opportunity to investigate and question witnesses while their memories were unfaded and also afforded the employer an opportunity to furnish medical care to the employee. We find this notice sufficient, especially in light of the liberal

construction our Supreme Court requires of workers' compensation provisions for notice.

CONCLUSION

The statutory efficacy of § 42-15-20 is bifurcated: (1) affording protection for the employer to investigate the facts and circumstances of an accident or injury and to question witnesses while memories are fresh; and (2) permitting the employer the opportunity and privilege to provide medical treatment and care to minimize disability and concomitant liability of the employer.

We rule the language of § 42-15-20 in regard to notice should be liberally construed in favor of claimants. We conclude that notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.

REVERSED.

CURETON and GOOLSBY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Richard Condrey,

Appellant.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 3471
Heard March 7, 2002 - Filed April 1, 2002

AFFIRMED

Assistant Appellate Defender Katherine Carruth Link, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Senior Assistant Attorney General Norman Mark

Rapoport, all of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

ANDERSON, J.: Richard Condrey was charged with two counts of criminal conspiracy, two counts of grand larceny, and one count of obtaining goods by false pretenses. He was convicted of one count of grand larceny and one count of criminal conspiracy. Condrey was acquitted of the remaining charges. He was sentenced to ten years for grand larceny and five years for criminal conspiracy, with both sentences suspended upon the service of three years, plus five years probation. Condrey appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

In the summer of 1999, Jay Manning, director of operations for Shoe Show based in Concord, North Carolina, received a report that some of his company's shoes were being sold at a flea market in South Carolina. He determined the shoes from the flea market came from a Shoe Show truck driven by Steve West. Manning concluded West was stealing shoes from the company and pinpointed a truck stop on Highway 901 in York County where West frequently stopped.

Manning hired an investigator, John Walters, to document West's actions. On the afternoon of July 8, 1999, Walters was at the truck stop and observed West arrive in his tractor trailer truck around 5:00 p.m. A short time after West parked his vehicle, Condrey drove up in a truck and parked behind West's truck. West and Condrey talked. Thereafter, the two men unloaded several cases of shoes from the tractor trailer onto Condrey's truck. Walters videotaped the transfer of the shoes. West and Condrey had another conversation after the shoes were loaded onto Condrey's truck. The men drove off in their respective vehicles and Walters followed Condrey. Walters opined that Condrey realized he was being followed and attempted to evade Walters.

Manning later confronted West, who initially denied stealing the shoes,

but eventually confessed. According to Detective Jerry Hoffman of the York County Sheriff's Department, West identified Condrey as his "partner." West was charged with breach of trust. He pled guilty and received probation. He agreed to testify against Condrey.

West testified he had known Condrey for "most of [his] life." Condrey knew West delivered shoes. West declared Condrey asked, "Big boy, can you get us some shoes?" West agreed to get the shoes for Condrey because he needed money to buy medicine for his mother. Condrey offered to pay West $50 a case. Each case contained ten to twelve boxes of shoes. When West had "leftovers" from deliveries, he put them aside and saved them. The two men had arranged that when West had the shoes and was in the area, he would page Condrey, who would meet West at the truck stop, the prearranged location.

In June 1999, West sold Condrey five cases of shoes at the agreed price of $50 per case. Condrey informed West he was going to sell the shoes at a flea market. On July 8, West met Condrey and sold him nine cases of shoes. On this occasion, West wanted more money. Condrey agreed to pay $100 per case. West stated he told Condrey that he was stealing the shoes from the company.

Tammy Keen, a vendor at the same flea market as Condrey, saw Condrey selling the shoes at the flea market in June. Condrey told her he was buying the shoes off an "eighteen wheeler" and that the shoes were "like store returns." Keen bought a total of 229 boxes of shoes from Condrey during two separate occasions at $20 a pair.

ISSUES

I. Did the trial court err in refusing to grant a directed verdict as to the charges of grand larceny and criminal conspiracy?

II. Did the trial court err in charging the "hand of one is the hand of all" doctrine?

III. Did the trial court err in not allowing defense counsel, in closing argument, to discuss the offense of receiving stolen goods or to argue that the State had charged Condrey with the wrong offense?

LAW/ANALYSIS

I. Directed Verdict

At the close of the State's case, Condrey moved for a directed verdict on all the offenses charged. He argued the State failed to produce any evidence he was a participant in the crimes of grand larceny and criminal conspiracy. The trial judge denied the motions.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991); State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997).

A. Larceny

Condrey was indicted for grand larceny. Larceny of goods, chattels, instruments, or other personalty valued in excess of one thousand dollars is grand larceny. S.C. Code Ann. § 16-13-30(B) (Supp. 2001). Larceny is the felonious taking and carrying away of the goods of another against the owner's will or without his consent. State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985); State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979). To make out the offense of larceny, there must be a felonious purpose. State v. Williams, 237

S.C. 252, 116 S.E.2d 858 (1960). The taking must be done animo furandi – with a view of depriving the true owner of his property and converting it to the use of the offender. Id.

Viewing the evidence in the light most favorable to the State, there was evidence that Condrey planned with West to take the shoes. Condrey asked West if he could get some shoes and he met West at the truck stop to pick up the shoes. He took the shoes and converted them to his own use by selling them to Keen. West testified that Condrey was aware the shoes were stolen. We find the case was properly submitted to the jury, as the evidence reasonably tended to prove Condrey's guilt as to the charge of grand larceny.

B. Criminal Conspiracy

A "conspiracy" is statutorily defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (Supp. 2001). In State v. Fleming, 243 S.C. 265, 133 S.E.2d 800 (1963), the Supreme Court stated the law of conspiracy with exactitude:

> The foregoing statute [the predecessor to § 16-17-410] is declaratory of the common law definition of conspiracy. State v. Jacobs, 238 S.C. 234, 119 S.E.2d 735 [1961], and authorities cited therein. It need not be shown that either the object or the means agreed upon is an indictable offense in order to establish a criminal conspiracy. It is sufficient if the one or the other is unlawful. State v. Davis, 88 S.C. 229, 70 S.E. 811 [1911]. Nor need a formal or express agreement be established. A tacit, mutual understanding, resulting in the willful and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end. 15 C.J.S. Conspiracy § 40. Although the offense of conspiracy may be complete without proof of overt acts, such "acts may nevertheless be shown, since from them an inference may be drawn as to the existence and object of the conspiracy. It sometimes happens that

> the conspiracy can be proved in no other way." State v. Hightower, 221 S.C. 91, 69 S.E.2d 363 [1952]. "To establish sufficiently the existence of the conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties. The circumstantial evidence and the conduct of the parties may consist of concert of action." 15 C.J.S. Conspiracy § 93a.

Id. at 274, 133 S.E.2d at 805.

An excellent academic review of the law of conspiracy is articulated in State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993):

> Generally, the agreement, which is the essence of the conspiracy, is proven by various overt acts committed in furtherance of the conspiracy. Therefore, a single conspiracy may be established by completely different aggregations of proof so that there appears to be several conspiracies. United States v. Ragins, 840 F.2d 1184 (4th Cir. 1988). Accordingly, a multi-pronged flexible "totality of the circumstances" test is applied to determine whether there were two conspiracies or merely one. Id. The factors considered are: (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated. Id. This test was adopted by this Court in [State v.] Dasher, [278 S.C. 454, 298 S.E.2d 215 (1982)].

Id. at 319-20, 428 S.E.2d at 873.

It is axiomatic that a conspiracy may be proved by direct or circumstantial

evidence or by circumstantial evidence alone. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). As State v. Miller, 223 S.C. 128, 74 S.E.2d 582 (1953), instructs: "Often proof of conspiracy is necessarily by circumstantial evidence alone." Id. at 133, 74 S.E.2d at 585 (citations omitted). Substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). Under South Carolina law, no overt acts need be shown to establish a conspiracy. The crime consists of the agreement or mutual understanding. Id.

Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981). Further, "the acts and declarations of any conspirator made during the conspiracy and in furtherance thereof are deemed to be the acts and declarations of every other conspirator and are admissible against all." Id. at 42, 282 S.E.2d at 842 (citation omitted).

When viewed in the light most favorable to the State, the evidence reasonably demonstrates Condrey formed an agreement with West to steal shoes from the tractor trailer that West was driving for Shoe Show. Condrey approached West and asked if West could "get" some shoes. He agreed to pay West's asking price for the shoes and prearranged a meeting place. West would page Condrey to meet him and pick up the shoes. There is evidence Condrey knew West was stealing the shoes. West declared the two men were "partners." The surveillance tape clearly shows West and Condrey unloading the cases of shoes and putting them onto Condrey's truck. The scheme would not have worked if the two men had not been working together with an agreement, as the completion of the project could not have been accomplished if both men had not been participating together. Based on this evidence, the trial judge properly denied Condrey's motion for directed verdict as to the charge of criminal conspiracy.

II. Charge as to "Hand of One is the Hand of All"

Condrey asserts the State's evidence did not support the court's charge concerning the accomplice liability theory of the "hand of one is the hand of all." This assertion is meritless.

Under the "hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999).

"It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted); see also State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987).

Under an accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." State v. Langley, 334 S.C. 643, 649-50, 515 S.E.2d 98, 101 (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)).

A formally expressed agreement is not necessary to establish the conspiracy. State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980); State v. Fleming, 243 S.C. 265, 133 S.E.2d 800 (1963); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). It may be shown by circumstantial evidence and the conduct of the parties. Oliver, 275 S.C. at 80, 67 S.E.2d at 530; Fleming, 243 S.C. at 274, 133 S.E.2d at 805; Bultron, 318 S.C. at 334, 457 S.E.2d at 622.

The law to be charged is determined from the evidence presented at trial. State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000), cert. denied. A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. Id. If any

evidence exists to support a charge, it should be given. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).

The evidence at trial supported the charge regarding the "hand of one is the hand of all." The State presented direct evidence showing the joint criminal activities of Condrey and West. West testified Condrey approached him about getting some shoes. The men then planned several meetings where West unloaded the shoes off of the Shoe Show truck onto Condrey's vehicle. Condrey paid West for the shoes. Thereafter, Condrey sold them at the flea market. The trial testimony constituted sufficient evidence whereby a jury could find Condrey was a willing accomplice in the crimes.

Furthermore, the trial judge specifically charged the jury that "mere presence" did not constitute guilt and that "prior knowledge" that a crime was going to be committed, without more, was insufficient to constitute guilt. Mere presence at the scene of a crime is insufficient to convict one as a principal on the theory of aiding and abetting. State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987); State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973). With this charge, the judge eliminated any danger the jury could be misled by the "hand of one is the hand of all" charge.

In light of the evidence that West and Condrey were acting pursuant to a plan to steal the shoes, together with the trial judge's charge as a whole, a jury could reasonably have concluded not only that the two men were knowingly involved in the commission of the criminal act, but that there had been some planning and agreement among them pertaining to the act. Accordingly, the judge properly charged the jury concerning the "hand of one is the hand of all."

III. Court's Limitation of Defense Counsel's Argument to the Jury

During his closing argument, defense counsel attempted to argue the law of receiving stolen goods. The State objected. After a bench conference, defense counsel continued his closing argument stating: "Let me say first of all, Mr. Condrey is not charged with receiving stolen goods. We're not talking

about that." Condrey contends the trial judge erred in not allowing him to discuss the offense of receiving stolen goods and argue that the State had charged the wrong offense.

The trial judge did not err in limiting defense counsel's closing argument. A trial judge is allowed broad discretion in dealing with the range and propriety of closing argument to the jury. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). Ordinarily, the judge's rulings on such matters

will not be disturbed. Patterson, 324 S.C. at 17, 482 S.E.2d at 766; Bell, 302 S.C. at 33, 393 S.E.2d at 372; Durden, 264 S.C. at 91, 212 S.E.2d at 590.

Condrey wanted to argue the offense of receiving stolen goods as an exclusionary offense. In State v. Good, 315 S.C. 135, 432 S.E.2d 463 (1993), our Supreme Court cautioned that requiring a comparison charge when the facts do not warrant one "opens the door for every criminal defendant to create a quasi lesser-included offense for which they could not be convicted." Id. at 138, 432 S.E.2d at 465. The Court explained: "The real impact of the instruction is that it permits the jury to reach a compromise verdict on a non-charged offense." Id. Here, allowing defense counsel to argue on a comparison charge of receiving stolen goods where Condrey was charged with grand larceny would have improperly presented receiving stolen goods as a quasi lesser-included offense of larceny. Receiving stolen goods is not a lesser-included offense of larceny. State v. McNeil, 314 S.C. 473, 445 S.E.2d 461 (Ct. App. 1994). Thus, the judge properly limited the scope of defense counsel's closing argument to matters which were relevant to the issues at trial. See Hoeffner v. The Citadel, 311 S.C. 361, 366, 429 S.E.2d 190, 193 (1993) ("Arguments by counsel which invite the jury to base its verdict on considerations not relevant to the merits of the case are improper.") (citation omitted).

CONCLUSION

Based on the foregoing reasons, Condrey's conviction is

AFFIRMED.

CURETON and GOOLSBY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Terry Kay,

Appellant,

v.

State Farm Mutual Automobile Ins. Co.,

Respondent.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3472
Heard March 5, 2002 - Filed April 1, 2002

AFFIRMED

Gregory A. Morton, of Donnan, Morton, Davis & Snyder, of Greenville, for appellant.

William W. Kehl, of Wyche, Burgess, Freeman & Parham, of Greenville, for respondent.

HEARN, C.J.: In this declaratory judgment action to determine the amount of available underinsured motorist (UIM) coverage, Terry Kay appeals

the grant of summary judgment to State Farm Mutual Automobile Insurance Company (State Farm). We affirm.

FACTS[1]

Terry Kay was seriously injured in an accident caused by an underinsured driver.[2] At the time of the accident, Kay was driving his Chevrolet truck that carried $25,000 UIM coverage. He also owned a Buick with a $100,000 UIM policy limit. Kay sought to recover the full amount of UIM coverage on his truck and the Buick. Under its interpretation of the policies, State Farm paid $25,000 on the involved vehicle and $25,000 from the Buick policy.

Kay brought a declaratory judgment action seeking an additional $75,000 from the Buick policy. Both parties filed summary judgment motions. The circuit court granted State Farm's motion. Kay appeals.

LAW/ANALYSIS

Kay argues the circuit court erred in granting State Farm's summary judgment motion, contending the policy should be construed differently because it contains an illegal provision. In cases with stipulated facts, this court reviews "whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).

Our analysis begins with the Buick policy provision dealing with stacking which reads:

> 3. If ***you***, ***your spouse*** or a ***relativ***e sustains ***bodily injury*** or ***property damage*** while ***occupying*** a ***motor***

---

[1]The facts are by stipulation of the parties.

[2]The parties agree that Kay's injuries exceed the amount of coverage claimed.

> ***vehicle*** owned by ***you***, ***your spouse*** or ***relative*** which is not ***your car*** or a ***newly acquired*** car, this policy shall:
>
> a. be excess; and
>
> b. apply only in an amount equal to the minimum limits required by the ***Financial Responsibility Act*** for bodily injury and property damage liability.

Section 3(b) of the policy violates S.C. Code Ann. § 38-77-160 (Supp. 2001) which states in relevant part:

> If . . . an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

South Carolina courts have interpreted this section to allow Class I insureds to stack UIM coverage from multiple automobile insurance policies. Ruppe v. Auto-Owners Ins. Co., 329 S.C. 402, 405, 496 S.E.2d 631, 632 (1998). "A policy provision which purports to limit stacking of statutorily-required coverage is invalid." Jackson v. State Farm Mut. Auto. Ins. Co., 288 S.C. 335, 337, 342 S.E.2d 603, 604 (1986). However, "the amount of coverage which may be stacked from policies on vehicles not involved in an accident is limited to an amount no greater than the coverage on the vehicle involved in the accident." S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham, 304 S.C. 442, 446, 405 S.E.2d 396, 398 (1991). Accordingly, State Farm's provision limiting stacking of UIM coverage to the minimum limits is invalid because it purports to limit the amount of coverage to an amount less than that available on the involved vehicle's policy.

Kay asserts that because policy section 3(b) is invalid, we should not permit State Farm to rewrite its policy to limit coverage according to section 38-77-160. Although we are perplexed as to why State Farm has persisted in using this clause which has been invalid under South Carolina law for more than twenty years, we cannot accept Kay's argument.

"Underinsured motorist coverage is controlled by and subject to our underinsured motorist act, and any insurance policy provisions inconsistent therewith are void, and the relevant statutory provisions prevail as if embodied in the policy." Garris v. Cincinnati Ins. Co., 280 S.C. 149, 153, 311 S.E.2d 723, 726 (1984); see State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App. 2000) ("Statutory provisions relating to an insurance contract are part of the contract as a matter of law. To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails." (citation omitted)). A policy of automobile insurance must provide at least the minimum amount of coverage outlined in the statute, and "a policy issued pursuant to the law which gives less protection will be interpreted by the court as supplying the protection which the legislature intended." Hamrick v. State Farm Mut. Auto. Ins. Co., 270 S.C. 176, 179, 241 S.E.2d 548, 549 (1978). Here, State Farm's policy language provided less coverage than that mandated by statute; therefore, that language is void and must be replaced by the terms of section 38-77-160.

Kay correctly asserts that parties may contract for greater coverage than that required by statute. See Putnam v. S.C. Farm Bureau Mut. Ins. Co., 323 S.C. 494, 496, 476 S.E.2d 902, 902 (1996). Kay contends that the void clause should be expunged from the contract and under the remaining language all of the Buick policy's UIM coverage should be available. However, an insurer's obligation "is defined by the terms of the policy itself, and cannot be enlarged by judicial construction . . . , [and] if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999). In addition to the quoted provision, the policy provides: "If any terms of this policy are in conflict with the statutes of South Carolina,

they are amended to conform to those statutes." This clause clearly contemplates that void clauses be replaced with the applicable statute. We find the policy is not ambiguous and that the language of section 38-77-160 should be substituted for the void clause. Accordingly, the grant of summary judgment to State Farm is

AFFIRMED.

CONNOR and SHULER, JJ., concur.